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UNDERSTANDING TERMINATIONS FOR "DISABILITY-CAUSED MISCONDUCT" AS FAILURES TO PROVIDE REASONABLE ACCOMMODATION

*Michael S. Verdichizzi**

INTRODUCTION

Among those impairments that may be considered "disabilities" under the law of employment discrimination, mental conditions are unique in that they are usually invisible.[1] An employee with a mental condition may spend years at the same job without her coworkers becoming aware that she has a disability—unlike, perhaps, cases involving a hearing-impaired person, or someone who requires the use of a wheelchair.[2] Ailments such as bipolar disorder, post-traumatic stress disorder (PTSD), or obsessive-compulsive disorder (OCD) often manifest themselves only in behaviors likely considered by peers to be odd or eccentric.[3] Often these behaviors are considered violations of workplace conduct rules,[4] which are in some cases designed to screen out individuals with mental conditions.[5] Further, the invisible nature of mental conditions can make them difficult for other individuals to

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1 Lizabeth A. Barclay & Karen S. Markel, *Ethical Fairness and Human Rights: The Treatment of Employees with Psychiatric Disabilities*, 85 J. BUS. ETHICS 333, 335 (2009) ("An individual with a psychiatric disability at first glance looks the same as other individuals. . . . Once the illness is discovered by others, the person with the condition is subject to negative attributions."); *see also* Andrew Hsieh, *The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities*, 44 MCGEORGE L. REV. 989, 1003 (2013).

2 *See* SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 10 (2002) ("Others struggle with depression and perform so capably that their coworkers and customers never suspect that they are experiencing tremendous difficulties.").

3 *See* Hsieh, *supra* note 1, at 1002–04.

4 *Id.* at 1003.

5 *See* STEFAN, *supra* note 2, at 155.

understand or empathize with. This lack of understanding among the public, coupled with the growing belief that mental conditions can lead to mass shootings or other acts of violence, contributes to the formation of harmful stereotypes about people who experience mental conditions.[6]

The Americans with Disabilities Act (ADA) is the primary legal mechanism for protecting private-sector employees who experience a disability, whether mental or physical.[7] Given that mental conditions often manifest themselves only in unusual, or perhaps disruptive, behaviors, what obligations, if any, does the ADA impose on employers when an employee's misconduct is caused by a known mental disability? As the Eleventh Circuit recently acknowledged, circuits are split on this issue.[8] A majority of courts have concluded that the violation of a workplace conduct standard, so long as the standard is applied even-handedly and out of business necessity, always constitutes a lawful basis for termination.[9] By contrast, the Second,[10] Ninth,[11] and Tenth[12] Circuit Courts of Appeals, as well as at least one district court outside those circuits,[13] treat disability-caused-misconduct as "part and parcel"[14] of the underlying disability, with the result that an employer

6 Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill,"* 34 U.C. DAVIS L. REV. 849, 851–52 (2001); *id.* at 851 n.4 (explaining that people with mental disabilities are frequently viewed not only as dangerous, but as "lazy, malingering, weak or just plain 'bad'").

7 Hsieh, *supra* note 1, at 995.

8 Caporicci v. Chipotle Mexican Grill, Inc., 729 Fed. App'x 812, 816, 816 n.5 (11th Cir. 2018) (acknowledging that "other circuits are split" on whether a firing based on disability-related misconduct constitutes disability-based discrimination under the ADA); *see also* Lauren Fierro, *Reasonably Accommodating Employees with Mental Health Conditions by Putting Them Back to Work*, 46 SW. L. REV. 423, 432–33 (2017).

9 *See, e.g.*, Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047 (5th Cir. 1998); Palmer v. Cir. Ct. of Cook Cnty., 117 F.3d 351 (7th Cir. 1997); Foley v. Morgan Stanley Smith Barney, LLC, No. 0:11-cv-62476, 2013 WL 795108 (S.D. Fla. Mar. 4, 2013); *see also* EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); *see also* Virginia Mixon Swindell, *Symposium: Employment Law: But My Disability Made Me Do It: ADA Claims Involving Disability-Related Misconduct*, 69 ADVOCATE 8, 9 (2014) (noting that a majority of courts have concluded that the decision to terminate an employee for misconduct is a legitimate, non-discriminatory reason, "even when the misconduct is arguably caused by the employee's disability").

10 *E.g.*, Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511 (2d Cir. 1991); *see also* Mercado v. N.Y.C. Hous. Auth., No. 95 CIV. 10018, 1998 WL 151039 (S.D.N.Y. Mar. 31, 1998).

11 *E.g.*, Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001); Dark v. Curry Cnty., 451 F.3d 1078 (9th Cir. 2006); EEOC v. Walgreen Co., 34 F. Supp. 3d 1049 (N.D. Cal. 2014).

12 *E.g.*, Den Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997).

13 *See* Walsted v. Woodbury Cnty., 113 F. Supp. 2d 1318 (N.D. Iowa 2000).

14 Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 EMP. RTS. & EMP. POL'Y J. 35, 45 (2013) (quoting Regulations to Implement the Equal Employment

is liable for employment discrimination if she fires an employee on the basis of misconduct which the employer knows was an actual result of the employee's disability.

The Note proceeds as follows. Part I provides a primer on the sorts of disability discrimination the ADA prohibits, with a special focus on the three types of claims one may bring under the act: disparate treatment, disparate impact, and failure to accommodate. Part II explores the current state of the misconduct issue in the disability discrimination context and demonstrates the circuit split by way of case analyses. Part III presents the principal argument of this Note, that uncontroversial canons of statutory interpretation demonstrate the erroneousness of the majority view, that the majority view hinders the ADA's objective of equal opportunity for individuals with disabilities, and that the minority view should be adopted under a failure to accommodate theory of discrimination liability.

I. DISABILITY DISCRIMINATION UNDER THE ADA

The general rule of the ADA is that no employer[15] "shall discriminate against a qualified individual on the basis of disability" in regard to hiring, discharge, or other terms, conditions, or privileges of employment.[16] Rather than list impairments that *per se* constitute disabilities for antidiscrimination purposes, the ADA defines "disability" as a physical or mental impairment that "substantially limits" one or more major life activities.[17] In creating this test of substantial limitation, rather than listing medical diagnoses that "count" as a disability, the drafters of the ADA intended to leave it to courts to determine, on a case-by-case basis, whether a particular

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Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16985 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630)).

15 42 U.S.C. § 12112(a) (2018). "Employer" means a person engaged in an industry affecting commerce with at least fifteen employees. *Id.* § 12111(5)(A). The antidiscrimination provision also applies to employment agencies, labor organizations, and joint labor-management committees. *Id.* § 12111(2). Where the employer is the federal government, the Rehabilitation Act, 29 U.S.C. §§ 701–96, applies instead of the ADA. *See* 42 U.S.C. § 12111(5)(B) (2018).

16 42 U.S.C. § 12112(a) (2018).

17 *Id.* § 12102 (1)(A). Having a "record" of such an impairment, or being regarded as having such an impairment, may also qualify as a disability under the ADA. *Id.* § 12102(1)(B), (C). Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12102(2)(A), (B).

plaintiff is a person with a disability.[18] This structure transforms the inquiry of whether someone has a disability from a factual question to a legal one.[19]

As a threshold matter, a plaintiff claiming disability discrimination under the ADA must show that she is a "qualified individual," meaning she "can perform the essential functions" of the position she holds or desires, "with or without reasonable accommodation."[20] This showing is required not because it tends to show that the employer has discriminated against the employee, but because the ADA prohibits discrimination only where the victim is a "qualified individual[]."[21] For instance, imagine that a manager fires an employee with a disability because he holds a personal animosity toward the disabled. Here, in a factual sense, discrimination has occurred. However, if the employee failed to show that she was "qualified" under the meaning of § 12111(8), the employer would incur no liability, because the person he discriminated against was not a member of the relevant protected class.[22] This nuance makes the ADA unique among antidiscrimination statutes. For example, in a Title VII claim, plaintiffs belong to a protected class by virtue of the same personal quality—race, sex, or sexual identity—upon which the Act prohibits

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18 STEFAN, *supra* note 2, at 5.

