The "Essential Functions" Hurdle to Disability Justice

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Courts are increasingly transforming the Americans with Disabilities Act's inclusive "qualified individual" definition into a hurdle disabled people must surmount before they may access the ADA's protection. For example, some courts hold that retirees cannot challenge disability discrimination in retirement plans unless they prove they can still perform the "essential functions" of their former jobs. Other courts bar disability-based harassment claims when the plaintiff has not performed the "essential function" of complying with an employer attendance policy.

Courts rationalize imposing this "essential functions" hurdle by stressing that the ADA defines "a qualified individual" as a person who can do a particular job's "essential functions" with or without a reasonable accommodation. Courts transform this definition into a hurdle by emphasizing that the ADA's prohibition of discrimination against "a qualified individual on the basis of disability" textually differs from race and sex discrimination statutes that prohibit race and sex discrimination against "any individual."

This superficial reading of the ADA fundamentally misunderstands the function of the ADA's unique "qualified individual" definition. Properly understood, the ADA's "qualified individual" language does not restrict the scope of the ADA's protected class. Instead, by forcing employers to treat workers who cannot do inessential job functions or otherwise need accommodations as "qualified," the ADA's "qualified individual" definition targets the discriminatory assumption that disability is disqualifying.

The judicially imposed "essential functions" hurdle risks reviving this assumption. By blocking claims alleging discrimination based on disability that would succeed if they alleged discrimination based on sex or age, the "essential functions" hurdle relegates ADA claims to a second-class status. Additionally, by imposing a gate-keeping mechanism that does not apply to other discrimination claims, the "essential functions" hurdle reinforces the presumption that disability negatively impacts performance unless proven otherwise. Disability law, which

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ostensibly aims to eliminate this stereotype, should not contribute to its retrenchment.

TABLE OF CONTENTS

I. INTRODUCTION

Testimony preceding the ADA's enactment informed Congress that "pervasive bias" causes employers to exclude disabled people.[1] New York City Schools excluded a teacher because she used a wheelchair.[2] The University of Colorado excluded a doctor because he had multiple sclerosis.[3] Many employers also routinely excluded people with vision impairments,[4] cancer,[5] abnormal

[1] S. REP. NO. 101-116, at 37 (1989).

[2] *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the S. Comm. on Lab. and Hum. Res.*, 101st Cong. 6 (1989) [hereinafter *Americans with Disabilities Act of 1989: Hearing on H.R. 2273*] (testimony of Arlene B. Mayerson, on behalf of the Disability Rights Education & Defense Fund) (citing Heumann v. Bd. of Educ. of N.Y., 320 F. Supp. 623 (S.D.N.Y. 1970)); *see also id.* at 32–33 (discussing how a California school district refused to allow a high school teacher to continue teaching because he had AIDS (citing Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988))).

[3] *Id.* at 12–13 (citing Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981)).

[4] H.R. REP. NO. 101-485, pt. 3, at 33 (1990).

[5] *Americans with Disabilities Act of 1989: Hearing on H.R. 2273*, *supra* note 2, at 14–16 (testimony of Arlene B. Mayerson, on behalf of the Disability Rights Education & Defense

back x-rays[6], hearing loss,[7] and seizure disorders,[8] despite compelling evidence that these conditions did not prevent the excluded individuals from performing their desired job's tasks.[9] In sum, Congress learned that employers' "inflated physical or other job requirements," unfounded assumptions about safety and absenteeism, and "outright prejudice" largely explained why only thirty-three percent of working-age disabled Americans had jobs.[10]

This testimony led Congress to conclude that "stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive."[11] Accordingly, Congress adopted the ADA's employment provisions to ensure "that job criteria actually measure skills required by the job."[12] As the House Judiciary Committee Report on the ADA explains, the "underlying premise" of the ADA's employment provisions "is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job."[13]

To accomplish this objective, the ADA prohibits excluding a disabled worker on the basis of any qualification standard, employment test, or selection criterion that is not "job-related" and "consistent with business necessity."[14] It also prohibits excluding a disabled worker because she needs "reasonable

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Fund) (citing R. McKenna, *Employability and Insurability of the Cancer Patient*, 2–3 (Nov. 25, 1974); George M. Wheatley, William R. Cunnick, Barbara P. Wright & Donald van Keuren, *The Employment of Persons with a History of Treatment for Cancer*, 33 CANCER 441, 445 (1974)).

[6] *Americans with Disabilities Act of 1989: Hearing on H.R. 2273*, *supra* note 2, at 16 (testimony of Arlene B. Mayerson, on behalf of the Disability Rights Education & Defense Fund) (citing Paul H. Rockey, Jane Fantel & Gilbert S. Omenn, *Discriminatory Aspects of Pre-Employment Screening*: *Low-Back X-ray Examinations in the Railroad Industry*, 5 AM. J.L. & MED. 197, 202 (1979)).

[7] *Id.* at 30–31 (citing Strathie v. Dep't of Transp., 716 F.2d 227 (3d Cir. 1983)).

[8] *Id.* at 14.

[9] *Id.* (citing H. Sands & S.S. Zalkind, *Effects of an Educational Campaign to Change Employer Attitudes Toward Hiring Epileptics*, 13 EPILEPSIA 87, 92 (1972)).

[10] *Americans with Disabilities Act of 1989: Hearing on H.R. 2273*, *supra* note 2, at 7–8, 17–18 (testimony of Arlene B. Mayerson, on behalf of the Disability Rights Education & Defense Fund); *see also* 42 U.S.C. § 12101(a)(5); H.R. REP. NO. 101-485, pt. 3, at 30 (1990); S. REP. NO. 101-116, at 9–10 (1989).

[11] H.R. REP. NO. 101-485, pt. 3, at 31 (1990); *see also* 42 U.S.C. § 12101(a) ("The Congress finds that . . . discrimination against individuals with disabilities persists in such critical areas as employment . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria . . . .").

[12] H.R. REP. NO. 101-485, pt. 3, at 31 (1990).

[13] *Id.*

[14] 42 U.S.C. § 12112(b)(6).

accommodations,"[15] such as "acquisition or modification of equipment or devices," "the provision of qualified readers or interpreters," or "part-time or modified work schedules."[16]

To further ensure that employers will not exclude workers on the basis of disability unless they are truly unable to do the job, the ADA expressly defines "qualified individual" to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position."[17] This definition directly targets employers' pre-ADA refusals to hire disabled workers due to their inability to do marginal tasks that were inessential to their desired position.[18] It also targets employers' refusals to adopt disability-inclusive architecture, equipment, and policies.[19]

Within the ADA's "qualified individual" definition, "reasonable accommodation" and "essential function" are inextricably intertwined. The question of whether a requested accommodation is reasonable often hinges on whether the job task the request seeks to adjust is "essential."[20] The House Judiciary Committee report to the ADA provides a useful illustration. It describes a pre-ADA employer that rejected a disabled applicant for a group counselor position due to his inability to drive.[21] The employer argued that driving was essential because its group counselors customarily drove residents to their court appearances and, in emergencies, to the hospital.[22] The House Judiciary Committee, by contrast, reasoned that driving was not, in fact, an "essential function" because "on any given shift, another group counselor could perform the driving duty."[23]

As this example illustrates, the conclusion that the employer could reasonably accommodate the plaintiff by shifting the driving duties to other employees amounted to concluding that the plaintiff could do the "essential functions" of the position and thus was a "qualified individual." By contrast, if no other workers had been available to perform the necessary driving duties,

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[15] *Id.* § 12112(b) ("[T]he term 'discriminate against a qualified individual on the basis of disability' 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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (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 . . . .").

[16] *Id.* §§ 12111(9)(B), 12112(b)(5).

[17] *Id.* § 12111(8).

[18] S. REP. NO. 101-116, at 26 (1989).

[19] *See* H.R. REP. NO. 101-485, pt. 3, at 7 (1990).

[20] *See id.* at 31–32.

[21] *Id.* at 33.

[22] *Id.*

[23] *Id.*

driving would have been an "essential function" and the plaintiff accordingly would not be a "qualified individual." In this way, as the Supreme Court has observed, "essential functions" and "reasonable accommodation" are functionally "two sides of a single coin; the ultimate question is the extent to which a[n employer] is required to make reasonable modifications" to the job.[24]

Unfortunately, instead of acknowledging the inextricable link between "essential functions" and "reasonable accommodations," many courts conclude that persons who "cannot perform the essential functions . . . have no rights under the [ADA's] statutory provisions."[25] In other words, many courts make proof that the plaintiff can perform "essential functions" a prerequisite to all ADA claims, including disparate treatment and harassment claims that are unconnected to the reasonable accommodations provision. Within this framework, courts shield employers from liability for disability-based employment decisions by concluding that "[e]ven if [the plaintiff] has produced direct evidence of [the employer's] discriminatory motive, [the plaintiff's] failure to establish that he is a qualified individual, or 'covered' under the ADA, prohibits him from proceeding with his claim."[26]

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[24] Alexander v. Choate, 469 U.S. 287, 299 n.19 (1985) (describing similar concepts relevant to § 504 of the Rehabilitation Act of 1973).

[25] Morgan v. Joint Admin. Bd., 268 F.3d 456, 457–58 (7th Cir. 2001); *see also* Lanman v. Johnson Cnty., 393 F.3d 1151, 1156 (10th Cir. 2004) ("[A]s a threshold matter, any plaintiff asserting a claim under the ADA must establish he or she is a 'qualified individual with a disability.'"); Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 851 (8th Cir. 2002) ("[T]he ADA does not protect an employee unable to perform 'the essential functions of the employment position that such individual holds.'"); Steele v. Thiokol Corp., 241 F.3d 1248, 1253 (10th Cir. 2001) ("[I]n order to bring any claim under the ADA, a plaintiff must first establish that he is a qualified individual with a disability."); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1112 (9th Cir. 2000) ("The term 'qualified' limits the protection of Title I of the Act."); Khan v. UNC Health Care Sys., No. 1:20CV977, 2021 WL 4392012, at *7 (M.D.N.C. Sept. 24, 2021) ("[T]he ADA does not protect an employee unable to perform 'the essential functions of the employment position that such individual holds.'"); Williams v. Ill. Dep't of Hum. Rts., No. 20-CV-2818, 2021 WL 197430, at *2 (N.D. Ill. Jan. 20, 2021) ("The ADA does not protect every individual with a disability. The ADA protects only 'qualified individual[s] with a disability.'" (alteration in original)); Choma v. Blue Cross Blue Shield of Del., No. 06-486-JJF, 2008 WL 4276546, at *9 (D. Del. Sept. 18, 2008) ("[T]he ADA does not protect an employee unable to perform the essential functions of the position the employee holds"); Pugliese v. Verizon N.Y., Inc., No. 05-CV-4005 (KMK), 2008 WL 2882092, at *13 (S.D.N.Y. July 9, 2008) ("Courts have defined 'essential functions' to mean the affirmative duties or inherent parts of a job. . . . 'It is well established that the ADA does not protect plaintiffs who are unable to meet these requirements.'" (citation omitted) (quoting Valentine v. Standard & Poor's, 50 F. Supp. 2d 262, 287 (S.D.N.Y. 1999))); Martin v. DeKalb Cnty. Cent. United Sch. Dist., No. 1:04-CV-047, 2005 WL 1869085, at *7–9 (N.D. Ind. Aug. 3, 2005) ("The ADA does not protect [a plaintiff] at all unless he can prove he is a 'qualified individual' . . . .").

[26] Leme v. S. Baptist Hosp. of Fla., Inc., 248 F. Supp. 3d 1319, 1340 (M.D. Fla. 2017); *see also, e.g.*, Galloway v. Aletheia House, 509 F. App'x 912, 913–14 (11th Cir. 2013)

Courts rationalize the "essential functions" hurdle by ignoring the statutory purpose of the ADA's "qualified individual" definition. Instead of acknowledging that the "qualified individual" definition targets pre-ADA assumptions that disabilities are disqualifying, courts emphasize that the ADA's text prohibits discrimination against "*a qualified individual* on the basis of disability."[27] They stress that this phrasing differs from parallel statutes that prohibit discrimination against "*any individual*" on the basis of a protected trait, such as race, sex, or age.[28] Downplaying the inclusion rationale for "qualified individual," courts conclude that the ADA provides less discrimination protection than its sister statutes focused on race, sex, and age. Accordingly, instead of acknowledging that the "essential functions" concept within the ADA's "qualified individual definition" is the mirror image of "reasonable accommodations," courts use "essential functions" as a protected class gatekeeping mechanism. They conclude that persons who "cannot perform the essential functions . . . have no rights under the statutory provisions" because "the ADA expressly limits its protection to qualified individuals."[29]

("Assuming *arguendo* that [plaintiff] presented direct evidence of discrimination, he nonetheless failed to present evidence to establish an essential element of his case: that he was a qualified individual under the ADA."); Wurzel v. Whirlpool Corp., 482 F. App'x 1, 10 n.10 (6th Cir. 2012) ("Under either a circumstantial-evidence analysis (requiring application of the *McDonnell Douglas* burden-shifting framework) or a direct-evidence analysis (not requiring the burden-shifting framework), a plaintiff must show that he is otherwise qualified for the position."); McNemar v. Disney Store, Inc., 91 F.3d 610, 621 (3d Cir. 1996) (concluding that Disney's motive for firing the plaintiff "is not a proper concern for the court unless McNemar first has established . . . that he was qualified for the job" and rejecting "the EEOC's assertion that '[a] plaintiff's claim cannot be defeated by an issue of qualifications that has nothing to do with the employer's motivation for the adverse action'"); Equal Emp. Opportunity Comm'n v. Austal USA, LLC, 447 F. Supp. 3d 1252, 1266 n.5 (S.D. Ala. 2020) ("Even if the EEOC had presented direct evidence of discrimination, it must still present evidence to establish that [plaintiff] was a qualified individual under the ADA."); Schultz v. Royal Caribbean Cruises, Ltd., 465 F. Supp. 3d 1232, 1265–66 (S.D. Fla. 2020) ("[D]irect evidence is relevant solely to a plaintiff's ability to satisfy the fourth element of his claim—that the defendant took the adverse employment action with discriminatory intent. A plaintiff must still establish that . . . he is a qualified individual . . . ." (citation omitted)); Mashek v. Soo Line R.R. Co, No. 11-487(MJD/JJG), 2012 WL 6552795, at *5–6 (D. Minn. Dec. 14, 2012) ("Whether or not the *McDonnell Douglas* burden shifting analysis applies," an ADA plaintiff must prove she "is qualified to perform the essential functions of [the] job, with or without reasonable accommodation"); Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act*, 2015 MICH. ST. L. REV. 1689, 1758 (documenting how ADA "regarded as" claims are "derailed at the *prima facie* stage even when there is direct evidence of an impairment-based motive for an adverse employment action").

