COMMENT

REASONABLE ACCOMMODATION: WHO SHOULD BEAR THE BURDEN?*

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I. INTRODUCTION

Recognizing the terrible prejudices facing America's disabled citizens[1] and the economic and social burdens placed on our society as a result of those prejudices,[2] Congress enacted the Americans with Disabilities Act of 1990 (ADA).[3] Not unlike Title VII of the 1964 Civil Rights Act,[4] a major purpose of the ADA is to prohibit discrimi-

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1. *See* 42 U.S.C. § 12101(a) (1994). Congress found that some 43,000,000 American citizens have disabilities, and as the nation grows older, this number will increase. *See* 42 U.S.C. § 12101(a)(1). Congress also listed in its findings that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, . . . exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5).

2. *See* 42 U.S.C. § 12101(a)(9). It is important to note that Congress is referring to the economic burden created by causing such a substantial portion of American society to be dependent and unproductive. *See id.* A major goal of the ADA, then, is to promote and facilitate economic efficiency. *See* 42 U.S.C. § 12101(a)(8). Compare this goal with the Author's comments accompanying *infra* note 189.

3. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994).

4. *See* 42 U.S.C. § 2000e to 2000e-17 (1994).

nation in the employment arena.[5] Despite the obvious similarities between race and disability discrimination, a fundamental difference in the latter presents problems unique to the disability context. Whereas Title VII strictly prohibits employers from considering an employee's protected trait,[6] it is often necessary for an employer to contemplate an employee's disability.[7]

The ADA, however, does not represent Congress' first attempt at addressing the problem of disability discrimination in employment. Prior to the ADA's enactment, recourse for disability based discrimination fell solely under the 1973 Rehabilitation Act (Rehabilitation Act),[8] which continues to serve as a mandate prohibiting "handicap"[9] based discrimination by federal agencies, federal contractors, recipients of federal grants, and participants in federal programs.[10] Awareness of this Act is essential when examining the development of the ADA because it is upon this Act that the ADA was modeled.[11] In fact, many of the ADA's pivotal concepts are derived directly from regulations and judicial decisions interpreting the Rehabilitation Act.[12] As a consequence, courts look to parallel Rehabilitation Act decisions for guidance in deciding issues which arise under the ADA.[13]

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5. *See* 42 U.S.C. §§ 12101–12213.

6. The obvious exception to this assertion is the bona-fide occupational qualification defense (BOQ).

7. *See* 42 U.S.C. § 12111(8) (defining "qualified individual with a disability"). "The ADA would not, for example, require a bus company to hire a blind driver." Lianne C. Kynch, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515, 1536 (1995).

8. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 791–796(I) (1988).

9. Instead of using the term "disability," the Rehabilitation Act uses the term "handicap." *See* 29 U.S.C. § 791(b). As at least one scholar has recognized, a difference may exist between the two terms. *See* Kynch, *supra* note 7, at 1546 n.1. Where "disability" refers to the medical condition itself, the term "handicap" refers to a person's status as a result of having the disability. *See id*.

10. *See* Kynch, *supra* note 7, at 1524.

11. *See* Louis C. Rabaut, *The Americans with Disabilities Act and the Duty of Reasonable Accommodation*, 70 U. DET. MERCY L. REV. 721, 727–28 (1993). For a discussion of the legislative history of the ADA, see *infra* notes 153–60 and accompanying text.

12. *See* Rabaut, *supra* note 11, at 727.

13. *See id.* The ADA itself provides, "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq*.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

As its general rule, Title I of the ADA states, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[14] On its face, the prohibition against disability discrimination seems linguistically similar to that prohibiting discrimination based on a protected trait under Title VII.[15] The significant difference, however, stems from Congress' definition of "qualified individual with a disability." The Act states, "`qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[16] Though the ADA does not impose an affirmative action requirement on employers in the same manner as does § 501 of the Rehabilitation Act,[17] Congress' use of the term "reasonable accommodation" implies that some measure of affirmative conduct on the part of an employer may be required.[18]

The issue most often arises in situations where a disabled employee cannot perform the essential functions of his or her employment position without some form of accommodation. Where the accommodation sought is reasonable, the employer must take the

14. 42 U.S.C. § 12112.

15. *See* 42 U.S.C. § 2000e-2(a)(1). This subsection of Title VII reads, "It shall be an unlawful employment practice for an employer — to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id*.

16. 42 U.S.C. § 12111(8).

17. *See* 29 U.S.C. § 791.

18. *See* 42 U.S.C. § 12111(9)(A)–(B). The ADA requires, where reasonable accommodation is possible, that an employer provide such accommodation. *See id*. Failure to do so constitutes violation of the Act. *See* 42 U.S.C. § 12112(b)(5)(A)–(B).

> As used in subsection (a) of this section, the term "discriminate" includes . . . (5)(A) 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 . . . ; (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .

Id.

steps necessary to provide the requested accommodation.[19] Though this construct is plainly obvious, the questions that surface as a result reveal the more fundamental problems facing the federal circuits today. Who must suggest the accommodation? Who must prove the accommodation's reasonableness? Proper allocation of the burdens of production and persuasion with regard to "reasonable accommodation" has emerged as one of the most problematic issues yet to be resolved under the ADA.

Complete discord among the federal circuits regarding the proper solution explicates this proposition.[20] Where some courts have placed both the burden of production and persuasion squarely on the plaintiff/employee,[21] others have split the burdens.[22] Still other courts have required an "interactive process," directing that both parties come together to determine the appropriate reasonable accommodation, provided one is possible.[23]

With its decision in *Willis v. Conopco, Inc.*,[24] the Eleventh Circuit added its name to this growing inter-circuit conflict. Because the decision is relatively recent,[25] the court in *Willis*, prior to adopting its particular solution, was able to address each of the competing theories offered by other circuits.[26] Accordingly, the *Willis* decision provides an ideal starting point for an analysis of this problem. Following a thorough examination of *Willis*, this Comment will assess the majority and minority perspectives, as articulated by the other circuit courts of appeal. Following this survey, the Author will look to congressional and administrative guidance for help in determining the solution that best fits with the Act's stated intent. Finally, the Author will critically analyze each of the rationales currently being followed and offer an opinion as to the proper solution to this

19. *See* 42 U.S.C. § 12112(b)(5)(A)–(B).

20. *See infra* notes 92–152 and accompanying text for discussion.

21. *See infra* notes 92–122 and accompanying text for discussion.

22. *See infra* notes 123–34 and accompanying text for discussion.

23. *See infra* notes 135–52 and accompanying text for discussion.

24. 108 F.3d 282 (11th Cir. 1997).

25. The *Willis* decision was entered on March 25, 1997. *See id.* At the time this Comment was written, the Eleventh Circuit had decided only two cases employing the rule from *Willis*. Terrell v. USAir, No. 96-2345, 1998 WL 2372 (11th Cir. Jan. 6, 1998); Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997).

26. *See infra* notes 27–91 and accompanying text for a complete discussion of the *Willis* decision.

dilemma.

