

## Accommodating Everyone

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*This Article attempts to eliminate “special treatment stigma” by accommodating everyone. Special treatment stigma occurs when some employees (usually individuals with disabilities and workers with caregiving responsibilities) are provided with accommodations in the workplace. This receipt of “special treatment” causes employers and coworkers to resent these employees. This Article argues that the best way to ameliorate the stigma that accompanies special treatment in the workplace is to accommodate everyone through a universal accommodation mandate. This mandate would require employers to accommodate all employees who request an accommodation in the workplace, regardless of the reason for the accommodation. As long as the accommodation requested was “reasonable” and did not cause an “undue hardship,” employers would be required to provide it. However, recognizing that some reasons for requesting accommodations are truly more compelling than other reasons, I propose the implementation of a two-tier undue hardship analysis. Thus, for accommodations that are necessary either to allow an employee to perform the essential functions of the job or to allow an employee to attend to unavoidable caregiving obligations, the undue hardship defense would be the more stringent test used under the Americans with Disabilities Act, where “undue hardship” is defined as “significant difficulty or expense.” For all other accommodation requests, the employer would still be required to grant them as long as they do not cause an undue hardship using the more lenient standard used for religious accommodations under Title VII of the Civil Rights Act of 1964, where undue hardship has been defined as anything more than a “de minimis expense.” My hope is that this universal accommodation mandate—which allows all employees to request an accommodation but recognizes at least some hierarchy between necessary accommodations and all other accommodations—will eliminate the harm caused by special treatment stigma while still creating a workable standard.*

I. INTRODUCTION.....	86
II. THE COMMON BOND.....	90
A. Cannot Conform to the Ideal-Worker Norm .....	91
1. Structural Norms of the Workplace .....	91
2. Physical Functions of the Job.....	96
B. Special Treatment Stigma .....	96
1. Stigmatized by Employers .....	97
2. Stigmatized by Coworkers .....	98

C. My Prior Attempt to Ameliorate Special Treatment Stigma.....	106
III. ELIMINATING SPECIAL TREATMENT STIGMA BY ACCOMMODATING EVERYONE .....	108
A. My Prior Consideration of a Universal Accommodation Mandate .....	109
B. The New Universal Accommodation Mandate .....	109
C. Application of the Universal Accommodation Mandate .....	111
1. Necessary Accommodations.....	111
a. Individuals with Disabilities .....	111
b. Older Workers .....	113
c. Pregnancy .....	114
d. Unavoidable Caregiving Obligations.....	115
2. All Other Accommodation Requests.....	118
a. Religion .....	119
b. Avoidable Caregiving Obligations.....	120
D. Justifying this Universal Accommodation Mandate...	122
1. Partially Remediating the Caregiver Conundrum..	122
2. Avoiding the Difficulty and Stigma of Classification .....	123
3. Encouraging Changes to Workplace Structures..	124
4. Providing Economic Benefits.....	125
5. Providing Balance to Everyone .....	126
6. Avoiding Special Treatment Stigma .....	128
IV. RESPONDING TO THE CRITICS .....	129
A. Remnants of Special Treatment Stigma .....	129
B. Employer Discretion .....	130
C. Dilution .....	132
D. Cumulative Effects of Undue Hardship .....	134
V. CONCLUSION .....	136

## I. INTRODUCTION

In prior work, I argued that there is a common bond between employees with disabilities and workers with caregiving responsibilities.<sup>1</sup> That common bond is based on these employees'

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\* Professor of Law, University of Toledo College of Law. I would like to thank participants at the Accommodations Discussion Group at the Southeastern Association of Law Schools Annual Conference in August 2015 and the participants at the AALS 2015 Mid-Year Meeting on Next Generation Issues on Sex & Gender, where I presented earlier versions of this paper. More specifically, at the risk of being under-

failure to meet their employers' workplace expectations, or failure to comply with the "ideal worker"<sup>2</sup> norm.<sup>3</sup> This failure often causes these employees to request job modifications, which are often stigmatized as special treatment—I call this "special-treatment stigma."<sup>4</sup> The perception of special treatment causes these employees to be stigmatized by their employers and by their coworkers.<sup>5</sup> Employers often believe accommodating workers is expensive and burdensome,<sup>6</sup> so they might refuse to provide accommodations if those accommodations are not required by law. Alternatively, employers might choose to not hire or promote employees who need accommodations.<sup>7</sup> The stigma from coworkers is less overt; coworkers often resent accommodations given to employees either because those accommodations cause burdens on the coworkers or the accommodation is something that the coworkers covet.<sup>8</sup> This coworker resentment in turn makes employers uncomfortable, and gives them another reason to refuse to provide accommodations or to avoid employing individuals who need accommodations.

Because both groups of employees—individuals with disabilities and workers with caregiving responsibilities—share this common experience, I argued in prior work that caregiving should be accommodated in the same way as disability is accommodated<sup>9</sup> under the Americans with Disabilities Act ("ADA").<sup>10</sup> I relied on the

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<sup>1</sup> Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1103–15 (2014).

<sup>2</sup> This phrase was first coined by Joan Williams and is now used by many in work/family scholarship. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (1999).

<sup>3</sup> Porter, *supra* note 1, at 1104–08.

<sup>4</sup> I coined this phrase to refer to the stigma individuals suffer from when receiving special treatment in the workplace. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 359 (2010) [hereinafter Porter, *Why Care*].

<sup>5</sup> Porter, *supra* note 1, at 1108.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1111–12.

<sup>9</sup> *Id.* at 1138–52.

<sup>10</sup> 42 U.S.C. §§ 12101–12213 (2008).

communitarian theory to demonstrate that accommodating both workers with caregiving responsibilities and individuals with disabilities benefits the workplace community, which includes employers, employees, and society.<sup>11</sup> At that time, I specifically explored and rejected a universal accommodation mandate.<sup>12</sup> A universal accommodation mandate would allow employees to request accommodations for any variation of the job functions, the workplace environment, or the structural norms<sup>13</sup> of the workplace, regardless of the reason for the request.<sup>14</sup> Although I recognized that accommodating everyone through a universal mandate would be the only way to truly end the stigma that accompanies special treatment,<sup>15</sup> I could not envision a workable universal accommodation mandate. I imagined all kinds of difficult line-drawing decisions employers would have to make when figuring out whether a specific accommodation is necessary, even though the specific reason for the accommodation could not be challenged.<sup>16</sup> Thus, I ultimately rejected a universal accommodation mandate, and as discussed above, I focused on arguing in favor of accommodating caregivers in the same way that we currently accommodate individuals with disabilities.<sup>17</sup>

But for reasons I discuss below, and after much thoughtful deliberation, I have reversed my way of thinking on both issues. I no longer think an accommodation mandate for only caregivers and individuals with disabilities is workable, for several reasons. First, the accommodation most often requested by both caregivers and individuals with disabilities is a modification to the structural norms of the workplace,<sup>18</sup> but (as I have explored in other works) these structural norms are very entrenched in most workplaces, and most employers are reluctant to modify them.<sup>19</sup> Second, I have reluctantly arrived at the realization that we will never eliminate special-treatment

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<sup>11</sup> Porter, *supra* note 1, at 1138–51.

<sup>12</sup> *Id.* at 1133–38.

<sup>13</sup> The “structural norms” of the workplace refer to hours, shifts, schedules, attendance policies, overtime requirements, and leave of absence policies—the when and where work is performed. See Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 70–71 (2014) [hereinafter Porter, *Backlash*].

<sup>14</sup> Porter, *supra* note 1, at 1135.

<sup>15</sup> *Id.* at 1133–35.

<sup>16</sup> *Id.* at 1136.

<sup>17</sup> *Id.* at 1138–52.

<sup>18</sup> See, e.g., Lisa Schur et al., *Accommodating Employees with and Without Disabilities*, 53 HUM. RESOURCES MGMT. 593, 601 (2014).

<sup>19</sup> Porter, *Backlash*, *supra* note 13, at 73–78; Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 981–86 (2014) [hereinafter Porter, *Entrenchment*].

stigma as long as we continue to give what appears to be preferential treatment to certain groups of employees.

Moreover, I now believe that I can conceptualize a workable universal accommodation mandate. This Article is devoted to that effort. Specifically, I propose and justify accommodating everyone<sup>20</sup> through a universal accommodation mandate that avoids some of the earlier problems I had identified by utilizing a two-tier “undue hardship” test.

As many readers know, the undue hardship analysis appears in two places in the employment discrimination context. Under the ADA, employers have to provide reasonable accommodations to employees with disabilities as long as they do not cause an undue hardship on the employer.<sup>21</sup> Undue hardship is defined as “significant difficulty or expense.”<sup>22</sup> The other place we see the concept of undue hardship is in the religious discrimination context under Title VII of the Civil Rights Act of 1964. There, under section 701(j) of the statute, Congress defined religion to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>23</sup> Even though undue hardship is not defined in the statute with respect to religious accommodations, the Supreme Court defined it to mean anything more than a “de minimis cost.”<sup>24</sup>

I use these two different undue hardship standards to propose a universal accommodation mandate with a two-tier undue hardship analysis. Thus, if an accommodation is necessary either because the employee cannot perform the essential functions of the job without it or because the employee would be neglecting an unavoidable caregiving obligation without it, the accommodation would have to be granted so long as it does not cause an undue hardship under the more

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<sup>20</sup> Some readers might be familiar with the recent article published by well-known disability scholars: *Accommodating Every Body*. Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689 (2014). As I explain below, my proposal is different from theirs because their proposal calls for accommodating all individuals who need an accommodation to be able to physically perform the functions of their job. *Id.* at 693. My proposal involves accommodating not just every “body,” but literally “everyone.”

<sup>21</sup> 42 U.S.C. § 12112(b)(5)(A) (2009).

<sup>22</sup> 42 U.S.C. § 12111(10)(A) (2008).

<sup>23</sup> 42 U.S.C. § 2000e(j) (1991).

<sup>24</sup> *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

stringent test under the ADA—“significant difficulty or expense.”<sup>25</sup> For all other accommodation requests, the accommodation would have to be granted unless the employer could demonstrate that the accommodation would cause an undue hardship using the more lenient test developed in the religious accommodation context, where anything more than a de minimis expense is considered an undue hardship. My goal with proposing this universal accommodation mandate with the two-tier undue hardship test is two-fold: eliminating the stigma that accompanies special treatment, and creating a workable proposal that recognizes that some accommodations are more necessary than others.

This Article proceeds in four additional parts. Part II elaborates on the common bond experienced by individuals with disabilities and workers with caregiving responsibilities, explaining how their failure to conform to the ideal worker norm has led to the marginalization of both groups because of the stigma that accompanies the need for special treatment in the workplace. Part II also explains why I believe my prior proposal to only accommodate these two groups of employees is unworkable.

Part III sets forth my proposal for a universal accommodation mandate that will hopefully work to end the stigma that accompanies special treatment in the workplace. It discusses why I rejected the idea of a universal accommodation mandate in prior work before turning to the mechanics of how this universal accommodation mandate, with its two-tier undue hardship analysis, would operate. This Part also provides the justifications for this proposal. Part IV responds to the anticipated criticism likely to be lobbed at this effort. Finally, Part V briefly concludes.

## II. THE COMMON BOND<sup>26</sup>

This Part will explore the common bond between individuals with disabilities and workers with caregiving responsibilities. Although I recognize the significant differences between these two groups of employees,<sup>27</sup> the common bond they share in the workplace is what leads to the marginalization of both groups of employees.

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<sup>25</sup> 42 U.S.C. § 12111(10)(A) (2008).

<sup>26</sup> This Part is derived in part from my earlier work. Porter, *supra* note 1, at 1103–15; Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213 (2016) [hereinafter Porter, *Stigma*].

<sup>27</sup> Porter, *supra* note 1, at 1119–31 (explaining the differences between the two groups of employees, but ultimately arguing that the differences are not so significant as to justify the different treatment in the law).

A. *Cannot Conform to the Ideal-Worker Norm*

Both individuals with disabilities and workers with caregiving responsibilities have difficulty meeting their employers' expectations. Primarily, these two groups of employees have difficulty meeting the "structural norms" of the workplace—the policies involving when and where work is performed.<sup>28</sup> Most jobs are built around an able-bodied and masculine norm.<sup>29</sup> This norm expects employees to be available to work full-time and overtime, often at a moment's notice.<sup>30</sup> Many jobs also have strict attendance policies and very rigid hours, schedules, and shifts.<sup>31</sup> Individuals with disabilities often need time off for medical appointments or to address the physical manifestations of their disabilities.<sup>32</sup> They also might need a change in hours or reduced hours in order to successfully work with their disability.<sup>33</sup> Workers with caregiving responsibilities often need time off to take children or adult loved ones to medical or other appointments,<sup>34</sup> and they often miss work if children are sick and cannot attend school or daycare.<sup>35</sup> Furthermore, workers with caregiving responsibilities might need or want to work particular shifts or hours in order to more successfully combine work with their children's daycare or school schedules.<sup>36</sup> In addition to the difficulty these groups of employees have meeting the structural norms of the workplace, some employees also have difficulty performing the physical functions of the job. This Part will take each of these problems in turn.

1. Structural Norms of the Workplace<sup>37</sup>

There are plenty of cases demonstrating the difficulty both groups of employees have meeting their employers' demands regarding the structural norms of the workplace. For instance, in the caregiving context, many workers faced termination because they had too many absences due to pregnancy or caregiving responsibilities.<sup>38</sup> In one case,

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<sup>28</sup> *Id.* at 1104.

<sup>29</sup> Porter, *Why Care*, *supra* note 4, at 362.

<sup>30</sup> Porter, *Entrenchment*, *supra* note 19, at 966.

<sup>31</sup> Porter, *Why Care*, *supra* note 4, at 362.

<sup>32</sup> In fact, as stated above, the most commonly requested accommodation by employees with disabilities was a change to the employee's work schedule. Schur et al., *supra* note 18, at 601.

<sup>33</sup> *See id.*

<sup>34</sup> Porter, *Why Care*, *supra* note 4, at 361.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 361–62.

<sup>37</sup> This Part is derived in significant part from Porter, *supra* note 1, at 1104–07.