[27] 42 U.S.C. § 12112(a) (emphasis added).

[28] *See, e.g.*, *id.* § 2000e-2(a) (emphasis added); 29 U.S.C. § 623(a) (emphasis added).

[29] *See supra* cases cited 25–26; Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020).

Using this "essential functions" hurdle, courts quash disability discrimination claims that would succeed if they alleged sex or age discrimination.[30] For example, courts hold that retirees no longer able to perform their former job's "essential functions" cannot bring ADA challenges to disability-based discrimination in the content or administration of their pension plans, health insurance, or other post-employment benefits they earned during their working years.[31] A retiree unable to do her former job may challenge race, sex or age discrimination, but cannot challenge disability discrimination. This approach particularly disfavors ADA claims brought by blue-collar retirees who less likely to remain able to perform their former jobs than white-collar retirees.

Courts compound the "essential functions" hurdle's impact on disability discrimination claims by expanding the concept of "essential functions" far beyond its original focus on job tasks to include employer preferences about how jobs are performed.[32] This mischaracterization of "essential functions," when combined with the "essential functions" hurdle, allows courts to conclude that a disabled worker's need for an ADA-listed reasonable accommodation prevents her from challenging disability-based disparate treatment. For example, some courts—rejecting the ADA's express endorsement of part-time schedule accommodations—have held that persons "physically incapable of working full time [are] not within the Act's protections."[33] In the most egregious cases, courts hold that a disabled worker's need for part-time hours prevents her from arguing that disability motivated her employer's decision to deny her the part-time schedule that the employer provided nondisabled workers.[34]

As these examples illustrate, courts applying the "essential functions" hurdle ignore the "qualified individual" definition's purpose within the ADA's structure. They fail to acknowledge that the ADA's unique "qualified individual" definition does not limit which workers may access the ADA's protection, but instead limits employers' ability to reject disabled workers who need accommodations. Courts applying the "essential functions" hurdle additionally ignore the reality that the ADA's "essential functions" terms is irrelevant to disability claims that do not implicate the ADA's reasonable accommodation provision, such as disparate treatment and harassment claims.

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[30] *See, e.g.*, *Anthony*, 955 F.3d at 1134.

[31] Morgan v. Joint Admin. Bd., 268 F.3d 456, 457–58 (7th Cir. 2001) (discussing cases).

[32] *See, e.g.*, White v. Standard Ins. Co., 895 F. Supp. 2d 817, 837 (E.D. Mich. 2012), *aff'd*, 529 F. App'x 547 (6th Cir. 2013) ("Plaintiff, in seeking to permanently have part-time employment, effectively requested that an essential function of her position be eliminated . . . .").

[33] DeVito v. Chicago Park Dist., 270 F.3d 532, 534 (7th Cir. 2001); *see also* Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001) ("[T]he Americans with Disabilities Act protects only persons who over the long run are capable of working full time."); Jeannette Cox, *Work Hours and Disability Justice*, 111 GEORGETOWN L.J. 1, 16–21 (2022) (demonstrating that this conclusion contravenes the ADA's text).

[34] *See infra* notes 103–19 and accompanying text.

Courts applying the "essential functions" hurdle appear influenced by the lingering effects of the pre-ADA assumption that disabled workers should have a heightened burden to prove they are qualified for employment. Sometimes judges express this assumption overtly, exchanging the ADA's text for their conclusion that "common sense" dictates that disabled workers must overcome the presumption that disability limits work capacity.[35] Other courts similarly appear to ground the "essential functions" hurdle in the disability-is-disqualifying presumption because they fail to apply the "essential functions" hurdle to the narrow subset of ADA claims brought by workers *without* disabilities.[36] This inconsistency suggests that assumptions about disability's negative impact on work performance are a stronger explanation for judicial imposition of the "essential functions" hurdle than the superficial textual difference between the ADA and other employment nondiscrimination statues.

This Article proceeds as follows. Part II illustrates how judicial imposition of the "essential functions" hurdle results in the dismissal of a wide range of claims that would succeed under parallel race, sex, and age discrimination statutes. Such claims include harassment claims, disparate treatment claims, cases involving after-acquired evidence, and challenges to discriminatory post-employment benefits. Part III demonstrates that courts' imposition of the "essential functions" hurdle contravenes the ADA's text and structure. Part IV argues that unstated presumptions about disability's negative impact on work performance, rather than the ADA's text, motivates judicial imposition of the "essential functions" hurdle. Part V suggests that if courts fail to correct their "essential functions" error, Congress may need to amend the ADA's employment provisions to restore parity between the ADA and parallel employment nondiscrimination statutes.

II. HOW THE "ESSENTIAL FUNCTIONS" HURDLE BLOCKS ADA CLAIMS THAT WOULD SUCCEED UNDER TITLE VII OR THE ADEA

Courts are increasingly transforming the original purpose of "essential functions"—to achieve disability inclusion—into an exclusionary hurdle that treats disabled plaintiffs less favorably than other employment discrimination plaintiffs. Instead of acknowledging that the question of whether a particular job task is an "essential function" is relevant solely to the question of whether the employer must provide a reasonable accommodation, courts treat "essential functions" as a statutory gatekeeping requirement. This results in the dismissal of a wide range of claims that would succeed under parallel race, sex, and age discrimination statutes.

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[35] Rizzo v. Child.'s World Learning Ctrs., Inc., 213 F.3d 209, 219 (5th Cir. 2000) (en banc) (Jones & Smith, JJ., dissenting) (joined by Weiner, J.).

[36] *See infra* notes 194–99 and accompanying text.

A. *The "Essential Functions" Hurdle to Harassment Claims*

To begin with an example that Holland Tahvonen identified two decades ago, the "essential functions" hurdle disadvantages disability harassment plaintiffs.[37] Under statutes that prohibit race and sex discrimination, such as Title VII of the Civil Rights Act of 1964 (Title VII), an employee's performance deficiencies are "wholly irrelevant in determining whether he was the subject of actionable harassment based on a protected characteristic."[38] Such statutes protect all employees—including objectively bad employees—from harassment.[39] For example, in *Betts v. Costco Wholesale Corp*., three plaintiffs lawfully terminated for misappropriating funds obtained a judgment holding their employer liable for the racially-charged hostile work environment they experienced prior to their terminations.[40] Similarly, in *Birden v. Regents of the University of California*, a plaintiff lawfully terminated for poor attendance recovered 1.3 million dollars for race-based harassment.[41]

In sharp contrast, the two circuits and numerous district courts that apply the "essential functions" hurdle to disability-based harassment claims conclude that plaintiffs unable to do their job's "essential functions" cannot bring disability-based harassment claims.[42] For example, in *Fox v. General Motors*, a disabled

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[37] Holland M. Tahvonen, Note, *Disability-Based Harassment: Standing and Standards for a "New" Cause of Action*, 44 WM. & MARY L. REV. 1489, 1499–05 (2003).

[38] *Id.* at 1503.

[39] *Id.* at 1503–04 ("The guidelines set forth in *Meritor* and subsequent 'hostile work environment' cases for establishing a claim of sexual harassment do not include any requisite showing of a complainant's qualifications for the job in question."); *see* Roberts v. Glenn Indus. Grp., 998 F.3d 111, 117 (4th Cir. 2021) ("To establish a *prima facie* case of sexual harassment based on a hostile work environment, a plaintiff must prove (1) unwelcome conduct; (2) based on the plaintiff's sex; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) that is imputable to the employer.").

[40] Betts v. Costco Wholesale Corp., 558 F.3d 461, 470 (6th Cir. 2009) (applying Michigan discrimination law).

[41] Birden v. Regents of the Univ. of Cal., No. B302956, 2021 WL 3560233, at *1 (Cal. Ct. App. Aug. 12, 2021) (applying California discrimination law); *see also* Suarez v. Am. Stevedoring, Inc., No. 06-CV-6721 (KAM)(RER), 2009 WL 3762686, at *11–12, *21 (E.D.N.Y. Nov. 10, 2009) (concluding that a Title VII plaintiff was lawfully terminated for "chronic absenteeism" but denying summary judgment to the employer on the plaintiff's hostile environment claim); Lesane v. Hawaiian Airlines, 75 F. Supp. 2d 1113, 1122–24 (D. Haw. 1999) (denying employer's motion for summary judgment on Title VII discrimination and harassment claims despite the plaintiff's poor attendance and performance deficiencies).

[42] *See, e.g.*, Fox v. Gen. Motors Corp., 247 F.3d 169, 177–78 (4th Cir. 2001) ("[A]n ADA plaintiff must prove the following to establish a hostile work environment claim: (1) he is a qualified individual with a disability . . . . [which means that] he was able to perform the essential functions of his job, with reasonable accommodation for his disability, and he would have continued to be able to do so had he not been harassed on the job."); Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 598 (8th Cir. 1998) (holding that, in

harassment cases, plaintiffs must demonstrate that they are "qualified to perform the essential functions of the job (either with or without reasonable accommodation)" (quoting Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996))); Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC, 516 F. Supp. 3d 1285, 1288 (D.N.M. 2021) (dismissing the plaintiff's hostile work environment claim because the plaintiff had not established he was a "qualified individual"); Jessup v. Barnes Grp., Inc., No. 6:18-2703-HMH-JDA, 2020 WL 3529577, at *3 (D.S.C. June 30, 2020), *aff'd on other grounds*, 23 F.4th 360 (4th Cir. 2022) (granting defendant summary judgment on hostile environment claim because plaintiff presented insufficient evidence that he was a "qualified individual"); Stebbins v. Reliable Heat & Air, LLC, No. 10-3305-CV-S-RED, 2011 WL 4729816, at *4 (W.D. Mo. Oct. 7, 2011), *aff'd*, 473 F. App'x 518 (8th Cir. 2012) (dismissing hostile environment claim because the plaintiff's failure to establish she was a "qualified individual" made her "argument meritless" (citation omitted)); Skinner v. City of Amsterdam, 824 F. Supp. 2d 317, 325 (N.D.N.Y. 2010) ("Regardless of whether the ADA does allow for a hostile work environment claim, a plaintiff . . . must show that: . . . he could perform the essential functions of his job with or without reasonable accommodation." (citations omitted)); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1107 (S.D. Ga. 1995) (denying summary judgment to the defendant on the plaintiff's harassment claim because the plaintiff had presented sufficient evidence to create a jury question as to whether he could perform the essential functions of his position); Mannell v. Am. Tobacco Co., 871 F. Supp. 854, 860 (E.D. Va. 1994) ("In order to invoke the protections of the ADA against harassment because of disability, the employee must be a 'qualified individual' as defined in the ADA. . . . [T]he Court has concluded that the undisputed evidence shows plaintiff is not a 'qualified individual' within the meaning of the Act. Plaintiff may not invoke the protections of the ADA . . . ."). *But see* Fox v. Costco Wholesale Corp., 918 F.3d 65, 74 (2d Cir. 2019) (stating that disability-based harassment claim requires a plaintiff to show "(1) that the harassment was 'sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment,' and (2) that a specific basis exists for imputing the objectionable conduct to the employer." (quoting Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002))); Leavitt v. Wal-Mart Stores, Inc., 74 F. App'x 66, 71 n.3 (1st Cir. 2003) ("Although the First Circuit has yet to address the issue, several other Circuit courts recently have recognized a cause of action for disability-based harassment under the ADA. Such actions permit recovery based on a plaintiff's exposure to a hostile work environment, and arise independently of claims based on the employer's failure to provide reasonable accommodations. To succeed on this claim, a plaintiff generally must demonstrate (1) that she was disabled as defined by the ADA; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action."); Anello v. Berryhill, No. 18-CV-00070-DMR, 2020 WL 137109, at *9–12 (N.D. Cal. Jan. 13, 2020) (allowing harassment claim to proceed in case in which plaintiff failed to plead she was a "qualified individual"); Killen v. Walgreen Co., No. 2:17-CV-145, 2019 WL 3064593, at *21 (E.D. Tenn. July 11, 2019) ("In order to bring a disability-based hostile-work environment claim, a plaintiff must show (1) she was a member of the protected class, that is, she was disabled; (2) she was subject to unwelcome harassment; (3) the harassment was based on her disability; (4) the harassment had the effect of unreasonably interfering with her work performance by creating an intimidating, hostile or offensive work environment; and (5) the existence of liability on the part of the defendant.").

plaintiff won a jury verdict supported by substantial harassment evidence, including his supervisors' routine reference to disabled employees as "handicapped M***** F*****s" and "911 hospital people."[43] On appeal, however, the Fourth Circuit carefully considered GM's argument that the district court should have reversed the jury's verdict because the plaintiff could no longer perform his job's essential functions.[44] The Fourth Circuit held for the plaintiff only because a doctor established that the plaintiff would have still been able to perform the essential functions if the harassment (which included supervisors forcing him to do tasks that worsened his disability) had not occurred.[45]

Courts often exacerbate the "essential functions" hurdle's impact on disability harassment claims by stretching the concept of "essential functions" far beyond fundamental job tasks to include employer preferences about how jobs are performed. Rejecting the ADA's legislative history—and EEOC regulations—that emphasize "essential functions" means fundamental "job tasks"[46] and *not* "the manner or circumstances under which the position . . . is customarily performed,"[47] many courts characterize the latter as themselves "essential functions."[48] When combined with the "essential functions" hurdle, this mischaracterization often means that a disabled worker's need for an accommodation prevents her from challenging disability-based harassment.