II. THE WILLIS *DECISION*

A. Factual and Procedural Development

Lynda Willis worked in the packing area of a plant owned by Lever Brothers, a company in the business of selling laundry detergent.[27] In March 1992, Ms. Willis began experiencing a persistent cough and skin rash.[28] The plant physician took blood tests, treated Ms. Willis, and placed her on restricted duty so as to limit her exposure to the detergent.[29] The blood tests demonstrated that Ms. Willis bore a high sensitivity to certain enzymes contained in the detergent.[30] As a result, her employer placed her on temporary assignment to an administrative position in the plant's safety office.[31] Upon confirmation of Ms. Willis' condition, "the employer monitored the air quality of its warehouse and spare parts area to determine" a suitable working environment.[32] The employer found such a suitable environment, and subsequently reassigned Ms. Willis to a spare parts area.[33] In addition to reassignment, Ms. Willis' employer (1) instructed her "to wear a mask when crossing the packing area floor";[34] (2) provided her with a pass allowing her to park her car near a door away from the packing area floor;[35] (3) "excused her from performing housekeeping audits in areas" containing a high enzyme level;[36] (4) excused her from meetings in those areas;[37] and (5) continued to monitor Ms. Willis' pulmonary functions.[38]

Because of an unrelated orthopedic condition,[39] Ms. Willis took medical leave beginning in October 1993.[40] In January 1994, her

27. *See Willis*, 108 F.3d at 283.
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *Id.*
33. *See Willis*, 108 F.3d at 283.
34. *Id*.
35. *See id.*
36. *Id.*
37. *See id.*
38. *See id.*
39. *See Willis*, 108 F.3d at 283.
40. *See id.*

orthopedic surgeon released her to return to work with Lever Brothers without restriction.[41] Soon after, however, she notified her employer that she had seen an "environmental medicine" physician[42] who advised Ms. Willis not to return to her particular job,[43] and naming immune system abnormalities, actually recommended that she stop working at the plant altogether.[44] At this point, Ms. Willis requested that her employer either: (1) reassign her to a safe work area; or (2) enclose and air condition the spare parts area.[45] In response, Lever Brothers retained a pulmonologist to examine Ms. Willis.[46]

Predictably, the pulmonologist found Ms. Willis fully capable of resuming her employment.[47] As a consequence, Lever Brothers instructed Ms. Willis, to return to work.[48] When she did not, Lever Brothers terminated her employment.[49]

Ms. Willis brought suit in the Northern District of Georgia alleging that her employer, Lever Brothers, violated the ADA.[50] The district court assumed Ms. Willis fit the definition of "qualified individual with a disability"[51] but nevertheless granted summary judgment for Lever Brothers, finding that "no triable issue of material fact existed on whether [Lever Brothers] could have made reasonable accommodations for [Ms. Willis'] disability."[52] The Eleventh Circuit Court of Appeals affirmed, holding that Ms. Willis did not meet her burden of requesting an accommodation, reasonable or other-

41. *See id.*

42. *Id.* An environmental medicine physician is not considered a practitioner of mainstream medicine. *See id.* at 283 n.1. Nor is environmental medicine "generally accepted as scientifically valid by `mainstream' medical community." *Id.*

43. *See id*.

44. *See id.* In his report, the environmental medicine physician stated, "[Plaintiff] has been exposed to various chemicals in the work environment at [Defendant plant] . . . . She definitely has immune system abnormalities and I think, she should stop working at this [] plant. There is nowhere within that building that she would be safe . . . . I reiterate: She should not be working in that building." *Id.* (alterations in original).

45. *See Willis*, 108 F.3d at 283.

46. *See id.*

47. *See id.* at 284.

48. *See id.*

49. *See id*.

50. *See id.*

51. *Willis*, 108 F.3d at 284.

52. *Id*.

wise.[53]

B. The *Willis* Court's Analysis

As grounds for her appeal, Ms. Willis asserted that the trial court committed two errors. First, she alleged error because Lever Brothers "failed even to attempt to make reasonable accommodations for her."[54] She asserted that Lever Brothers neither transferred her to a new position,[55] nor did they endeavor to make the spare parts area safe for her.[56] Second, Ms. Willis contended that the district court erred when it placed on her the burden to request a specific accommodation.[57] She claimed that the ADA merely required her to request an accommodation in the abstract,[58] after which she and the defendant were required to participate in an "interactive process" for the purpose of actually arriving at a reasonable accommodation.[59]

As support for her claim, Ms. Willis mainly relied on the Seventh Circuit's opinion in *Beck v. University of Wisconsin Board of Regents*.[60] In that case, the Seventh Circuit cited the Equal Employment Opportunity Commission's Interpretive Guidance (EEOC Guidance) as the impetus for its rationale.[61] The EEOC Guidance states, "regulations envision an interactive process that requires participation by both parties: `[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a reasonable process that involves both the employer and the [employee] with a disability.'"[62] *Beck* interprets this language as requiring an

53. *See id.* at 287. The court also dismissed Ms. Willis' claim alleging retaliatory discharge. *See id.*

54. *Id.* at 284.

55. *See id*.

56. *See id.*

57. *See Willis*, 108 F.3d at 284.

58. *See id*. Ms. Willis saw her duty as only requesting the concept of accommodation. *See id.* She asserted that after requesting this concept, her burden was relieved. *See id.*

59. *See id.* For discussion of the interactive process, see *infra* notes 135–52 and accompanying text.

60. 75 F.3d 1130 (7th Cir. 1996).

61. *See Willis*, 108 F.3d at 284. For further discussion of the Seventh Circuit's stance and the rationale involved, see *infra* notes 135–41 and accompanying text.

62. *Willis*, 108 F.3d at 284 (quoting *Beck*, 75 F.3d at 1135 (alterations in original)).

employee to meet only his or her initial burden of informing the employer of the need for an accommodation.[63] Once this has been accomplished, "[t]he employer has at least some responsibility in determining the necessary accommodation."[64] The best method for fulfilling this obligation is for the employer to enter into a "flexible, interactive process" with the employee.[65]

The *Willis* court, concentrating its focus on what it termed as the "traditional norms and rules of litigation,"[66] rejected the "interactive process" requirement.[67] For direction, the court looked to a District of Columbia Circuit case decided under the Rehabilitation Act, in which a heavy emphasis was placed on the Code of Federal Regulations giving guidance to that Act.[68] The Code identifies the plaintiff's burden as one that includes a showing of reasonable accommodation, which the plaintiff must describe.[69] The defendant must then refute the plaintiff's case.[70] At all times, however, the burden remains with the plaintiff to prove his or her case by a preponderance of the evidence.[71]

Accordingly, the *Willis* court recognized, where a plaintiff cannot show "reasonable accommodation," the employer's lack of investigation into such accommodation is not a relevant issue.[72] Though

63. *See id.* at 285.

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

65. *Willis*, 108 F.3d at 284 (citing *Beck*, 75 F.3d at 1135).

66. *Id*. at 286. The court intimated that the traditional rules and norms of litigation involve a process whereby the plaintiff proves every element of his or her case. *See id.* The court asserted:

> [W]e doubt that, in providing for a private right of action to enforce the rights created by the ADA, Congress intended such a departure from the traditional rules and norms of litigation. This doubt is especially strong where an established body of civil rights jurisprudence (which employed conventional burdens of production and proof for plaintiffs and defendants) existed, and Congress expressly relied on existing civil rights laws in creating the [ADA].

Id.

67. *Id*.

68. *See id*. at 284. The case cited is *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993). For discussion of *Barth*, see *infra* notes 86, 101–04, and accompanying text.

69. *See Willis*, 108 F.3d at 284 (quoting *Barth*, 2 F.3d at 1186 and citing 29 C.F.R. § 1613.702(f) (1997)).

70. *See id*. (citing *Barth*, 2 F.3d at 1186).