19 This deference to courts to determine whether someone has a disability became controversial shortly after the enactment of the ADA, as the courts adopted what many considered an all-too-narrow construction of what it meant to have a disability. *See* Hsieh, *supra* note 1, at 993–94. The Supreme Court insisted that the ADA definition of disabilities "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled." Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184, 197 (2002). This narrow conception had the effect of denying recovery to many ADA plaintiffs, especially those claiming to have a mental impairment. STEFAN, *supra* note 2, at 71, 75. In response, Congress enacted the ADA Amendments Act of 2008 ("ADAAA"), which enumerated an expansive, non-exhaustive range of "major life activities" and stated that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A) (2018); Hsieh, *supra* note 1, at 994.

20 42 U.S.C. § 12111(8) (2018) (defining "qualified individual"). The EEOC regulations define "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires" and specify that the term "does not include the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1) (2020). Generalization beyond this point is difficult; essential functions are best understood as the functions which the job exists to perform. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2008-3, APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES pt. II (2008) (defining "essential functions" as "the most important job duties").

21 Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 190–91 (2005).

22 *See id.* at 190–91.

discrimination.[23] By contrast, ADA plaintiffs are protected from disability discrimination only insofar as they are "qualified," even though the ADA prohibits discrimination based on disability status; in other words, the ADA declines to protect everyone who can claim membership in the very class that constitutes an unlawful basis for discrimination.

What does it mean, then, to "discriminate" against a qualified individual on the basis of disability? The section following the ADA's "general rule" is titled "construction" and lists, non-exhaustively, seven acts or omissions "include[d]" in the term "discriminate against a qualified individual on the basis of disability."[24] Together the seven acts and omissions have come to form three distinct theories of discrimination which the ADA prohibits: disparate treatment, disparate impact, and failure to accommodate.[25]

The theory of discrimination as "disparate treatment" captures what lay people probably mean when they use the term "discrimination": unfairly treating an individual or group of individuals differently than others.[26] Simply put, disparate treatment is intentional discrimination.[27] Disparate treatment occurs when an employee's disability motivates the adverse employment action taken against her. Thus, the plaintiff must show that the forbidden consideration, disability, was a "but-for" cause of the adverse action.[28] Because motive can be difficult to prove in discrimination cases, the Supreme Court in *McDonnell Douglas Corp. v. Green* established a burden-shifting framework by which a Title VII or ADA plaintiff may prove disparate treatment by way of circumstantial evidence.[29] The *McDonnell Douglas* framework partitions the disparate treatment analysis into three parts. First, the plaintiff must establish a "prima facie" case of disparate treatment, by showing that (a) she has a disability; (b) she was qualified for the job in question; and (c) an

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23 *See id.* at 191 n.14; 42 U.S.C. § 2000e-16 (2018).

24 42 U.S.C. § 12112(b) (2018).

25 *See, e.g.*, Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 919 (10th Cir. 2012) (noting that the three "theories" of a disability discrimination claim are intentional discrimination, conduct having an unlawful disparate impact, and failure to provide a reasonable accommodation).

26 *Discrimination,* MERRIAM-WEBSTER DICTIONARY (2021); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.").

27 Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

28 *E.g.*, Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010).

29 411 U.S. 792, 801–05 (1973). *McDonnell Douglas* was decided before the enactment of the ADA, but it has since been applied to ADA cases in every jurisdiction. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003).

adverse employment decision was made under circumstances which give rise to an inference of unlawful discrimination.[30] If the prima facie case is established, a presumption of discrimination arises, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action.[31] Finally, if the employer articulates a legitimate reason, the burden shifts back to the plaintiff, who must then show that the articulated reason was pretextual, i.e., an *ad hoc* cover-up for the true, discriminatory motive.[32]

Next, whereas disparate treatment addresses intentional discrimination, the disparate impact theory addresses the existence of policies, standards, or other workplace conditions that have a discriminatory effect, regardless of whether their formulation involved discriminatory motive.[33] In the context of the enactment of the Rehabilitation Act, the Supreme Court has noted that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[34] Thus, 42 U.S.C. § 12112(b) specifies that disability discrimination includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability" and "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability."[35] In effect, this means that an employer can incur ADA liability even when they do not intend to discriminate. In order to prevail on a disparate impact claim, a plaintiff need only show that a facially neutral employment practice or policy had an adverse effect on her because of her disability, at which point it becomes the employer's burden to show that the practice in question is job-related and consistent with business necessity.[36] For example, imagine that a parcel

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30 *McDonnell Douglas*, 411 U.S. at 802; Butler v. City of Prairie Vill., 172 F.3d 736, 748 (10th Cir. 1999)

31 *McDonnell Douglas*, 411 U.S. at 802. However, the employer's burden is only one of production, and the ultimate burden of persuading the trier of fact that intentional discrimination occurred remains at all times with the plaintiff. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (citing Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981)).

32 *McDonnell Douglas*, 411 U.S. at 804.

33 Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (concluding that Title VII prohibits practices, procedures, and tests with discriminatory effect even if they are "neutral in terms of intent"); *Raytheon*, 540 U.S. at 53 ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA.").

34 Alexander v. Choate, 469 U.S. 287, 295 (1985).

35 42 U.S.C. § 12112(b)(3), (6) (2018).

36 Timmons, *supra* note 21, at 202.

service categorically rejects all applicants for a driving position if the applicant's hearing abilities fail to meet the service's prescribed standards.[37] Although the parcel service, in formulating this policy, very probably had innocent intentions, the qualification standard is discriminatory on its face against people with hearing disabilities.[38] If the parcel service could not show that the hearing standards were job-related and consistent with business necessity, it would be liable for discrimination under a disparate impact theory.[39]

The final theory of discrimination, failure to accommodate, is unique in that it imposes liability for omissions rather than acts. Disparate treatment requires an adverse employment decision, and disparate impact requires there to be a policy, standard, or condition applies throughout the workplace. By contrast, the ADA provisions involving reasonable accommodation impose an affirmative obligation on employers to act in a certain way.[40] Discrimination by failure to accommodate is in many cases an issue not of malfeasance, but nonfeasance. Section 12112 provides that disability discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," absent a showing that providing the accommodations would involve undue hardship.[41] Another unique feature of this provision is the scienter requirement: only a "known" limitation must be accommodated.[42] Often, the employer's knowledge is by itself insufficient to trigger the duty to accommodate; the employee must first request an accommodation (although the employee need not use the magic word "accommodation") unless the need is extremely obvious.[43] For example, imagine that the management staff of a hospital becomes aware that an employee suffers from severe asthma and that said employee currently works in an area of the hospital undergoing construction.[44] Under the reasonable accommodation provisions of the ADA, hospital management has an affirmative duty to relocate the employee to an area of the hospital free of construction dust and materials, provided that the cost of doing so is not unreasonable.[45]

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37 *See* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 981 (9th Cir. 2007).

38 *See id.* at 988.

39 *See id.* at 992–93.

40 Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 289 n.19 (1987).

41 42 U.S.C. § 12112(b)(5)(A) (2018).

42 *Id.*

43 Timmons, *supra* note 21, at 199 ("In order to trigger the duty to accommodate, a plaintiff generally must inform the employer of his or her disability and request an accommodation.").

44 *See* Naughton v. Gilbane, Inc., 46 F. Supp. 3d 152, 153 (D.R.I. 2014).

45 *Id.* at 154.