For example, in *Poorbaugh v. Board of County Commissioners of Chaffee*, the court concluded that the plaintiff's inability to perform the "essential function" of working in a particular building foreclosed her disability harassment claim.[49] Poorbaugh's difficulties began when her employer moved her from one office building to another.[50] Due to an unidentified environmental factor, Poorbaugh had debilitating asthmatic reactions whenever she worked in her new building.[51] In response to Poorbaugh's accommodation requests (to work in another building or to work in her personal trailer parked beside the new building), her supervisor

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[43] *Gen. Motors Corp.*, 247 F.3d 169 at 174.

[44] *Id.* at 177–78.

[45] *Id.* at 178.

[46] 29 C.F.R. § 1630.2(n)(1) (1998) ("The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position."); H.R. REP. NO. 101-485, pt. 3, at 33 (1990) ("Essential functions means job tasks that are fundamental and not marginal."); S. REP. NO. 101-116, at 26 (1989) (defining "essential [job] functions" as the fundamental, "non-marginal functions of the job in question"); *see also id.* at 32 ("[I]f [a] collective bargaining agreement includes job duties, it may be taken into account as a factor in determining whether a given task is an essential function of the job.").

[47] 29 C.F.R. § 1630.2(o)(1)(i)–(ii) (1998).

[48] Cox, *supra* note 33, at 16–17; Travis, *supra* note 26, at 1715; *see* Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 6 (2014).

[49] Poorbaugh v. Bd. of Cnty. Comm'rs of Chaffee, No. 12-CV-01548-RPM, 2013 WL 5799910, at *3–4 (D. Colo. Oct. 28, 2013).

[50] *Id.* at *1.

[51] *Id.* at *1–2.

yelled at her, accused her of faking the asthma attacks, and repeatedly called her a liar in front of her coworkers.[52] Instead of analyzing whether this treatment constituted actionable disability-based harassment, the court concluded that physical presence in the building was an "essential function."[53] It then reasoned that Poorbaugh's inability to do that "essential function" prevented her from being a "qualified individual" and (using the logic of the "essential functions" hurdle) took her outside the ADA's protection.[54] In other words, the court concluded that the unresolved environmental problems in the employer's building made Poorbaugh ineligible to bring any ADA claim, including a workplace harassment claim.[55]

Similarly, in *Caroselli v. Allstate Insurance Co.*, a plaintiff with fibromyalgia worked a part-time schedule for two years before her new supervisor abruptly demanded that she work full-time.[56] Despite the ADA's text, which indicates that "part-time or modified work schedules" are "reasonable accommodations,"[57] the court decided that the new supervisor's preference that Caroselli work full-time hours made full-time hours an "essential function."[58] Then, following the logic of the "essential functions" hurdle, it concluded that Caroselli's inability to work full-time hours excluded her from the ADA's protected class.[59] On this rationale, the court concluded not only that Allstate lawfully terminated Caroselli, but that Caroselli was ineligible for statutory protection from disability-based workplace harassment.[60]

Courts' willingness to regard compliance with an employer's attendance policy as an "essential function" similarly bars disability harassment claims. For example, in *Posante v. Lifepoint Hospitals, Inc.*, Posante experienced workplace harassment related to his HIV-positive status.[61] The court concluded, however, that Posante's failure to perform what the court termed the "essential function" of

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[52] *Id.* at *2.

[53] *Id.* at *3.

[54] *Id.* at *4.

[55] *Poorbaugh*, 2013 WL 5799910, at *3–4.

[56] Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004, at *1–2 (N.D. Ill. Feb. 23, 2004).

[57] 42 U.S.C. § 12111(9). House and Senate committee reports explaining the ADA's reasonable accommodations provision repeatedly note the need for part-time schedule accommodations, identifying the fact that "[s]ome people with disabilities are denied employment opportunities because they cannot work a standard schedule" as one of the problems the ADA targets. S. REP. NO. 101-116, at 31 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 62 (1990) (same).

[58] *Caroselli*, 2004 WL 407004, at *5.

[59] *Id.*

[60] *Id.*

[61] Posante v. Lifepoint Hosps. Inc., No. 4:10-CV-00055, 2011 WL 3679108, at *2 (W.D. Va. Aug. 23, 2011).

reliable attendance excluded him from the ADA's protection.[62] *Posante* sharply contrasts with the aforementioned Title VII case, *Birden v. Regents*, in which a plaintiff who had an attendance record poor enough to justify her termination recovered a substantial judgment (1.3 million dollars) to hold her employer accountable for the workplace harassment she experienced prior to her lawful termination.[63]

B. *The "Essential Functions" Hurdle to Disparate Treatment Claims*

Courts' application of the "essential functions" hurdle also frustrates a larger category of ADA claims: those that allege disability-based disparate treatment. As with harassment plaintiffs, the "essential functions" hurdle prevents disability discrimination plaintiffs from recovering for disparate treatment that would be actionable if it involved sex or age discrimination instead of disability discrimination.

Under Title VII and the Age Discrimination in Employment Act (ADEA), "court[s] must not demand [a] plaintiff to establish that 'he was performing his duties satisfactorily'" when evaluating the plaintiff's discrimination claim.[64] Even in cases lacking direct evidence of discrimination, where the *McDonnell Douglas* framework requires plaintiffs to present evidence that they are "qualified" in order to trigger the employer's obligation to proffer a legitimate nondiscriminatory reason for its decision, courts have characterized the *McDonnell Douglas* "qualified" showing as "de minimis."[65] They have

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[62] *Id.* at *5; *see also* Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC, 516 F. Supp. 3d 1285, 1292 (D.N.M. 2021) (similarly concluding that the plaintiff's attendance record meant he could not perform the "essential function" of reliable attendance and thus he was ineligible to challenge disability-based harassment).

[63] Birden v. Regents of the Univ. of Cal., No. B302956, 2021 WL 3560233, at *1, *10 (Cal. Ct. App. Aug. 12, 2021) (applying California discrimination law); *see also* Suarez v. Am. Stevedoring, Inc., No. 06-CV-6721 (KAM)(RER), 2009 WL 3762686, at *10, *13, *21 (E.D.N.Y. Nov. 10, 2009) (concluding that a Title VII plaintiff was lawfully terminated for "chronic absenteeism" but denying summary judgment to the employer on the plaintiff's hostile environment claim); Lesane v. Hawaiian Airlines, 75 F. Supp. 2d 1113, 1123–24, 1127 (D. Haw. 1999) (denying employer's motion for summary judgment on Title VII discrimination and harassment claims despite the plaintiff's poor attendance and performance deficiencies).

[64] *Suarez*, 2009 WL 3762686, at *11 (quoting Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 91 (2d Cir. 2001)).

[65] Beyer v. County of Nassau, 524 F.3d 160, 163 (2d Cir. 2008); *see also* Travis, *supra* note 26, at 1743 ("Title VII claims are rarely dismissed for an employee's failure to state a *prima facie* case, particularly for failure to establish the 'qualified' element."); *id.* ("[T]he trend has been toward lowering the bar on the 'qualified' element of a Title VII *prima facie* case . . . ."); AM. JUR. 2D, JOB DISCRIMINATION § 188 (2022) (listing Title VII cases that demonstrate that the plaintiff need not show perfect performance, or even average performance to satisfy *McDonnell Douglas*); Denny Chin & Jodi Golinsky, *Moving Beyond*

emphasized that its purpose is simply to trigger the employer's obligation to assert a legitimate nondiscriminatory reason for its decision.[66] Once an employer does so, courts "need not—*and should not*—decide" whether the plaintiff is actually "qualified" but must instead focus on the "central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of [a protected trait]?"[67] In some cases, the mere fact that the plaintiff was hired may be sufficient to fulfill the plaintiff's duty to demonstrate she is "qualified" for *McDonnell Douglas* purposes.[68]

By contrast, courts that impose the "essential functions" hurdle bar plaintiffs who have poor attendance records or other performance deficiencies from challenging disability-based disparate treatment. By treating the ADA's "qualified individual" definition as a gatekeeping mechanism, they conclude that plaintiffs unable to perform an "essential function" cannot challenge disparate treatment.[69] The Eleventh Circuit's reasoning is illustrative. After concluding that

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McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 668 (1998) (Title VII's "prima facie case has evolved into something of a formality," and "many courts simply presume" that it is met); David N. Rosen & Jonathan M. Freiman, *Remodeling* McDonnell Douglas*:* Fisher v. Vassar College *and the Structure of Employment Discrimination Law*, 17 Q.L.R. 725, 752 (1998) ("[Under Title VII,] a plaintiff need make only a 'minimal showing of qualification,' and need not show that she is a strong or even plausible candidate." (footnote omitted)).

[66] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (explaining that, once an employer has asserted a legitimate nondiscriminatory reason for its decision, the question of whether the plaintiff "properly made out a prima facie case . . . is no longer relevant").

[67] Brady v. Off. of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) *see also id.* at 492 ("[W]hether the plaintiff in a [Title VII] disparate-treatment discrimination suit actually made out a prima facie case is almost always irrelevant when the district court considers an employer's motion for summary judgment . . . .").

[68] *See, e.g.*, Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001) ("[E]specially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw."); Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1360 (11th Cir. 1999) ("[P]laintiffs, who have been discharged from a previously held position, do not need to satisfy the *McDonnell Douglas* prong 'requiring proof of qualification.' . . . '[W]here a plaintiff has held a position for a significant period of time, qualification for that position sufficient to satisfy the test of a prima facie case can be inferred.'" (quoting Young v. General Foods Corp., 840 F.2d 825, 830 n.3 (11th Cir. 1988))); Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988) ("[A] plaintiff challenging his termination or demotion can ordinarily establish a prima facie case of age discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action.").

[69] *See, e.g.*, Bethscheider v. Westar Energy, 820 F. App'x 749, 753 (10th Cir. 2020) (dismissing plaintiff's disparate treatment claim because her absences made her "not a 'qualified individual' entitled to protection under the ADA"); Kelleher v. Fred A. Cook, Inc.,

a plaintiff could not perform an essential function, the Eleventh Circuit explained: "[b]ecause [the plaintiff] must show that he is a qualified individual to proceed under the ADA, we do not address his remaining arguments, such as the legitimacy of [the employer's] reasons for his termination."[70]

Cases involving plaintiffs with imperfect attendance illustrate how judicial imposition of the "essential functions" hurdle bars ADA claims that would succeed under Title VII or the ADEA. Courts treat Title VII plaintiffs that employers have fired for poor attendance as "qualified" for *McDonnell Douglas* purposes to ensure they have an opportunity to demonstrate that the employer's attendance rationale is pretextual.[71] For example, in *Kaufman v. General Electric*

939 F.3d 465, 469 (2d Cir. 2019) (criticizing the district court for analyzing an ADA plaintiff's disparate treatment evidence without first determining whether the plaintiff's absences prevented him from being a "qualified individual"); Stern v. St. Anthony's Health Ctr., 788 F.3d 276, 285 & n.4 (7th Cir. 2015) (concluding that a plaintiff must first establish that he is a "qualified individual" to bring a disparate treatment claim); Galloway v. Aletheia House, 509 F. App'x 912, 913–14 (11th Cir. 2013) ("Assuming *arguendo* that Galloway presented direct evidence of discrimination, he nonetheless failed to present evidence to establish an essential element of his case: that he was a qualified individual under the ADA."); Wurzel v. Whirlpool Corp., 482 F. App'x 1, 10 n.10 (6th Cir. 2012) ("Under either a circumstantial-evidence analysis (requiring application of the *McDonnell Douglas* burden-shifting framework) or a direct-evidence analysis (not requiring the burden-shifting framework), a plaintiff must show that he is otherwise qualified for the position.").

[70] Jordan v. City of Union City, 646 F. App'x 736, 741 (11th Cir. 2016).