<sup>38</sup> *See* Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to*

the plaintiff was terminated one day before a scheduled maternity leave for being tardy due to severe morning sickness.<sup>39</sup> She lost her lawsuit.<sup>40</sup>

And as I've noted before, "Some of the most troubling [work/family] conflict stories involve a caregiver having to make the impossible decision between leaving a child alone or losing [her] job."<sup>41</sup> For instance, one woman was terminated because her child was in a car accident and had to be taken to the hospital.<sup>42</sup> Another mother left her one-year-old and nine-year-old children home alone because the babysitter did not arrive on time and the mother's employer had threatened termination if she did not report to work; while she was gone, the children died in a fire.<sup>43</sup> There is no federal protection for the woman in the latter story.<sup>44</sup> It is possible that the woman in the first story could have been eligible for leave under the Family and Medical Leave Act (FMLA), but that statute only covers employers with fifty or more employees and only covers employees who have worked for the employer for at least one year.<sup>45</sup> And even when employees are eligible for leave under the FMLA, simply requesting that leave can stigmatize those employees.<sup>46</sup> In fact, some argue that women who are of child-bearing age experience stigma because their employers believe they will request leave, even if they have yet to do so.<sup>47</sup>

Even when not subject to strict attendance policies, many caregivers have difficulty meeting the overtime requirements or the

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*Solving the Caregiving Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 783–85, 847–48 (2010) [hereinafter Porter, *Synergistic Solutions*].

<sup>39</sup> *Troupe v. May Dep't Stores*, 20 F.3d 734, 735 (7th Cir. 1994).

<sup>40</sup> *Id.*

<sup>41</sup> Porter, *Why Care*, *supra* note 4, at 407–08.

<sup>42</sup> 9TO5, NAT'L ASS'N OF WORKING WOMEN, *10 Things That Could Happen to You If You Didn't Have Paid Sick Days and the Best Way to Make Sure they Never Happen to Anyone*, 4 (2014),

[http://njtimetocare.com/sites/default/files/18\\_Ten%20Things%20That%20Could%20Happen%20to%20You%20if%20You%20Didnt%20Have%20Paid%20Sick%20Days.pdf](http://njtimetocare.com/sites/default/files/18_Ten%20Things%20That%20Could%20Happen%20to%20You%20if%20You%20Didnt%20Have%20Paid%20Sick%20Days.pdf).

<sup>43</sup> Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES (Oct. 19, 2003), <http://www.nytimes.com/2003/10/19/nyregion/daily-choice-turned-deadly-children-left-on-their-own.html?pagewanted=all>.

<sup>44</sup> See Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 340–41 (2013) [hereinafter Porter, *FMLA*].

<sup>45</sup> 5 U.S.C. §§ 6381–6387 (2012); 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2011).

<sup>46</sup> Thus, this is the reason that the Family and Medical Leave Act was drafted to be gender neutral. Porter, *FMLA*, *supra* note 44, at 333–34.

<sup>47</sup> See Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate Over Changing Gender Norms*, 41 SW. U. L. REV. 1, 40 (2011).



face-time requirements of their employers.<sup>48</sup> For instance, in one case, a divorced single mother was fired when she requested to work more manageable hours than the almost fourteen-hour, six day-a-week schedule that her employer demanded.<sup>49</sup> Many professional women seek—and suffer stigma from—working part time or reduced-hour schedules.<sup>50</sup>

Individuals with disabilities also have difficulty complying with the structural norms of the workplace. As stated above, in one study, the most requested accommodation by individuals with disabilities was a modification to their schedules.<sup>51</sup> Although “part-time or modified work schedules” is listed as a possible accommodation in the statute,<sup>52</sup> employers often successfully argue that the accommodation does not have to be granted because the schedule or shift is an “essential function” of the job.<sup>53</sup>

For instance, in one case, the plaintiff managed an AT&T store, and working more than forty hours per week exacerbated her MS symptoms.<sup>54</sup> She asked for an accommodation to limit her work schedule to no more than forty hours per week but her employer refused, stating that being able to work more than forty hours per week was an essential function of the store manager position.<sup>55</sup> Similarly, in another case, the plaintiff was a systems engineer who worked between sixty to eighty hours per week.<sup>56</sup> After he was diagnosed with hepatitis C, he requested an accommodation that would allow him to reduce his hours to forty hours per week so he could get adequate rest and reduce his stress level.<sup>57</sup> Although the employer temporarily accommodated him, it refused to accommodate him on an ongoing basis, arguing that it could not continue to do so without hiring additional staff, thus making the accommodation unreasonable.<sup>58</sup> The court agreed with the employer and held that working overtime was an essential function

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<sup>48</sup> Porter, *Synergistic Solutions*, *supra* note 38, at 785–86.

<sup>49</sup> *Upton v. JWP Businessland*, 682 N.E.2d 1357 (Mass. 1997).

<sup>50</sup> Porter, *Synergistic Solutions*, *supra* note 38, at 787–88.

<sup>51</sup> Schur et al., *supra* note 18, at 601.

<sup>52</sup> 42 U.S.C. § 12111(9)(B) (2008).

<sup>53</sup> See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 62 (2005) (criticizing this practice by employers and courts).

<sup>54</sup> *EEOC v. AT&T Mobility Servs. LLC*, No. 10-13889, 2011 WL 6309449, at \*2 (E.D. Mich. Dec. 15, 2011).

<sup>55</sup> *Id.* at \*3–4.

<sup>56</sup> *Davis v. Microsoft Corp.*, 37 P.3d 333, 335 (Wash. Ct. App. 2002), *aff'd*, 70 P.3d 126 (Wash. 2003).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

of the job and the employer was not obligated to accommodate the plaintiff.<sup>59</sup> Other scholars have commented on this phenomenon, where employers refuse to provide accommodations for the structural norms of the workplace.<sup>60</sup>

In a recent work, I explored many cases where the plaintiff unsuccessfully sought an accommodation to one of the structural norms of the workplace after the ADA Amendments Act (“ADAAA”).<sup>61</sup> Many of these cases involved shifts and schedules. For instance, in *Tucker v. Missouri Dept. of Social Services*, the plaintiff could not work the night shift because of the effects of his migraine medicine, and he was fired from his job.<sup>62</sup> The court held that he was not qualified because working all shifts was an essential function of the job.<sup>63</sup>

Similarly, in *Azzam v. Baptist Healthcare Affiliates*, a registered nurse sought light duty, no nights, no weekends, and five-hour workdays after she suffered a stroke.<sup>64</sup> The court held that the plaintiff was not a qualified individual, deferring to the employer’s argument that all nurses must rotate being on call at night and on the weekends to provide health care in emergency situations.<sup>65</sup>

In another case involving rotating shifts, the plaintiff requested a permanent eight-hour day shift schedule following a surgery.<sup>66</sup> The plaintiff was employed as a resource coordinator and that position was scheduled to work rotating shifts in order to provide twenty-four-hour customer service.<sup>67</sup> The employer denied plaintiff’s request for a permanent day shift, arguing that working rotating shifts was an

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<sup>59</sup> *Id.* at 337.

<sup>60</sup> See generally CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY & MEDICAL LEAVE ACT: RIGHTS ON LEAVE 67 (Cambridge Univ. Press 2010) (stating that despite specific language in the ADA allowing for accommodations regarding schedules, courts often reject as unreasonable any accommodations that might modify “institutionalized time standards” without looking at whether they can be accomplished easily); Travis, *supra* note 53, at 24–36 (discussing cases where courts held that full-time schedules, excessive hours, mandatory overtime, being present at work (rather than working from home), set starting and ending times, and regular attendance are all essential functions of the job).

<sup>61</sup> Porter, *Backlash*, *supra* note 13, at 73–78. This discussion is derived in significant part from this work.

<sup>62</sup> *Tucker v. Mo. Dep’t. of Soc. Servs.*, No. 2:11-CV-04134-NKL, 2012 WL 6115604, at \*1 (W.D. Mo. Dec. 10, 2012).

<sup>63</sup> *Id.* at \*4, \*6.

<sup>64</sup> *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653, 655–56 (W.D. Ky. 2012).

<sup>65</sup> *Id.* at 661–62.

<sup>66</sup> *Kallail v. Alliant Energy Corp.*, 691 F.3d 925, 928 (8th Cir. 2012).

<sup>67</sup> *Id.* at 927.

essential function of the job. The court agreed.<sup>68</sup>

One recent case dealt with the hours an employee works. In *White v. Standard Insurance Co.*, the court held that full-time employment was an essential function of the job, and therefore the plaintiff, whose back pain limited her ability to work more than four hours per day, was not qualified.<sup>69</sup>

Several recent cases held that attendance is an essential function of the job. One case stated that a business does not have to endure “erratic, unreliable attendance by its employees,” even when that conduct is due to an alleged disability, specifically depression, anxiety, and migraine headaches.<sup>70</sup> Similarly, in *Lewis v. New York City Police Department*, the court found that the plaintiff’s absences because of her disability established that she was not a qualified individual.<sup>71</sup>

Certainly, it makes sense for an employer to expect reliable attendance of its employees, including those employees who have a disability. However, when an employee with a disability misses too much work, she often needs either to be able to work from home for a period of time, or she simply needs time to heal to get her medical issues resolved or under control. Thus, the reliable attendance issue often coincides with working from home and leaves of absence as possible accommodations.<sup>72</sup>

Although some employers allow both of these accommodations,<sup>73</sup> many more refuse them.<sup>74</sup> In one particularly troubling case, the Court of Appeals for the Seventh Circuit held that the plaintiff was not qualified when she violated the employer’s very stringent attendance policy (allowing only eight absences per year) while she was experiencing numbness and weakness related to an eventual diagnosis of multiple sclerosis.<sup>75</sup> Because she had not been employed for more than one year, she was not entitled to FMLA leave.<sup>76</sup> The employer refused to give her leave even though it had a discretionary policy that allowed thirty days of leave in some circumstances.<sup>77</sup> Because the court found that there was not any evidence that thirty days would be enough

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<sup>68</sup> *Id.* at 931.

<sup>69</sup> *White v. Standard Ins. Co.*, 529 F. App’x 547, 549–50 (6th Cir. 2013).

<sup>70</sup> *Brown v. Honda of Am.*, No. 2:10-CV-459, 2012 WL 4061795, at \*4–6 (S.D. Ohio Sept. 14, 2012).

<sup>71</sup> *Lewis v. New York City Police Dep’t*, 908 F. Supp. 2d 313, 326 (E.D.N.Y. 2012).

<sup>72</sup> Porter, *Backlash*, *supra* note 13, at 76.

<sup>73</sup> *Id.* at 73.

<sup>74</sup> *Id.* at 76–77.

<sup>75</sup> *Basden v. Prof’l Transp., Inc.*, 714 F.3d 1034, 1036–37 (7th Cir. 2013).

<sup>76</sup> *Id.* at 1039.

<sup>77</sup> *Id.* at 1037.

time for plaintiff to recover enough to return to work, the court affirmed the district court's grant of the defendant's motion for summary judgment.<sup>78</sup>

## 2. Physical Functions of the Job

Obviously, some employees with disabilities have difficulty performing the physical functions of the job and therefore must seek accommodations. As I have concluded in a study of recent cases brought under the ADA after it was amended in 2008, employers are more likely to grant accommodation requests when those requests seek a modification of the physical functions of the job (rather than a modification of the structural norms of the workplace),<sup>79</sup> but there are still many cases where employers refuse to grant accommodations, often arguing that the physical task is an essential function of the job,<sup>80</sup> and therefore, there is no way of accommodating it without eliminating the function, which is not required under the ADA.<sup>81</sup>

Although most workers with caregiving responsibilities do not have difficulty performing the physical tasks of the job, many pregnant workers do, and pregnancy is a form of caregiving. Some pregnant women have complications with their pregnancies that cause their doctors to put restrictions on what they can do—usually involving lifting or other physically arduous functions of the job.<sup>82</sup>

Thus, because both individuals with disabilities and workers with caregiving responsibilities have difficulty consistently meeting their employers' expectations, they are forced to seek some type of accommodations or modifications of the job. As I have argued elsewhere, doing so causes them to be subject to special treatment stigma.

### B. *Special Treatment Stigma*

When employees seek accommodations in the workplace, they are often subject to special treatment stigma. They are stigmatized by both their employers and their coworkers.

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<sup>78</sup> *Id.*

<sup>79</sup> Porter, *Backlash*, *supra* note 13, at 67–70.

<sup>80</sup> *Id.* at 65–66.

<sup>81</sup> Porter, *supra* note 1, at 1108; Porter, *Backlash*, *supra* note 13, at 70.

<sup>82</sup> *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015) (noting that the plaintiff's doctor restricted her from lifting over 20 pounds for the first 20 weeks of her pregnancy and over 10 pounds thereafter); *Tysinger v. Police Dep't of Zanesville*, 463 F.3d 569, 571 (6th Cir. 2006) (noting that the plaintiff's doctor put her on light duty from her job as a police officer after she was in an altercation with a suspect).

First, employers are often reluctant to accommodate workers if they do not believe that the law absolutely requires them to. And when the law does require the employer to accommodate an employee, employers are sometimes more reluctant to hire or promote those individuals who need or are likely to need accommodations. Second, employees who receive accommodations are stigmatized by their coworkers because their coworkers are resentful of the accommodations—either because those accommodations place burdens on the coworkers or because they are accommodations that the coworkers also covet. I will elaborate on each of these in turn.

### 1. Stigmatized by Employers<sup>83</sup>

As I have explored elsewhere, despite having a legal obligation to accommodate individuals with disabilities (as compared to workers with caregiving responsibilities), employers often are reluctant to provide accommodations to individuals with disabilities.<sup>84</sup> In fact, employers are often willing to provide informal accommodations to an employee until and unless the employee requests an accommodation that signals a possible legal obligation.<sup>85</sup> For instance, in *Serednyj v. Beverly Healthcare, LLC*,<sup>86</sup> in her attempt to prove that the employer discriminated against her because of her pregnancy, the plaintiff pointed to the fact that before her pregnancy, other employees assisted her in performing her more strenuous job duties, but after she became pregnant and asked for the same assistance, the employer refused.<sup>87</sup> The court stated that there was a material difference between requesting and receiving assistance from other employees and forcing those employees to give assistance if needed as an accommodation.<sup>88</sup> In the disability law context, I have described a similar phenomenon that I call “withdrawn accommodations.”<sup>89</sup> Frequently, employers are willing to provide temporary modifications of job duties, but when the employee requests a permanent accommodation, the employer refuses

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<sup>83</sup> This sub-part is derived in significant part from a prior work. See Porter, *supra* note 1, at 1109–11.