For better or worse, almost every ADA case has been analyzed according to one of these three theories of discrimination.[46] It is difficult to imagine a type of discrimination which does not fit under one of the theories. But it is no secret that many litigants and courts have confused or conflated the categories.[47] Such confusion generally results in a judgment in favor of the employer because plaintiffs laboring under such confusion might mistakenly tailor the evidence they produce to one theory or another and because courts will consider the disparate impact theory waived if it is not set forth in the complaint—despite the fact that disparate treatment and disparate impact are treated as mere "constructions" of the general antidiscrimination provision which is invoked in any ADA case.[48]

II. WORKPLACE MISCONDUCT IN THE ADA CONTEXT

In this area of the law, "misconduct" simply refers to conduct by an employee that provokes discipline or disapproval by the employer, usually because the conduct violates a promulgated standard of workplace behavior or because coworkers find the employee's conduct inappropriate or discomforting.[49] "Misconduct" thus encompasses a wide variety of behaviors falling into several categories, including attendance issues,[50] such as absenteeism, tardiness, and leave abuse; conflicts with co-workers,[51] supervisors, or patrons, such as making inflammatory comments or threats, insubordination, harassment, or engaging in verbal or physical altercations; inventory theft;[52] being or becoming under the influence of drugs or alcohol while working;[53] and dress code or safety equipment violations.[54] Employers sued for terminations predicated on misconduct often concede that the

46 *See* Timmons, *supra* note 21, at 189.

47 *See* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 107, 135 (2006).

48 *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003); *see also* Seiner, *supra* note 47, at 113 (observing that *Hazen Paper* and *Raytheon* "provide excellent examples of how an individual who may have been discriminated against by an employer's facially neutral policy can fall through the cracks and walk away with nothing").

49 *See* STEFAN, *supra* note 2, at 153 (describing how misconduct cases "run the gamut" of a wide range of behaviors); *id.* at 157 ("Sometimes the employee breaks no 'rule' but behaves in a way that makes other employees or customers uncomfortable.").

50 *E.g.*, Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1130 (9th Cir. 2001).

51 *E.g.*, Palmer v. Cir. Ct. of Cook Cnty., 117 F.3d 351, 351–52 (7th Cir. 1997).

52 *E.g.*, EEOC v. Walgreen Co., 34 F. Supp. 3d 1049, 1050–51 (N.D. Cal. 2014).

53 *See, e.g.*, Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 513 (2d Cir. 1991).

54 *E.g.*, Holmes v. Gen. Dynamics Mission Sys., Inc., 835 Fed. App'x 688, 689 (4th Cir. 2020).

employee-plaintiff met or exceeded job performance expectations.[55] Many of these plaintiffs received designations like "trainer of the month"[56] or "the company's all-time profit producer,"[57] or their performance evaluations indicate that, apart from their ailment, they would have been a model employee.[58]

The law has to some extent embraced this distinction between conduct and performance.[59] Thus, the fact that an employee has engaged in misconduct, even repeatedly, does not preclude her being considered a qualified individual, since whether an employee engages in intermittent conduct violations has little to do with her ability to perform her regular duties.[60] For example, that a talented software engineer is prone to occasional fits of anger in which he punches holes in the wall does not necessarily preclude his being "qualified," though it may provide a legitimate basis for his termination. Generally, misconduct comes to bear on an employee's qualifications only when the employee may pose a significant risk of substantial harm to other individuals in the workplace, because the ADA provides a "direct threat" defense whereby an employee posing such a threat may be considered disqualified regardless of her ability to perform the essential functions of her position.[61]

When a plaintiff brings an ADA claim that involves misconduct by the employee, the following fact pattern usually forms the basis for the

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55 *See* STEFAN, *supra* note 2, at 103.

56 *E.g.*, Venable v. T-Mobile USA, Inc., 603 F. Supp. 2d 211, 216 (D. Me. 2009).

57 *E.g.*, Holihan v. Lucky Stores, Inc., 87 F.3d 362, 364 (9th Cir. 1996).

58 *E.g.*, Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1132 (9th Cir. 2001).

59 Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 171–72 (2d Cir. 2006) (quoting Owens v. N.Y.C. Hous. Auth., 934 F.2d 405, 409 (2d Cir. 1991)) ("[M]isconduct is distinct, however, from the issue of minimal qualification to perform a job. An individual may well have the ability to perform job duties, even if her conduct on the job is inappropriate or offensive. Accordingly, the finding of misconduct here cannot preclude [the plaintiff] from showing her qualification for employment . . . ."); *see also Venable*, 603 F. Supp. 2d at 214, 219 (genuine issue of fact as to whether epileptic employee could perform essential functions of her trainer position even where employee admitted to being abrasive and receiving "unacceptable" rating in teamwork).

60 In administrative hearings for claims of disability discrimination against federal agencies, the EEOC's Office of Federal Operations has declined to consider regular attendance an essential function of any position, reasoning that it creates a "circular argument." Ruiz v. Frank, EEOC DOC 05880859, 1990 WL 711461, at *4 (May 21, 1990) ("If attendance is considered an essential job function, any frequently absent handicapped employee could be considered *unqualified* and, thus, an agency always could avoid the issue of reasonable accommodation.").

61 42 U.S.C. § 12113(b) (2018). The use of direct threat qualification standards requires an individualized assessment of the individual's present ability to safely perform the essential functions of the job based on a reasonable medical judgment and can exclude only individuals who pose a "significant risk." *See* Bragdon v. Abbott, 524 U.S. 624, 649 (1998).

complaint. First, during or before employment with the defendant, the plaintiff was diagnosed with a medical condition; then, the plaintiff violated a workplace conduct rule; in response, the employer discharged the plaintiff for violating the rule; finally, the plaintiff can draw some connection between her medical condition or its treatment and her violation of the rule.[62] Courts generally agree that if the employer did not know of and did not have reason to know of the disability until after the termination was effectuated, then there can be no ADA liability.[63] In other words, a termination for misconduct cannot become unlawful solely because the employee happens to have a medical condition. Also, if the invocation of the disability seems to be merely an *ex post* excuse for misconduct in which the plaintiff chose to engage, then the claim is practically certain to fail.[64] Before even entertaining whether discrimination has occurred, courts will require the plaintiff to show some "causal nexus" between her alleged disability and the conduct that formed the basis for her termination.[65] Finally, there is a clean hands requirement with regard to the disability's causing of the misconduct; if, for example, a plaintiff was negligent in taking his medication and as a result engages in misconduct, there can be no ADA liability for the employer who terminates him for the misconduct.[66] This all assumes, of course, that the plaintiff fits within the ADA's protected class of "qualified individuals." If the plaintiff cannot show that he could perform the essential functions of the position, or if he cannot establish that he has a disability in the legal sense, then whether discrimination occurred is of no moment to the courts.

Therefore, in analyzing the circuit split regarding disability-caused misconduct, and in suggesting reform in this area of the law, when this Note refers to cases which the majority rule and minority

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62 *E.g.*, *Humphrey*, 239 F.3d at 1130–33.

63 *See, e.g.*, Alamillo v. BNSF Ry. Co., 869 F.3d 916, 920 (9th Cir. 2017) (plaintiff could not establish causation in case involving a termination for misconduct because employer did not know about disability when it decided to initiate disciplinary proceedings).

64 *See, e.g.*, Dewitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 1316 (10th Cir. 2017) (quoting Davila v. Qwest Corp., Inc., 113 Fed. App'x 849, 854 (10th Cir. 2004)) (concluding that an employer never has to provide a fresh start/second chance to an employee "whose disability could be offered as an *after-the-fact excuse*").

65 *See, e.g.*, Trujillo v. U.S. Postal Serv., 330 Fed. App'x 137, 139 (9th Cir. 2009) (affirming summary judgment for employer, despite Ninth Circuit rule that conduct resulting from a disability is considered to be part of the disability, because employee failed to show that his absences were related to his disabilities).