71. *See id.*

72. *See id*. at 285 (paraphrasing Moses v. American Nonwovens, Inc., 97 F.3d 446, 448 (11th Cir. 1996)).

the employer's failure to investigate may be disheartening,[73] this omission does not establish a cause of action under the ADA.[74] For support for this proposition, the *Willis* court cited one of its earlier decisions, *Moses v. American Nonwovens, Inc.*[75] In that case, the Eleventh Circuit rejected an ADA claim where the claimant/employee alleged that his "employer not only failed to make reasonable accommodations for his disability, but also failed — before terminating" the claimant, to even consider the available accommodation options.[76] To hold otherwise, the *Moses* court realized, would be to provide an ADA plaintiff with a cause of action even in situations where no accommodations could possibly have been made.[77]

In addition to rejecting the "interactive process" theory on the grounds already discussed, the *Willis* court looked to the theory's punitive nature[78] as further support for its rationale.[79] The ADA, the court intimated, is remedial rather than punitive. The Act was not designed to punish callous behavior — such as where an employer completely ignores any possible accommodations — if, in fact, no accommodation could possibly be made.[80]

Remaining focused on the idea that an ADA plaintiff must prove his or her case, the *Willis* court addressed yet another contention. Several circuits, including the Second and Third, have held that whether an accommodation is reasonable or whether it would impose an undue hardship encompasses, in reality, the same issue.[81] Such a construct, according to *Willis*, confuses some very important elements of the ADA.[82] Combining these problems would, in effect,

73. *See id.* The court explained that it was "troubled by evidence that the employer had failed to investigate accommodating the plaintiff." *Id*.

74. *See id.*

75. 97 F.3d 446 (11th Cir. 1996).

76. *Willis*, 108 F.3d at 285.

77. *See id.*

78. *See id.* The statute would become punitive in such a case because, instead of righting the wrongs that arise as a result of disability discrimination, conduct could be punished where no discrimination took place. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 285–86. For a thorough discussion of this issue, see *infra* notes 120–31 and accompanying text.

82. *See Willis*, 108 F.3d at 286.

relieve the plaintiff's obligations under the statute.[83] That the reasonable accommodation and undue hardship inquiries may at times be similar, or even identical, should not affect the burden carried by the plaintiff with regard to making his or her case.[84] Citing *Barth v. Gelb*, the court stated, "the question of whether an accommodation is reasonable (though it must be determined within a given set of specific facts) is more of a `generalized' inquiry than the question of whether an accommodation causes a `hardship' on the particular employer that is undue."[85] The court in *Willis* noted that "reasonable accommodation" is one which "is reasonable in the run of cases." Conversely, the "undue hardship" inquiry is more fact specific.[86] Establishing reasonability, no matter how clearly linked to the affirmative defense of undue hardship, remains a major component of the plaintiff's burden.[87]

The *Willis* decision is most easily characterized by its emphasis on the traditional views associated with statutory burdens of production and persuasion.[88] The court expressly rejected arguments, accepted by other circuits, that stand for any alteration of the traditional norms and rules of litigation.[89] According to the *Willis* court, relieving an ADA plaintiff of his or her duty to prove each element of his or her case does nothing for the purpose of the statute.[90]

III. OTHER CIRCUITS

In addition to the point of view adopted by the *Willis* court, differing interpretations of statutory language, legislative history, and case law have led courts to at least two other general conclusions. Furthermore, several circuits add their own spin to the general rule they follow. In the ensuing sections, the Author will evaluate these stances and identify the nuances adopted under each.

83. *See id.* For further analysis of this issue, see *infra* notes 183–92 and accompanying text.

84. *See Willis*, 108 F.3d at 286.

85. *Id*. at 286 n.2.

86. *Id.* (quoting *Barth,* 2 F.3d at 1187).

87. *See id.*

88. *See id.*

89. *See id.*

90. *See Willis*, 108 F.3d at 285–86.

A. Circuits Placing Both Burdens on the Employee

Courts placing both the burden of production and persuasion on the employee champion the theory that an ADA plaintiff must prove every element of his or her case. This burden includes a showing that the applicant or employee is a "qualified individual with a disability."[91] Within that definition is the requirement that he or she be able to perform the essential functions of his or her employment position with or without reasonable accommodation.[92] According to these courts, the term "reasonable" represents an integral part of the plaintiff's prima facie case.

The District of Columbia Circuit, in *Carter v. Bennett*,[93] recognized the "essential functions" requirement when it used the Interpretive Guidance to the Rehabilitation Act[94] for help in deciding the proper method for allocating the burden of proof with respect to reasonable accommodation.[95] Under that Guidance, the court, in dicta,[96] recognized the employer's duty to provide reasonable ac

91. *See supra* note 16 and accompanying text for definition of "qualified individual with a disability." If not "qualified," a claimant may not bring an ADA claim. *See* 42 U.S.C. § 12112(a). "Qualified," therefore, is a major component of an ADA plaintiff's case.

92. *See supra* note 16 and accompanying text.

93. 840 F.2d 63 (D.C. Cir. 1988). This case, decided under the Rehabilitation Act, involved a legally blind man who was terminated, allegedly, for poor performance. *See id.* at 64. The man worked with the Department of Health, Education and Welfare as a public affairs assistant. *See id.* His main duties included transcribing printed matter into braille and answering correspondence directed to the Office of Civil Rights by members of Congress and the public. *See id.* Citing poor performance and less than satisfactory attitude, his supervisor presented Carter with a "Decision to Remove" in June 1982. *See id.* After filing several complaints with the Equal Employment Opportunity office, Carter filed suit in district court alleging his employer's violation of both the Rehabilitation Act and Title VII of the 1964 Civil Rights Act. *See id.*

94. 29 C.F.R. § 1613.704 (1986).

95. *See Carter*, 840 F.2d at 65.

96. The court pointed out that

> [t]he EEOC promulgated extensive regulations to guide federal employers in making reasonable accommodations for handicapped persons:
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> > (a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
> > (b) Reasonable accommodation may include, but shall not be limited: (1) making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers

commodation, but listed as part of the plaintiff's prima facie case the duty to show that reasonable accommodation is possible.[97] "Once the plaintiff makes such a showing, the employer bears the burden of demonstrating inability to accommodate."[98] Though this language could possibly be interpreted as merging the reasonable accommodation inquiry with that of undue hardship, the same court, in *Barth v. Gelb*, cleared any confusion.[99]

In *Barth*, the District of Columbia Circuit again looked to the EEOC Guidance for help in deciding its position.[100] In doing so, the court stated that a "reasonable accommodation is one employing a method of accommodation that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular agency's operations."[101] In *Barth*, the plaintiff, a diabetic, was denied a position with the Voice of America (VOA) because, as the VOA asserted, he could not be guaranteed an assignment to a location with a proper medical facility.[102] The court did not deny that assignment only to those areas with proper medical facilities could be considered a reasonable accommodation in most cases, but recognized that in the particular situation before it, such an accommodation would have posed an undue hardship to the defendant.[103]

The Fifth Circuit, in *Reil v. Electronic Data Systems*,[104] followed

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and interpreters, and other similar actions.

Id. (quoting 29 C.F.R. § 1613.704 (1986)).

97. *See id*. The court stated, "In cases in which a handicapped plaintiff sought but was denied a position with the federal government, courts have held that the initial burden is on the plaintiff to make a prima facie showing that reasonable accommodation of his handicap is possible." *Id*.

98. *Id.*

99. *See Barth*, 2 F.3d at 1187.

100. *See id.* at 1184 (citing 29 C.F.R. §§ 1613.702). Title 29 C.F.R. § 1613.702 defines "handicapped person" and "qualified handicapped person." "Handicapped person is defined . . . as one who . . . [h]as a physical or mental impairment which substantially limits one or more . . . major life activities . . . ." *Id*. The definition of "qualified handicapped person" is nearly identical to that of "qualified individual with a disability" under the ADA. *See id*.