<sup>84</sup> Porter, *supra* note 1, at 1109.

<sup>85</sup> SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 56 (2009) (“Disability rights advocates commonly charge that employers accommodate the needs of workers without disabilities all the time; in many cases, it is only when a disabled worker asks for accommodation that the employer balks.”).

<sup>86</sup> *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011).

<sup>87</sup> *Id.* at 549.

<sup>88</sup> *Id.*

<sup>89</sup> Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885 (2015).

and withdraws the accommodation.<sup>90</sup>

Further evidence that employers dislike having to provide accommodations is the fact that the ADA has not noticeably improved the employment rate of individuals with disabilities.<sup>91</sup> Many scholars have argued that the reason for this is because employers are resistant to providing accommodations to individuals with disabilities<sup>92</sup> so employers simply do not hire those individuals.<sup>93</sup> As most employment lawyers know, it is far easier for an employer to defend a failure to hire claim than it is to defend a termination claim.<sup>94</sup> Therefore, anything that arguably increases the costs of employing an individual or makes it more difficult for an employer to fire an employee might incentivize an employer to not hire the individual in the first place.<sup>95</sup>

## 2. Stigmatized by Coworkers<sup>96</sup>

Coworkers resent employees who receive accommodations for two reasons. First, they resent some accommodations that place burdens on the coworkers. Second, coworkers resent accommodations that they wish they could have.

Courts often reject accommodations if those accommodations require assistance from other employees. For instance, in *Meinen v. Godfrey Brake Service & Supply, Inc.*,<sup>97</sup> after the plaintiff was hospitalized and subsequently diagnosed with multiple sclerosis (MS),<sup>98</sup> the company created two part-time positions to cover the parts department

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<sup>90</sup> *Id.* at 896–905.

<sup>91</sup> BAGENSTOS, *supra* note 85, at 117 (stating that the ADA “has failed significantly to improve the employment position of people with disabilities”).

<sup>92</sup> Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1308 (2009) (“It has . . . been suggested that the ADA has increased the difficulty for individuals with disabilities to obtain employment, because employers seek to avoid the obligations under the statute.”); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 315 (noting that “employers were initially the ADA’s primary opponents because of the concerns about the potential costs of accommodations”).

<sup>93</sup> BAGENSTOS, *supra* note 85, at 117 (pointing to, but disagreeing with, some commentators who argue that the employment rates of individuals with disabilities declined because of the ADA).

<sup>94</sup> *Id.* at 134.

<sup>95</sup> Porter, *supra* note 1, at 1111.

<sup>96</sup> This Part is derived from Porter, *Stigma*, *supra* note 26, at 236–39, and Porter, *supra* note 1, at 1111–15. Because employers have a legal obligation to accommodate employees with disabilities, most of these cases demonstrating the resentment of coworkers are cases brought under the ADA.

<sup>97</sup> *Meinen v. Godfrey Brake Serv. & Supply, Inc.*, No. CIV. 10-5077-JLV, 2012 WL 4364669 (D.S.D. Sept. 24, 2012).

<sup>98</sup> *Id.* at \*1.

(where plaintiff had worked) and to retain his position until he could return to work.<sup>99</sup> When the plaintiff returned to work, he could not work more than four hours per day.<sup>100</sup> The plaintiff's supervisor testified that upon the plaintiff's return, when he was still suffering from some vision loss caused by the MS, the plaintiff required a lot of help from other employees in seeing parts to determine what they were, finding parts in the catalog, and locating parts in the building.<sup>101</sup> The supervisor testified that "it bothered him that other employees had to help [the plaintiff] because it was taking time away from other things that needed to be done."<sup>102</sup> When the defendant terminated the plaintiff, the supervisor stated that a full-time employee would be preferable because the plaintiff required so much help that took away from other employees' time.<sup>103</sup> When the plaintiff's wife went into the workplace to collect plaintiff's check, she asked the owner whether there was anything that her husband could do to keep his job.<sup>104</sup> He replied in the negative, stating that the plaintiff "was too slow and that he couldn't have his other employees wasting their time helping" the plaintiff.<sup>105</sup> The court held that creation of a part-time position is not a reasonable accommodation and that simply allowing the plaintiff to work a part-time position for a period of time does not obligate the employer to continue to provide the accommodation.<sup>106</sup> More importantly for our purposes here, the court also held that the employer was not required to continue to provide the plaintiff with assistance from other employees in performing the essential functions.<sup>107</sup>

In a similar case, *Lopez v. Tyler Refrigeration Corp.*,<sup>108</sup> the plaintiff suffered an injury at work that led to permanent restrictions, including an inability to lift objects over twenty-five pounds and only occasional

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<sup>99</sup> *Id.* at \*2.

<sup>100</sup> *Id.* at \*1 n.3.

<sup>101</sup> *Id.* at \*3.

<sup>102</sup> *Id.*

<sup>103</sup> *Meinen*, 2012 WL4364669, at \*3.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at \*10. I find it interesting (and somewhat infuriating) that even though the ADA lists "part-time or modified work schedules" as possible reasonable accommodations, courts easily ignore this by stating that the accommodation requested is not a modification to the current position, but rather is the creation of an entirely new part-time position. *Id.* at \*8-9.

<sup>107</sup> *Id.* at \*13.

<sup>108</sup> *Lopez v. Tyler Refrigerator Corp.*, No. 99-10637, 2000 WL 122387 (5th Cir. Jan. 4, 2000) (per curiam).

use of hand tools for no more than two hours daily.<sup>109</sup> After allowing the plaintiff to work around his restrictions for a short period of time, the employer fired him because his restrictions would never allow him to return to his regular assembler position.<sup>110</sup> The plaintiff's supervisor testified that when he created a temporary modified job for the plaintiff, the more strenuous aspects of the job were given to other employees so that the plaintiff could work on the easier functions.<sup>111</sup> In holding that the plaintiff was not qualified to perform the essential functions of the position, the court stated that it was "unreasonable" to modify the job permanently to meet the plaintiff's restrictions because it forced other employees to perform the heavy lifting of the job.<sup>112</sup>

Some cases more explicitly demonstrate coworkers' resistance to accommodations that arguably make other employees work harder or longer.<sup>113</sup> For instance, in *Petrosky v. New York State Department of Motor Vehicles*,<sup>114</sup> the plaintiff suffered stigma and resentment when she was diagnosed with Type II diabetes and was required to take regular breaks to eat and manage her condition properly.<sup>115</sup> Although she requested a lighter workload, she was given a heavier load after her diabetes diagnosis, which sometimes caused her to be unable to take the breaks she needed to properly manage her diabetes.<sup>116</sup> The facts indicate that she was the "subject of derogatory comments and complaints from co-workers who contended that they were required to do more work" because of her illness.<sup>117</sup> In addition, when she requested reduced hours, two of her supervisors complained about her request.<sup>118</sup> Although the plaintiff ultimately survived summary judgment, this case demonstrates the type of bias employees face when they ask for accommodations in the workplace.<sup>119</sup>

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<sup>109</sup> *Id.* at \*1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*2.

<sup>112</sup> *Id.* at \*3.

<sup>113</sup> See, e.g., *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (indicating it is unreasonable to accommodate a disabled employee if doing so would require other employees to work harder or longer); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124–25 (10th Cir. 1995) ("An accommodation that would result in other employees having to work[] harder or longer hours is not required.").

<sup>114</sup> *Petrosky v. N.Y. State Dep't of Motor Vehicles*, 72 F. Supp. 2d 39 (N.D.N.Y. 1999).

<sup>115</sup> *Id.* at 46.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 60 ("The record reflects that Petrosky's supervisors and coworkers were upset by realignments made in the work schedule to accommodate Petrosky.").



Modifications to the structural norms of the workplace for an individual with a disability can also place burdens on coworkers. For instance, a commonly requested accommodation is a waiver of the requirement to work rotating shifts. Many employers who operate around the clock utilize rotating shifts, but if an individual has a disability that precludes him from working rotating shifts, the easiest way for an employer to accommodate this request is to require other employees to rotate through the less desirable shifts more often.<sup>120</sup> The courts are almost uniform in holding that an employer does not have to allow an employee with a disability to have a waiver of the rotating shifts requirement as an accommodation.<sup>121</sup> And in so holding, the courts use rhetoric indicating that they are concerned about placing burdens on the coworkers of the individual with a disability.

For instance, in *Bogner v. Wackenhut Corp.*,<sup>122</sup> the plaintiff, who had epilepsy and suffered from occasional seizures, asked to work only the day shift because his doctor believed that it would limit the recurrence of his seizures.<sup>123</sup> In holding that rotating shifts were an essential function of the job, and therefore, it was unreasonable to allow the plaintiff to avoid working rotating shifts as an accommodation, the court stated that the accommodation was not reasonable because it would impose “an additional burden on Bogner’s co-workers.”<sup>124</sup>

In another case, the plaintiff had Type I diabetes and related complications.<sup>125</sup> The plaintiff worked as a resource coordinator, and her employer required all resource coordinators to work rotating shifts, rotating between twelve-hour and eight-hour shifts and between day and night shifts.<sup>126</sup> Because of the difficulties associated with managing her diabetes, the plaintiff’s doctor advised her to work a

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<sup>120</sup> Porter, *Stigma*, *supra* note 26, at 245–47. *But see id.* at 244–45 (discussing a real life scenario I dealt with in practice where the employer allowed itself to overstaff on the day shift (which the disabled employee needed) and understaff on the afternoon or night shifts to avoid placing the burden on other employees of rotating through the less desirable shifts more often).

<sup>121</sup> Porter, *Stigma*, *supra* note 26, at 245–47 (discussing cases). However, I have found one case where the court held that the employer should have granted the plaintiff’s request to only work the day shift and not the graveyard shift, because the graveyard shift exacerbated plaintiff’s insomnia, migraine headaches, and depression. *Maes v. City of Espanola*, No. 1:12-CV-01250, 2014 U.S. Dist. LEXIS 36154 (D.N.M. Jan. 13, 2014).

<sup>122</sup> *Bogner v. Wackenhut Corp.*, No. 05-CV-6171, 2008 WL 84590 (W.D.N.Y. Jan. 7, 2008).

<sup>123</sup> *Id.* at \*1–2.

<sup>124</sup> *Id.* at \*6.

<sup>125</sup> *Kallail v. Alliant Energy Corp. Servs.*, 691 F.3d 925, 928 (8th Cir. 2012).

<sup>126</sup> *Id.* at 927.

straight day shift.<sup>127</sup> Apparently, the rotating shift was causing her to experience erratic changes in her blood pressure and blood sugar and was putting her at higher risk of diabetic complications, including death.<sup>128</sup> The plaintiff appealed from the district court's grant of summary judgment in favor of the defendant, arguing that the court erred in finding that working rotating shifts was an essential function of the position.<sup>129</sup> The court stated that shift rotation enhances the non-work life of the other employees by spreading the less desirable shifts among all of the employees. If the plaintiff were allowed to work a straight day shift, other employees would have to work more night and weekend shifts.<sup>130</sup> In fact, the employer had considered adding a couple of straight-shift positions, but it abandoned the idea because other employees complained.<sup>131</sup>

Similarly, in *Dicksey v. New Hanover Sheriff's Department*, the plaintiff, who had a seizure disorder, was transferred to a job working rotating shifts.<sup>132</sup> His doctor advised that he would be better able to control his seizure disorder if he worked a straight shift.<sup>133</sup> The day after he requested a straight shift as an accommodation for his disability, he was terminated.<sup>134</sup> In holding that the employer should not have to reallocate essential functions of the job (working a rotating shift), the court used the often-stated rule that any accommodation that makes other employees work harder or longer is unreasonable.<sup>135</sup> The court also stated: "Assigning plaintiff to the day shift on an indefinite basis would have placed upon plaintiff's coworkers or his boss the burden of working plaintiff's night shifts."<sup>136</sup>

Finally, in *Rehrs v. Iams Co.*, the plaintiff, who suffered from Type I diabetes, began having trouble managing his diabetes when his company implemented a rotating-shift schedule for all warehouse workers.<sup>137</sup> His doctor requested that he be placed on a fixed daytime schedule in order to better control his diabetes, and although he was allowed to work that schedule for a period of time, the employer

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<sup>127</sup> *Id.* at 928.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 930.

<sup>130</sup> *Id.* at 931.

<sup>131</sup> *Kallail*, 691 F.3d at 931.

<sup>132</sup> *Dicksey v. New Hanover Cty. Sheriff's Dep't*, 522 F. Supp. 2d 742, 744–45 (E.D.N.C. 2007).

<sup>133</sup> *Id.* at 745.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 748–49.

<sup>136</sup> *Id.* at 749.

<sup>137</sup> *Rehrs v. Iams Co.*, 486 F.3d 353, 354–55 (8th Cir. 2007).

eventually withdrew this accommodation and put him on short-term disability leave.<sup>138</sup> When defending the lawsuit, the employer argued that not enforcing the shift rotation would “adversely affect other technicians, creating inequities, because these other technicians would be forced to work the night shift exclusively or for longer periods and lose the benefits of shift rotation, thereby decreasing their opportunities for promotion and development.”<sup>139</sup>

In addition to rotating shifts, courts sometimes find that leaves of absence and working from home accommodations place burdens on other employees. For instance, in *Mason v. Avaya Communications, Inc.*, the court held that the plaintiff’s request for an accommodation to allow her to work at home was unreasonable.<sup>140</sup> The plaintiff worked as a service coordinator, which required her to schedule service appointments for technicians working in the field.<sup>141</sup> After a horrific workplace violence scare, the plaintiff learned that the threatening employee was going to return to work, and she became sick, suffering from post-traumatic stress disorder.<sup>142</sup> Accordingly, she asked for several accommodations, including relocating the threatening employee, allowing her to work at another facility, and allowing her to work from home.<sup>143</sup> The employer denied these requests.<sup>144</sup> In determining whether working from home was a reasonable accommodation, the court deferred to the employer’s assertion that teamwork was an essential function of the coordinator position because the coordinators assisted and covered for one another.<sup>145</sup> The court stated that the plaintiff’s “suggestion that teamwork is not an essential function because other service coordinators can pick up the slack in her stead is simply irrelevant in determining whether teamwork is an essential function of the job.”<sup>146</sup>

In a similar case, the plaintiff needed to miss work intermittently because she had several disabilities.<sup>147</sup> Her supervisor began questioning her about her frequent absences and told her that every

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<sup>138</sup> *Id.* at 355.