66 *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087 (10th Cir. 1997) (distinguishing Siefken v. Vill. of Arlington Heights, 65 F.3d 664 (7th Cir. 1995) on grounds that the misconduct in *Siefken* was a result of plaintiff's own failure to monitor his condition).

rule courts would decide differently, it speaks of a case in which the following factual assertions are true. First, either the employer knows of, or a reasonable employer would know of, the existence and nature of the employee's disability. Second, the stated purpose for the termination was that the employee engaged in misconduct. Third, the disability was a but-for cause of the misconduct. Finally, the employee could not have prevented the disability from causing the misconduct by exercising ordinary care. In sum, this Note deals with the disability discrimination case where (a) an employee has an impairment that, under the ADA, qualifies as a disability (b) and that renders her unable to comply with a workplace conduct rule, (c) the violation of which forms the basis for her termination (d) by someone who had actual or constructive knowledge of the disability before the termination was effectuated.

Two questions arise under this fact pattern. First, can such an employer be held liable for disability discrimination? Second, if the ADA does impose liability for the termination, under which theory of discrimination—disparate treatment, disparate impact, or failure to accommodate—should courts scrutinize the claim and allocate the evidentiary burdens among the parties? The remainder of this Note addresses how the federal courts of appeals have responded to these questions and evaluates how their responses conform to the text and fulfill the purposes of the ADA.

A. *The Majority View: The ADA Permits Terminations Based on Disability-Caused Misconduct*

The majority view is demonstrated clearly in *Palmer v. Circuit Court of Cook County*.[67] Plaintiff's employer, the county court, subjected her to progressive discipline that culminated in her termination.[68] Management predicated the discipline and termination on a series of co-worker disputes, including incidents where plaintiff called her co-worker and supervisor a "bitch," threatened to throw one coworker out a window, and said that she "could just kill" her supervisor, whom she said "would be better off dead."[69] During this period, plaintiff requested leave to attend an out-patient program for mental illness;[70] she was prescribed medication for what her doctor called "paranoid

67 117 F.3d 351 (7th Cir. 1997) (affirming grant of employer's motion for summary judgment).

68 *Id.* at 351–52.

69 Palmer v. Cir. Ct. of Cook Cnty., 905 F. Supp. 499, 501–02 (N.D. Ill. 1995) (granting employer's motion for summary judgment).

70 *Id.* at 502.

delusions";[71] and, following the threats against her supervisor, she was involuntarily committed to a hospital where she was diagnosed with "[d]elusional (paranoid) disorder" and "[m]ajor [d]epression."[72] Immediately after her release from the hospital, the county court terminated the plaintiff, citing her "pattern of abusive behavior."[73]

Plaintiff sued in federal court for disability discrimination under the ADA. In granting the employer's motion for summary judgment, the district court noted, "[t]here is no dispute that plaintiff was fired due to her inability to control the expression of her mental illness in the workplace,"[74] but concluded that the evidence indicated "that plaintiff's termination was based on her past misconduct . . . [not] due to her alleged disability."[75]

Judge Richard Posner, writing for a majority in the Seventh Circuit Court of Appeals, affirmed the grant of summary judgment.[76] At first, the appellate court corrected the court below, observing that "it is not possible to negate the inference that [plaintiff] has in fact a disabling mental illness."[77] Judge Posner opined that the "paranoid delusions" plaintiff experienced "are typical symptoms of schizophrenia."[78] However, the court continued:

> [T]he judgment of the district court must still be affirmed. There is no evidence that Palmer was fired because of her mental illness. She was fired because she threatened to kill another employee. The cause of the threat was, we may assume, her mental illness . . . . But if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act.[79]

Hence, both the District Court and the Seventh Circuit in this case drew a sharp distinction between being terminated "because of [a] mental illness" and being terminated because of misconduct "the cause of [which] was . . . mental illness."[80] This distinction is typical of

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 509.

75 *Id.* at 511.

76 Palmer v. Cir. Ct. of Cook Cnty., 117 F.3d 351, 353 (7th Cir. 1997).

77 *Id.* at 352.

78 *Id.*

79 *Id.* Here, Judge Posner quoted a scene from *Hamlet* in which the young Hamlet seeks pardon for a wrong that should, he says, be excused by his (feigned) madness: "[w]as't Hamlet wrong'd Laertes? Never Hamlet./ If Hamlet from himself be ta'en away,/ And when he's not himself does wrong Laertes,/ Then Hamlet does it not; Hamlet denies it./ Who does it then? His madness." *Id.* (quoting WILLIAM SHAKESPEARE, HAMLET act 5, sc. 2, ll. 247–51).

80 *See Palmer*, 117 F.3d at 352.

the courts that follow the majority rule, which distinguish disabilities from misconduct they might induce.[81]

B. The Tenth Circuit Approach (Disparate Impact)

Four months after the Seventh Circuit held that a termination based on disability-caused misconduct warranted no relief under the ADA, the Tenth Circuit decided the opposite. In *Den Hartog v. Wasatch Academy*, the Tenth Circuit held that a "sharp dichotomy" between disability and disability-caused conduct "would make no sense" under the ADA.[82] *Den Hartog* thus became the first decision in which a federal court of appeals applied the minority rule to an ADA case.

Den Hartog worked for Wasatch as a teacher, a school historian, and a groundskeeper from 1964 through most of 1994.[83] Den Hartog's son Nathaniel, who lived with his father on the Wasatch campus, was, in 1992, diagnosed with bipolar affective disorder.[84] Nathaniel had developed a close relationship with Travis Loftin, the son of Wasatch's headmaster, Joseph Loftin, and after his diagnosis began threatening the Loftin family over the phone, such as by telling them to "keep a very close eye" on their four-year-old daughter.[85] Shortly thereafter, Nathaniel was involuntarily committed to a mental hospital.[86] However, he was released after less than a month of treatment and subsequently continued his threatening behaviors.[87] After an incident in which Nathaniel battered a former schoolmate and warned thereafter that Joseph Loftin was "next," Nathaniel was arrested and sent to Utah State Hospital for a competency evaluation.[88] Following the arrest, Joseph informed Den Hartog that Wasatch would not be renewing his contract the following year.[89]

Den Hartog sued for disability discrimination, claiming that Wasatch discriminated against him on the basis of his son's disability.

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81 *E.g.*, Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4th Cir. 1999) ("The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability."); Maddox v. Univ. of Tenn., 62 F.3d 843, 846–47 (6th Cir. 1995) (district court did not err in distinguishing between discharge for misconduct and discharge by reason of disability); Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) ("The cause of [plaintiff's] discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment.").

82 Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087 (10th Cir. 1997).

83 *Id.* at 1078.

84 *Id.*

85 *Id.* at 1078–79.

86 *Id.* at 1079.

87 *Id.* at 1079–80.

88 *Id.* at 1080.

89 *Id.*

The district court granted summary judgment in favor of Wasatch and agreed that the ADA was "inapplicable" because Wasatch terminated Den Hartog "only in response to Nathaniel's misconduct," rather than in response to his disability.[90] On appeal, the Tenth Circuit reversed, stating that "[a]s a general rule, an employer may *not* hold a disabled employee to precisely the same standards of conduct as a nondisabled employee unless such standards are job-related and consistent with business necessity."[91] This language demonstrates that the Tenth Circuit viewed Den Hartog's claim as one of disparate impact; the discrimination arose not from discriminatory animus but from the way in which a neutral workplace rule was applied.[92] The Tenth Circuit thus held that an employer must tolerate "eccentric or unusual conduct caused by the employee's mental disability" unless either (a) the employee is not a "qualified individual" or (b) an affirmative defense applies.[93]

Ultimately, the Tenth Circuit affirmed the lower court decision because the appellate court found that Wasatch had established a "direct threat" defense.[94] But here the exception proved the rule. The Tenth Circuit engaged in the direct threat analysis only because, all else equal, Den Hartog had set forth a cognizable claim of disability discrimination.[95] Absent the success of Wasatch's affirmative defense, it would have been a violation of the ADA to terminate Den Hartog by applying the workplace conduct rule to misconduct which Wasatch knew was the product of a disability.