101. *Barth*, 2 F.3d at 1187.

102. *See id*. at 1181.

103. *See id.*

104. 99 F.3d 678 (5th Cir. 1996).

an identical line of reasoning when it addressed a similar issue.[105] In *Reil*, the court reversed a summary judgment order because the defendant/employer failed to properly plead its defense.[106] In district court, the employer attacked the plaintiff's proposed accommodations as unreasonable in the defendant's specific circumstances.[107] The Fifth Circuit held that this pleading could not be used to rebut the plaintiff's showing of reasonable accommodation, but must be plead as the affirmative defense of "undue hardship."[108] Therefore, the issue should have gone before the trier of fact.[109] In conclusion, the *Reil* court stated, "Reil (the plaintiff) need only show an accommodation reasonable `in the run of cases' and undue hardship will often be overlapping and resist neat compartmentalization. Nonetheless, they remain distinct inquiries even if asked of similar evidence."[110]

Inherent in the theory that an ADA plaintiff bears the burden of proving each and every element of his or her case is the idea that the plaintiff must also be the party responsible for suggesting, or proposing, the accommodation. In *White v. York International Corp.*,[111] the Tenth Circuit provided an excellent example of this concept.[112] The court opined that to qualify for relief under the ADA,

105. *See id.* at 680. This case dealt with a diabetic systems engineer who was fired for alleged poor performance. *See id.* The disabled claimant, Reil, failed to meet 13 milestone deadlines. *See id.* at 681. He alleged that his diabetes caused vision problems and fatigue which, in turn, prevented him from meeting those deadlines. *See id.* at 680. Following his termination, Reil sued his employer for violation of the ADA, claiming that the employer failed to accommodate his renal failure and accompanying fatigue. *See id*. at 681. The district court applied the *McDonnell Douglas/Burdine* burden shifting scheme to analyze Reil's discrimination contention. *See id.* The district court found that Reil did not meet the definition of "qualified individual with a disability" because he could not perform the essential functions of the position with or without reasonable accommodation. *See id.* Additionally, the district court held that the accommodations Reil sought were not "reasonable accommodations" under the ADA. *See id.*

106. *See id.* at 684.

107. *See id*. at 681.

108. *See id.*

109. *See id.* at 683.

110. *Reil*, 99 F.3d at 683.

111. 45 F.3d 357 (10th Cir. 1995).

112. *White* involved an individual who suffered from a fused right ankle. *See id*. at 359. He worked as a machine operator until he was terminated for excessive absenteeism; as the result of the injury to his ankle, White left work for more than a 12 month period. *See id.* In addition to the absenteeism, the employer cited White's disability as a factor in his termination. *See id.* The employer indicated that, because of White's medi-

a plaintiff must show three elements.[113] First, he or she must be a disabled person under the ADA.[114] Second, he or she must be "qualified."[115] Third, the plaintiff must be able to show that the employer terminated him or her "because of" his or her disability.[116] In *White*, the court rejected the plaintiff's argument that with reasonable accommodation, which the plaintiff did not describe, he could perform the essential functions of the position.[117] The plaintiff offered nothing but his opinion, and maintained that because of his request, the employer's failure to initiate the "interactive process" for the purpose of identifying the precise reasonable accommodations that could be made, constituted a violation of the ADA.[118] In response, the court proclaimed that the interactive process can only be triggered once the disabled employee is "qualified" within the meaning of the statute; a showing which includes the concept of reasonable accommodation.[119] The plaintiff was not "qualified," according to the court, because he "produced no evidence that accommodation was possible."[120] The employer's duties, provided he had any, were never triggered.[121]

B. Circuits Merging Reasonable Accommodation With Undue Hardship

Two circuits, promoting the theory that an accommodation is not reasonable if it causes undue hardship, have adopted the view that the "reasonable accommodation" and "undue hardship" inquiries amount to two sides of the same coin.[122] Perhaps best demon

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cal restrictions, it was unaware of any accommodation it could make that would allow White to perform his job. *See id.* White sued under the ADA, alleging that if provided reasonable accommodation, he could perform his job. *See id.*

113. *See id.* at 360.
114. *See id.*
115. *See id.*
116. *See id.*
117. *See White*, 45 F.3d at 363.
118. *See id*.
119. *See id.*
120. *Id.*
121. *See id.*
122. *See, e.g.,* Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995); Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991); Guess v. Pfizer, Inc., 971 F. Supp. 164, 173 (E.D. Pa. 1996). The Second

strating this rationale is the Second Circuit's decision in *Borkowski v. Valley Central School District*.[123] That case, brought under the Rehabilitation Act, involved a school teacher who was terminated as the result of alleged poor performance.[124] The court held that she presented a valid case because she had known disabilities and the school terminated her without considering whether those disabilities could be accommodated.[125] To properly evaluate her claim, the court first addressed the allocation of the burdens of production and persuasion with regard to "reasonable accommodation."[126]

The *Borkowski* court defined "reasonable accommodation" as a relational term.[127] The court stated that such a term requires an analysis of both the benefits of the accommodation and the costs.[128] The court then recognized that the term "undue hardship" possessed the same characteristics.[129] In either instance, a cost/benefit analysis must be performed.[130] The court then elected to reserve this analysis for the defendant as part of his or her "undue hardship" affirmative defense.[131] The plaintiff's burden, the court decided, is only one of production, requiring a facial showing that the costs of the proposed accommodation do not clearly exceed the benefits.[132] As the court recognized, such a showing is not difficult, and does not require any manner of proof.[133]

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and Third Circuits merge the reasonable accommodation inquiry with the affirmative defense of undue hardship.

123. 63 F.3d 131 (2d Cir. 1995).

124. *See id.* at 134. As the result of a motor vehicle accident, the claimant/school teacher suffered major head trauma and sustained serious neurological damage. *See id.* Though she improved significantly, she was left with continuing memory loss and an inability to concentrate. *See id.* Her balance, coordination, and mobility also showed effects from the accident. *See id.* Unfortunately, her performance as a teacher suffered. *See id.* She had trouble controlling classes and could not stand and move about while teaching. *See id.* Consequently, Ms. Borkowski was denied tenure. *See id.* She subsequently filed suit under the Rehabilitation Act. *See id.*

125. *See id.* at 135.

126. *See id.* at 136.

127. *See id.* at 138.

128. *See id.*

129. *See Borkowski*, 63 F.3d at 138.

130. *See id.* at 139.

131. *See id.* at 138.

132. *See id.*

133. *See id.* at 139. "On the issue of reasonable accommodation, the plaintiff bears only the burden of *identifying* an accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id.* (emphasis added).

C. Circuits Adopting the Interactive Process

Perhaps the best illustration of the need for a solution to the "reasonable accommodation" burden shifting problem is exhibited by the federal circuits requiring an "interactive process" as part of the "reasonable accommodation" analysis. The confusion, created by different interpretations of agency regulations and prior precedent, rears its ugly head because the federal circuits do not construe "interactive process" in quite the same fashion.

In the Seventh Circuit, interactive process is required when the employer knows that the applicant or employee needs an accommodation.[134] Consequently, the burdens of production and proof with regard to reasonable accommodation are borne by both parties.[135] The rationale for such an interpretation comes directly from the Code of Federal Regulations implementing the ADA.[136] The Code states, "the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability."[137] In *Beck v. University of Wisconsin Board of Regents*,[138] the court held that liability for the employer's failure to provide reasonable accommodation attaches only in situations where the employer is responsible for the breakdown of the interactive process.[139] In so holding, the court intimated that whichever party is re-

134. *See* Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996).