<sup>139</sup> *Id.* at 357.

<sup>140</sup> *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1116 (10th Cir. 2004).

<sup>141</sup> *Id.* at 1117.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1117–18.

<sup>145</sup> *Id.* at 1121.

<sup>146</sup> *Mason*, 357 F.3d at 1121.

<sup>147</sup> *Zimmerman v. Gruma Corp.*, No. 3:11-CV-01990-L, 2013 WL 3154118, at \*1–2 (N.D. Tex. June 21, 2013).

time she was not at work, she placed a burden on her coworkers.<sup>148</sup> The plaintiff claimed that she received “ongoing harassment” because of her absences.<sup>149</sup>

The cases above addressed the situation where a coworker resents an accommodation because the accommodation places burdens on other employees. The second reason coworkers might be resentful of an accommodation is if they see the accommodation as providing preferential treatment to the individual with a disability. In other words, coworkers are resentful when some employees receive accommodations that the coworkers covet.<sup>150</sup> This resentment also leads some employers to not want to grant the accommodation, for fear of the backlash they might receive from granting what looks like “special treatment” or because they are worried about the precedent-setting effect of granting some accommodations.<sup>151</sup>

For instance, in *Hancock v. Washington Hospital Center*, the court considered whether an employer should have to give the plaintiff an accommodation that could be seen as preferential treatment.<sup>152</sup> The plaintiff was a medical assistant whose responsibilities included, among other things, quite a bit of walking and lifting.<sup>153</sup> After complications related to a surgery to remove cysts, the plaintiff was under doctor’s instructions that limited her ability to lift and walk.<sup>154</sup> One of the possible accommodations discussed was to allow her a light duty position of answering the telephones.<sup>155</sup> The plaintiff’s supervisor balked at this request stating: “If I only utilize her on the phones (long-term), then it sets me up to have to make likewise accommodations for other staff members in the future.”<sup>156</sup>

Similarly, in *Lee v. Harrah’s New Orleans*, the plaintiff was a dealer in a casino and suffered from severe back pain and fibromyalgia, which limited her ability to stand for long periods of time.<sup>157</sup> Plaintiff’s position required her to stand most of the time, but another position, the box person assignment, was mostly a sitting position. The plaintiff

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<sup>148</sup> *Id.* at \*2.

<sup>149</sup> *Id.*

<sup>150</sup> Porter, *Stigma*, *supra* note 26, at 249–51.

<sup>151</sup> *Id.* at 249.

<sup>152</sup> *Hancock v. Washington Hosp. Ctr.*, 908 F. Supp. 2d 18, 19 (D.D.C. 2012), *aff’d*, 618 F. App’x 4 (D.C. Cir. 2015).

<sup>153</sup> *Id.* at 20.

<sup>154</sup> *Id.* at 20–21.

<sup>155</sup> *Id.* at 22.

<sup>156</sup> *Id.*

<sup>157</sup> *Lee v. Harrah’s New Orleans*, No. 11-570, 2013 WL 3899895, at \*1 (E.D. La. July 29, 2013).

requested to be assigned to the box person position as an accommodation for her disability.<sup>158</sup> She sued when the employer refused to assign her permanently to that position. Her supervisor testified that he tried to assign her to the seated position as much as possible without showing favoritism.<sup>159</sup>

Finally, the accommodation that might cause the most resentment by other employees involves reassignment to another position. If the employee can no longer perform the essential functions of his current position, the employee might request “reassignment to a vacant position,” which is an accommodation specifically referenced in the ADA.<sup>160</sup> As I have discussed elsewhere, there is a circuit split in the courts regarding whether an employer has to reassign an employee with a disability if another, more qualified employee also applies for the vacant position.<sup>161</sup> It is not difficult to imagine how other employees might be resentful of an employee with a disability if that employee gets a coveted position over the more-qualified, non-disabled coworker.

Because employers are legally obligated to accommodate individuals with disabilities, we see much more evidence of the resentment of coworkers when accommodations are given to individuals with disabilities. With the exception of providing leave under the FMLA to eligible employees, employers are not legally obligated to accommodate workers with caregiving responsibilities.<sup>162</sup> Nevertheless, sometimes employers do accommodate caregivers. And when they do, those caregivers experience the same type of resentment that individuals with disabilities do.<sup>163</sup> As I have discussed elsewhere, other scholars have argued that accommodating caregivers is likely to create tensions between those caregivers and their coworkers:<sup>164</sup>

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<sup>158</sup> *Id.* at \*2, \*4–5.

<sup>159</sup> *Id.* at \*2.

<sup>160</sup> 42 U.S.C. § 12111(9)(B) (2008).

<sup>161</sup> Porter, *Stigma*, *supra* note 26, at 250–51 (comparing EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012) with Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007)).

<sup>162</sup> Porter, *supra* note 1, at 1117–18. In some cases, however, employers might be legally obligated to accommodate pregnant workers. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

<sup>163</sup> JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 35 (2010) (stating that when employers provide paid leave, they often burden other employees, causing resentment).

<sup>164</sup> Porter, *supra* note 1, at 1114; see also Michelle Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 329 (2003) (stating that when employers change the rule for some but not all employees, this may “contribute to coworkers’ resentment and the feeling that accommodations represent bare preferential treatment or affirmative action rather than a form of equal opportunity.”).

The argument is that accommodating caregivers bestows undue privileges on parents, yet holds nonparents to higher performance standards. Many studies indicate that employees without primary caregiving responsibilities express a desire to work fewer hours like their caregiving counterparts and express resentment that only the caregiving employees are allowed the opportunity to work reduced hours. Many of us have also heard anecdotal stories regarding coworkers' resentment when workers with caregiving responsibilities must leave work early or are not expected to come in on the weekends, leaving the non-caregivers to pick up the slack for their caregiving coworkers.<sup>165</sup>

This resentment was recently discussed by Professor Trina Jones.<sup>166</sup> She argues that the extension of flexibility and benefits to some workers, when all workers experience difficulty balancing work and life, has created a "tipping point," causing single workers to question the fairness of the load they are carrying.<sup>167</sup> Specifically, she argues that when companies try to appear family friendly, they pressure single workers to travel more, work more weekends and holidays, stay later during the week, and refrain from taking time off.<sup>168</sup> Moreover, these companies often do not compensate for or treat single workers better because of this extra work.<sup>169</sup> She also argues that parents get benefits that non-parents do not get but wish they could.<sup>170</sup> Thus, Jones argues that this causes childfree workers to feel resentful of the benefits given to working parents.<sup>171</sup>

### C. *My Prior Attempt to Ameliorate Special Treatment Stigma*

Because individuals with disabilities and employees with caregiving responsibilities are likely to suffer stigma flowing from both employers and employees, I have spent quite some time trying to figure out how to ameliorate the effects of "special treatment stigma." In prior work, I acknowledged that special treatment stigma was inevitable and unavoidable unless we could change the minds of those

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<sup>165</sup> Porter, *supra* note 1, at 114 (footnotes and citations omitted).

<sup>166</sup> Trina Jones, *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, 46 ARIZ. ST. L.J. 1253 (2014).

<sup>167</sup> *Id.* at 1265.

<sup>168</sup> *Id.* at 1266.

<sup>169</sup> *Id.* at 1269–71.

<sup>170</sup> *Id.* at 1329. Jones is referring to benefits such as tuition assistance for an employee's children, part-time or other reduced hour schedules, and flexible leave policies.

<sup>171</sup> *Id.* at 1255–56.

who resented the accommodations given to individuals with disabilities and sometimes to caregivers.<sup>172</sup> In order to effect that culture shift, I relied on communitarian theory.<sup>173</sup>

Specifically, I argued that if we focus on the workplace as a community, and if we understand the advantages of working together within the workplace community for the mutual benefit of all employees (and the employer), we will have a better appreciation for why accommodating both individuals with disabilities and caregivers is appropriate and warranted.<sup>174</sup> After explaining the basic tenets of communitarian theory,<sup>175</sup> I argued that this theory supported providing accommodations to individuals with disabilities and caregivers.<sup>176</sup> I argued that the resentment coworkers feel towards individuals who receive some type of special benefits in the workplace is evidence of an overemphasis on individual rights.<sup>177</sup> “Instead, if we all view the workplace as a community and understood ourselves as having a responsibility to others in our community,” the resentment coworkers feel about accommodations would dissipate.<sup>178</sup>

Furthermore, I argued that the workplace community benefits in several ways from providing individuals with accommodations.<sup>179</sup> First, accommodating workers allows them to remain employed, thereby reducing the considerable costs of attrition and turnover.<sup>180</sup> Second, society benefits when employers provide accommodations to individuals with disabilities and caregivers because increasing the employment opportunities for these groups reduces the chance that they will rely on public assistance.<sup>181</sup> Third, relying in large part on the important work of Professor Travis, I argued that the ADA benefits nondisabled employees in addition to helping disabled employees.<sup>182</sup> Finally, I argued that accommodating caregivers also benefits non-caregivers.<sup>183</sup> I pointed out that caregiving is inevitable. All of us, at

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<sup>172</sup> Porter, *supra* note 1, at 1139–40.

<sup>173</sup> *Id.* at 1139–52.

<sup>174</sup> *Id.* at 1140.

<sup>175</sup> These tenets include the departure from a preoccupation with rights and an emphasis on the responsibility we owe to others within our communities. Porter, *Why Care*, *supra* note 4, at 394.

<sup>176</sup> Porter, *supra* note 1, at 1142.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1142–43.

<sup>180</sup> *Id.* at 1142.

<sup>181</sup> *Id.* at 1143.

<sup>182</sup> Porter, *supra* note 1, at 1143–47.

<sup>183</sup> *Id.* at 1148–51.

one point or another, will either find ourselves in a caregiving role or will be in need of care.<sup>184</sup> This is true even for those who do not ever have children.<sup>185</sup> I also argued that parents and other caregivers have a moral obligation to attend to the proper care of their children or others who are dependent on them, and that society as a whole (including non-caregivers) benefits when caregivers are given the tools needed to provide this care.<sup>186</sup> Thus, I argued, the communitarian theory supports providing accommodations to caregivers in the same way we accommodate individuals with disabilities.<sup>187</sup>

I still believe this to be true. I continue to believe that if employees and employers would stop considering only their own interests and would begin to see the benefits of working together in our workplace communities, we could begin to eliminate the special treatment stigma that accompanies accommodations in the workplace. But I recognize this is quite a utopian position for me to take. With all of the emphasis on individual merit, seniority, and competition in the workplace, in addition to the sense of insecurity felt by many American workers, my proposal to see the workplace as a community, where employees support one another for the good of the community, will likely not gain much traction. I accordingly suggest a compromise—a pragmatic alternative to my more lofty goal of ending special treatment by attacking it directly. I propose a universal accommodation mandate so that there will no longer be any “special treatment” that can be stigmatized.

### III. ELIMINATING SPECIAL TREATMENT STIGMA BY ACCOMMODATING EVERYONE

In order to eliminate the special treatment stigma suffered by individuals with disabilities and workers with caregiving responsibilities, this Part will propose and justify a universal accommodation mandate. The idea of a universal accommodation mandate is simple: any employee has the right to request a workplace accommodation and the employer cannot refuse the request based on the reason for the request. The employer would, of course, be able to

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<sup>184</sup> *Id.* at 1148.

<sup>185</sup> *Id.* (pointing out that everyone could be forced into a caregiving role by being called upon to provide care for a sick or disabled spouse, partner, parent, or other family member).

<sup>186</sup> *Id.* at 1149–50. *But see* Jones, *supra* note 166, at 1300 (arguing that, “while parenting is important, the critical nature of this function alone is insufficient to explain why [child free employees], who are doing the same work as parents within the workplace, are required to indirectly subsidize parenting.”).

<sup>187</sup> *Id.* at 1150.



reject the request if the accommodation was unreasonable or if it would cause an undue hardship. Otherwise, the employer must provide the accommodation.

A. *My Prior Consideration of a Universal Accommodation Mandate*

In prior work, I considered, but ultimately rejected, the idea of a universal accommodation mandate.<sup>188</sup> My main concern was over the difficulty in implementing such a broad mandate; specifically, I became fixated on the idea that the employee requesting an accommodation would have to prove that he needs the accommodation.<sup>189</sup> I found delineating the boundaries of “needs” to be difficult. Is “need” based on the employee’s subjective perception or an objective inquiry?<sup>190</sup> For instance, imagine an employee is training for a marathon in the winter and wants flex-time throughout the winter (arriving earlier in the morning and leaving earlier in the afternoon) in order to get home for training runs while it is still light outside. Does this marathon-training employee *need* the accommodation?<sup>191</sup> Or as another example, imagine an employee asks to be excused from some of the cleaning tasks required of the job at the end of the day because the cleaning materials irritate her, but not to the point where her sensitivity would qualify as a disability under the ADA. Does this employee *need* this accommodation?<sup>192</sup> In both cases, the individual employee might respond in the affirmative—she does need the accommodation. And yet, the employers in both of these situations are likely to disagree.

B. *The New Universal Accommodation Mandate*

This proposal picks up where the last proposal ended (and

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<sup>188</sup> Porter, *supra* note 1, at 1133–38.