C. The Ninth and Second Circuit Approach (Disparate Treatment)

Less than four years after the Tenth Circuit decided *Den Hartog*, the Ninth Circuit produced a similar result in *Humphrey v. Memorial Hospitals Association*, holding that "[f]or purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."[96]

90 Den Hartog v. Wasatch Acad., 909 F. Supp. 1393, 1400 (D. Utah 1995); *id.* at 1402 (concluding that "the ADA generally protects disability and not disability-caused misconduct").

91 *Den Hartog*, 129 F.3d at 1086.

92 STEFAN, *supra* note 2, at 155 (describing the *Den Hartog* construction as "extremely important because it precludes employers from devising rules of workplace behavior that, although neutral on their face, have an enormously disparate impact on employees with psychiatric disabilities").

93 *Den Hartog*, 129 F.3d at 1086, 1088.

94 *Id.* at 1090.

95 *See id.* at 1086 ("[T]he district court erred by importing the 'disability v. disability-caused misconduct' dichotomy into [this] case . . . .").

96 239 F.3d 1128, 1139–40 (9th Cir. 2001) (citing Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997)).

Humphrey involved a medical transcriptionist who had been diagnosed with obsessive compulsive disorder (OCD).[97] The OCD caused Humphrey to engage in a series of obsessive rituals each morning, with the result that she was often unable to get to work on time, if at all.[98] After learning that Humphrey's OCD was contributing to her attendance problem, the employer granted her a flexible start time. However, that accommodation proved insufficient, and after Humphrey was absent two more times, she was terminated. The stated reason for the termination was her history of tardiness and absenteeism.[99]

Humphrey sued her employer for disability discrimination under a disparate treatment theory. In reversing the decision of the district court, which had granted summary judgment in favor of the employer, the Ninth Circuit held that "a jury could reasonably find the requisite causal link between a disability of OCD and Humphrey's absenteeism and conclude that [her employer] fired Humphrey because of her disability."[100] Thus, the analysis centered not on whether the employer "h[e]ld the disabled person to exactly the same conduct [standard] as a nondisabled person,"[101] but on whether Humphrey's employer terminated her "because of" her disability.[102] Therefore, although both the *Den Hartog* and *Humphrey* approaches reached the same result, the Ninth Circuit departed from *Den Hartog* in that it treated the claim as one of disparate treatment, rather than one of disparate impact.

The Ninth Circuit continued its use of the disparate treatment approach in *Dark v. Curry County*.[103] Dark, an operator of construction vehicles, had been diagnosed with epilepsy.[104] He controlled his condition with medication but still experienced occasional seizures, which were usually preceded by what Dark called an "aura," indicating the potential for a seizure on the day of the aura.[105] One morning, he reported to work despite experiencing an aura and suffered a seizure while driving a pickup truck.[106] His passenger, a co-worker, gained control of the vehicle and brought it to a safe halt. In response to the incident, the employer terminated Dark, stating that the incident demonstrated Dark's disregard for the safety of others and his inability

97 *Id.* at 1130.
98 *Id.*
99 *Id.* at 1133.
100 *Id.* at 1140.
101 *Den Hartog*, 129 F.3d at 1086.
102 *Humphrey*, 239 F.3d at 1133.
103 451 F.3d 1078 (9th Cir. 2006).
104 *Id.* at 1081.
105 *Id.*
106 *Id.*

to perform the essential functions of his job, despite his seventeen years of experience.[107]

Dark sued under the ADA. The district court granted summary judgment for the employer, finding under the *McDonnell Douglas* framework that the employer had articulated a legitimate, nondiscriminatory reason for the termination, namely that Dark reported to work and operated heavy equipment despite being warned that he might experience an epileptic seizure.[108] On appeal, the Ninth Circuit reversed, holding that the employer had failed to articulate a nondiscriminatory reason:

> [T]he reason given for Dark's termination must actually constitute a valid nondiscriminatory explanation, *i.e.*, one that "disclaims any reliance on the employee's disability in having taken the employment action." . . . The County does not argue that Dark's "misconduct" resulted from other than [sic] his disability. Thus, the Board's explanation, as a matter of law, fails to qualify as a legitimate, nondiscriminatory explanation for Dark's discharge.[109]

Since it was undisputed that the misconduct was caused by the disability, the articulation of the misconduct as the reason for termination failed to "disclaim any reliance" on Dark's disability. It is clear from this reasoning that the Ninth Circuit views disability-caused misconduct as a sort of proxy for the disability itself. Thus, in claiming to rely on the misconduct in making the employment decision, the employer essentially concedes having discriminated against the employee on the basis of disability. This approach is directly opposite the majority view, which considers misconduct a legitimate reason for termination and burdens the plaintiff with proving that the articulated reason was pretextual.[110]

D. *The Supreme Court Speaks:* Raytheon Co. v. Hernandez

The closest the Supreme Court came to resolving this circuit split was in deciding *Raytheon Co. v. Hernandez*.[111] The plaintiff in *Raytheon* was fired in 1991 for testing positive for cocaine after appearing to be under the influence of drugs at work.[112] Years later, in 1994, the plaintiff applied to be rehired by the same employer, including in his application proof that he had been attending Alcoholics Anonymous

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107 *Id.*

108 Dark v. Curry Cnty., No. Civ. 03-3041-CO, 2004 WL 2009407, at *5–6 (D. Or. Sept. 8, 2004).

109 *Dark*, 451 F.3d at 1084 (quoting Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1093 (9th Cir. 2001)).

110 See *supra* text accompanying notes 67–81.

111 540 U.S. 44 (2003).

112 *Id.* at 47.

meetings and was in recovery.[113] The reviewer of his application rejected it, however, citing a company policy against rehiring employees who were terminated for workplace misconduct.[114] Since the 1991 separation letter recorded plaintiff's discharge as simply a "discharge for personal conduct," the reviewer, who never met plaintiff during his earlier period of employment, could not have known about plaintiff's history of substance abuse nor about the details of his termination.[115] Nevertheless, the plaintiff sued under a disparate *treatment* theory and failed to plead or raise the disparate *impact* theory in a timely manner.[116]

Ultimately, this procedural hiccup—probably a result of the plaintiff's confusion about the difference between disparate treatment and disparate impact—cost the plaintiff his case. The trial court granted the employer's motion for summary judgment on grounds that the employer had articulated a legitimate, nondiscriminatory reason for the rejection of plaintiff's application, namely, the company policy against rehiring those fired previously for misconduct.[117] However, the Ninth Circuit reversed. It held that the no-rehire policy was *not* a legitimate, nondiscriminatory reason because the policy, as applied, "serve[d] to bar the reemployment of a drug addict despite his successful rehabilitation."[118] The Supreme Court then granted certiorari to determine "whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules."[119] In other words, the issue was whether an ex-employee terminated for misconduct might receive special treatment ("preferential rehire rights") where the misconduct was the result of a disability. Resolution of this question probably would have settled the circuit split, at least implicitly, because a holding that the ADA did confer preferential rehire rights would have implied that employers must react differently to misconduct in cases where the misconduct was disability related.[120]

The Court, however, did not reach the question on which it granted certiorari.[121] It simply held that the Ninth Circuit erred in applying a disparate impact theory in what was, by virtue of the plaintiff's failure to plead disparate impact, indisputably a disparate

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113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 49.

117 *Id.*

118 *Id.* at 51 (quoting Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1036–37 (9th Cir. 2002)).

119 *Raytheon*, 540 U.S. at 46.

120 *See* Timmons, *supra* note 21, at 231.