135. For further discussion of the interactive process and its effects on both parties, see text accompanying *infra* notes 188–99.

136. 29 C.F.R. § 1630 (1995).

137. 29 C.F.R. § 1630.9 (1995).

138. 75 F.3d 1130 (7th Cir. 1996).

139. *See id*. at 1137. The *Beck* case involved the alleged failure of the University of Wisconsin to provide "reasonable accommodations," within the meaning of the ADA, to Lorraine Beck, an employee who, during the latter part of her employment, suffered from osteoarthritis and depression. *See id.* at 1132. Beck was a secretary to the Dean of the School of Nursing. *See id.* Her disability caused her great pain when performing her secretarial duties, leading her to request numerous accommodations so as to make performance less burdensome. *See id.* After taking medical leave, she requested that she be reinstated in a new department. *See id.* at 1133. Her request was denied, however, and she was told to report to work. *See id.* When she did not, she was terminated. *See id.* She then filed suit against her former employer alleging violation of the ADA. *See id.*

sponsible for breakdown of the interactive process will lose on the issue of reasonable accommodation.[140]

Several circuits, including the First and Tenth, strongly recommend that parties enter into an interactive process, but concede that the process should not serve as a requirement. The First Circuit, in *Jacques v. Clean-up Group, Inc.*,[141] held that although failure to participate in the interactive process may at times constitute a violation of the ADA, the court could not so find in the particular circumstances before it.[142] In reaching this conclusion, the First Circuit adopted a middle ground approach between those circuits, such as the Seventh and Ninth, which require the interactive process,[143] and those circuits which reject the idea altogether. The court in *Jacques* noted that the Regulations' use of the word "may" instead of the word "shall" when referring to an employer's responsibility to engage in an interactive process clearly shows that while Congress could have instituted this step as an obligation, it refrained from doing so.[144] The court then discussed the merits of the Seventh Circuit's rationale for actually requiring the process.[145] In choosing its path, the court stated that whether failure to engage in the interactive process serves as a violation often turns on the particular facts of the case and an appraisal of the reasonableness of the parties' actions.[146] Where such a failure is reasonable, it will not

140. *See id*. at 1137.

141. 96 F.3d 506 (1st Cir. 1996).

142. *See id.* at 515. The epileptic complainant, Jacques, was employed by Clean-up Group, Inc. as an all-purpose cleaning person. *See id.* at 509. Due to his epilepsy, Jacques was not permitted to drive a motorized vehicle in Maine. *See id.* Financial problems forced the employer to lay off several employees, including Jacques, but when more work became available, he was rehired. *See id.* Jacques was then assigned a cleaning job for which he needed some form of motorized transport. *See id.* The employer told Jacques that he would have to provide the transportation himself. *See id.* When he could not, the employer assigned the job to another employee. *See id.* at 510. Despite his problems, Jacques remained with the company. *See id.* His next assignment, however, was considered one of the least desirable. *See id.* He managed to report to the site for about one month before he decided to leave the Clean-up Group, Inc. *See id.* Jacques then sued his former employer under the ADA, alleging that when he returned to work, the employer discriminated against him by not accommodating his inability to transport himself to the initial work site assigned him. *See id.*

143. *See supra* text accompanying notes 134–42.

144. *See Jacques*, 96 F.3d at 513 (examining 29 C.F.R. § 1630.2(o)(3)).

145. *See id.* at 514.

146. *See id.*

constitute a violation.[147]

The Tenth Circuit, as evidenced in *White v. York International Corp.*, also recognizes the Regulations' interactive process suggestion.[148] But unlike the circuits previously mentioned, the Tenth does not attach the possibility of this requirement until after the plaintiff has proven himself otherwise qualified.[149] Consequently, the interactive process need not occur until after the possible accommodations have been suggested and proven reasonable.[150] At this point, the Tenth Circuit recognizes that the Regulations only "recommend" that the employee and employer come together to work out a proper solution.[151]

IV. CONGRESSIONAL AND AGENCY GUIDANCE

Though agency regulations and the legislative history of the ADA can be blamed for the tremendous confusion in the courts, careful scrutiny can provide some guidance as to which party bears the reasonable accommodation burdens. In the final analysis, however, it is Congress' failure to articulate a resolution to this seemingly predictable problem that has created, and continues to foster such confusion.

A. Congressional Intent as Expressed in Legislative History

The legislative history, with regard to the "reasonable accommodation" requirement, is best described as contradictory. For instance, one House Report states, "Like sections 501, 503, and 504 of the 1973 Rehabilitation Act, the ADA provides that the employer is not required to provide accommodations if the employer demonstrates that providing such an accommodation will pose an undue hardship on the operation of its business."[152] The Report then attempts to clarify the meaning of this language by stating that the definition of "undue hardship" was included in the statute solely for the purpose of distinguishing the duty to provide reasonable accom-

147. *See id.*
148. *See White*, 45 F.3d at 363.
149. *See id.*
150. *See id.*
151. *See id.*
152. H.R. REP. NO. 101-485, at 39 (1990).

modation under the ADA from the same duty under Title VII of the 1964 Civil Rights Act as it applies in the religious discrimination context.[153] The "undue hardship" language was included only to show that reasonable accommodation is a more significant standard under the ADA than the de minimus standard applied under Title VII.[154]

When viewed in this manner, it seems that Congress included the "undue hardship" language to only clarify the reasonable accommodation standard. It would seem that Congress intended for these inquiries to represent two sides of the same coin: an accommodation imposing undue hardship is, by definition, not reasonable. If looked at only through the lens of this interpretation, Congress clearly intended to place the burden of proving, or disproving, reasonableness on the employer's shoulders.

However, the same House Report seems to imply that the reasonable accommodation and undue hardship inquiries are indeed separate and distinct.[155] "The Committee recognizes that some accommodations that can easily be made in an office setting may impose an undue hardship in other settings. The determination of undue hardship is a factual one which must be made on a case by case basis."[156] This statement implies exactly the approach that cases paralleling *Willis v. Conopco, Inc*. have adopted: that reasonable accommodation is a generalized inquiry, while undue hardship is an employer's defense based on his or her particular circumstances.[157]

Congress' meticulous use of the word "reasonable" may also provide some guidance to the true intent underlying the ADA. For example, one committee report states, "[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not

153. *See id.* at 40.

154. *See id.* The report states, "[A] definition [of undue hardship] was included in order to distinguish the duty to provide reasonable accommodation in the ADA from the Supreme Court's interpretation of [T]itle VII in *TWA v. Hardison*, [432 U.S. 63 (1977).] which held that accommodations to religious beliefs need not be provided if the cost was more than de minimus to the employer." *Id.*

155. *See id.* at 42.

156. *Id.*

157. *See id.*

be considered discrimination."[158] Consistent use of the term "reasonable" in front of "accommodation" may indicate Congress' intention to place the burden of proving reasonableness on the plaintiff.

Senate Hearing 933 presents further evidence that the terms "reasonable accommodation" and "undue hardship" were intended to represent separate, distinct burdens. In that hearing, the Committee on Labor and Human Resources stated, "reasonable accommodation is a flexible standard that balances the rights of the applicant or employee with the employer's legitimate business interests. The determination of undue hardship must therefore be made on an individual basis."[159] This again supports the theme that "reasonable accommodation" is a general inquiry while "undue hardship" is specific.