<sup>189</sup> The fixation on determining if someone needs an accommodation makes some sense. It makes sense because, generally, when individuals with disabilities request accommodations, it is because they cannot perform the essential functions of the job without an accommodation. The ADA, however, also requires employers to provide accommodations to individuals with disabilities if that accommodation would allow the employee to enjoy the privileges or benefits offered by the employer. EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, No. 915.002 (Oct. 17, 2002) (unpaginated), <http://www.eeoc.gov/policy/docs/accommodation.html>. Thus, if an employer hosts a holiday party for its employees, and one of the employees uses a wheelchair, the employer should make sure that the location of the party is accessible for the employee who uses a wheelchair.

<sup>190</sup> Porter, *supra* note 1, at 1136.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

hopefully, this proposal succeeds where the last one failed). Although defining “needs” is still difficult, this proposal covers accommodations beyond those that are strictly necessary in order to allow the employee to perform the functions of the position. This is because I believe that if an accommodation mandate only covered accommodations needed by an employee in order to perform his job, there would be many accommodations that would not be granted. A large subset of those would be accommodations requested by caregivers because many caregiving accommodations, such as reduced or modified hours, or time off for various child-related activities, would not be seen as strictly necessary in order to perform the functions of the job. Furthermore, if a universal accommodation mandate covered only necessary accommodations, the stigma suffered by those groups of employees who are accommodated would continue.

At the same time, I do not suggest a universal accommodation mandate should accommodate all requests equally. The pushback from employers for such a proposal would be substantial. Moreover, many of those who advocate on behalf of individuals with disabilities or caregivers might be worried about the dilution effect<sup>193</sup>—that giving someone running a marathon the same right to an accommodation as someone who has a caregiving conflict or needs flextime to accommodate medical appointments for a disability will dilute the effectiveness of the rights given to protected groups.

As a compromise between these two competing views, I propose a universal accommodation mandate with a two-tier undue hardship analysis. This two-tier undue hardship analysis would work as follows. For all accommodations that are necessary either because the employee cannot perform the job without it (for any reason, not just because of a disability) or because the employee would be neglecting unavoidable caregiving obligations without it, this proposal would apply the more stringent undue hardship standard borrowed from the ADA—defined as “significant difficulty or expense.”<sup>194</sup> For all other accommodations requested, the undue hardship standard that would apply would be the more relaxed standard borrowed from the religious accommodation context, where anything more than a de minimis expense would constitute an undue hardship.<sup>195</sup> Below I discuss how this proposal would apply to various accommodation requests.

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<sup>193</sup> I will discuss the dilution effect in more detail below. *See infra* Part IV.C.

<sup>194</sup> 42 U.S.C. § 12111(10)(A) (2008).

<sup>195</sup> *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

*C. Application of the Universal Accommodation Mandate*

This universal accommodation mandate would apply to both the physical functions of the job and to the structural norms of the workplace. And, as noted above, it would cover accommodations that are not strictly “necessary.” This feature is one thing that makes this proposal different from other universal accommodation proposals. For instance, in *Accommodating Every Body*, four disability scholars propose accommodating every “work-capable” individual for whom the “provision of reasonable accommodation is necessary to give meaningful access to enable their ability to work.”<sup>196</sup> The authors emphasize that not every desire for an accommodation, even when that accommodation would be effective, would result in an entitlement.<sup>197</sup> The proposed accommodation would have to be “necessary for an individual to fulfill essential job functions.”<sup>198</sup> My proposal is broader, covering not just necessary accommodations but also everything else.

*1. Necessary Accommodations*

I classify “necessary accommodations” as encompassing two things. First, an accommodation is necessary if an employee cannot perform the essential functions of the job without it. Second, an accommodation is necessary if the employee would be neglecting unavoidable caregiving obligations without it.

*a. Individuals with Disabilities*

Many individuals with disabilities need accommodations in order to perform the essential functions of their jobs. And because individuals with disabilities are already entitled to an accommodation under the ADA,<sup>199</sup> the status quo would not change for most of them under my proposal. But because employers cannot scrutinize the reason for the accommodation, employees would not need to first prove that they have a disability as defined under the ADA. Rather, the employees would have to demonstrate to their employer only that they have a physical limitation that makes it impossible for them to perform the essential function of the job without an accommodation.

The one area where my proposal might differ from current law under the ADA is with regards to accommodations that are not strictly necessary in order to perform the functions of the job. This situation

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<sup>196</sup> Stein et al., *supra* note 20, at 693.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> 42 U.S.C. § 12112(b)(5)(A) (2012).

might arise if an employee requests an accommodation that allows the employee to enjoy the privileges or benefits of a particular workplace. As stated in an enforcement guidance by the Equal Employment Opportunity Commission (EEOC),<sup>200</sup> the ADA “requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the ‘benefits and privileges of employment’ equal to those enjoyed by similarly-situated employees without disabilities.”<sup>201</sup> These might include services such as employee assistance programs; credit unions, cafeterias, lounges, gymnasiums, and auditoriums; transportation; and parties or other social functions.<sup>202</sup> These benefits and privileges of employment might not be “necessary” for an employee to perform the essential functions of the job.

I am conflicted about how to deal with this. Under my proposal, these accommodation requests would be subject to the less stringent “undue hardship” standard because they would not be strictly necessary. And yet these accommodation requests are important for the full integration of individuals with disabilities into the workplace.<sup>203</sup> One factor that might mitigate the harm of this result is the fact that some courts have denied such accommodations under the ADA using a cost/benefit analysis. For instance, in *Vande Zande v. Wisconsin Department of Administration*,<sup>204</sup> the court held that the employer did not have to provide a lowered sink in the break room so that the plaintiff, who used a wheelchair, could reach the sink. The evidence provided that lowering the sink would cost only \$150, which would clearly not be unduly expensive.<sup>205</sup> However, the court stated:

Given the proximity of the bathroom sink, Vande Zande can hardly complain that the inaccessibility of the kitchenette sink interfered with her ability to work or with her physical comfort. Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different or inferior . . . . But we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working

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<sup>200</sup> EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, No. 915.002 (Oct. 17, 2002) (unpaginated), <http://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>201</sup> *See id.*

<sup>202</sup> *See id.*

<sup>203</sup> *See Stein et al., supra* note 20, at 744–49 (discussing the importance of integration of individuals with disabilities).

<sup>204</sup> *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995).

<sup>205</sup> *Id.* at 546.

conditions between disabled and non-disabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet. We conclude that access to a particular sink, when an access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer.<sup>206</sup>

Thus, even though the ADA currently requires employers to accommodate privileges and benefits of employment (rather than only those accommodations that are necessary for the employee to perform the essential functions of the job), courts often find ways to deny those accommodations.<sup>207</sup> I say this not to excuse those decisions (because I think these accommodations should be given) but to point out that my proposal is unlikely to cause a significant departure from the current state of affairs.

#### b. Older Workers

As discussed in the *Accommodating Every Body* article mentioned above,<sup>208</sup> as increasingly more individuals want or need to continue working later in life, many will end up having impairments that affect their ability to perform some of the functions of the job, especially if the job is physically arduous.<sup>209</sup> While many of these individuals might also be considered individuals with disabilities—especially after the expansion of the definition of disability in the ADA Amendments Act<sup>210</sup>—some might have pain or limitations that do not rise to the level of a disability.<sup>211</sup> Furthermore, forcing older individuals to claim and argue that they should be considered an individual with a disability will lead to many of them choosing not to seek accommodations.<sup>212</sup>

My proposal will not require these older individuals to prove that

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<sup>206</sup> *Id.*

<sup>207</sup> *See, e.g., id.*

<sup>208</sup> *See generally* Stein et al., *supra* note 20.

<sup>209</sup> *Id.* at 703, 708.

<sup>210</sup> *See generally* Porter, *Backlash*, *supra* note 13, at 46–47 (pointing to the numerous cases where courts adopted a much broader definition of disability under the ADA after the ADA Amendments Act).

<sup>211</sup> Furthermore, there is some doubt about the effectiveness of the ADA Amendments Act in changing the judiciary’s opinion about the proper scope of disability protections. Stein et al., *supra* note 20, at 699.

<sup>212</sup> *Id.* at 708 (“Impaired individuals’ reluctance to request an accommodation may be driven by questions regarding whether they have a legally defined ‘disability,’ the desire to avoid the perception that they are getting ‘special’ treatment, an inhospitable workplace culture, fears of retaliation, and/or the incentive to pursue SSDI benefits instead of pursuing work.”).

they belong to the class of individuals protected under the ADA. Instead, as long as an accommodation is needed to allow the older employee to perform the essential functions of the job, the accommodation would have to be granted.

In addition to older workers who might have restrictions on their ability to perform some workplace tasks, some workers who are smaller than the average person might also have difficulty performing some tasks and therefore might need an accommodation in order to be able to perform the essential functions of the job.<sup>213</sup> Of course, only if the accommodation is reasonable and does not cause an undue hardship does the accommodation have to be granted. An accommodation would not be reasonable if it required the elimination of an essential function of the job.<sup>214</sup>

### c. Pregnancy

Although many pregnant women proceed through their entire pregnancies without any difficulties, some women are put on certain restrictions by their doctors because of actual or potential complications with the pregnancy.<sup>215</sup> For instance, some doctors might place a pregnant woman on a lifting restriction, demanding that she not lift more than a certain amount.<sup>216</sup> In other cases, if the employee has a physically arduous job, the doctor might ask that she be placed on light duty.<sup>217</sup>

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<sup>213</sup> See *id.* at 697 (discussing the fact that many workplace environments and pieces of equipment have been built around or structured with the average man in mind, thereby excluding many women); Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1303–05 (2008) (exploring cockpits, machinery, and other workplace characteristics that unintentionally exclude many women and individuals with disabilities).

<sup>214</sup> See, e.g., *Hill v. Walker*, 737 F.3d 1209, 1217 (8th Cir. 2013) (stating that employers need not eliminate essential functions of the job to accommodate an employee with a disability); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1229 (11th Cir. 2005). Because the employer would be required to consider the accommodation requested by a small woman, however, the employer might realize that there are alternative ways to perform the particular function. See Stein et al., *supra* note 20, at 697 n.31 (pointing to the example of women generally being unable to perform the fireman's lift to rescue people from a burning building, but noting there are other modes of rescue that allow women to execute the same function in an alternative manner).

<sup>215</sup> See generally Bradley Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125 (2016).

<sup>216</sup> See, e.g., *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015) (noting that the plaintiff's doctor "told her she should not lift more than twenty pounds during the first twenty weeks of her pregnancy or more than ten pounds thereafter.").

<sup>217</sup> *Tysinger v. Police Dep't of Zanesville*, 463 F.3d 569, 571 (6th Cir. 2006) (noting that the plaintiff's doctor put her on light duty from her job as a police officer after

2016]

## ACCOMMODATING EVERYONE

115

Under my proposal, in cases where the doctor places the pregnant woman on restrictions to protect the health of the woman or the unborn baby, the accommodation is considered necessary and the employer would have to provide it, absent being able to prove that the accommodation is unreasonable or creates an undue hardship under the more stringent standard—significant difficulty or expense.<sup>218</sup>

## d. Unavoidable Caregiving Obligations

In addition to situations where individuals cannot perform the physical functions of the job without an accommodation, I also believe an accommodation is necessary if a caregiver would be neglecting unavoidable caregiving obligations without it. Although delineating the precise boundaries and parameters of these unavoidable caregiving obligations is beyond the scope of this Article, I have a rough idea of where that line should be drawn.

As I have discussed above and elsewhere,<sup>219</sup> some of the most troubling stories involve caregivers having to choose between their job and caring for their minor children. For instance, one woman was terminated because her child was in a car accident and had to be taken to the hospital.<sup>220</sup> Another mother left her children aged one and nine alone because the babysitter had not arrived and the mother feared termination if she did not report to work; while she was gone, the children died in a fire.<sup>221</sup> In another horrendous case, a caregiver left a two-year-old child home alone to avoid losing her job and, in her absence, the child fell from a balcony and died.<sup>222</sup> Some parents force older children to miss school to stay home and care for younger children who are sick.<sup>223</sup> Another caregiver lost her job because she stayed home with her child who had the flu.<sup>224</sup>

Accordingly, one reform I proposed in earlier work was to protect

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she was in an altercation with a suspect).

<sup>218</sup> 42 U.S.C. § 12111(10)(A) (2008).

<sup>219</sup> Porter, *Why Care*, *supra* note 4, at 407–09.

<sup>220</sup> 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN, *10 Things That Could Happen to You if You Didn't Have Paid Sick Days And The Best Way to Make Sure They Never Happen to Anyone*, 4 (2014), [http://njtimetocare.com/sites/default/files/18\\_Ten%20Things%20That%20Could%20Happen%20to%20You%20if%20You%20Didnt%20Have%20Paid%20Sick%20Days.pdf](http://njtimetocare.com/sites/default/files/18_Ten%20Things%20That%20Could%20Happen%20to%20You%20if%20You%20Didnt%20Have%20Paid%20Sick%20Days.pdf).

<sup>221</sup> Nina Bernstein, *Daily Choice Turned Deadly: Children Left on Their Own*, N.Y. TIMES (Oct. 19, 2003), <http://www.nytimes.com/2003/10/19/nyregion/daily-choice-turned-deadly-children-left-on-their-own.html>.

<sup>222</sup> *See id.*

<sup>223</sup> Porter, *Why Care*, *supra* note 4, at 408.

<sup>224</sup> *See id.*

caregivers from termination in these situations.<sup>225</sup> In other words, at a bare minimum, caregivers who would be terminated if they are not given an accommodation that is needed to keep them from neglecting unavoidable caregiving obligations should be accommodated. Only if the accommodation would cause an undue hardship using the more stringent ADA standard—significant difficulty or expense—should the accommodation be refused.