121 *Raytheon*, 540 U.S. at 46.

treatment case. The Court held that, in rejecting the proffered nondiscriminatory reason because the no-rehire policy would "screen[] out"[122] rehabilitated addicts, the Ninth Circuit conflated the analytical frameworks for disparate impact and disparate treatment claims. A disparate treatment analysis, the Court reasoned, would have compelled the conclusion that the proffered reason was legitimate and nondiscriminatory because it was a rationale that disclaimed any reliance on plaintiff's membership in a protected class in making the employment decision. Again, the reviewer of plaintiff's application could not have been motivated to reject the application because of plaintiff's disability, as she was entirely unaware that such a disability existed.[123] So the Court simply remanded the case to have the correct framework applied. Yet, in a footnote that is arguably dicta, the Court added:

> To the extent that the [lower] court suggested that, because respondent's workplace misconduct is related to his disability, petitioner's refusal to rehire respondent on account of that workplace misconduct violated the ADA, we point out that we have rejected a similar argument in the context of the Age Discrimination in Employment Act.[124]

This footnote led some scholars to conclude that *Raytheon* "implicitly rejected" the disparate treatment approach to disability-caused misconduct cases.[125] This characterization probably overstates the meaning of the footnote in question, given that the responsible management official in *Raytheon* lacked any knowledge or reason to know of plaintiff's disability and that the court expressly stated that it did not reach the question of whether misconduct warrants different treatment when it is disability-related.[126] Furthermore, courts in the Ninth Circuit have continued to apply the disparate treatment version of the minority rule in post-*Raytheon* cases, without a word from the Supreme Court.[127] In any event, the procedural nature of the holding in *Raytheon*, coupled with the lack of any other Supreme Court cases addressing the disability-caused misconduct issue, has left the circuit split unresolved.

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122 *Id.* at 51 (quoting *Hernandez*, 298 F.3d at 1036–37).

123 *See id.* at 54 n.7.

124 *Id.* at 54 n.6 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)).

125 Timmons, *supra* note 21, at 236.

126 *Raytheon*, 540 U.S. at 46–47.

127 *See, e.g.*, Dark v. Curry Cnty., 451 F.3d 1078 (9th Cir. 2006); EEOC v. Walgreen Co., 34 F. Supp. 3d 1049 (N.D. Cal. 2014).

III. THE MINORITY VIEW BETTER SERVES THE TEXT AND PURPOSES OF THE ADA

A. The Majority View is a Misguided Interpretation, and Counteracts the Purposes, of the ADA

The first statutory interpretation problem the majority view encounters has to do with 42 U.S.C. § 12114(c)(4) (2018), which provides that an employee who engages in the illegal use of drugs or who is an alcoholic may be held to the same qualification standards for job behavior as other employees, "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." Under the majority view, this provision is superfluous. If Judge Posner was correct to say that a discharge for misconduct caused by *any* disability "does not present an issue under"[128] the ADA, then why would the statute need to specify that a discharge for misconduct caused by a certain kind of disability is legally permissible? The sensible reading of this provision is that the ADA contemplates a distinction between disabilities and conduct caused by disabilities only in the context of alcoholism and drugs. The inclusion of one thing is the exclusion of others; if it is necessary to say that an employer may discipline an employee for disability-caused misconduct when the disability in question is alcoholism or drug addiction, it follows that, where neither alcoholism nor drugs are involved, the employer may not discipline an employee for disability-caused misconduct, absent other defenses.

The § 12114(c)(4) dilemma might be excused as a legislative oversight were it not for the presence of a similar problem in the "defenses" section of Title 42. Section 12113 provides certain affirmative defenses to discrimination claims, including the "direct threat" defense, which states that an employer may take action against an employee who poses a "direct threat to the health or safety of other individuals in the workplace."[129] Assume for a moment that the majority view is correct: adverse employment action predicated on workplace misconduct does not constitute discrimination in the first place. Why, then, would an affirmative defense be necessary to protect employers who discipline or disqualify an individual for endangering the safety of others? The majority view would limit the direct threat defense to cases where an employee with a disability has not engaged in any misconduct but somehow still poses a significant risk to the

128 Palmer v. Cir. Ct. of Cook Cnty., 117 F.3d 351, 352 (7th Cir. 1997).

129 *See* 42 U.S.C. § 12113 (a)–(b) (2018). "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

health and safety of others. One might conceive of circumstances where both those conditions are present but it would be strange to limit one of the main defenses to ADA employment discrimination liability to such a narrow category of cases. Furthermore, the definition of "direct threat" suggests that if the risk to health or safety can be eliminated by reasonable accommodation, then the defense does not apply. This caveat implies that sometimes disability-caused misconduct must be accommodated; but this proposition is irreconcilable with the idea that the ADA does not prevent employers from firing employees whose disabilities cause them to engage in misconduct.[130]

These statutory anomalies should be interpreted with an eye toward establishing coverage for individuals with disabilities as broadly as the text of the statute will permit. Federal courts, including the Supreme Court, have exhibited a tendency to interpret anti-disability discrimination provisions all too narrowly.[131] It was in response to that phenomenon that Congress enacted the ADAAA and amended the chapter-wide definition of "disability" to include "[r]ules of construction regarding the definition of disability."[132] As such, the statute itself now provides that the definition of disability "shall be construed in favor of broad coverage . . . to the maximum extent" permitted by the terms of text and that the phrase "'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]."[133] The ADA was enacted in light of congressional findings that individuals with disabilities encounter various forms of discrimination, including "overprotective rules and policies" and "exclusionary qualification standards and criteria."[134] A *per se* exclusion of disability-caused misconduct from the forbidden bases of employment action goes directly against these stated purposes. As suggested by the name of the agency charged with implementing workplace antidiscrimination laws, the ideal toward which the ADA strives is not simply equal treatment, but equal opportunity.[135] An employee discharged because her disability caused her to violate a workplace conduct standard may have been treated in a manner "equal" with respect to other, nondisabled employees who broke the same rule, but the refusal to distinguish between those employees and

130 This was the reasoning of the court in Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087 (10th Cir. 1997).

131 *See* Timmons, *supra* note 21, at 282.

132 *See* 42 U.S.C. § 12102(4) (2018).

133 *Id.* § 12102(4)(a)–(b).

134 *Id.* § 12101(a)(5).

135 *See* Timmons, *supra* note 21, at 238 (noting that the "objective" of the ADA is equal opportunity, as opposed to equal treatment).

the employee whose conduct violations are unlawful is essentially a refusal to recognize equal opportunity.

Furthermore, a statute should not be construed in a manner that encourages the very type of behavior it seeks to deter or that otherwise produces absurd results. The majority view regarding disability-caused misconduct violates that principle because it incentivizes employers in certain circumstances to terminate employees with disabilities that otherwise may have been retained in the absence of potential ADA liability. At first blush, the majority rule is, from the employer's perspective, attractively simple: retain employees who can perform their job and follow the rules, regardless of whether they are disabled or not; and fire employees who cannot do so, without risk of litigation even should you happen to know that the misconduct might be related to a disability. With so many employers across the nation who are subject to these rules, the value of that simplicity can hardly be overstated. However, in light of the ADA's imposition of duties not just to refrain from discriminatory animus, but to take affirmative steps to provide reasonable accommodations for employees with disabilities, the law should not allow employers to escape liability simply by adopting a "disability-blind" approach. Where an employer discovers terminable misconduct has been committed by an employee with an unaccommodated disability, the majority rule may encourage discrimination against that employee. Imagine, for instance, an employee with a mental condition that often makes it extremely difficult to get out of bed in the early morning. She works an early shift, from 6:00 a.m. to 3:00 p.m., and she often shows up late to work, sometimes by more than an hour, because of her condition. The employer is considering firing her for her absenteeism, so he confronts the employee, and discovers that the absenteeism is a result of a disability. Since in this workplace, as in many others, whether absenteeism warrants termination is left to the employer's discretion, the employer now has a choice to make. He can retain the employee, perhaps out of sympathy for her (heretofore undisclosed) disability; but if he does, he will subsequently be obligated to explore reasonable accommodation options, since now the disability is "known." This will require initiating an interactive process to try and meet the employee's needs, and it may require revising the schedule to give the employee a later shift, incurring modest increases in labor costs, or shifting operating hours to periods that are less profitable.[136] Or, the employer

136 *See* Dunlap v. Liberty Nat. Prods., Inc., 878 F.3d 794, 799 (9th Cir. 2017) (explaining that an employer has a duty to engage in an interactive process with a disabled individual to identify reasonable accommodations); Snapp v. United Transp. Union, 889 F.3d 1088, 1095 (9th Cir. 2018) (noting that failure to engage in interactive process constitutes unlawful discrimination if a reasonable accommodation would have been possible).

can simply fire the employee and replace her with someone who can show up on time consistently, potentially increasing the productivity of the enterprise by having workers present at the time of his choosing, and probably lowering labor costs since the replacement employee probably will have a lower pay grade.