B. Agency Regulations

Contradiction and confusion in the legislative history of the ADA only leads to more of the same in the Regulations adopted to give it guidance. Still, even though they are non-binding,[160] nearly all the circuit courts have adopted portions of these Regulations as part of their particular solutions to this problem.[161] Unfortunately, as demonstrated above, different sections of the Regulations use different language and can therefore be interpreted in many different ways.

One excellent example of the conflict surrounding the proper use, or use at all, of agency regulations lies in the difference between decisions such as *Willis*, which clearly reject the idea of interactive process,[162] and those such as the Seventh Circuit's decision in *Beck*, which stand for the opposite.[163] The *Willis* court, recognizing that

158. H.R. REP. NO. 101-336, at 693–94 (1990).

159. S. REP. NO. 101-336, at 320 (1989).

160. *See* Jeffrey S. Berenholz, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act*, 15 HOFSTRA LAB. & EMP. L.J. 635, 645 (1998). The author writes that although the agency guidelines are just EEOC's interpretation by the EEOC, the Supreme Court has indicated that the guidelines are not controlling; they can be used as persuasive authority. *See id.*

161. *See id.*; *see also supra* notes 95–98, 135–52, and accompanying text.

162. See *supra* notes 54–91 and accompanying text for a discussion of the *Willis* case.

163. See *supra* notes 60–65, 139–41, and accompanying text for a discussion of the *Beck* decision.

the EEOC Guidance is not binding, rejected interactive process as too punitive in nature.[164] The court argued that the ADA was intended to be a remedial statute, and that punishment for failure to participate in the interactive process was never contemplated by the ADA's drafters.[165] The *Beck* court, on the other hand, effectively ignored the word "may" in the regulations when it decided to require the interactive process.[166] As justification for this stance, the *Beck* court simply cites to another section of the Regulations which states, "the employer must make a reasonable effort to determine the appropriate accommodation."[167]

The *Willis* Court, in embracing the rationale applied in *Barth v. Gelb*, however, indirectly relied on agency regulations as well. For support, the court in *Barth* depended, as discussed previously, on the EEOC's Interpretive Guidance to the Rehabilitation Act.[168] For instance, the court was careful to point out that, according to the Code of Federal Regulations, a reasonable accommodation is one that is reasonable "in the run of cases," alternatively undue hardship looks at the plaintiff's preferred accommodation in the defendant's particular circumstances.[169]

In sum, legislative history and agency regulation cannot be afforded much weight with respect to solving this particular problem. Different courts can, and do, screen what it is they seek from each. In this way, a court can construct a solution to the question of which party carries the burdens of production and persuasion with regard to reasonable accommodation that fits with that court's particular agenda.

V. CRITICAL ANALYSIS

Second Circuit Chief Judge John O. Newman described the situation best when, in his *Borkowski* concurrence,[170] he stated, "This appeal exemplifies a recurring set of issues that arise when-

164. *See supra* notes 66–77 and accompanying text.
165. *See supra* notes 135–52 and accompanying text.
166. *See supra* text accompanying notes 135–52.
167. *Beck*, 75 F.3d at 1137.
168. *See supra* text accompanying note 101.
169. *Barth*, 2 F.3d at 1187.
170. See *supra* notes 123–33 and accompanying text for discussion of the *Borkowski* decision.

ever Congress makes very clear its desire to help some group of disadvantaged persons, but leaves very unclear how it expects its legislative solution to be implemented in a courtroom."[171] Judge Newman professed that "[w]hen Congress fails to make clear what procedural framework it wishes courts to follow in applying its substantive standards, there should be no surprise that different circuits embark on different procedural courses."[172] "The resulting uncertainty and confusion are unfortunate, but they will exist until these matters are given uniform answers either by the Supreme Court or by subsequent legislation."[173]

The question remains, however: Why the confusion? Does a proper solution exist? Through process of elimination, the Author will attempt to provide an answer to these questions. A closer look at each of the stances taken reveals the faults inherent in each, and may reveal the best solution for all those affected.

A. Analysis of Circuits Merging Undue Hardship with Reasonable Accommodation

As discussed earlier, the Second and Third Circuit Courts of Appeal abide by the theory that "undue hardship" and "reasonable accommodation" are, in effect, the same inquiry.[174] In taking this stance, these circuits have opted to place only the burden of proposing an accommodation on the plaintiff/employee.[175] The defendant/employer then carries the burden of proving unreasonableness as part of his or her "undue hardship" affirmative defense.[176] This approach, however, is flawed for two principal reasons. First, such a construction is not supported by the statute's language; and second, the plaintiff is relieved from proving a major element of his or her case. The latter results in serious ramifications for employers and, as some scholars would argue, society as a whole.[177]

171. *Borkowski*, 63 F.3d at 144 (Newman, J., concurring).

172. *Id.* at 148.

173. *Id.*

174. See *supra* notes 122–33 and accompanying text for discussion of the stances taken by the Second and Third Circuits.

175. *See supra* text accompanying notes 122–33.

176. *See supra* text accompanying notes 122–33.

177. See *infra* note 189 for a brief discussion of the economic consequences of the "merging" and "interactive process" theories. *Cf.* Berenholz, *supra* note 160, at 655. The

1. Problems with Language

A reading of the ADA reveals the most obvious problem inherent in the stance taken by the Second and Third Circuits. Simply put, the construction these circuits employ is in obvious derogation of the statute's language. Section 12112(b) of the ADA reads, in pertinent part:

> As used in subsection (a) of this Section, the term "discriminate" 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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .[178]

Similarly, § 12113(a) points out that a defense exists to a charge of discrimination where performance of the job "cannot be accomplished by *reasonable* accommodation."[179]

According to these excerpts, the terms "undue hardship" and

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author states:

> The only defense which employers can claim is that of undue hardship. . . . [I]t is important to take a brief look at the compliance costs and possible hardships which reassignment to a vacant position might cause. The EEOC estimates that the cost of an average reasonable accommodation would come out to $261. At this cost, it would seem that reasonable accommodations would not be an undue hardship for some employers. However, the economic impact should be regarded on a grand scale. "The required scope of an employer's search for alternative positions may be quite substantial depending on its size and resources."
>
> The laws, by design will allow more disabled individuals to enter into the workforce, who might require accommodations. The employer will have to find an accommodation for an injured employee, rather than declare him or her to be unfit for work. While some accommodations have a fixed cost, . . . others are intangible. These intangible costs, especially the cost of time lost to reassigning and training a disabled employee for a vacant position, are difficult to calculate, but still "must also be borne by the employer." Bearing even more on this point, "an employer fails to satisfy its obligation to provide reasonable accommodation if the disabled employee is assigned to a position in which he is not capable of performing."

Id. (citations omitted).

178. 42 U.S.C. § 12112(b)(5)(A).

179. 42 U.S.C. § 12113(a) (emphasis added).

"reasonable accommodation" are distinct notions. In proving his or her affirmative defense, it is not for the employer to prove that any proposed accommodation would result in undue hardship; the ADA clearly states that an employer must prove that a proposed *reasonable* accommodation involves such hardship. Where congressional intent provides little guidance,[180] complete ignorance of the statute's language when construing its scope is contrary to accepted methods of judicial interpretation.[181]

2. Effects of this Construction

In combining these inquiries into a single question, the Second and Third Circuits have released the ADA plaintiff from proving all the elements of his or her case.[182] When bringing a claim under the ADA, one of the first requirements an employee must meet is that he or she is, in fact, a "qualified individual with a disability."[183] Specifically, he or she must be an individual who, "with or without *reasonable* accommodation, can perform the essential functions of the employment position."[184] To remove the term "reasonable" from this required showing would, as the *Willis* court recognized, represent a significant "departure from the traditional rules and norms of litigation."[185] The ultimate burden of persuasion should rest at all times with the plaintiff.[186] Obligating the plaintiff to show only that accommodations exist, regardless of reasonableness, imputes a component of this burden to the employer.[187]

A defendant/employer who must prove the unreasonableness of the proposed accommodation is confronted with a tremendous burden. He or she faces the prospect of having to conduct a cost/benefit analysis, or other "pretermination investigation," in any situation

180. See *supra* notes 152–59 and accompanying text for discussion of legislative history and congressional intent.

181. *See* Bryant v. Better Bus. Bureau of Greater Md., 923 F. Supp. 720, 736 (D. Md. 1996).