[71] *See* Sokolnicki v. Cingular Wireless, LLC, 331 F. App'x 362, 367 (6th Cir. 2009) (holding, in Title VII case, that the district court erred by using policy violations relied upon by the defendant as its reason for discharging the plaintiff to evaluate whether she was qualified); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 574 (6th Cir. 2003) ("[C]ourt[s] may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case. To do so would bypass the burden-shifting analysis . . . ."); Equal Emp. Opportunity Comm'n v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193 (10th Cir. 2000) ("When an employee's failure to meet objective, employer-imposed criteria is one of the legitimate, non-discriminatory reasons advanced by an employer to dispel the inference of discrimination raised by an employee at the prima facie stage, it cannot also be used to defeat the employee's prima facie case."); Gilchrist v. Bolger, 733 F.2d 1551, 1552–53 (11th Cir. 1984) (affirming district court's conclusion that Title VII plaintiff with "attendance problems [that] made her unreliable" was qualified for *McDonnell Douglas* purposes); Kenyatta v. Bookey Packing Co., 649 F.2d 552, 553–54 (8th Cir. 1981) (affirming the district court's conclusion that employer lawfully terminated Title VII plaintiff due to excessive absences but also concluding that the plaintiff met his burden to show he was "qualified" as part of his *prima facie* case); Bah v. Millstone Med. Outsourcing, No. 12-2396-STA-tmp, 2013 WL 4782373, at *5 n.30 (W.D. Tenn. Sept. 5, 2013) (noting that the employer's attempt to argue that the plaintiff's record of absenteeism undercut his showing that he was qualified for the position "misunderstands the nature of the *McDonnell Douglas/Burdine* burden-shifting structure"); Grant v. Roche Diagnostics Corp., No. 09-CV-1540 (JS)(AKT), 2011 WL 3040913, at *6 (E.D.N.Y. July 20, 2011) ("Defendant's argument that [plaintiff] was not qualified because of his repeated performance deficiencies is misplaced. While an employer's dissatisfaction with an employee's

Co., the court emphasized that, "because GE relies upon Kaufman's poor attendance record as its reason for terminating her employment, the Court may not consider Kaufman's attendance in determining whether she was qualified for her position."[72] Using this reasoning, courts have permitted Title VII plaintiffs with extremely poor attendance records to reach juries, such as a plaintiff who missed more than 1,450 of her scheduled work hours (the equivalent of 36 forty-hour weeks) in a seventy-four week period.[73]

By contrast, courts applying the "essential functions" hurdle deny ADA plaintiffs the opportunity to demonstrate that their employer's attendance-related justification for terminating them is pretextual. For example, in *Bethscheider v. Westar Energy*, the Tenth Circuit held that a plaintiff's absences due to her migraine-causing disability took her outside the ADA's protection on the rationale that she had not performed the "essential function" of reliable attendance.[74] This conclusion sidestepped facts that supported the plaintiff's claim that the employer terminated her not because of her attendance record, but because of her disability.[75] The employer never provided the plaintiff a written attendance policy and had told the plaintiff she was welcome to use "flex time" so long as she made up the hours she missed during evenings and weekends.[76] In fact, the employer did not give the plaintiff any notice that her attendance record was

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performance may ultimately provide a legitimate, non-discriminatory reason for the employer's adverse action, to satisfy his burden [plaintiff] need only 'establish basic eligibility for the position at issue.'" (quoting Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001))); Price v. Gen. Motors Corp., No. 05-CV-506, 2007 WL 2461784, at *2, *7 (W.D.N.Y. Aug. 24, 2007) (plaintiff's "record of absenteeism and disciplinary issues" did not preclude his age-based harassment claim).

[72] Kaufman v. Gen. Elec. Co., No. 3:16-CV-00204-TBR, 2017 WL 2312477, at *3 (W.D. Ky. May 26, 2017); *see also* Suarez v. Am. Stevedoring, Inc., No. 06-CV-6721 (KAM)(RER), 2009 WL 3762686, at *10–11 (E.D.N.Y. Nov. 10, 2009) (holding the plaintiff "qualified" for *McDonnell Douglas* purposes even though "the undisputed evidence of plaintiff's many unexcused absences, the numerous letters . . . warning plaintiff of the consequences of his absences, and plaintiff's repeated suspensions clearly indicate 'regular attendance to be an important criterion for job performance.'" (quoting Perez v. Comm'ns Workers of Am. Loc. 1109, No. 03-CV-3740, 2005 WL 2149204, at *9 (E.D.N.Y. Sept. 6, 2005))); Barnett v. Boeing Co., 173 F. Supp. 2d 1125, 1131–32 (D. Kan. 2001) (rebuffing the employer's argument that the plaintiff's "excessive absenteeism" prevented him from establishing a *prima facie* case under *McDonnell Douglas* and stressing that the plaintiff's evidence that he possessed the basic skills his position required "suffices at the prima facie stage" of a Title VII case "regardless of plaintiff's attendance and disciplinary history" because it was essential to allow the plaintiff an opportunity to demonstrate that the defendant's purported reliance on his attendance record was pretextual).

[73] Taylor v. Principi, No. 02-4083-JAR, 2004 WL 303208, at *6–7 (D. Kan. Feb. 4, 2004), *aff'd*, 141 F. App'x 705 (10th Cir. 2005).

[74] *Bethscheider*, 820 F. App'x at 752–53.

[75] *See id.* at 750.

[76] *Id.* at 753.

unacceptable until the moment it terminated her and informed her that her migraine-related absences were the reason for her termination.[77]

Cases that apply the "essential functions" hurdle to parents caring for disabled children similarly illustrate how the "essential functions" hurdle dooms ADA claims that would likely reach a jury if they involved race or sex discrimination.[78] For example, in *Whitfield v. Hart County*, Whitfield argued that her employer terminated her because she used Family Medical Leave Act (FMLA) leave to obtain emergency medical care for her disabled son.[79] The facts supporting Whitfield's claim led the court to hold that a reasonable jury could conclude Whitfield's employer violated Whitfield's FMLA rights by retaliating against her for using FMLA leave.[80] However, the court dismissed Whitfield's ADA claim on the rationale that Whitfield's failure to perform the "essential function" of "meet[ing] the attendance requirement of her job" took her outside the ADA's protection.[81]

This application of the "essential functions" hurdle led the court to disregard evidence that supported Whitfield's contention that her employer treated her less favorably than similarly situated employees that missed the same amount of work for non-disability reasons.[82] For example, Whitfield presented evidence that her coworkers, without consequence, frequently arrived late or left early to attend to their personal affairs.[83] Whitfield also emphasized that she made up many of the work hours she missed by working evenings and weekends.[84] Additionally, as her employer conceded, Whitfield had unused vacation and sick days at the time of her termination.[85] The court, however, did not engage with this evidence because it concluded that Whitfield's use of FMLA leave meant she had not performed the "essential function" of meeting her employer's

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[77] *See id.* at 750, 753.

[78] The ADA's associational discrimination provision prohibits employers from discriminating against employees or applicants closely associated with a disabled person. 42 U.S.C. § 12112(b)(4). Such cases often involve allegations that an employer discriminated against the parent or spouse of a disabled person to avoid healthcare costs associated with disability or because the employer assumed that the disability will negatively impact the employee's work performance. Magnus v. St. Mark United Methodist Church, 688 F.3d 331, 337 (7th Cir. 2012) ("Although an employer does not have to accommodate an employee because of her association with a disabled person, the employer cannot terminate the employee for unfounded assumptions about the need to care for a disabled person.").

[79] Whitfield v. Hart Cnty., No. 3:13-CV-114 (CDL), 2015 WL 1525187, at *8–9 (M.D. Ga. Apr. 3, 2015).

[80] *Id.* at *8.

[81] *Id.* at *10.

[82] *Id.* at *1, *10.

[83] *Id.* at *1.

[84] *Id.*

[85] *Whitfield*, 2015 WL 1525187, at *3.

attendance expectations and thus (using the logic of the "essential functions" hurdle) she was not a member of the ADA's protected class.[86]

Kelleher v. Fred A. Cook, Inc., similarly illustrates how the "essential function" of meeting an employer's attendance expectations blocks ADA disparate treatment claims that would succeed under Title VII.[87] In the first four months of his employment, Kelleher received favorable performance reviews and a promotion.[88] However, Kelleher lost his positive standing after he disclosed his infant daughter's disability diagnosis.[89] When Kelleher told his supervisors that he might occasionally need to leave immediately after his shift to tend to his daughter, they forbade him from doing so and stressed that "his problems at home were not the company's problems."[90] When Kelleher missed a day of work after his daughter was hospitalized due to a near-fatal seizure, his supervisors demoted him to a laborer position that primarily involved shoveling sewer systems.[91] Two-and-a-half weeks later, they terminated him for arriving to work ten-to-fifteen minutes late.[92]

Although this evidence appears to support a quintessential claim of discrimination based on a worker's association with a disabled child, the Second Circuit, applying the "essential functions" hurdle, stressed that the trial court should not have considered the employer's motivation for terminating Kelleher before first considering whether Kelleher's one-day absence and single late arrival demonstrated he had not performed the "essential function" of reliable attendance.[93] While the Second Circuit concluded that Kelleher's allegations with respect to his job performance satisfied the *Twombly/Iqbal* plausibility pleading standard, it expressed doubt as to whether Kelleher would ultimately be able to prove he could do his job's "essential functions."[94] Slavishly deferring to the employer's idiosyncratic conception of "essential functions," the Second Circuit opined that "[a]n employer can make its own rules, and is not required to be tolerant of small, isolated infractions, or of common workplace behavior such as leaving after one's shift. Depending on the employer's business, policy, and practice, such conduct may . . . render[] the employee unqualified" and thus outside the ADA's protection.[95]

In other words, the Second Circuit concluded that an employer may, by imposing unusually exacting attendance standards, remove workers from the

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[86] *Id.* at *10.

[87] Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 469 (2d Cir. 2019).

[88] *Id.* at 466.

[89] *Id.* at 466–67.

[90] *Id.* at 467 (citation omitted).

[91] *Id.* Kelleher's supervisors also denied his request to work eight hour shifts (instead of his usual ten-to-twelve hour shifts) for one week while his daughter was hospitalized. *Id.*

[92] *Id.*

[93] *Kelleher*, 939 F.3d at 469–70.

[94] *Id.* at 468, 470.

[95] *Id.*

ADA's protected class. In this way, the "essential functions" hurdle enables an employer to avoid the question of whether disability motivated the employer's termination decision.[96] This result dramatically differs from Title VII cases in which courts ensure that plaintiffs fired for poor attendance have an opportunity to demonstrate that the employer's purported attendance justification for their termination is pretextual.[97]

In addition to frustrating ADA disparate treatment claims in which employers assert attendance-based rationales for their decisions, the "essential functions" hurdle impedes ADA disparate treatment claims involving workplace accommodations.[98] Such claims allege that the employer not only violated the ADA's unique, stand-alone reasonable accommodation provision,[99] but also engaged in disability-based disparate treatment identical to parallel race, sex, and age-based disparate treatment claims.[100]

While Title VII cases typically do not involve accommodation requests, Title VII caselaw nonetheless contains examples of plaintiffs reaching juries based on their allegations that their employers engaged in disparate treatment with respect to employment terms that function similarly to ADA accommodations. For example, in *Arnold v. City of Denver*, the court held that a reasonable jury could conclude that an employer's refusal to provide a female employee the "off-call every other weekend" accommodation that it provided her male colleague constituted sex discrimination.[101] Similarly, in *Gaynor v. Martin*, the court concluded that a male plaintiff's allegation that his employer granted his request for reduced hours less promptly than female employees' parallel requests supported his sex-based disparate treatment claim.[102]

Ironically, despite the ADA's unique stand-alone provision that promises disabled workers reasonable accommodations,[103] judicial imposition of the "essential functions" hurdle can make it more difficult for ADA plaintiffs to

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[96] Notably, the Second Circuit failed to acknowledge that one of Kelleher's employer's practices—prohibiting "leaving after one's shift"—violates the Fair Labor Standards Act. *Id.* at 467, 469; *see* Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. (prohibiting employers from requiring unpaid post-shift work).

[97] *See supra* notes 71–73 and accompanying text. Also compare Kalia v. Robert Bosch Corp., No. 07-11013, 2008 WL 2858305, at *10–12 (E.D. Mich. July 22, 2008) (denying employer's motion for summary judgment in a Title VII case—despite significant problems with the plaintiff's performance and attendance—because the plaintiff's supervisor had called her morning sickness a "personal problem" and had complained that she was using her pregnancy to avoid overtime (citation omitted)).

[98] *See* Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004).

[99] 42 U.S.C. § 12111(9).

[100] *See* 42 U.S.C. §§ 12112, 2000e-2.

[101] Arnold v. City of Denver, No. 14-cv-00290-REB-CBS, 2015 WL 333056, at *1–3 (D. Colo. Jan. 23, 2015).

[102] Gaynor v. Martin, 77 F. Supp. 2d 272, 277 (D. Conn. 1999).

[103] 42 U.S.C. § 12111(9).

hold employers accountable for disparate treatment with respect to workplace accommodations. For example, in *Caroselli v. Allstate*, a case discussed above in the context of disability harassment claims, the "essential functions" hurdle blocked Caroselli's attempts to prove that her supervisor terminated her because of her disability.[104] Despite Caroselli's two-year tenure in her position and the fact that Allstate had "numerous employees who worked on a part time basis,"[105] the court concluded that Caroselli's new supervisor's decision to transform Caroselli's part-time position into a full-time position made full-time hours an "essential function."[106] This application of the "essential functions" hurdle blocked Caroselli's attempt to prove that disability animus motivated her supervisor's decision to constructively discharge her (by increasing her job's hours) instead of attempting to hire a second part-time employee to cover the additional hours.[107]

The Fourth Circuit's endorsement of the "essential functions" hurdle similarly blocked Janet Perdue from holding her employer accountable for disability-based disparate treatment with respect to the employer's job-sharing policy.[108] When Perdue applied to job share following the same procedures as successful job-sharing applicants, her supervisor began the interview by asking questions about Perdue's disability.[109] In litigation, however, the employer insisted that it denied Perdue's job-share request not because of Perdue's disability, but due to Perdue's proposed job-share partner's performance deficiencies.[110] In response, Perdue emphasized that, prior to litigation, management's response to the proposed job-share focused on her disability.[111] She also noted her proposed partner was "well regarded within the company, having received a gold sales award and an 'exceeds expectations' end-of-year rating . . . ."[112] The Fourth Circuit, however, characterized this evidence supporting Perdue's disparate treatment claim as "irrelevant" because Perdue's inability to work full-time hours took her outside the ADA's protected class.[113]

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[104] Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004).