Thus, even though defining unavoidable caregiving obligations is not easy, we should all be able to agree that employees should be protected when they miss work because they have no responsible person with whom to leave a child under the age of twelve, despite having made reasonable efforts to find such a person.<sup>226</sup> Such a situation might arise because the child's illness precluded attendance at a group-based daycare or school, because a babysitter is too ill to care for the child or otherwise does not show up for work, or because the child's school is unexpectedly closed.<sup>227</sup> Certainly there are likely to be disputes regarding what constitutes reasonable efforts to find alternative care arrangements, as well as defining who is a responsible person.<sup>228</sup>

One way to solve some of these disputes is to borrow from Professor Peggie Smith, who has proposed using the standards from unemployment compensation cases in order to define unavoidable caregiving obligations. In her article, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*,<sup>229</sup> Professor Smith proposes a model for accommodating parental obligations that focuses on "compelling parental obligations."<sup>230</sup> Her proposal requires an employee seeking accommodation to demonstrate that the employee (1) faced a compelling parental obligation that conflicted with an employment requirement; (2) informed the employer about the conflict; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement.<sup>231</sup> If the employee could prove this, then the employer would have the burden of proving that the employer made a good faith effort to accommodate the employee's parental

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<sup>225</sup> *Id.* at 407–09.

<sup>226</sup> *Id.* at 409.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (2001).

<sup>230</sup> *Id.* at 1465–79.

<sup>231</sup> *Id.* at 1466.



obligations or that the employer was unable to reasonably accommodate the employee without experiencing an undue hardship.<sup>232</sup> So Professor Smith’s proposal—similar to mine—requires determining what is considered a “compelling parental obligation.”

To do so, Professor Smith relies on unemployment compensation case law.<sup>233</sup> As explained by Smith, employees who are terminated from their jobs may be eligible for unemployment compensation, but they are usually ineligible if they voluntarily quit their jobs or are fired for misconduct.<sup>234</sup> Courts often apply a “good cause” standard in assessing whether an employee leaves a job voluntarily.<sup>235</sup> Thus, courts are often required to consider whether employees had good cause for voluntarily leaving their employment based on work-family conflicts.<sup>236</sup> Smith uses these decisions to help delineate the parameters of when employees are faced with compelling parental obligations that require accommodation.<sup>237</sup>

Some of the cases where the employee was able to prove that she had good cause to voluntarily quit her employment or to refute an employer’s argument that it terminated for misconduct include: when an employer suddenly and dramatically changes an employee’s schedule, making the employee’s prior daycare arrangement unworkable (and the employee cannot find an affordable alternative compatible with the new shift);<sup>238</sup> changing an employee’s schedule from a predictable shift to one that varies daily where the employee had no alternative daycare on the days she was required to work until 8:30 p.m.;<sup>239</sup> and where an employee was fired for missing two days of work after her employer changed her shift to the evening shift and she was unable to arrange alternative childcare.<sup>240</sup> As explained by Smith, these cases and others like them include two related inquiries: the significance of the parental obligation at stake and the reasonableness of the employee’s efforts to meet that obligation.<sup>241</sup>

Smith explains that courts are more likely to find that good cause led an employee to quit her job when the employee’s family

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1467–72.

<sup>234</sup> *Id.* at 1467.

<sup>235</sup> Smith, *supra* note 229, at 1467.

<sup>236</sup> *Id.* at 1468.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1468 (citing *White v. Sec. Link*, 658 A.2d 619 (Del. Super. Ct. 1994)).

<sup>239</sup> *Id.* at 1469 (citing *Newland v. Job Serv. N.D.*, 460 N.W.2d 118 (N.D. 1990)).

<sup>240</sup> *Id.* at 1469–70 (citing *King v. Unemployment Comp. Bd. of Review*, 414 A.2d 452 (Pa. Commw. Ct. 1980)).

<sup>241</sup> Smith, *supra* note 229, at 1470.

responsibility is deemed “compelling and necessitous.”<sup>242</sup> This occurs when there are “circumstances that . . . would compel a reasonable person under those circumstances to act in the same manner.”<sup>243</sup> Thus, when an employee is forced to quit her job because she refuses to leave her children unaccompanied at home in the evening, this would be considered a compelling reason to separate from her job.<sup>244</sup> Smith recognizes (as do I) that not all caregiving obligations are compelling (or unavoidable as I refer to them). For instance, she argues that an employee’s desire to leave work early to attend a child’s softball game is not compelling, nor is taking time off to accompany a child on a class field trip.<sup>245</sup> Both of these situations do not present circumstances that would compel a reasonable person to separate from his or her job.<sup>246</sup> As Smith summarizes: “The underlying premise of this proposal is that some parental sacrifices are unacceptable: employees should not be forced unnecessarily to choose between the fundamental welfare of their children and employment.”<sup>247</sup>

I recognize that, even with the explanation above, “unavoidable caregiving obligations” is still a vague term. But as Smith notes, using the precedent from unemployment compensation cases can provide guidance for determining when a caregiving obligation should be deemed compelling or unavoidable. If we ask the same question as the unemployment compensation courts ask—would a reasonable person be compelled to quit if faced with a similar dilemma between caring for children and work?—we should arrive at the correct answer.

## 2. All Other Accommodation Requests

All of the above “necessary” accommodations should be granted as long as the accommodation does not cause an undue hardship for the employer under the more stringent definition of “significant difficulty or expense.” Under my proposal, all other accommodation requests should still be granted unless the accommodation would cause an undue hardship under the more lenient standard of anything more than a de minimis expense.

This category would basically encompass everything else not defined as a “necessary” accommodation above. Some reasons an employee might seek a workplace accommodation include: advancing

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<sup>242</sup> *Id.* at 1471.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Smith, *supra* note 229, at 1471.

her education; community volunteering or other civic engagement; a second job or starting a business;<sup>248</sup> and other intellectual, physical, or emotional pursuits. These types of pursuits might lead an employee to request a schedule change or reduced hours for a period of time. Although not all jobs allow for an easy adjustment of working hours, many employers have found that schedule changes, especially minor adjustments to the starting and stopping time, are relatively simple to provide.

The two more difficult or controversial categories that would fall under the more lenient undue hardship standard (because they would not be classified as “necessary”) are religious accommodation requests and caregiving accommodation requests that are not for “unavoidable caregiving obligations,” discussed above.

a. Religion

As noted above, Title VII requires employers to accommodate an employee’s bona fide religious beliefs and practices if they conflict with a workplace rule:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.<sup>249</sup>

Even though the statute uses the same “undue hardship” phrase as the ADA, the Supreme Court has defined that phrase quite differently in the religious accommodation context.<sup>250</sup> The Court held in *Trans World Airlines, Inc. v. Hardison* that an employer should not have to be short-handed or pay others premium pay through overtime in order to accommodate the plaintiff’s desire not to work on his Sabbath.<sup>251</sup> According to the Court, requiring “TWA to bear more than a de minimis cost in order to give Hardison Saturdays off [was] an undue hardship.”<sup>252</sup> The Court believed that requiring TWA to bear additional costs when no such costs are incurred to give other employees a day off would involve “unequal treatment of employees

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<sup>248</sup> Obviously, an employer would be allowed to enforce normal non-compete agreements.

<sup>249</sup> 42 U.S.C. § 2000e(j) (1991).

<sup>250</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 64 (1977).

<sup>251</sup> *Id.* at 84.

<sup>252</sup> *Id.*

on the basis of their religion.”<sup>253</sup> Absent legislative history to the contrary, the Court could not “readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”<sup>254</sup>

Two things likely account for the difference between how the religious accommodation provision is treated as compared to the ADA’s reasonable accommodation provision. First, because the ADA protects only individuals with disabilities, it does not allow for “reverse discrimination” claims.<sup>255</sup> The religious accommodation provision, on the other hand, is part of Title VII, which protects all employees based on their religion (in addition to race, color, sex, and national origin).<sup>256</sup> And second, there is some evidence that the Court narrowly defined employers’ obligations to accommodate religious practices to avoid a conflict with the Establishment Clause of the First Amendment.<sup>257</sup>

Although there have been proposals to expand the reasonable accommodation obligation for religion,<sup>258</sup> thus far, neither the Supreme Court nor Congress has broadened the coverage of the religious accommodation provision. Although I would not be opposed to broadened coverage for religious accommodations—that is, requiring employers to accommodate employees’ religious practices as long as those accommodations do not result in “significant difficulty or expense”—my proposal maintains the status quo with respect to religious accommodations.

#### b. Avoidable Caregiving Obligations

As discussed above, I recognize that distinguishing between avoidable and unavoidable caregiving obligations is difficult. Yet, I believe we need to make a real effort to do so, for reasons that I describe more fully below. Obviously, the question that would be asked in these cases is whether the caregiving obligation is *unavoidable*, not *avoidable*. But just to give the reader an idea of what types of caregiving tasks or obligations I think are avoidable, here is a brief (and

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 85.

<sup>255</sup> Porter, *Backlash*, *supra* note 13, at 7.

<sup>256</sup> *Trans World Airlines*, 432 U.S. at 81 (“The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities.”).

<sup>257</sup> Leach C. Myers, *Disability Harassment: How Far Should the ADA Follow in the Footsteps of Title VII?*, 17 *BYU J. PUB. L.* 265, 268–69 (2003).

<sup>258</sup> See, e.g., Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 *MARQ. L. REV.* 1, 3 (2008).

2016]

## ACCOMMODATING EVERYONE

121

incomplete) list.

If a caregiver asked for reduced hours (or modified hours) so she could be home every day at 3:00 p.m. when her kids get home from school—assuming that her children do not have special needs or she does not live in an area where after-school care is unavailable—this would be an avoidable caregiving obligation. Similarly, if a caregiver asked for reduced hours or a compressed workweek so she could have one or two days off every week to spend with her baby or toddler, this would be an avoidable caregiving obligation. Absences that exceeded an employer's attendance policy that were requested to allow a parent to attend a child's game or performance or to volunteer at the child's school or on a school field trip would be an avoidable caregiving task.

To be clear, I think employers should consider all of these requested accommodations and grant them when possible. Under this proposal, employees would have a right to request these accommodations and the employer could refuse them only if they resulted in an undue hardship as defined under the more lenient standard of anything more than *de minimis* expense.

However, many of these requests would not cost an employer any money or result in any loss of productivity. For instance, a request for modified hours (but not a reduction in total hours) is often a very easy accommodation to grant, assuming the individual's job can be performed at any time.<sup>259</sup> And an extra absence or two because an employee wants to attend a school performance or volunteer at a school field trip or party is unlikely to cause any hardship on the employer. Either the employee is paid hourly and is therefore not paid for that missed time or the employee is salaried and will likely make the time up later in the day or week.

My point is not to say that all accommodations will have to be granted. Rather, my point is simply that, once employers are required to consider these types of requests, they might realize how easy it is for them to grant many or most of them.

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<sup>259</sup> In fact, "flex time" or flexible working hours is the most frequently provided accommodation given to caregivers. See Ellen Galinsky et al., *2008 National Study of Employers, FAMILIES AND WORK INST. 6* (2008), <http://familiesandwork.org/site/research/reports/2008nse.pdf> (stating that 79% of employers now allow at least some employees to periodically change their arrival and departure time).

*D. Justifying this Universal Accommodation Mandate*

## 1. Partially Remediating the Caregiver Conundrum

There are several benefits of this proposal, and I imagine different readers will be motivated by different reasons. Based on my interests, one of the primary justifications for this proposal is to provide assistance to caregivers trying to balance work and family. As I have discussed in depth elsewhere, caregivers have very few rights to a flexible workplace—that is, one that allows them to balance work and family.<sup>260</sup> Other than limited leave under the FMLA, and the right to be free from discrimination based on pregnancy, caregivers are not entitled to any accommodations to allow them to balance work and family.<sup>261</sup> Thus, caregivers are often at the whim of the strict attendance policies of some employers, and many caregivers have no ability to control their schedules or the number of hours they work.<sup>262</sup>

This proposal would allow these employees to request modified schedules or to miss work if needed to care for a sick child or take a child to the doctor. Even though not all caregiving responsibilities would be considered unavoidable and thus subject to the more stringent undue hardship test, employees could seek an accommodation for all caregiving obligations. If the employer refuses the request, the employer would be required to prove that the accommodation results in more than a de minimis expense. The hope is that employers would begin to realize that many of these accommodations are inexpensive or even costless.

As I have discussed before, communitarian theory helps us understand that helping caregivers successfully balance work and family benefits everyone.<sup>263</sup> This is true for several reasons. First, at a very basic level, we all benefit from parents' choices to procreate because society needs procreation to continue and employers need procreation to continue to staff their workplaces.<sup>264</sup> Professor Fineman frequently refers to caretaking work as an "important and essential public good. Every society and every institution in society is dependent

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<sup>260</sup> See, e.g., Porter, *Why Care*, *supra* note 4, at 370–80; Porter, *Stigma*, *supra* note 26, at 235–36.

<sup>261</sup> Porter, *Why Care*, *supra* note 4, at 361–63.

<sup>262</sup> *Id.* at 363–65.

<sup>263</sup> Porter, *Why Care*, *supra* note 4, at 396–98. The remainder of this subpart is derived in significant part from Porter, *Why Care*, *supra* note 4, at 395–403. However, to avoid excessive citations to my prior work, I will cite to the original sources cited in that piece.

<sup>264</sup> Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1137–38 (1986).

upon caretaking labor in order to perpetuate and reproduce itself.<sup>265</sup> Second, everyone lives with the consequences of children who are not brought up well and who then harm communities through misconduct and crime.<sup>266</sup> Third, even non-caregivers should support accommodations provided for caregiving because non-caregivers could find themselves engaging in caregiving involuntarily. Even if they do not have children, many workers have spouses/partners and parents, and many of these adult loved ones could become disabled and dependent as they age.<sup>267</sup> And there are benefits to having dependent adults cared for by loved ones. Not only do adults have better health and happiness outcomes when cared for by loved ones,<sup>268</sup> but also, society needs the thirty-three million unpaid family caregivers to continue giving that care—the long-term care system would collapse and nursing homes would burst at the seams without the unpaid work of family caregivers.<sup>269</sup> Finally, we all benefit from allowing caregivers to balance work and family because this means that as we age or become disabled and need care, we will reap the benefits of having institutional structures in place that will allow our loved ones to care for us without sacrificing their jobs.<sup>270</sup>

## 2. Avoiding the Difficulty and Stigma of Classification

Another benefit of this proposal is that accommodating everyone mostly avoids the stigma of classification. In order to be protected under current law, an employee has to fall into a particular protected class. Primarily, this includes individuals with disabilities, but it also might include those who need accommodations for religious practices or, after the decision in *Young v. United Parcel Service, Inc.*,<sup>271</sup> pregnant workers. Although it is not difficult to establish that you belong to a particular religion or that you are pregnant, it is more difficult to establish that you have a disability, even after the Amendments have

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<sup>265</sup> Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1406 (2001).