182. *See* Willis v. Conopco, Inc., 108 F.3d 282, 286 (11th Cir. 1997); Reil v. Electronic Data Sys. Corp., 99 F.3d 678 (5th Cir. 1996); Barth v. Gelb, 2 F.3d 1180 (D.C. Cir. 1993); *see also* Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

183. *See* 42 U.S.C. § 12112(a).

184. 42 U.S.C. § 12111(8) (emphasis added).

185. *Willis*, 108 F.3d at 286.

186. *See id.*

187. *See id.*

where a disabled applicant or employee who, after being turned down or terminated from a position due to disability, asserts, without proof or support, that with some accommodation he or she could perform the job.[188] More significantly, the cost of such precautions can only be imputed to society as a whole.[189] Governmental constriction of management prerogatives in such a situation is economically inefficient, inexcusable, and unwarranted.[190] Should society pay for management's need for protection against a small minority of citizens?[191]

B. Analysis of the Rationale Requiring an "Interactive Process"

188. Under the rationale espoused by the Second Circuit in *Borkowski*, a cost/benefit analysis would need to be performed each time a disabled applicant or employee asserted that with some form of reasonable accommodation, which he or she must only facially describe, he or she could perform the job. *See Willis*, 108 F.3d at 285 (referring, in a quote from *Moses v. American Nonwovens, Inc.*, 97 F.3d at 448, to a "pretermination investigation" that would have to be conducted in such a circumstance). The burden of proof on the issue, though, is on the defendant. Regardless, then, of whether the employee may be accommodated, an employer will be forced to perform a precise cost/benefit analysis in order to avoid liability. *See id.* The problem is similar to that brought about by the interactive process.

189. Where an employer pays the cost of accommodation, society as a whole benefits. *See* Sue A. Krenek, *Beyond Reasonable Accommodation*, 72 TEX. L. REV. 1969, 2006–07 (1994). This cost is then passed on to customers or shareholders, and therefore, to society in general. *See id.* It follows, based on this reasoning, that where costs are increased, such as would occur when an employer's affirmative duties are expanded, this increase will also be imputed to society as a whole. *See* Christopher J. Willis, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 725–30 (1995) (stating that "[e]ach EEOC charge and lawsuit, whether successful or not, imposes costs on an employer forced to defend against the charge. . . . To the extent that the ADA increases business costs (by . . . adding litigation costs to an employer's cost of labor), business will attempt to pass that increased cost on to customers."). Hence, according to the rationale espoused in *Barth* and other decisions employing the "merging" theory, society will pay the increase in costs resulting from situations that involve no actual discrimination. This problem applies equally, though to a lesser degree, to the "interactive process" requirement. *See supra* notes 134–51 and accompanying text.

190. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 484 (1992).

191. Such a question refers only to the prospect, under the theory embraced by the Second and Third Circuits, that employers will be faced with having to address, with *proof*, unsubstantiated claims for accommodation. That society *should* bear the cost of providing reasonable accommodations where needed and proven is unchallenged. Society, as a whole, should have to pay for any benefits inherent to integrating disabled individuals into the mainstream. *See* Krenek, *supra* note 189, at 2005.

Though the interactive process, as promulgated by the EEOC Interpretive Guidance, has been recognized in several courts,[192] its application can be best described as inconsistent.[193] Even so, the interactive process requirement seems, on its face, to possess some measure of merit. It serves the desirable objective of bringing together the employer and employee for the purpose of solving the problem amicably. It is upon further examination, however, that the process exposes its flaws.

Again, as in the situation merging the "undue hardship" defense with the "reasonable accommodation" inquiry, the interactive process requirement effectively relieves an ADA plaintiff of his or her burden of proof with respect to his or her claim.[194] In some of the jurisdictions using this process, the plaintiff's burden is only one of suggesting an accommodation in the abstract.[195] Once the plaintiff has made such a suggestion, the employer's obligation to enter into the interactive process has been triggered.[196] Responsibility for a breakdown in the process, on the part of either party, can bring about dire ramifications for that party's position.[197]

The problem arises in situations where no possible accommodations exist.[198] If employers faced with these situations can be held liable for failing to enter into an interactive process, the ADA's disposition turns punitive.[199] As several courts have recognized, and as evidenced by Congress' findings in § 2 of the Act, Congress intended

192. *See supra* notes 134–51 and accompanying text.

193. *Compare supra* text accompanying notes 134–41, *with supra* text accompanying notes 141–51 for an illustration of inconsistencies in the application of the interactive process.

194. *See supra* text accompanying notes 67–80.

195. *See, e.g.,* Jacques v. Clean-Up Group, Inc., 96 F.3d 506 (1st Cir. 1996); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996).

196. *See Beck*, 75 F.3d at 1137 (stating that "[o]nce an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary"); *see also* Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1437 (N.D. Cal. 1996) (stating that "[o]nce an employee has let an employer know that he is disabled and desires reasonable accommodation, the employer is then obligated to offer reasonable accommodation . . . which may entail engaging in an interactive process with the employee").

197. *See Beck*, 75 F.3d at 1136.

198. *See Willis*, 108 F.3d at 285.

199. *See id.*; *see also* Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

the ADA to be remedial.[200] It is an attempt to "remedy" the wrongs in our society which preclude disabled individuals from full participation therein.[201] To hold an employer liable for failing to engage in an interactive process where no "reasonable" accommodation can possibly be provided cuts deep into the employer's managerial prerogatives,[202] and is clearly punitive in design.[203] Punishment should be reserved for violators, following the claimant's proof that *reasonable* accommodations were indeed possible.

C. The Proper Stance: Placing Both the Burden of Production and Persuasion with Regard to the "Reasonable Accommodation" Inquiry on the Claimant

Finally, the process of elimination ends with the stance espoused in *Willis v. Conopco, Inc*. The same basic concerns that proved the other stances inadequate serve to demonstrate the strong rationale behind the *Willi*s decision, and those decisions it followed.

1. Placing Both Burdens on the Claimant Is Most Consistent with the Language of the ADA

Perhaps the most significant indication that Congress intended to separate the "reasonable accommodation" inquiry from the "undue hardship" defense is the fact that these concepts are separated in the language of the statute itself.[204] If "undue hardship" was intended to be the sole inquiry, the term "reasonable" would constitute merely excess verbiage. Such a construction would "violate the well known maxim . . . that all words and provisions of statutes are intended to have meaning and are to be given effect."[205] The courts have made it clear that in construing legislation, substantial consideration should be given to the exact words of a statute, as those

200. *See* 42 U.S.C. § 12101.

201. *See id.*

202. Management prerogative, according to one scholar, includes "decisions about firm operation, the level of employment, the direction of profits to investment, and the like." Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws*," 1990 WIS. L. REV. 1, 107.

203. *See Willis*, 108 F.3d at 285.

204. *See* 42 U.S.C. § 12111.