Under the majority rule, the termination of the employee is permissible. There will be no disparate treatment liability because the absenteeism constitutes a legitimate, nondiscriminatory reason for the adverse employment action. Nor can there be any disparate impact liability, since the requirement that employees show up to work when they are scheduled is job-related and consistent with business necessity.[137] As for failure to accommodate liability, it is well-settled that reasonable accommodations are always prospective, never retroactive, and so no accommodation is required unless the misconduct that occurred prior to the discovery of the disability is itself an insufficient basis for termination.[138] Therefore, the ADA will impose accommodation costs on the employer if he decides to retain the employee with a disability, but it will decline to impose liability if the employer fires the employee precisely to avoid those costs. Irony aside, this hypothetical demonstrates the very real possibility that the ADA will encourage the termination of employees with disabilities in certain circumstances, at least under the majority rule regarding disability-caused misconduct.

Whether one considers the disability-caused misconduct issue in light of its statutory context, the stated purposes of the ADA and its amendments, how the equitable principles underlying disability discrimination law, or all three together, the rationale for the majority view remains obscure. At the very least, the minority view deserves reconsideration.

B. Courts Should Adopt the Minority View Under a Failure to Accommodate Theory

The main reason the minority approach has remained the minority approach is probably the erroneous belief that to abandon the disability versus disability-caused-misconduct distinction would leave workplaces vulnerable to dangerous employees whom employers

137 Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, L.L.C., 516 F. Supp. 3d 1285, 1289 (D.N.M. 2021) ("Clearly, attendance is also job-related and consistent with business necessity.").

138 McElwee v. Cnty. of Orange, 700 F.3d 635, 641 (2d Cir. 2012) ("A requested accommodation that simply excuses past misconduct is unreasonable as a matter of law."); DeWitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 1316 (10th Cir. 2017) ("[T]he requirement to provide reasonable accommodations under the ADAAA is 'always prospective' . . . .").

would nevertheless hesitate to terminate for fear of incurring ADA liability.[139] This belief, coupled with pervasive stereotypes in our culture regarding individuals with mental conditions,[140] has led many to be skeptical of any sort of expansion of the minority approach.[141] However, stereotypes, no matter how pervasive, should not be allowed to defeat the efforts of antidiscrimination statutes to provide equal employment opportunities.

It is very unlikely that adopting a general rule which includes disability-caused misconduct within the gambit of "on the basis of disability" would chill employer decisionmaking in situations involving potentially dangerous individuals. As discussed above, one reason that the minority approach makes sense as a matter of statutory interpretation is precisely because the direct threat defense remains available even once the plaintiff has established a prima facie case of discrimination.[142] In abandoning the fiction that conduct caused by a disability is distinguishable from the disability itself,[143] doctrinal coherence is restored to those provisions of the ADA that specify circumstances where the conduct should be severed from the condition, in essence, when the underlying disability involves drug use or alcoholism, or where the conduct the disability is liable to cause poses a significant risk of harm to other people. Outside those circumstances, it is difficult to imagine what purpose could possibly be served by allowing employers *carte blanche* to terminate an employee whenever their disability manifests itself in "misconduct," like when

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139 *E.g.*, James J. McDonald, Jr., *Feature: "My Disability Made Me Do It!": Is Employee Misconduct Protected if It's Related to a Disability*?, 50 ORANGE CNTY. LAW. 46, 49–50 (2008) ("Perhaps the [disabled] employee must be given a lecture concerning the dangers inherent in bringing a loaded weapon to work. Or warned that if he shoots someone he will be subject to disciplinary action. Or perhaps he should be allowed to keep his gun but not his bullets."). Titles like that of McDonald, Jr.'s article, though perhaps facetious, are not uncommon. *See, e.g.*, Virginia Mixon Swindell, *Symposium: Employment Law: But My Disability Made Me Do It: ADA Claims Involving Disability-Related Misconduct*, 69 ADVOCATE 8 (2014); Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 179 (1995) (discussing the caution that employers must exercise before acting against an employee who claims, "my disability made me do it").

140 Hsieh, *supra* note 1, at 993.

141 *See, e.g.*, McDonald, Jr. *supra* note 139; Swindell, *supra* note 9.

142 *See supra* notes 128–30 and accompanying text.

143 The hair-splitting nature of this distinction was illustrated by the Second Circuit in Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 515 (2d Cir. 1991). In a hypothetical, the court imagined an employee with a permanent limp whose limp caused the worker to make a loud "thump" whenever he took a step. *Id.* at 516. Were an employer to fire the employee because the thumping often disrupted the workplace, the court reasoned, the employer should not be allowed to escape disability discrimination liability by relying on conduct "symptomatic" of a handicap rather than on the "*handicap itself*," because judicial recognition of such a distinction would allow any employer to "avoid the burden of proving that the handicap is relevant to the job qualifications." *Id.* at 516–17.

their OCD makes them late for work,[144] or when they take a bag of chips off the inventory shelf and eat them to prevent their blood sugar from dropping to dangerous levels.[145]

However, widespread recognition of the minority rule would necessitate some tweaks to the doctrine as it exists in cases like *Humphrey* or *Dark*, because it is the failure to accommodate theory, rather than the disparate treatment or disparate impact theories, that best captures the type of discrimination that occurs when an employer fires an employee for misconduct that the employer knew was really a manifestation of the employee's disability.

The main reason the disparate treatment theory is a poor fit is that disparate treatment pertains to traditional, "bad motive" discrimination whereas in disability-caused misconduct cases the employer is not necessarily motivated by discriminatory animus. An employer who, like in our hypothetical above, terminates an employee solely to avoid the costs and effort that the implementation of a reasonable accommodation might require does not by his conduct exhibit an animosity toward people with disabilities. Rather, he exhibits merely an unwillingness to offer special assistance to an employee who could be replaced by someone who does require not assistance. Such employers hinder the accomplishment of the ADA's aims not because they act in a way that puts down people with disabilities but because they refuse to exercise a reasonable effort to lift them up. Another problem with applying disparate treatment in these cases is that doing so would likely confuse litigants who often already find themselves muddling the tripartite *McDonnell Douglas* framework. The idea of showing evidence of "pretext" is inapplicable in disability-caused misconduct cases, because in most of them, the proffered reason will be the real reason; rarely do employers try to "cover-up" the fact that they are discharging an employee for violating a workplace conduct standard. Nor is it helpful to say that misconduct never constitutes a legitimate, nondiscriminatory motive, because it may very well be legitimate and nondiscriminatory if the employer never knew the employee had a disability.[146] Finally, implementing the minority approach under a disparate treatment theory would also require sidestepping the dicta in *Raytheon*, which some scholars have regarded as an implicit disapproval of the use of disparate treatment in cases of misconduct-predicated terminations.[147] The *Raytheon* dicta hinted toward the rejection of disparate treatment as applied to misconduct cases on the ground that the Court had already rejected a

144 *See supra* notes 96–101 and accompanying text.