[105] Plaintiff's Response to Defendant's Motion for Summary Judgment at 13–14, 16, Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004 (N.D. Ill. Feb. 23, 2004); *see also id.* ("Allstate's organizational chart showed that other employees worked part time or had a job share situation . . . .").

[106] *Caroselli*, 2004 WL 407004, at *4–5.

[107] *Id.* at *2, *5.

[108] Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954, 960 (4th Cir. 2021).

[109] *Id.* at 957–58; *see* Appellee's Brief at 4–5, Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954 (4th Cir. 2021) (No. 19-2094).

[110] *Id.*

[111] *Id.* at 958.

[112] *Id.* at 957.

[113] *Perdue*, 999 F.3d at 959 n.2, 960. The Fourth Circuit appeared to base its conclusion that Perdue's disparate treatment evidence was irrelevant, in part, on the fact that disparate treatment evidence is not *required* for a plaintiff to establish a failure-to-accommodate claim.

Accordingly, in the court's view, it did not need to consider whether disability discrimination motivated the employer's denial of Perdue's job-share proposal.

Caroselli and *Perdue* demonstrate how courts' distortion of the "essential functions" provision's original focus on "job tasks" to include "full-time hours" compounds the "essential functions" hurdle's frustration of the ADA. In both cases, the courts contravened the ADA's clear text, which, absent proof of undue hardship, provides disabled employees a stand-alone statutory right to "part-time or modified schedules" when necessary to facilitate their performance of the job's true "essential functions."[114] They also ignored EEOC guidance, which makes clear that "[t]he ADA requires employers to provide reasonable accommodations to individuals with disabilities . . . even [when such accommodations] are not available to others."[115] The courts then compounded this error by concluding that Caroselli and Perdue's need for part-time schedule accommodations made them ineligible to bring disparate treatment claims challenging their employers' refusal to provide them the part-time schedules their employers provided to other employees.[116]

If Caroselli and Perdue had argued that their employers based their denials of their part-time schedule requests on their sex instead of their disability, their claims likely would have reached a jury. Even in the absence of any evidence that the employer provided other employees part-time schedules, courts have held that reasonable juries can conclude that employers' denials of part-time schedule requests constitute discrimination under Title VII.[117] Similarly, as

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Id. at 960. The Fourth Circuit failed to acknowledge that evidence that the employer permits other employees to work part-time undermines the employer's claim that full-time hours are an "essential function." More fundamentally, the Fourth Circuit failed to acknowledge the fact that Perdue's complaint clearly articulated a disparate treatment claim in addition to a failure to accommodate claim. *Cf.* Complaint at para. 28, Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004 (N.D. Ill. Feb. 23, 2004) (alleging that Allstate violated the ADA by treating her differently from her peers in the terms and conditions of her employment and ultimately terminating her employment).

[114] 42 U.S.C. § 12111(8)–(9); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (Oct. 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada [https://perma.cc/C8GB-KQQH] ("An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.").

[115] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 114.

[116] *Compare* 42 U.S.C. § 12112(a) (prohibiting discrimination "on the basis of disability in regard to . . . terms, conditions, and privileges of employment"), *with Caroselli*, 2004 WL 407004, at *4–5; *Perdue*, 999 F.3d at 959–61.

[117] *See, e.g.*, Pagan-Alejandro v. PR ACDelco Serv. Ctr., 468 F. Supp. 2d 316, 326–27 (D.P.R. 2006) (holding that a reasonable jury could conclude that the employer's denial of the plaintiff's request for a part-time schedule was pregnancy discrimination); *cf.* Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1317 (10th Cir. 2006) (holding that the employer's refusal to permit the plaintiff to work part time, "in light of the fact that it permitted another

discussed above, courts have held that juries can conclude that an employer's refusal to provide male and female employees the same schedule flexibility violates Title VII's prohibition of sex discrimination.[118] By contrast, the "essential functions" hurdle blocked Caroselli and Perdue from arguing that disability discrimination explained why their employers denied them the part-time schedule accommodations that they provided to other employees.[119]

C. *The "Essential Functions" Hurdle and After-Acquired Evidence*

Cases involving evidence the employer obtained after terminating the plaintiff similarly illustrate how the "essential functions" hurdle bars disability discrimination claims that would succeed under Title VII or the ADEA. In *McKennon v. Nashville Banner Publishing Co.*, the Supreme Court held that information an employer learns after terminating a plaintiff cannot absolve the employer from liability for basing its termination decision on the plaintiff's age.[120] Reasoning that "the employer could not have been motivated by knowledge it did not have," the Court concluded that while "after-acquired evidence" that the employer would have had lawful justification to terminate the employee may preclude a reinstatement remedy (and reduce the plaintiff's backpay damages), it cannot completely defeat an age discrimination claim.[121] The Court justified its decision by emphasizing the discriminatory harm the plaintiff suffered and the ADEA's broad, public-regarding "purpose: 'the elimination of discrimination in the workplace.'"[122]

Based on *McKennon*, terminated plaintiffs have held their employers accountable for age and sex discrimination in situations in which after-acquired evidence revealed that the plaintiffs had engaged in disqualifying conduct[123] or

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[similarly situated employee] to do so, could be viewed as retaliation" for challenging salary discrimination); Mayo v. Rsch. Analysis & Maint., Inc., No. 04-1014, 2006 WL 2113186, at *4 (W.D. La. July 26, 2006) (concluding that a reasonable jury could conclude that the employer's refusal to provide the plaintiff a part-time schedule was retaliation for filing a sexual harassment complaint); Cole v. Del. Tech. & Cmty. Coll., 459 F. Supp. 2d 296, 306 (D. Del. 2006) (holding that a reasonable jury could conclude that the employer's denial of medically necessary reduced-hours request was retaliation for a race discrimination complaint).

[118] *See, e.g.*, Gaynor v. Martin, 77 F. Supp. 2d 272, 277 (D. Conn. 1999).

[119] *Perdue*, 999 F.3d at 959 n.2; Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004); *cf.* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 178 (2017) (critiquing other forms of protected class gatekeeping as "not a productive line of inquiry for disparate treatment law" because courts should instead focus "on the question of whether a discriminator was motivated by forbidden grounds").

[120] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362–63 (1995).

[121] *Id.* at 360, 362.

[122] *Id.* at 358 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

[123] *See, e.g.*, Quinn-Hunt v. Bennett Enters., Inc., 122 F. App'x 205, 208 (6th Cir. 2005) (holding that employer's post-termination discovery that the plaintiff had misappropriated

lacked a required certification or academic degree.[124] Courts have even held that *McKennon* applies to plaintiffs who obtained their jobs via fraud.[125] For example, plaintiffs who lied about having a college degree have held their employers accountable for age discrimination in situations in which the employer proved that it would not have hired the plaintiff had it known the plaintiff lacked the degree.[126]

By contrast, courts applying the "essential functions" hurdle conclude that after-acquired evidence of nonqualification permits employers to entirely escape liability for *disability* discrimination.[127] These courts reason that post-termination discovery that an ADA plaintiff is not a "qualified individual" entirely bars the plaintiff's discrimination claim, even though "the employer could not have been motivated by knowledge it did not have."[128]

This application of the "essential functions" hurdle blocks claims that would succeed if they alleged age or sex discrimination instead of disability discrimination. For example, in *McConathy v. Dr. Pepper/Seven Up Corp.*, Marge McConathy had evidence supporting her claim that Dr. Pepper fired her because of her disability.[129] When she approached her supervisor about her need for jaw surgery the year after she had used the majority of her sick leave and vacation time to undergo three other jaw surgeries, her supervisor grew angry.[130] He told her that she "better get well this time" and that he would "no longer tolerate her

documents did not bar his Title VII claim); Vaughn v. Sabine County, 104 F. App'x 980, 988 (5th Cir. 2004) (concluding that evidence of criminal conduct that occurred after the employer's decision not to hire the plaintiff did not impact the plaintiff's Title VII claim); O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 759, 764 (9th Cir. 1996) (holding that after-acquired evidence of misconduct sufficient to justify termination does not bar age discrimination claim).

[124] *See, e.g.*, Risk v. Burgettstown Borough, 364 F. App'x 725, 729–30 (3d Cir. 2010) (holding that Title VII plaintiff's lack of a required police officer training certification did not doom his religious discrimination claim).

[125] *See, e.g.*, Wehr v. Ryan's Fam. Steak Houses, Inc., 49 F.3d 1150, 1153 (6th Cir. 1995) (holding that after-acquired evidence of resume fraud did not bar plaintiff's Title VII retaliation claim); Russell v. Microdyne Corp., 65 F.3d 1229, 1235, 1240 (4th Cir. 1995) (holding that after-acquired evidence of resumé fraud did not bar plaintiff's sex discrimination claim); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1185–88 (11th Cir. 1992) (holding plaintiff's omission of a prior conviction from her job application did not bar her Title VII and Equal Pay Act claims).

[126] *See, e.g.*, Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1109 (5th Cir. 1995); Smith v. Gen. Scanning, Inc., 876 F.2d 1315, 1319–20 (7th Cir. 1989).

[127] *See* Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020) ("*McKennon*'s limitation on the use of after-acquired evidence does not extend to evidence used to show an ADA plaintiff is not a qualified individual."); Herron v. Peri & Sons Farms, Inc., 676 F. App'x 639, 639–40 (9th Cir. 2017); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998); McNemar v. Disney Store, Inc., 91 F.3d 610, 621 (3d Cir. 1996).

[128] McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995).

[129] *McConathy*, 131 F.3d at 560–61.

[130] *Id.* at 560.

health problems."[131] He also advised her that, due to her role as a company benefits manager, it was "inappropriate" for her to use the company's medical insurance plan so extensively.[132] Dr. Pepper fired McConathy the following year, shortly after McConathy informed her supervisor that she would need an additional surgery (to replace a screw installed during a previous surgery that had come loose).[133]

Instead of analyzing whether a reasonable jury could conclude that disability motivated Dr. Pepper's decision to terminate McConathy, the Fifth Circuit held that McConathy could not bring an ADA claim.[134] To support this conclusion, the Fifth Circuit pointed to the fact that McConathy, in an application for Social Security Disability (SSD) benefits, attested that her jaw pain prevented her from working.[135] The court failed to consider the strong possibility that McConathy was adequately performing her job's essential functions at the time Dr. Pepper fired her, which was two years before McConathy applied for SSD. Dr. Pepper itself claimed that McConathy "was not disabled within the meaning of the ADA while she worked for Dr. Pepper"[136] and acknowledged that McConathy had "yearly reviews by her supervisor, all of which were satisfactory."[137] Despite these signals indicating that Dr. Pepper lacked a performance-based justification for terminating McConathy, the Fifth Circuit concluded that McConathy's post-termination statements about her work capacity prevented her from being a "qualified individual" eligible to hold Dr. Pepper accountable a disability-based termination decision.[138]

Although the Supreme Court has since clarified that statements ADA plaintiffs make in SSD applications about their work capacity do not preclude ADA claims,[139] the Fifth Circuit's core holding—that post-termination evidence of nonqualification precludes employer liability for disability-based terminations—remains applicable in the Fifth Circuit, as well as in the Third and Ninth Circuits.[140] By applying the "essential functions" hurdle instead of *McKennon* to ADA claims, these courts conclude that the public value of

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[131] *Id.*

[132] *Id.*

[133] *Id.* at 560–61.

[134] *Id.* at 561.

[135] *McConathy*, 131 F.3d at 561–63.

[136] Appellant's Reply Brief at 7, McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998) (No. 97-10037) (citing Appellee's Brief at 7, *McConathy*, 131 F.3d 558 (No. 97-10037)).

[137] *Id.* (citing Appellee's Brief, *supra* note 136, at 6).

[138] *McConathy*, 131 F.3d at 562–63.

[139] Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 797–98 (1999).

[140] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1134 (9th Cir. 2020); Herron v. Peri & Sons Farms, Inc., 676 F. App'x 639, 639 (9th Cir. 2017); *McConathy*, 131 F.3d at 563; McNemar v. Disney Store, Inc., 91 F.3d 610, 621 (3d Cir. 1996).

eliminating age discrimination that the Supreme Court articulated in *McKennon* does not apply to disability discrimination.[141]

The Third Circuit's explanation for why it applies *McKennon* to sex and age claims but not disability claims is particularly striking. In a pre-*McKennon* sex and age discrimination case, the Third Circuit enthusiastically endorsed the discrimination-remedying values the Supreme Court later articulated in *McKennon*.[142] It reasoned that the plaintiff's fraudulent assertion that she possessed a bachelor's degree could not bar her sex and age discrimination claims because:

> to maintain that a victim of employment discrimination has suffered no injury is to deprecate the federal right transgressed and to heap insult ("You had it coming") upon injury.
> . . . .
> . . . An employee's fraud or misconduct . . . simply does not justify, excuse, or make harmless the employer's intentional, invidious discrimination.
> . . . .
> . . . A plaintiff in an employment-discrimination case . . . acts not only to vindicate his or her personal interests in being made whole, but also as a "private attorney general" to enforce the paramount public interest in eradicating invidious discrimination.
> . . . [T]he employer's discrimination is a wrong against the employee *and* society at large.[143]

Shortly after this full-throated endorsement of *McKennon*'s reasoning, the Third Circuit refused to extend *McKennon* to disability discrimination claims.[144] Instead, it held that the question of whether disability motivated an employer's termination decision "is not a proper concern for the court unless [the plaintiff] first has established . . . that he was qualified for the job."[145] Squarely rejecting "the EEOC's assertion that '[a] plaintiff's claim cannot be defeated by an issue of qualifications that has nothing to do with the employer's motivation for the adverse action,"[146] the Third Circuit concluded that after-acquired evidence of nonqualification made the plaintiff's evidence that his employer terminated him shortly after learning he was HIV-positive "irrelevant."[147]

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[141] *See Anthony*, 955 F.3d at 1134; *Herron*, 676 F. App'x at 639; *McConathy*, 131 F.3d at 563; *McNemar*, 91 F.3d at 621.