<sup>266</sup> AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 54, 69 (1993).

<sup>267</sup> Porter, *Why Care*, *supra* note 4, at 399.

<sup>268</sup> K. Nicole Harms, *Caring for Mom & Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69, 83–85 (2003).

<sup>269</sup> Jane Gross, *Who Cares for the Caregivers?*, N.Y. TIMES: NEW OLD AGE (Oct. 14, 2008), <http://newoldage.blogs.nytimes.com/2008/10/14/who-cares-for-the-caregivers/>.

<sup>270</sup> Porter, *Why Care*, *supra* note 4, at 400.

<sup>271</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

made it much easier to do so.<sup>272</sup>

Under my proposal, an individual would need a doctor's note to verify that there is some function of the job that the employee cannot do or that the employee needs an accommodation for the employer's workplace structural norms (schedules, shifts, hours, etc.) because of a mental or physical condition. But the employee would not be required to prove to the employer that the condition qualifies as a disability. Not only is this an easier burden to meet for the employee, but it also avoids the stigma of being classified as "disabled."<sup>273</sup> Professor Albiston has also discussed the stigma that attaches from having to be classified in a protected group in order to receive accommodations. She states, "[f]ocusing on how work must change to accommodate disability and gender marks women and people with disabilities as separate and different from all workers, who become normalized in the process."<sup>274</sup> Accommodating everyone avoids the stigma of group classification.

### 3. Encouraging Changes to Workplace Structures

Although this proposal calls for an individual accommodation mandate, the hope is that it ultimately encourages employers to see the benefits of making broader structural changes to their workplaces.<sup>275</sup> For instance, if several employees in one workplace seek an accommodation of flextime hours, the employer might realize that allowing flextime is not only relatively simple, but also that it would be more efficient for the employer to set up a system whereby all employees can work flextime rather than making individual modifications for those employees who seek an accommodation.<sup>276</sup> Similarly, several requests for a modification of the physical functions of the job—perhaps for employees with lifting restrictions because of a back impairment, pregnancy, or small stature—might cause the employer to realize that there is a better way of performing that lifting

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<sup>272</sup> See generally Porter, *Backlash*, *supra* note 13.

<sup>273</sup> See also Stein et al., *supra* note 20, at 752–53 (“Detaching the right to accommodation from assignment of a special disability identity is consistent with integrating employees with disabilities rather than marking, and perhaps stigmatizing, them as essentially different from most workers.”).

<sup>274</sup> ALBISTON, *supra* note 60, at 148.

<sup>275</sup> See, e.g., Porter, *Stigma*, *supra* note 26, at 259 (arguing that accommodating more employees could lead to employers restructuring the workplace).

<sup>276</sup> See also Stein et al., *supra* note 20, at 751 (stating that their “accommodating every body” proposal should lead “employers who value efficiency and innovation to prophylactically implement changes in policy so as to make the workplace more accessible for everyone”).



function.<sup>277</sup> This will not only help employees who have lifting restrictions but also might cause fewer employees to get injured on the job, reducing the employers' workers compensation costs.

In some ways, this proposal is similar to proposals in favor of "universal design," which is an architectural principle in which environments are designed to be useable by everyone to the maximum extent possible.<sup>278</sup> As noted by Stein and his co-authors, if "employers anticipate having to make more accommodation-related changes to the workplace environment, they may be more apt to invest time and effort on the earlier 'design' end to avoid subsequent needs to retrofit."<sup>279</sup> Professor Albiston also argues in favor of these types of structural changes. She argues that the question should be focused not on who needs changes to the workplace structure, but rather, on whether the workplace could be restructured.<sup>280</sup> She states, "[t]his approach queries whether a work practice is necessary or desirable, and does not simply assume it is necessary because it is part of the way things have always been done."<sup>281</sup>

#### 4. Providing Economic Benefits

This proposal provides economic benefits not just to the employees who receive the accommodations, but also to employers and society. Most obviously, the employees who are accommodated are benefitted by experiencing "higher levels of job satisfaction," "stronger intentions to remain with their employers," less negative spillover between work and home, and better mental health.<sup>282</sup> This is especially true in cases where not accommodating them might lead to their termination (if they cannot perform the job without the accommodation) or their resignation (if they cannot get an accommodation that allows them to meet their caregiving obligations). Accommodating employees allows them to avoid the devastating

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<sup>277</sup> See *id.* ("Employers and employees would join together efficiently to adjust features of the job to help capable persons work, keep working, or otherwise optimize workplace productivity—all of these outcomes being results that avail management and worker alike.").

<sup>278</sup> Stein et al., *supra* note 20, at 751; Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 560 (2008) (stating that universal design principles could guide the planning of a facility's infrastructure and "[b]y accommodating a greater number of ways of functioning at the construction stage, fewer buildings would need to be retrofitted as access issues arise").

<sup>279</sup> Stein et al., *supra* note 20, at 751.

<sup>280</sup> ALBISTON, *supra* note 60, at 107.

<sup>281</sup> *Id.*

<sup>282</sup> Galinsky et al., *supra* note 259, at 3.

consequences of unemployment.<sup>283</sup>

But it is not just the accommodated employees and their families who benefit from accommodations. Employers also benefit by keeping valuable employees. The perceived costs of accommodation are often greatly over-estimated,<sup>284</sup> and the actual costs of attrition are quite high.<sup>285</sup> By providing reasonable accommodations that do not result in an undue financial burden, employers would keep valuable employees who would be more productive because of the accommodation. At the same time, employers would avoid the high costs of attrition.<sup>286</sup> Moreover, studies indicate that employees who are accommodated are happier, more productive, and more loyal.<sup>287</sup>

Society also benefits when workers are accommodated. Especially with respect to workers with disabilities, accommodating them increases the likelihood that they will remain employed and will thus not need to rely on public benefits.<sup>288</sup>

#### 5. Providing Balance to Everyone

There has been renewed interest recently in the idea that everyone needs balance in their lives—not just caregivers or those employees who are dealing with a medical condition. Professor Trina Jones, in *Single and Childfree! Reassessing Parental and Marital Status Discrimination*, argues that providing family-friendly benefits only to parents involves “implicit assumptions about the personal activities of [childfree workers] and risk[s] perpetuating the notion that the

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<sup>283</sup> Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 581 (2013); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 336–37 (2007) [hereinafter Porter, *Reasonable Burdens*] (discussing the negative consequences of termination).

<sup>284</sup> Schur et al., *supra* note 18, at 609 (stating that most accommodations have no or very low costs); Porter, *supra* note 1, at 1111 n.61 (citing sources demonstrating that the costs of accommodation are greatly over-estimated).

<sup>285</sup> Porter, *supra* note 1, at 1142; Schur et al., *supra* note 18, at 614.

<sup>286</sup> Porter, *Why Care*, *supra* note 4, at 381 n.194; Galinsky et al., *supra* note 259, at 3 (stating that employers benefit from providing family-friendly workplaces because they have “more engaged employees, higher retention and potentially lower health care costs”).

<sup>287</sup> Schur et al., *supra* note 18, at 607 (stating that individuals whose accommodation requests were granted had better attitudes on important workplace measures); *id.* at 612–13 (stating that a majority of employees in the study who had received accommodations said the accommodations had a variety of positive impacts, including more loyalty to the company; increased employee morale and job satisfaction).

<sup>288</sup> Stein et al., *supra* note 20, at 754 (stating that “empirical data show that receiving a workplace accommodation reduces the likelihood that someone will apply for SSDI benefits”).

people and activities in a [childfree worker's] life are not as important as the people and activities in the lives of married couples or parents."<sup>289</sup> Jones counters the point about the societal value of caring for children by pointing to other scenarios that also have social value, such as when a childfree employee assists a sibling who has lost a job or an employee elects to support a community center in a low-income neighborhood.<sup>290</sup> She states, "[t]he point is that employees engage in many socially valuable activities outside of the workplace. Merely asserting that parenting should be subsidized because it may produce positive consequences does not explain why parenting should be elevated above these other socially valuable activities."<sup>291</sup> Some of the other important activities that childfree employees might engage in include: "furthering one's education, volunteering with a homeless shelter, or working with other community organizations."<sup>292</sup> She also points out that childfree workers engage in other kinds of caregiving, such as "caring for friends, siblings, neighbors, and other people's children."<sup>293</sup> And yet, under the current law, caregiving is defined narrowly; for instance, the FMLA only allows leave to care for a spouse, parent, or child, ignoring the significance of other close relationships.<sup>294</sup>

The point made by Jones is an important one. Single, childfree workers might not want to spend every minute working.<sup>295</sup> They might want to enjoy a healthy balance between work and the rest of their lives. Thus, she argues that employers should adopt policies that all employees can use.<sup>296</sup> Rather than thinking only in terms of "family-friendly" policies, "employers would aim to design workplaces that produce greater work-life balance for all workers."<sup>297</sup> As she poignantly points out: "[f]riends care for friends. Neighbors look out for each other. . . . [a]nd, family love is not solely directed at spouses, parents, and children, but includes aunts, uncles, siblings, and cousins."<sup>298</sup>

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<sup>289</sup> Jones, *supra* note 166, at 1301.

<sup>290</sup> *Id.* at 1304.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1308.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 1272.

<sup>295</sup> Jones, *supra* note 166, at 1314.

<sup>296</sup> *Id.* at 1330.

<sup>297</sup> *Id.* at 1330–31; see also Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 135 (Judy Fudge & Rosemary Owens eds., 2006) (arguing in favor of reduced hours for all employees to ensure sufficient time for "family, community, and leisure").

<sup>298</sup> Jones, *supra* note 166, at 1342.

## 6. Avoiding Special Treatment Stigma

Last, but certainly not least, this proposal can make significant steps in minimizing and hopefully<sup>299</sup> eliminating special treatment stigma. Quite simply, if all employees were entitled to accommodations, there would no longer be any special treatment; thus, there would no longer be “special treatment stigma.”<sup>300</sup>

This rationale was also relied on in the *Accommodating Every Body* article, discussed above. As the authors of that article note, normalizing accommodations by making them available to everyone will remove the perception that accommodations are stigmatizing.<sup>301</sup> Furthermore, in a study of the reactions of employees and employers regarding accommodations in the workplace, the authors conclude that reform should be aimed at accommodating all employees.<sup>302</sup> Specifically, they argue that accommodations “need to be viewed in the context of accommodations for the personal needs of all employees, and that accommodations may not only maximize the inclusion of people with disabilities but may have positive spillovers on other employees that foster overall workplace productivity.”<sup>303</sup> They also point out that some companies are already trying to accommodate all employees, specifically mentioning those who have work/life balance issues.<sup>304</sup> In the caregiving context, several scholars have argued that providing workplace flexibility benefits to all employees will eliminate the stigma of only providing family-friendly benefits to caregivers.<sup>305</sup> In sum, because providing accommodations only to some employees is so stigmatizing, eliminating that stigma through a universal accommodation mandate is the primary goal of and justification for this proposal.

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<sup>299</sup> I use the word “hopefully” because, as I will discuss *infra* Part IV.A, it is possible that some stigma would remain even if this proposal were adopted.

<sup>300</sup> Porter, *supra* note 1, at 1133–36; Porter, *Stigma*, *supra* note 26, at 258–59 (discussing the benefits of accommodating everyone).

<sup>301</sup> Stein et al., *supra* note 20, at 750, 755.

<sup>302</sup> Schur et al., *supra* note 18, at 614–16.

<sup>303</sup> *Id.* at 616.

<sup>304</sup> *Id.* at 605, 614.

<sup>305</sup> See, e.g., Jones, *supra* note 166, at 1331; Schultz & Hoffman, *supra* note 297, at 140 (stating that adopting a universal approach of a reduced workweek for everyone would free caregivers of the stigma associated with more targeted benefits); Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1768 (2001) (stating that by accommodating all employees’ hobbies and personal pursuits, we will reduce the stigma of providing workplace benefits to only some).

2016]

ACCOMMODATING EVERYONE

129

## IV. RESPONDING TO THE CRITICS

I recognize that this proposal will be seen by some as fairly radical. Thus, in this Part, I have attempted to anticipate and respond to the primary criticisms that will be lobbed at me and this proposal.

*A. Remnants of Special Treatment Stigma*

Despite my statement above that the primary benefit of this proposal is eliminating special treatment stigma, I recognize that the possibility of some residual stigma remains. This is for two reasons.

First, even though everyone has a right to request and receive accommodations under this proposal, certain employees are slightly<sup>306</sup> more likely to receive those accommodations because of the two-tier undue hardship approach. Those who need accommodations because they would not be able to perform their jobs without them and those who would be neglecting unavoidable caregiving obligations without an accommodation are entitled to the benefit of the more stringent undue hardship test—significant difficulty or expense.<sup>307</sup> Although the first group is broader than only individuals who have a disability—it includes everyone who has a physical or mental condition that requires accommodation in order for her to be able to perform her job<sup>308</sup>—it is possible that this group will be perceived as comprising only or mainly individuals with disabilities. The second group (the unavoidable caregiving obligations group) might be viewed as preferring some life choices (having children) over other life choices.

I have three responses to this criticism. First, those who express resentment about including unavoidable caregiving obligations should be reminded that not all caregivers are accommodated. In fact, it is relatively difficult for an employee to prove that a caregiving obligation is unavoidable.<sup>309</sup> Many caregiving requests will fall under the catch-all “All Other Accommodation Requests” category. Second, caregiving is defined broadly to include not just caring for children but also caring for adult loved ones who are disabled or ill: spouses or partners,

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<sup>306</sup> I use the word “slightly” because I think the difference between the two levels of undue hardship will not be dispositive all that often. This is because some accommodations will be deemed unreasonable before we even get to the undue hardship defense (imagine a request by a hotel housekeeper to be allowed to work from home) and because so many accommodations are costless (such as flex-time); thus, an employer would not be able to prove undue hardship even under the more lenient test.

<sup>307</sup> See *supra* Part III.B.

<sup>308</sup> Thus, as stated above, pregnant women or older employees would be included in this group. See *supra* Part III.C.1.