145 EEOC v. Walgreen Co., 34 F. Supp. 3d 1049, 1050 (N.D. Cal. 2014).

146 *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 54 n.7 (2003).

147 *See, e.g.*, Timmons, *supra* note 21, at 236.

similar argument in the Age Discrimination in Employment Act context,[148] meaning perhaps that the failure to accommodate theory, which is unique to the ADA, would be the Court's preferred flavor of the minority view in the event it overturned the majority view.[149]

As for disparate impact, it might suffice to say that no one wants to see disparate impact become more complicated than it already is.[150] That aside, one doctrinal problem with applying disparate impact in disability-caused misconduct cases is that disparate impact has no real mens rea element.[151] If disparate treatment is too narrow for this type of case because it typically requires an "ableist" motive, then disparate impact is too broad because it typically considers the mental state of the employer irrelevant. The whole point of disparate impact, after all, is to capture discrimination that may be unintentional.[152] Properly calibrating liability for terminations predicated on disability-caused misconduct requires a mental state standard between disparate treatment and disparate impact, including those cases where the employer acts less culpably than he would with full-stop discriminatory animus, but excluding those cases where the employer did not know enough about the employee's situation to even realize that an accommodation may have been necessary. One helpful way of thinking about the different mental state requirements is in comparison to the Model Penal Code:[153] Disparate treatment requires an employer to *purposefully act* against an employee on the basis of disability; disparate impact requires an employer *negligently* to exclude disabled individuals from the workforce;[154] and failure to accommodate requires an employer to be *knowingly* apathetic toward the remediable disadvantages an employee experiences by virtue of her disability.

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148 *Raytheon*, 540 U.S. at 54 n.6.

149 *See* Hsieh, *supra* note 1, at 998 (characterizing failure to accommodate as an additional theory of liability in comparison to other antidiscrimination statutes); Timmons, *supra* note 21, at 236–38 (explaining that expanding disparate treatment beyond the implications of the *Raytheon* dicta "is not necessary . . . [for] eliminating discrimination against the disabled caused by thoughtlessness and indifference" because the ADA also prohibits disparate impact and requires reasonable accommodations).

150 *See, e.g.*, Seiner, *supra* note 47, at 96 ("Confusion. There is no better way to describe the current state of U.S. law regarding allegedly discriminatory workplace standards . . . ."); *see also id.* at 104 (noting that courts continue to misapply disparate impact and disparate treatment analyses).

151 *See id.* at 99 ("The key to any disparate impact claim is that it does not require *intent*.").

152 *See supra* notes 33–39 and accompanying text.

153 *See generally* MODEL PENAL CODE § 2.02 (AM. L. INST. 1985).

154 Seiner, *supra* note 47, at 99 ("[D]isparate impact has been likened to a negligence theory in claims of discrimination.").

Thus, the fact that the ADA expressly conditions liability for failure to accommodate on the impairment being a "known" disability makes it the best discrimination theory for conceptualizing liability for disability-caused misconduct terminations.[155] To return to the example above about the employee who is chronically absent from work—why does such a case befoul the purposes of the ADA? The answer is that the employer is knowingly circumventing his obligation to engage in the interactive accommodation process with the employee. He shirks his duty to accommodate and then retreats behind the "disability-blind" reason that he simply fired the employee because she engaged in misconduct—despite the fact that he would be significantly less incentivized to treat a nondisabled employee the same way, as outlined above.[156] Because the majority rule considers "misconduct" as *per se* legitimate reason for adverse employment action, the employer is allowed to impose termination in lieu of an accommodation. Essentially, the majority rule creates a troublesome loophole in the ADA which becomes relevant whenever (1) an employee's misconduct is actually caused by her disability but (2) she fails to disclose the disability and its relation to the misconduct until the employer considers disciplinary action, and (3) the employer is left discretion regarding what type of discipline, if any, to impose.[157] The ill-timed disclosure is key. Had the employee disclosed the disability and its relationship with the misconduct before she had violated standards to such an extent that would make the employer contemplate termination, there would be no question that, despite

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155 *See* 42 U.S.C. § 12112 (b)(5)(A) (2018) (including as construction of discrimination "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

156 *See supra* notes 136–38 and accompanying text.

157 The EEOC guidance seems to assume that the disciplinary process in response to employee misconduct lends itself to a clear-cut application of prescribed punishments for different types of violations. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA ¶ 36 (2002) ("An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future . . . except where the punishment for the violation is termination."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1997-2, ENFORCEMENT GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES ¶ 30 (1997) [hereinafter EEOC GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES] (providing an example of how to discipline a disabled employee's misconduct assuming that the employer has a "policy of immediately terminating the employment of anyone who threatens a supervisor"). The reality, however, seems to be that employers, even when establishing categories of work rule violations, retain discretion to impose even the most severe penalties, i.e., termination, when circumstances warrant. *E.g.*, 1 STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS § 4:03 (2008) (practical guidance advising employers to reserve the right to discharge employees for nonserious offenses).

whatever lesser discipline imposed for the first few offenses, the employer would have a duty to accommodate the disability going forward. On the other hand, had the employee failed to disclose the disability until after she was fired, the knowledge prong of the failure to accommodate framework could not be satisfied, and thus the employer could not be held liable for failing to accommodate a disability of which he was totally unaware.

The legal test for this tweaked version of the minority rule, then, might look something like the following. First, the plaintiff would establish a prima facie case by showing that (1) she is an individual with a disability; (2) she is "otherwise qualified" for the position from which she was terminated; (3) there exists a "causal nexus" between the disability and the conduct on which her termination was predicated; and (4) the management official responsible for her termination, at a point in time before the termination decision was finalized, knew or should have known about both the existence of the disability and its causal connection to the misconduct. If the plaintiff satisfies these elements under a preponderance of the evidence standard, the burden will shift to the employer to prove an affirmative defense, such as by showing (a) that there exists no reasonable accommodation which would allow the employee to comply with the conduct standard in the future to the extent required by business necessity; (b) that retention of the employee would pose a significant risk of substantial harm to the safety of other individuals in the workplace; or (c) that engaging in the accommodation process would subject the employer to undue hardship.

This formulation strives to preserve the traditional threshold requirements of an ADA case (as (1) and (2) establish the plaintiff's membership in the protected class) but also focuses the inquiry on the underlying cause of the conduct that predicated the termination and the responsible official's actual or constructive knowledge of it. It also declines to graft onto the case the *McDonnell Douglas* disparate treatment framework nor the disparate impact analysis. Note that this test dispenses with both (a) the categorical rejection of the idea that an employer never has to tolerate an employee's misconduct and (b) the maxim that "reasonable accommodation is never 'retroactive.'"[158] Dispensing with the former recognizes that tolerance for misconduct is unproblematic insofar as the direct threat defense remains unavailable. Dispensing with the latter recognizes that the idea of retroactivity with respect to accommodations has been a misnomer;

158 *See generally* EEOC GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES, *supra* note 157, ¶ 36 ("Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.").

there is nothing necessarily "retroactive" about refraining from discipline for conduct for which the employee was not culpable and which may be remedied going forward by an accommodation.

However, this formulation is probably not the only workable test, and the central aim of this Note was never to advocate for the widespread adoption of a particular test one way or the other. Rather, this Note aims to have illustrated the difference between the majority rule and the minority rules with respect to terminations for disability-caused misconduct and to have demonstrated that the majority rule is neither a coherent nor a desirable interpretation of the ADA. The haste with which the federal courts have granted employers a blank check to remove employees with disabilities wherever the label of "misconduct" appears justifiably concerns those who wish to see the promises of the ADA fulfilled. The goal of equal opportunity in the workforce for individuals with disabilities—even amidst prevalent stereotypes about the dangers of the mentally ill—should not be so easily defeated.