[142] Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1223, 1231–34 (3d Cir. 1994), *judgment vacated*, 514 U.S. 1034 (1995), *and abrogated by* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).

[143] *Id.*

[144] *McNemar*, 91 F.3d at 621.

[145] *Id.*

[146] *Id.* (alteration in original).

[147] *Id.* at 620–21.

The disparate outcomes and tenor of these opinions, which were written just two years apart, are a striking indication of how lack of judicial buy-in for the ADA's nondiscrimination aims contributes to courts' willingness to disadvantage ADA claims vis-à-vis ADEA and Title VII claims. The Third Circuit readily concluded that an unqualified plaintiff (who engaged in resume fraud) could hold her employer accountable for sex and age discrimination on the rationale that such discrimination harms the plaintiff and society as a whole.[148] By contrast, the Third Circuit's mechanical application of the "essential functions" hurdle to a parallel ADA claim failed to acknowledge that disability-based employment discrimination similarly harms both the plaintiff and society as a whole.

D. *The "Essential Functions" Hurdle and Post-Employment Benefits*

To conclude this survey of the "essential functions" hurdle's impact with a final example: four circuits apply the "essential functions" hurdle to bar ADA challenges to discrimination in post-employment benefits.[149] These are benefits an employee earns during her employment that do not materialize until after the employee retires or otherwise leaves the job through which she earned the benefits. Examples of post-employment benefits include pensions and post-employment health insurance benefits.

The ADEA and Title VII permit former employees to challenge discrimination related to the content and administration of post-employment benefits.[150] For example, when Galyan Harris brought an ADEA class action challenge to his former employer's decision to substantially raise retirees' health insurance premiums (while not comparably raising current employees' premiums), the court did not ask whether Harris—or the thousands of other retirees he represented—could still do their former jobs.[151] It instead focused on the question Harris raised: whether his former employer's disparate treatment of retirees and current employees constituted age discrimination.[152]

By contrast, four circuits conclude that eligibility to bring ADA challenges to disability discrimination in post-employment benefits is contingent upon proof that the plaintiffs remain able do their former jobs' "essential

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[148] *Id.* at 619.

[149] McKnight v. Gen. Motors Corp., 550 F.3d 519, 528 (6th Cir. 2008); Slomcenski v. Citibank, N.A., 432 F.3d 1271, 1280–81 (11th Cir. 2005); Morgan v. Joint Admin. Bd., 268 F.3d 456, 457 (7th Cir. 2001); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1112 (9th Cir. 2000).

[150] *See, e.g.*, Harris v. City of Orange, 902 F.3d 1061, 1071 (9th Cir. 2018) (analogizing to Title VII to conclude that the ADEA's discrimination provisions "cover post-employment benefits for already retired employees").

[151] *Id.* at 1064–65.

[152] *Id.* at 1072.

functions."[153] For example, the Seventh Circuit rejected an ADA challenge brought by Hattie Morgan on behalf of herself and other pensioners who retired early due to disability.[154] Morgan argued that her former employer violated the ADA by refusing to provide disability pensioners the cost-of-living increase that it provided the rest of its pensioners.[155] The Seventh Circuit refused to consider this question because it reasoned that Morgan and her fellow disability pensioners "cannot perform the essential functions of their job, and therefore they have no rights under the [ADA's] statutory provisions . . . ."[156]

Similarly, Kimberly Slomcenski argued that her former employer's decision to terminate her from its long-term disability benefits plan was discriminatory because her employer admitted that it would not have terminated her if it believed that her disability had a physical, rather than mental, etiology.[157] Instead of analyzing whether this admission constituted disability discrimination, the Eleventh Circuit dismissed Slomcenski's claim because she—like all persons eligible for long-term disability benefits—could no longer perform her former job's "essential functions."[158]

This application of the "essential functions" hurdle substantially undermines the ADA's express aim to deter and redress disability discrimination in "terms [and] conditions . . . of employment,"[159] including "fringe benefits."[160] As a dissenting judge explains, "[i]t would be counter-intuitive, and quite surprising, to suppose . . . that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection . . . at precisely the time that those benefits are designed to materialize."[161]

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[153] *McKnight*, 550 F.3d at 528; *Slomcenski*, 432 F.3d at 1280; *Morgan*, 268 F.3d at 457–58; *Weyer*, 198 F.3d at 1112.

[154] *Morgan*, 268 F.3d at 457.

[155] *Id.* at 457–58.

[156] *Id.* at 458.

[157] *See Slomcenski*, 432 F.3d at 1274–75.

[158] *Id.* at 1280. The Ninth Circuit reached the same result in a similar case. *See Weyer*, 198 F.3d at 1107–08, 1112 (imposing the "essential functions" hurdle to dismiss challenge to a long-term disability benefits plan that provided benefits up to age sixty-five for physical disabilities but only two years of benefits for mental disabilities).

[159] 42 U.S.C. § 12112(a).

[160] *Id.* § 12112(b)(2).

[161] Gonzales v. Garner Food Servs., Inc., 89 F.3d 1523, 1532 (11th Cir. 1996) (Anderson, J., dissenting); *see also* Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (concluding that it is "inconceivable" that Congress wanted to "allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be 'qualified' at or after their retirement, although they had earned those fringe benefits through years of service"); Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998) (interpreting "the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA").

Much like other applications of the "essential functions" hurdle, courts' application of the hurdle to post-employment benefit claims erects an arbitrary barrier to recovery—the plaintiff's ability to do "essential functions"—that has no connection to the question of whether the employer discriminated.[162] It relegates ADA claims to a second-class status vis-a-vis parallel claims alleging sex or age discrimination.

III. THE "ESSENTIAL FUNCTIONS" HURDLE CONTRAVENES THE ADA'S TEXT AND STRUCTURE

As explained above, courts rationalize the "essential functions" hurdle by contrasting the ADA's central employment nondiscrimination provision's phrasing, which prohibits discrimination "against a qualified individual on the basis of disability," with parallel employment nondiscrimination statutes, which use the phrase "any individual."[163] Stressing this difference, courts insist that, although the ADA is "part of the same statutory scheme to protect employees in the workplace" as parallel statutes prohibiting discrimination on the basis of race, sex, and age, "the ADA expressly limits its protection to qualified individuals."[164] Then, because the ADA defines "qualified individual" to mean "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,"[165] courts conclude that persons who "cannot perform the essential functions of their job . . . have no rights under the statutory provisions."[166]

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[162] *See, e.g.*, McKnight v. Gen. Motors Corp., 550 F.3d 519, 528 (6th Cir. 2008).

[163] *Compare* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a *qualified individual* on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (emphasis added)), *with* 42 U.S.C. § 2000e-2 ("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 . . . ." (emphasis added)), *and* 29 U.S.C. § 623(a) ("It shall be unlawful for an employer to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." (emphasis added)).

[164] Anthony v. Trax Int'l Corp., 955 F.3d 1123, 1130 (9th Cir. 2020).

[165] 42 U.S.C. § 12111(8).

[166] Morgan v. Joint Admin. Bd., 268 F.3d 456, 458 (7th Cir. 2001)*; see also* Lanman v. Johnson Cnty., 393 F.3d 1151, 1156 (10th Cir. 2004) ("[A]s a threshold matter, any plaintiff asserting a claim under the ADA must establish he or she is a 'qualified individual with a disability'"); Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847, 851 (8th Cir. 2002) ("[T]he ADA does not protect an employee unable to perform 'the essential functions of the employment position that such individual holds.'"); Steele v. Thiokol Corp., 241 F.3d 1248, 1253 (10th Cir. 2001) ("[I]n order to bring any claim under the ADA, a plaintiff must

This conclusion that the ADA requires the "essential functions" hurdle, while superficially linked to the ADA's text, substantially contravenes the ADA's text and structure. Unlike other nondiscrimination statutes (which do not employ the term "qualified individual"), the ADA pointedly substitutes pre-ADA assumptions about who is "qualified" for a more inclusive "qualified individual" definition. By defining "qualified" with respect to capacity to perform "essential functions," the ADA's "qualified individual" definition makes clear that employers may not exclude disabled workers "simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job."[167] Additionally, by directing courts to assess a plaintiff's ability to perform a position's essential functions "with or without [a] reasonable accommodation," the "qualified individual" definition makes clear that employers may not reject disabled workers because "the manner in which particular job tasks comprising those functions are performed, or the equipment used in performing them, may be different for an employee with a disability than for a non-disabled employee."[168]

Accordingly, in context, the ADA's unique "qualified individual" definition does not define the boundary of the ADA's protected class, but instead helps define the scope of employers' reasonable accommodation duties. As the Supreme Court observed, in a case involving the slightly differently worded Rehabilitation Act of 1973, "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' [in a reasonable accommodation case] would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications . . . ."[169] As the

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first establish that he is a qualified individual with a disability."); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1112 (9th Cir. 2000) ("The term 'qualified' limits the protection of Title I of the Act."); Khan v. UNC Health Care Sys., No. 1:20CV977, 2021 WL 4392012, at *7 (M.D.N.C. Sept. 24, 2021) ("[T]he ADA does not protect an employee unable to perform 'the essential functions of the employment position that such individual holds.'"); Williams v. Ill. Dep't of Hum. Rts., No. 20-CV-2818, 2021 WL 197430, at *2 (N.D. Ill. Jan. 20, 2021) ("The ADA does not protect every individual with a disability. The ADA protects only 'qualified individual[s] with a disability.'" (alteration in original)); Choma v. Blue Cross Blue Shield of Del., No. 06-486-JJF, 2008 WL 4276546, at *9 (D. Del. Sept. 18, 2008) ("[T]he ADA does not protect an employee unable to perform the essential functions of the position the employee holds."); Pugliese v. Verizon N.Y., Inc., No. 05-CV-4005 (KMK), 2008 WL 2882092, at *13 (S.D.N.Y. July 9, 2008) ("Courts have defined 'essential functions' to mean the affirmative duties or inherent parts of a job . . . . 'It is well established that the ADA does not protect plaintiffs who are unable to meet these requirements.'" (citation omitted) (quoting Valentine v. Standard & Poor's, 50 F. Supp. 2d 262, 287 (S.D.N.Y. 1999))); Martin v. DeKalb Cnty. Cent. United Sch. Dist., No. 1:04-CV-047, 2005 WL 1869085, at *7 (N.D. Ind. Aug. 3, 2005) ("The ADA does not protect [a plaintiff] at all unless he can prove he is a 'qualified individual' . . . .").

[167] H.R. REP. NO. 101-485, pt. 3, at 33 (1990) (quoting 42 Fed. Reg. 22,686 (May 4, 1977)).

[168] 42 U.S.C. § 12111(8); H.R. REP. NO. 101-485, pt. 3, at 33.

[169] Alexander v. Choate, 469 U.S. 287, 299 n.19 (1985); *see also* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1167 (2010)

Supreme Court's observation suggests, a court cannot conclude that the inability to perform an "essential function" prevents a plaintiff from being a "qualified individual" until it determines whether a reasonable accommodation would enable the plaintiff to perform the "essential function."[170] This inextricable relationship between "essential functions" and "reasonable accommodations" signals that while the inability to perform an essential function may justify an employer's decision to exclude a disabled worker from a particular job, it does not exclude the disabled worker from the ADA's protected class.

The inherently job-position-specific nature of the ADA's "essential functions" language further indicates that "essential functions" does not define the scope of the ADA's protected class. Throughout employment nondiscrimination law, courts may determine statutory coverage by reference solely to employer and plaintiff attributes; they do not need to study written job descriptions, assess their accuracy, and determine which job tasks are essential. Title VII protects all employees of covered employers, in every job.[171] Similarly, the ADEA protects employees who have reached or exceeded forty years of age, without regard to job type.[172] If courts applying the "essential functions" hurdle are correct that the ADA has a contingent protected class in which the same individual is covered with respect to jobs *A* and *B*, but not jobs *C*, *D*, and *E*, such a protected

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(observing, in context of parallel provisions in Title III of the ADA, that the Supreme Court has "treated reasonable modification and fundamental alteration as one term, two sides of the same coin")); *id.* at 1169 (noting, in the context of parallel provisions in Title II of the ADA, that "the plurality opinion [in *Olmstead*] also read 'reasonable modifications' and 'fundamental alteration' as the same term") (quoting Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 605–06 (1999)).

[170] *See Alexander*, 469 U.S. at 301.