<sup>309</sup> See *supra* Part III.C.1.d.

parents, siblings, and other relatives. Thus, even though someone has made a decision to remain child free, that person might inadvertently be thrust into a caregiving role because of the need to care for an adult loved one. Third (and perhaps most importantly), those who need an accommodation to be able to perform their jobs (even if they are not disabled under the ADA) and those who would be neglecting unavoidable caregiving obligations without the accommodation need those accommodations to be able to keep their jobs. Because of the devastating consequences of unemployment (especially for those employees who might have difficulty finding another job, such as individuals with disabilities, pregnant workers, and older employees), these “necessary” accommodations deserve slightly more protection than everything else.

The second reason some stigma might remain despite my effort to eliminate it is because it is possible that, even though everyone has the right to seek accommodations under this proposal, only those who have traditionally sought accommodations will seek the benefit of this proposal. In other words, because mostly women seek workplace modifications to manage work/life balance,<sup>310</sup> if women and individuals with disabilities<sup>311</sup> continue to request the vast majority of accommodations under this regime, it is likely that there will remain some special treatment stigma. I do not have a great response to this criticism except to say that this proposal’s effectiveness will depend on employers and employees fully embracing it. Perhaps accompanying this proposal with a strong public relations campaign emphasizing the benefits of accommodating everyone will help to ensure that everyone believes that they can and should make use of their ability to balance work and life goals under a universal accommodation mandate.<sup>312</sup>

#### B. *Employer Discretion*

Although there is some argument that a universal accommodation mandate can actually be beneficial because it eliminates the tough decisions supervisors and managers must make regarding who deserves accommodations and for what reasons when those accommodations are not required by law,<sup>313</sup> employers might

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<sup>310</sup> Porter, *supra* note 1, at 1104 n.14.

<sup>311</sup> Of course, I do not mean these to be mutually exclusive groups. I recognize that there are many women who have disabilities, and many of them are also caregivers.

<sup>312</sup> It should go without saying that this proposal would need to be accompanied by an anti-retaliation provision that makes it unlawful to retaliate against an employee who has sought his right to an accommodation under this proposal.

<sup>313</sup> Porter, *Reasonable Burdens*, *supra* note 283, at 344–46.

object to it for exactly this reason. In other words, some employers might prefer to have complete discretion in determining when to wield their power of granting preferential treatment. Of course, this discretion can be used in illegitimate ways,<sup>314</sup> and thus, this is a good reason to limit it.

On the other side of the spectrum, this proposal might also be criticized because it gives *too much* discretion to employers, in that it requires them to make decisions about accommodating a much larger group of employees for a much broader set of reasons.<sup>315</sup> The labor movement is generally suspicious of giving employers the discretion to decide who gets accommodations or modifications of neutral workplace rules.<sup>316</sup> However, in non-unionized workplaces not bound by collective bargaining agreements,<sup>317</sup> employers already have this discretion and many employers have likely exercised this discretion based on arbitrary or discriminatory reasons.

For instance, two employees might ask for the same type of accommodation—a change in their schedules to better accommodate their caregiving obligations. The employer might grant the request for one employee and not the other, perhaps based on the employer’s perceptions of how valuable and productive the favored employee is (and therefore worth keeping happy) or perhaps based on something less legitimate, such as old-fashioned favoritism or discrimination. The employee who is granted the accommodation is told to keep it quiet and the employee who is denied the accommodation is likely told that only individuals with disabilities are allowed modifications to their

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<sup>314</sup> Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL’Y REV. 1, 4–5 (2013) (stating that employer discretion is “a force prone to abuse” because employers might use their discretion in illegitimate ways).

<sup>315</sup> See *id.* at 53, which argues against universal accommodation mandates, specifically because they increase the amount of discretion an employer has and can be used to harm the goal of organized labor. More specifically, Shapiro argues that the discretion in providing accommodations could be used to harm those who support the union. *Id.* at 32.

<sup>316</sup> *Id.* at 33 (“While this increased flexibility promises significant benefits for nondisabled employees, it entails what the labor movement would regard as a significant cost: undermining a generally applicable workplace policy designed to constrain the discretion of employers and thus their ability to engage in arbitrary treatment.”).

<sup>317</sup> I recognize that there are some unique concerns with unionized workplaces, especially with regard to how this proposal would interact with collective bargaining agreements. However, because only around seven percent of private sector employees are unionized, see, e.g., Nicole Buonocore Porter, *Women, Unions, and Negotiation*, 14 NEV. L.J. 465 n.1 (2014), the intricacies of how this proposal might play out in the context of unionized workplaces with collective bargaining agreements is beyond the scope of this Article.

schedules. Under my proposal, the employer would have to consider both accommodation requests and could deny them only if they resulted in an undue hardship.

I do not dispute that this proposal still leaves employers with discretion—in determining whether the accommodation falls into the “necessary” category (which determines the level of undue hardship to apply) and in determining whether the accommodation would cause an undue hardship.<sup>318</sup> Obviously, adjusting to new employer mandates is never easy or painless, but just as employers have become accustomed to the requirements of the ADA and the FMLA, they would also become accustomed to this proposal. And if it appears that employers are applying the requirements of this proposal in a discriminatory fashion<sup>319</sup> (for instance, based on sex or race), those employees could and should complain (internally or externally) about this discrimination.

### C. Dilution

Some scholars are opposed to universal solutions because they threaten to dilute the rights of disadvantaged groups by trivializing the more serious harms of discrimination and undermining support for anti-discrimination in general.<sup>320</sup> Professor Jessica Clarke argues that allowing protections for everyone trivializes the needs of caregivers and individuals with disabilities and “water[s] down protections like parental leave.”<sup>321</sup> According to Professor Clarke, a truly universal accommodation mandate that would allow for granting accommodations for “frivolous” things like “manicures, fantasy football, and tropical vacations” would “undermine the entire

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<sup>318</sup> Cf. Shapiro, *supra* note 314, at 32 (pointing out that, even in the disability context, employers still have discretion in granting accommodations because questions about who has a disability and whether a particular accommodation is necessary to allow the employee to perform the essential functions of the job do not have clear-cut answers).

<sup>319</sup> Jessica Clarke has expressed concern about this problem. She argues that when managers decide whether to offer work-family accommodations to some employees, this inevitably involves those managers making judgment calls regarding “whose ‘life’ is more worthy of accommodation,” which might allow the “enforcement of class, race, and gender biases.” Jessica Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1223 (2011).

<sup>320</sup> Clarke, *supra* note 319, at 1247; see also Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 401, 479–80 (2000) (expressing disagreement that the ADA should lead to a “universal regime of individualized accommodation” because he favors protection only for those whose impairments are “stigmatizing”).

<sup>321</sup> Clarke, *supra* note 319, at 1278.



project.”<sup>322</sup> She notes that when scholars argue in favor of universal mandates, they give examples like military service or volunteering because these look like caregiving in that they contribute to the “reproduction and preservation of American life and culture.”<sup>323</sup> But a truly universal accommodation mandate, Professor Clarke recognizes, would also protect the worker who just wants to spend more time watching television.<sup>324</sup> This, in turn, might dilute the protections of those who need them the most;

[i]f all employees were entitled to request leave for any reason, and employers were not . . . permitted to inquire into a worker’s reasons for taking leave, then a worker who needed the day off to take an elderly parent to a doctor’s appointment would have the same chance of getting that accommodation as a worker who wants the day off to go fishing.<sup>325</sup>

This is a legitimate concern regarding my proposal. I have several responses. First, using her example, it is quite possible that both accommodations could be granted without any hardship at all on the employer. As it stands now, many employers offer several days of unexcused absences and even allow for the amorphous “personal day.”<sup>326</sup> Thus, for many employers, saying yes to both the caregiving request and the fishing request would not change the status quo. Second, if the caregiving request was because of an “unavoidable caregiving obligation,” then the caregiving request would be given preference because it would be subject to the more stringent undue hardship test. Third, in the unlikely scenario that an employer received both requests on the same day and concluded that it could only grant one without causing an undue hardship, I imagine the employer would naturally favor the caregiving employee.

But I recognize that there might be situations where an employer is granting accommodations for reasons that most of us might think are unworthy of protection. I personally would be bothered by someone who seeks a modification of normal workplace hours to watch television. But there are all kinds of accommodation requests that would help an employee better balance their work life and home life that have nothing to do with caregiving or a medical condition, and yet are worthwhile to that employee’s personal well-being. Whether that involves volunteering, community service, entrepreneurial efforts,

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 1278–79.

<sup>325</sup> *Id.* at 1279.

<sup>326</sup> Porter, *FMLA*, *supra* note 44, at 361.

continuing one's education, or achieving some physical fitness goal like running a marathon, all of these allow an employee to be renewed and refreshed, which will make that employee more productive as well as happier and more loyal. I am admittedly bothered by some of the more frivolous reasons for seeking an accommodation, and there is part of me that wants to find a way to preclude some of those accommodation requests. But if we start prioritizing some reasons over others, we are right back to where we started, with the stigma that accompanies special treatment. In other words, the only way to eliminate special treatment stigma is to accommodate everyone, for all reasons (subject, of course, to the accommodation not causing an undue hardship).

*D. Cumulative Effects of Undue Hardship*

Related to the dilution issue is the concern that those who need the protections the most might not get an accommodation because of the cumulative effects of undue hardship. For example, imagine that five employees in the same department<sup>327</sup> seek to work flextime, whereby they want to come in at 7 a.m. and leave at 3 p.m. Three of these employees are seeking this schedule to allow them to be home after school with their children (this would most likely *not* be considered an unavoidable caregiving obligation). One employee wants the schedule because he is training for a marathon and this schedule would allow him to train in the afternoons throughout the fall and winter before it gets dark. Another employee has kidney failure and needs this work schedule to accommodate his kidney dialysis treatments. Let us further imagine that the first four employees request and are granted this accommodation before the fifth employee requests the accommodation. When the fifth employee (the individual with a disability) requests the accommodation, the employer legitimately believes that it cannot manage effectively with five employees not working from 3:00-5:00 p.m. In other words, viewed cumulatively, the fifth employee's request would cause an undue hardship for this employer, even using the more stringent undue hardship test (significant difficulty or expense). Simply by virtue of timing, and the cumulative effects of undue hardship, the employee with the most significant need for the accommodation might have his accommodation request rejected.

There are several ways to respond to this problem. One response

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<sup>327</sup> The ADA protects employers with fifteen or more employees. 42 U.S.C. § 12111(5)(A) (2008). However, it is certainly possible that a specific department of a particular employer would be relatively small.

might be to recognize a “first in time” rule, and allow the first four accommodation seekers to keep their accommodations and explain to the fifth individual that he is out of luck because he did not request his accommodation sooner. This strikes me as a very perverse result for the reasons discussed above in the section on dilution.<sup>328</sup> Some accommodation requests are truly more compelling than others—recognition of that fact is the reason for the two-tier undue hardship.

Another solution to this problem is to make the grant of accommodations to the first four employees conditional,<sup>329</sup> where they are told that they can enjoy the accommodation as long as someone with superior rights does not seek the same accommodation. This would only happen in the admittedly rare case where several employees requested the same accommodation and the employer experienced an undue hardship because of the cumulative effect of the multiple requests. For instance, in this case, the employer might argue that because the fifth employee has a morally superior need for the accommodation, one of the other employees who received the accommodation has to relinquish it so that the employee with the disability can get the schedule he needs to continue working with his disability.

I recognize that this approach might exacerbate the special treatment stigma that I am trying so hard to eliminate. My response is to revert to my reliance on the ideals espoused by communitarian theory. Communitarian theory places less emphasis on individual rights and more of an emphasis on working together with others in our community to support common goals.<sup>330</sup> If we viewed the “workplace as a community and understood ourselves as having a responsibility to others in our community,” some of the resentment coworkers feel could be dissipated.<sup>331</sup> For instance, if the marathon-running employee understood that the employee with kidney failure would not be able to continue working without an accommodation, the marathon runner should be willing to relinquish his right to the flextime in favor of the

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<sup>328</sup> See *supra* Part IV.C.

<sup>329</sup> This idea has a corollary in the area of riparian rights to a body of water. Under common law riparianism, owners of land adjacent to a river or lake have the right to withdraw a reasonable amount of the water, subject to the correlative rights of other riparians to also make reasonable water withdrawals. Thus, no riparian has a right to withdraw a fixed amount of water in perpetuity; it all depends on a variety of factors, including the relative value of the various uses of the water. See *generally* RESTATEMENT (SECOND) OF TORTS § 850A (AM. LAW INST. 1979). Hat-tip to Professor Kenneth Kilbert for giving me this example.

<sup>330</sup> Porter, *supra* note 1, at 1142.

<sup>331</sup> *Id.*

employee with a disability.

Finally, it is not entirely clear whether cumulative effects should be considered when determining undue hardship.<sup>332</sup> This is an undeveloped and unclear area in disability law; thus, settling on a definitive answer here is premature. Thus, whether the cumulative effect of accommodations should be considered in the ADA context and in the context of my universal accommodation mandate is a subject left for further study.

#### V. CONCLUSION

Accommodating only certain groups of employees has led to the situation where accommodations are viewed with skepticism and often resentment by both employers and the coworkers of those who receive accommodations. This Article argues that this special treatment stigma can only be eliminated by accommodating everyone. However, unlike other proposals that argue in favor of accommodating only those employees who need the accommodation to be able to perform their jobs, or those scholars who propose accommodating everyone indiscriminately, this proposal argues that we can accommodate everyone while still recognizing that some requests for accommodation are more compelling than others—hence, the two-tier undue hardship test. I realize that many of the details of this proposal are left unspecified. It was not my goal to write a statute. Instead, my hope is to start a conversation about accommodating everyone.

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<sup>332</sup> *Id.* at 1137. Compare *Kralik v. Durbin*, 130 F.3d 76, 87 (3d Cir. 1997) (Mansmann, J., dissenting), with David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses*, 41 U. KAN. L. REV. 783, 790 (1993) (stating that the “issue of whether the cumulative effect of multiple accommodations upon the employer constitutes undue hardship is not addressed in the statute or in the EEOC regulations”).