205. *Bryant*, 923 F. Supp. at 736 (quoting West Virginia Div. of the Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975)).

words are included for a specific purpose.[206] The "use of different language creates the inference that Congress meant different things."[207] Legislative will is expressed in language,[208] and where the legislative history offers little guidance, as in the present situation, no justification exists for breaking with the accepted methods of judicial construction.[209]

The language, as it appears in the statute, clearly delineates the respective burdens which must be met by each party. The claimant/-employee carries the initial burden of establishing that he or she is capable of performing the essential functions of the employment position with, or, as the case may be — without, a "reasonable" accommodation.[210] The employer, then, is saddled with the burden of proving that the proposed "reasonable" accommodation would pose an undue hardship.[211] Though these inquiries can be very similar, and may often overlap, they are not exactly the same.[212]

2. Placing Both Burdens on the Plaintiff Upholds the Traditional Norms and Rules of Litigation

As the court in *Willis* declared, it is doubtful that Congress intended, in providing a private cause of action to enforce rights created under the ADA, to depart "from the traditional rules and norms of litigation."[213] Civil rights jurisprudence, like all other jurispru-

206. *See id.*
207. Moore v. Harris, 623 F.2d 908, 914 (4th Cir. 1980).
208. *See* United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994).
209. *See Bryant*, 923 F. Supp. at 736.
210. *See Willis*, 108 F.3d at 286.
211. *See id.*
212. The *Willis* court stated:

> That the evidence probative of the issue of whether an accommodation for the employee is reasonable will often be similar (or identical) to the evidence probative of the issue of whether a resulting hardship for the employer is undue, does not change the fact that establishing that a reasonable accommodation exists is a part of an ADA plaintiff's case, whereas undue hardship is an affirmative defense to be pled and proven by an ADA defendant.

Id. at 286. The court further stated:

> These two issues are not exactly the same: the question of whether an accommodation is reasonable (though it must be determined within a given set of specific facts) is more of a `generalized' inquiry than the question of whether an accommodation causes hardship on the particular employer that is undue.

Id. at 286 n.2.
213. *Id*. at 286.

dential spheres, requires that a plaintiff establish each and every element of his or her case.[214] The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff.[215]

Separating the undue hardship defense from the "reasonable accommodation" inquiry maintains this requirement. Injecting the "interactive process" requirement, or merging the two inquiries effectively relieves the plaintiff of his or her duty to prove a major element of his or her case: that "reasonable" accommodations exist that would allow the disabled employee to perform the job.[216]

Unfortunately for the employer in situations where the burdens are merged, the element of "reasonableness" does not simply vanish. With no proof that anything could possibly be done for the employee, the employer must then *prove* that an accommodation would pose an undue hardship.[217] The effect of such a break from the practiced norms of litigation, especially in the employment law context, carries severe consequences in a society based on free market and capitalist values.[218]

3. Placing Both Burdens on the Plaintiff Maintains Some Measure of Management Prerogative

As stated earlier, the ADA is unique when compared to other civil rights legislation, such as Title VII, because it permits necessary consideration of a protected trait.[219] Consideration of those traits, however, should not serve as the rationale for allowing governmental intrusion into the realm of traditional management prerogative. Still, judicial constructs adhering to the merging theory or

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214. *See id.* Here, the *Willis* court cites to cases decided under Title VII, such as *St. Mary's Honor Society v. Hicks*, 509 U.S. 502 (1993), for support. *See Willis*, 108 F.3d at 286.

215. *See Willis*, 108 F.3d at 286.

216. *See id*. at 285–86.

217. *See Barkowski*, 63 F.3d at 138. In the Seventh Circuit, the employer's burden is even greater. *See Beck*, 75 F.3d at 1135. The employer must also suggest the specific accommodation. *See id.* The plaintiff need only request an accommodation in the abstract, which, in turn, triggers the interactive process. *See id.; see also supra* notes 134–51 and accompanying text.

218. *See also supra* note 189 and authorities cited therein; *cf.* EPSTEIN, *supra* note 190.

219. *See supra* text accompanying notes 6–7.

the interactive process requirement serve precisely this end.

Under either of these stances, an employer is forced to address the issue of reasonable accommodation even where nothing could possibly have been done.[220] In contrast, the stance espoused in *Willis* allows an employer to retain the right of judgment. Legal liability presents itself as a threat only where proof of a violation could be established. The statute's purpose is upheld,[221] while the employer need not protect him or herself against every possible claim, frivolous or otherwise.[222]

The statute, as interpreted under *Willis*, provides the deterrent effect necessary for satisfying the findings and purposes of the ADA.[223] In addition to being simply bad business to terminate or refuse to hire a disabled individual when reasonable accommodations exist, the ADA provides for severe consequences where violations are proven. Punishment for failing to take affirmative steps, regardless of whether accommodations even exist, fails to serve the remedial nature of the statute.[224]

Congress has deemed it desirable for an employer to bear the costs of providing reasonable accommodations to disabled applicants and employees.[225] Construing the statute to be punitive in nature increases the employer's risks, and, consequently, his or her costs.[226]

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220. *See Willis*, 108 F.3d at 285; *see also supra* notes 72–90 and accompanying text.

221. *See* 42 U.S.C. § 12101; *see also supra* text accompanying notes 79–80 for a discussion of ADA's purpose and nature as a remedial statute.

222. *See Willis*, 108 F.3d at 284–85. Response by an employer will only be necessary where the plaintiff has presented a valid, prima facie case of disability discrimination. *See id.*

223. *See id.* at 285. The court, quoting *Moses*, 97 F.3d at 448, stated:

> We are persuaded that [the employer's] failure to investigate did not relieve [plaintiff] of his burden of producing probative evidence that reasonable accommodations were available. A contrary holding would mean that an employee has an ADA cause even though there was no possible way for the employer to accommodate the employee's disability. Stated differently: An employer would be liable for not investigating even though an investigation would have been fruitless. We are confident that although the ADA does not mandate a pretermination investigation, the possibility of an ADA lawsuit will, as a matter of practice, compel most employers to undertake such an investigation before terminating a disabled employee.

Id.

224. *See Willis*, 108 F.3d at 286.

225. *See* 42 U.S.C. § 12112.

226. *See supra* notes 128–34 and accompanying text (discussing precautions, such as cost/benefit analysis, an employer must take in order to avoid liability in jurisdictions

Under *Willis*, management is free to use its own business judgment in determining whether a disabled individual can perform the position in question. Management shoulders no responsibilities until the plaintiff can prove a violation.[227] If the employer violates the law, he or she will face the consequences. Under *Willis*, the economic impact that would stem from the creation of an employer's affirmative duty to prove undue hardship in any ADA claim wherein the claimant felt entitled to an accommodation, whether possible or not, is not imputed to society.

VI. CONCLUSION

Of the three basic "reasonable accommodation" constructions, the perspective adopted by the Eleventh Circuit in *Willis v. Conopco, Inc.*, is the only view that remains consistent with the aims of the ADA, while at the same time refrains from placing unreasonable, non-traditional burdens on the employer. Though the logic of those circuits requiring the "interactive process," or those merging the "reasonable accommodation" inquiry with the defense of "undue hardship" is evident to a certain degree, careful analysis reveals the pitfalls and problems with each. Perhaps it comes as no surprise, then, to find that following the *Willis* decision, in which the Eleventh Circuit took its definitive stance on the issue, a majority rule was established. Now, seven of the twelve federal circuits place both the burdens of production and persuasion with regard to reasonable accommodation on the plaintiff/employee.

employing the interactive process requirement or the merging theory — even where the plaintiff has no case).

227. *See Willis*, 108 F.3d at 286.