[171] 42 U.S.C. § 2000e(f). The sole Title VII exceptions are for jobs with religious institutions, religious ministry positions, and the small category of jobs, such as portraying a historical figure on film, in which race, sex, or national origin may be a bona fide occupational qualification. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 188, 194–95 (2012) (describing Supreme Court caselaw holding that the First Amendment requires an exception to Title VII for religious minister positions in order to "ensure[] that the authority to select and control who will minister to the faithful . . . is the church's alone"); 42 U.S.C. § 2000e-2(e) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .").

[172] 29 U.S.C. § 631(a). Like Title VII, the ADEA contains a narrow exception for rare situations in which "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." *Id.* § 623(f). It also allows government employers to refuse to hire or mandatorily retire firefighters and law enforcement officers over 55, and permits mandatory retirement for employees 65 years or older who have been employed in a bona fide executive or high policymaking position if the employee is entitled to an immediate nonforfeitable annual retirement benefit equal to at least $44,000. *Id.* §§ 623(j), 631(c).

class would be an unprecedented departure from Congress's otherwise consistent design for employment nondiscrimination statutes.

Other ADA provisions similarly demonstrate that proof that the plaintiff is a "qualified individual" is not a prerequisite for protected class membership. For example, the ADA's "qualification standards" provision defines "discrimination" to include:

> failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).[173]

It also defines "discrimination" to include:

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.][174]

The ADA's "defenses" section largely repeats this language, providing that:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.[175]

By requiring employers to prove that exclusionary selection criteria are truly necessary, these provisions make clear that proof the plaintiff is a "qualified individual" is not a prerequisite to challenging discriminatory employment tests or other qualification standards.[176] Instead, it is often the court's ultimate conclusion, made after the court evaluates the legitimacy of the employer's exclusionary selection criteria and the feasibility of any accommodations the plaintiff's disability may require.

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[173] 42 U.S.C. § 12112(b)(7).
[174] *Id.* § 12112(b)(6).
[175] *Id.* § 12113(a).
[176] *See id.* §§ 12112(b)(6), 12113(a).

Similarly, a more obscure ADA provision that targets current illegal drug users further signals that judicial imposition of the "essential functions" hurdle contravenes Congressional intent. In keeping with the "War-on-Drugs" era in which Congress enacted the ADA,[177] the ADA's text disfavors current users of illegal drugs by excluding persons "currently engaging in the illegal use of drugs" from the term "qualified individual with a disability."[178] However, the ADA limits this exclusion to "*when the covered entity acts on the basis of* such [current illegal drug] use."[179] Accordingly, while employers may lawfully terminate employees for violating drug policies, the ADA expressly prevents courts from treating compliance with such policies as a prerequisite to ADA coverage. This limitation means that current illegal drug users may bring ADA claims that, due to the "essential functions" hurdle, other disabled workers cannot.

Third Circuit caselaw involving "after-acquired" evidence illustrates how courts imposing the "essential functions" hurdle treat current illegal drug users—a group Congress intended to disfavor—more favorably than other ADA plaintiffs. In a case in which an employer discovered, after terminating the plaintiff, that the plaintiff "was unqualified at the relevant time frame as a result of his drug abuse," the Third Circuit upheld the plaintiff's disability discrimination claim.[180] Quoting the Supreme Court's *McKennon* decision discussed above,[181] the Third Circuit held the defendants accountable for discrimination despite the plaintiff's disqualifying drug use because the defendants "could not have been motivated by knowledge [they] did not have."[182] By contrast, in a case in which the employer used statements the plaintiff had made about his work capacity to prove nonqualification, the Third Circuit refused to apply *McKennon*.[183] Even though, as in the drug use case, the after-acquired nonqualification evidence "ha[d] nothing to do with the employer's motivation for the adverse action," the Third Circuit concluded that it barred the plaintiff's discrimination claim on the rationale that the employer's discriminatory motivation for terminating a plaintiff is "not a proper concern for

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[177] In 1990, the same year the 101st Congress passed the ADA, it also passed the Solomon-Lautenberg amendment, which encouraged states to suspend the driver's licenses of convicted drug offenders by reducing federal highway funding if states did not comply. 23 U.S.C. § 159; *see* Pub. L. No. 101-516, § 333, 104 Stat. 2155, 2185 (1990). The action closely followed the Anti-Drug Abuse Act of 1986, which established mandatory minimum prison sentences for many drug offenses, Pub. L. 99-570, 102 Sta. 3207 (1986), and the Anti-Drug Abuse Act of 1988, which amended it, Pub. L. 100-690, 102 Sta. 4181 (1988).

[178] 42 U.S.C. § 12114(a).

[179] *Id.* (emphasis added).

[180] Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 537 (3d Cir. 2007).

[181] *See supra* notes 120–26 and accompanying text.

[182] *Bowers*, 475 F.3d at 537 (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360 (1995) (alteration in original)).

[183] McNemar v. Disney Store, Inc., 91 F.3d 610, 618–19 (3d Cir. 1996).

the court unless [the plaintiff] first has established . . . that he was qualified for the job."[184]

Following the same logic, plaintiffs disqualified because of illegal drug use enjoy protection from disability-based disparate treatment not based on their current illegal drug use. Additionally, so long as they remain physically and mentally able to perform their former job's essential functions, plaintiffs disqualified because of illegal drug use may challenge disability discrimination in post-employment benefits. Plaintiffs disqualified because of illegal drug use also enjoy the disability-based harassment protection denied to Raymond Posante (who could not perform the "essential function" of complying with his employer's attendance policy), Corinne Caroselli (who could not perform the "essential function" of full-time hours), and Jayne Poorbaugh (who could not perform the "essential function" of working in the building that triggered her asthma attacks).[185]

It seems highly unlikely that the 101st Congress, which compounded penalties for drug possession,[186] wished to favor current illegal drug users over workers who violate attendance policies, need part-time hours, or cannot work in a particular building. Instead, the 101st Congress appears to have assumed that courts would implement the ADA to align with longstanding Title VII caselaw holding that a plaintiff's failure to meet an employer's qualification requirements does not categorically bar the plaintiff from holding the employer accountable for discrimination.

Finally, the reality that many circuits do not consistently apply the "essential functions" hurdle is another mark against their conclusion that the ADA's text requires it. The Second Circuit, for example, has applied the "essential functions" hurdle to associational discrimination claims, but not to post-employment benefit claims.[187] The Third Circuit has applied it to after-acquired evidence cases, but not to post-employment benefits cases.[188] The Fourth Circuit has applied it to

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[184] *Id.* at 621 (quoting Brief for EEOC at 12, *McNemar*, 91 F.3d 610 (3d Cir. 1996) (No. 95-1590)).

[185] *See* cases cited *supra* notes 49–63.

[186] The Solomon-Lautenberg amendment, enacted in 1990, encouraged states to suspend the driver's licenses of convicted drug offenders by reducing federal highway funding if states did not comply. 23 U.S.C. § 159; *see* Pub. L. No. 101-516, § 333, 104 Stat. 2155, 2185 (1990); Joni Hirsch & Priya Sarathy Jones, *Driver's License Suspension for Unpaid Fines and Fees: The Movement for Reform*, 54 U. MICH. J.L. REFORM 875, 879 n.19 (2021).

[187] *Compare* Kelleher v. Fred A. Cook, Inc., 939 F.3d 465, 469–70 (2d Cir. 2019) (applying the "essential functions" hurdle to an associational discrimination case), *with* Castellano v. City of New York, 142 F.3d 58, 69 (2d Cir. 1998) (critiquing other circuits' application of the "essential functions" hurdle to post-employment benefit claims because it is "inconceivable" that Congress wanted to "allow employers to discriminatorily deny or limit post-employment benefits to former employees who ceased to be 'qualified' at or after their retirement, although they had earned those fringe benefits through years of service").

[188] *Compare McNemar*, 91 F.3d at 621 (quoting EEOC Brief, *supra* note 184, at 12) (concluding that Disney's motive for firing the plaintiff "is not a proper concern for the court

harassment claims but not to associational discrimination claims.[189] The Fifth Circuit has applied it to after-acquired evidence cases but not to associational discrimination claims.[190] The Sixth Circuit has applied it to direct evidence claims, but not to harassment and associational discrimination claims.[191] The Tenth Circuit has applied it to disparate treatment and direct evidence claims, but not associational discrimination claims.[192] These numerous unexplained

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unless [plaintiff] first has established . . . that he was qualified for the job" and rejecting "the EEOC's assertion that 'a plaintiff's claim cannot be defeated by an issue of qualifications that has nothing to do with the employer's motivation for the adverse action'"), *with* Ford v. Schering-Plough Corp., 145 F.3d 601, 607 (3d Cir. 1998) (interpreting "the ADA to allow disabled former employees to sue their former employers regarding their disability benefits so as to effectuate the full panoply of rights guaranteed by the ADA").

[189] *Compare* Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001) (applying the "essential functions" hurdle to an ADA harassment claim), *with* Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, 53 F.3d 55, 58–59 (4th Cir. 1995) (applying *McDonald Douglas* approach instead of the "essential functions" hurdle to an associational discrimination claim).

[190] *Compare* McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998) (applying "essential functions" hurdle to after-acquired evidence cases), *with* Spencer v. FEI, Inc., 725 F. App'x 263, 267–68 (5th Cir. 2018) (applying *McDonnell Douglas* approach rather than the "essential functions" hurdle to associational discrimination claim; analyzing employer's argument that it terminated the plaintiff due to performance deficiencies as the employer's legitimate nondiscriminatory reason).

[191] *Compare* Wurzel v. Whirlpool Corp., 482 F. App'x 1, 10 (6th Cir. 2012) (concluding that the "essential functions" hurdle applies to disparate treatment claims, including claims involving direct evidence of discrimination), *and* McKnight v. Gen. Motors Corp., 550 F.3d 519, 528 (6th Cir. 2008) (applying the "essential functions" hurdle to post-employment benefits), *with* Stansberry v. Air Wis. Airlines Corp., 651 F.3d 482, 487–88 (6th Cir. 2011) (in an associational discrimination case, analyzing the plaintiff's poor performance not in terms of whether he was a "qualified individual," but as the employer's legitimate, nondiscriminatory reason for terminating him), *and* Gentry v. Summit Behav. Healthcare, 197 F. App'x 434, 437–38 (6th Cir. 2006) (explaining that, to prove a hostile environment claim, an ADA plaintiff "must prove the following: (a) he was a member of the protect[ed] class, that is, he was disabled; (b) he was subjected to unwelcomed harassment; (c) the harassment was based on his disability; (d) the harassment had the effect of unreasonably interfering with his work performance by creating an intimidating, hostile or offensive work environment; and (e) the existence of liability on the part of [the employer]").

[192] *Compare* Bethscheider v. Westar Energy, 820 F. App'x 749, 753 (10th Cir. 2020) (dismissing plaintiff's disparate treatment claim because her absences made her "not a 'qualified individual' entitled to protection under the ADA"), *and* Lanman v. Johnson Cnty., 393 F.3d 1151, 1156 (10th Cir. 2004) ("[A]s a threshold matter, any plaintiff asserting a claim under the ADA must establish he or she is a 'qualified individual with a disability.'" (quoting 42 U.S.C. § 12112(a))); Steele v. Thiokol Corp., 241 F.3d 1248, 1253 (10th Cir. 2001) ("[I]n order to bring any claim under the ADA, a plaintiff must first establish that he is a qualified individual with a disability."), *with* Trujillo v. PacifiCorp, 524 F.3d 1149, 1154–61 (10th Cir. 2008) (applying the *McDonnell Douglas* approach to an associational discrimination claim and denying summary judgment to the employer even though the plaintiffs conceded that they intentionally falsified time records in order to earn compensation for time they had not worked).

inconsistent applications of the "essential functions" hurdle belie courts' contentions that the ADA's text requires it.

IV. THE "UNQUALIFIED" PRESUMPTION MOTIVATES COURTS' IMPOSITION OF THE "ESSENTIAL FUNCTIONS" HURDLE

Instead of the ADA's text, the belief that disabled people should be subject to a heightened qualification standard appears to motivate courts' distortion of the ADA's "essential functions" provision. Occasionally, judges expressly invoke this belief. For example, three Fifth Circuit judges have opined that the "essential functions" hurdle reflects what they call the "common sense" idea "that an employee's ability to do the job, and to do so safely, is a matter of heightened concern when it comes to disability, and has a special meaning not present in the context of age or sex."[193] This argument exchanges the ADA's text (which requires employers to justify disability-based exclusions) for the unsupported pre-ADA assumption that disabled workers are more likely than nondisabled workers to apply for jobs that exceed their competence.

While other judges do not so explicitly invoke this pre-ADA presumption, they reveal that it influences them by failing to apply the "essential functions" hurdle to *non*disabled ADA plaintiffs. The ADA's associational discrimination provision, which prohibits discrimination on the basis of the plaintiff's close relationship with a disabled person, employs the same "qualified individual" language that courts say necessitates imposition of the "essential functions" hurdle to disabled plaintiffs' claims.[194] Just like the ADA's core nondiscrimination provision, (which prohibits discrimination "against a *qualified individual* on the basis of disability"),[195] the ADA's associational discrimination provision prohibits discrimination against "a *qualified individual* because of the known disability of an individual with whom the *qualified individual* is known to have a relationship or association."[196] Despite this textual congruity, four circuits that impose the "essential functions" hurdle on disabled plaintiffs do not impose it

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[193] Rizzo v. Child.'s World Learning Ctrs., Inc., 213 F.3d 209, 219 (5th Cir. 2000) (en banc) (Jones & Smith, JJ., dissenting) (joined by Weiner, J.).

[194] 42 U.S.C. § 12112(b)(4).

[195] *Id.* § 12112(a) (emphasis added).

[196] *Id.* § 12112(b)(4) (emphasis added). The ADA Amendments Act of 2008 heightened the significance of the associational discrimination provision's use of the term "qualified individual." The pre-amendments version of the ADA defined "qualified individual with a disability" with reference to "essential functions" and did not provide a stand-alone definition for the term "qualified individual." Americans with Disabilities Act of 1990, Pub. L. 101-336, §§ 101, 102, 104 Stat. 327, 331–32 (current version at 42 U.S.C. §§ 12111, 12112). By contrast, the post-amendments ADA universally applies the term "qualified individual" (and the accompanying "essential functions" phrase, embedded in its statutory definition) to both disabled plaintiffs as well as associational discrimination plaintiffs, who are often nondisabled. 42 U.S.C. §§ 12111(8), 12112(a), (b)(4).

on nondisabled associational discrimination plaintiffs.[197] They treat nondisabled associational discrimination plaintiffs like ADEA and Title VII plaintiffs who need not prove they can do "essential functions" in order to challenge discrimination. This inconsistency suggests that judicial assumptions about the relative competence of disabled and nondisabled people, rather than the ADA's text, underlies the "essential functions" hurdle.

A recurring semantic error in associational discrimination cases similarly suggests that an unstated assumption that disabled workers should be subject to a heightened qualifications standard drives judicial application of the "essential functions" hurdle. Two courts have applied the associational discrimination provision's "qualified individual" language to the plaintiffs' disabled relatives instead of, as the text requires, to the plaintiffs themselves. For example, the Sixth Circuit began its analysis of an associational discrimination claim by stating that the court would "assume that [the plaintiff]'s wife is a qualified individual with a disability."[198] Another court—omitting the phrase "with a disability"—bizarrely characterized associational discrimination claims as alleging discrimination "against [the plaintiff] for her association with qualified individuals."[199] This unintentional shift of the term "qualified" from the nondisabled plaintiff to the disabled associate suggests that subjecting disabled plaintiffs' work capacity to heightened scrutiny is intuitive to courts while subjecting nondisabled plaintiffs' work capacity to the same standard is not.

Similar errors in retaliation cases also suggest that disability bias animates application of the "essential functions" hurdle. Unlike the rest of the ADA's employment nondiscrimination provisions, the ADA's retaliation provision is completely disconnected from the term "qualified individual." Instead of using the term "qualified individual," the ADA's retaliation provision states that "*any individual*" may bring a retaliation claim.[200] In this way, the ADA's retaliation provision precisely mirrors Title VII and the ADEA.[201] Despite this clear

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[197] *See* Fourth, Fifth, Sixth, and Tenth Circuit cases cited *supra* notes 189–92. *But see* Kelleher v. Fred A. Cook, Inc. 939 F.3d 465, 469–70 (2d Cir. 2019) (applying the "essential functions" hurdle to an associational discrimination case); Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1226, 1231 (11th Cir. 1999) (same).

[198] Stansberry v. Air Wis. Airlines Corp., 651 F.3d 482, 486 (6th Cir. 2011).

[199] Tyson v. Access Servs., 158 F. Supp. 3d 309, 311 (E.D. Pa. 2016).

[200] 42 U.S.C. § 12203(a) (emphasis added).

[201] *Compare* 42 U.S.C. § 12203(a)–(b) ("No person shall discriminate against *any individua*l because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. . . . It shall be unlawful to coerce, intimidate, threaten, or interfere with *any individual* in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." (emphasis added)), *with* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against . . . any individual . . . because he has opposed any practice made an unlawful employment practice

indication that courts' stated rationale for the "essential functions" hurdle is inapplicable to retaliation claims, some courts have nonetheless applied the "essential functions" hurdle to disabled plaintiffs' retaliation claims.[202] For example, one court concluded that, because the plaintiff "is not a qualified individual under the ADA," it would "not address" whether the plaintiff had "established a prima facie case for . . . retaliation . . . ."[203] Similarly, another court declared that the "viability" of the plaintiff's retaliation claim was "dependent on whether Plaintiff could perform the essential functions of her job and was therefore a qualified individual."[204] This misreading of the ADA's text

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by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."), *and* 29 U.S.C. § 623(d) (using almost identical language in the context of age discrimination). *See also* Kotaska v. Fed. Express Corp., 966 F.3d 624, 632 (7th Cir. 2020) ("[E]ven those who are not qualified individuals can maintain a claim for retaliation."); Morgan v. Joint Admin. Bd., 268 F.3d 456, 458 (7th Cir. 2001) ("[T]he language of the Americans with Disabilities Act . . . supports differentiating retaliation plaintiffs from discrimination plaintiffs. The statutory protections against discrimination are protections of '[otherwise] qualified individual[s] with a disability,' . . . but the retaliation provision protects individuals, period . . . ." (quoting 42 U.S.C. § 12112(a))).

[202] *See* Forslund v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC, 516 F. Supp. 3d 1285, 1288 (D.N.M. 2021) ("Sandia argues that Forslund's claims fail because: (1) Forslund is not a 'qualified individual' under the ADA, (2) Forslund has not established a prima facie case for the discrimination and retaliation claims, and (3) Forslund supports his hostile work environment claim with stale conduct that is neither severe nor pervasive. . . . Because the Court is granting the Motion based on its conclusion that Forslund is not a qualified individual under the ADA, it will not address Defendant's second and third arguments." (internal citation omitted)); Taylor-Novotny v. Health All. Med. Plans, No. 12 CV 2132, 2013 WL 5832670, at *2 (C.D. Ill. Oct. 30, 2013) ("The viability of the three ADA claims: (1) disparate treatment; (2) failure to accommodate; and (3) retaliation are dependent on whether Plaintiff could perform the essential functions of her job and was therefore a qualified individual.") *aff'd*, 772 F.3d 478, 488 (7th Cir. 2014) (recounting, without comment, that the district court "noted that, in order to prevail on any of those claims—disparate treatment, failure-to-accommodate and retaliation—the plaintiff had to establish that 'she was a qualified individual who, with or without reasonable accommodation, could perform the essential functions of the employment position.'" (citation omitted)); *cf.* Steele v. Thiokol Corp., 241 F.3d 1248, 1253 (10th Cir. 2001) ("[I]n order to bring any claim under the ADA, a plaintiff must first establish that he is a qualified individual with a disability."); *see also* Lanman v. Johnson Cnty., 393 F.3d 1151, 1156 (10th Cir. 2004) ("[A]s a threshold matter, any plaintiff asserting a claim under the ADA must establish he or she is a 'qualified individual with a disability.'" (quoting 42 U.S.C. § 12112(a))); Krouse v. Am. Sterilizer Co., 984 F. Supp. 891, 901 (W.D. Pa. 1996) (concluding that the plaintiff's retaliation claim failed because he was not a "qualified individual"), *aff'd while rejecting this conclusion*, 126 F.3d 494 (3d Cir. 1997).

[203] *Forslund*, 516 F. Supp. 3d, at 1288.

[204] Taylor-Novotny v. Health All. Med. Plans, Inc., 772 F.3d 478, 488 (7th Cir. 2014) (recounting, without comment, that the district court "noted that, in order to prevail on any of those claims—disparate treatment, failure-to-accommodate and retaliation—the plaintiff had to establish that 'she was a qualified individual who, with or without reasonable

appears fueled by the judicial assumption that persons alleging disability-based discrimination, unlike plaintiffs alleging age or sex discrimination, must overcome the presumption they are unqualified before they may access discrimination protection.

Overall, courts applying the "essential functions" hurdle appear to assume that the core question—and often the only question—in an ADA case is whether the plaintiff is "qualified."[205] Courts appear to embrace the pre-ADA assumption that employers' decisions to exclude disabled workers are generally justified on the grounds that disabled workers are not qualified for the positions they seek.[206] Courts appear unaware of the reality that employers continue to discriminate against people with disabilities at startlingly high rates.[207] They also appear unaware of—or resistant to—research indicating that implicit disability-based bias is nearly universal and frequently goes undetected because most people (including judges) mistakenly believe they have only positive views about disabled people.[208]

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accommodation, could perform the essential functions of the employment position.'" (internal citation omitted)). Other courts, while superficially acknowledging that the "essential functions" hurdle cannot apply to retaliation claims, undercut ADA retaliation claims in another way. They hold, without textual support, that an employer's denial of a reasonable accommodation request after a plaintiff files an EEOC complaint "cannot serve as an adverse action for an ADA retaliation claim." *See* Moore-Fotso v. Bd. of Educ. of City of Chi., 211 F. Supp. 3d 1012, 1037 (N.D. Ill. 2016); *see also* Avet v. Dart, No. 14 C 4555, 2016 WL 757961, at *6 (N.D. Ill. Feb. 26, 2016) (holding that the employer's refusals to grant the plaintiff's accommodation requests after he filed an EEOC complaint could not support the plaintiff's retaliation claim). This conclusion sharply contrasts with Title VII caselaw that allows plaintiffs to use denials of workplace accommodations, such as refusals to permit the plaintiff to work part-time hours, as the adverse employment action that supports their retaliation claims. *See, e.g.*, Mickelson v. N.Y. Life Ins. Co., 460 F.3d 1304, 1317 (10th Cir. 2006); Mayo v. Rsch. Analysis & Maint., Inc., No. 04-1014, 2006 WL 2113186, at *4 (W.D. La. July 26, 2006).

[205] *See supra* Part II.

[206] *See* notes 196–97 and accompanying text.

[207] One study found that only thirty-three percent of businesses would choose to hire a person with a disability even if they were qualified, due in large part to the belief that employees with disabilities are "less capable members of the workforce." Marjorie L. Baldwin & Steven C. Marcus, *Perceived and Measured Stigma Among Workers with Serious Mental Illness*, 57 PSYCH. SERVS. 388, 388 (2006).

[208] *See, e.g.*, Dale Larson, Note, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 475–78 (2008) (summarizing social science research documenting implicit disability-based bias and stating "people are particularly unwilling to admit—or more likely, are unaware of—their implicit bias against individuals with disabilities"); Steven R. Pruett & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 REHAB. PSYCH. 202, 207 (2006) (finding no significant correlation between implicit and explicit disability bias in a study of 223 subjects); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 36, 40 (2007).

V. AMENDING THE ADA TO STOP JUDICIAL IMPOSITION OF THE "ESSENTIAL FUNCTIONS" HURDLE

To curb courts' ongoing and expanding application of the "essential functions" hurdle, Congress should consider excising the "qualified individual" language—and the "essential functions" phrase embedded within it—from the ADA's text. It has long been clear that both phrases are, at best, unnecessary. Without them, the ADA still requires reasonable accommodations, including the removal of nonessential job functions.[209] Additionally, without "qualified individual" and "essential functions," the ADA—like all other employment discrimination statutes—makes clear that an employer does not discriminate when it excludes workers from jobs they truly cannot perform.

In the years leading up to the ADA, many voices criticized § 504 of the Rehabilitation Act of 1973's parallel "otherwise qualified" phrasing.[210] The National Council on the Handicapped noted that it was redundant because people not hired because they lack legitimate qualifications have not been subjected to discrimination.[211] It additionally observed that, "if the qualifications established for a job or activity are themselves discriminatory, the concept of 'otherwise qualified' in the statute only further complicates the analysis."[212] The U.S. Civil Rights Commission agreed that "[t]he limitation of protection to 'otherwise qualified' appears unnecessary" because, "[i]f a handicapped person is denied an opportunity because he or she is not qualified, the discrimination is not . . . 'on the basis of [his or her] handicap.'"[213] As discussed above, even the Supreme Court suggested that the "portion of § 504 which requires that a handicapped individual be 'otherwise qualified' before the nondiscrimination principle of

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[209] 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodations); *id.* § 12111(9)(B) (defining "reasonable accommodation" to include "job restructuring"); 29 C.F.R. pt. 1630 app. § 1630.2(o) (2023) ("[One] of the potential accommodations listed is 'job restructuring.' An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions. For example, an employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires an individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the individual with a disability can perform are made a part of the position to be filled by the individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position.").

[210] 29 U.S.C. § 794(a).

[211] NAT'L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS, app. at A-19 to -22 (Feb. 1986).

[212] *Id.* at A-20.

[213] U.S. COMM'N ON C.R., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 114 n.66 (Sept. 1983).

§ 504 becomes relevant"[214] is unnecessary because "the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications."[215]

Removing "qualified individual" and "essential functions" from the ADA's employment provisions would allow the ADA's employment provisions to function similarly to the ADA's public accommodations title, which does not include those phrases.[216] Instead of using "qualified individual" and "essential functions," the ADA's public accommodation title simply provides that "no individual shall be discriminated against on the basis of disability."[217] It addresses employers' interests with provisions that parallel the employment section's "qualification standards" provision and undue hardship defense.[218] To further define the limits of covered entities' responsibilities to reasonably modify their facilities and practices to accommodate people with disabilities, it includes a "fundamental alteration" defense.[219]

The public accommodations section's "fundamental alteration" defense—much like the "essential functions" language currently in the ADA's employment provisions—functions as a boundary for covered entities' duties to modify their practices and procedures to accommodate disabled people.[220] Within the context of the public accommodations section, a "fundamental alteration" is "a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered."[221] In the context of a professional golf tournament, the Supreme Court decided that it would not be a "fundamental alteration" to permit Casey Martin, a golfer with a degenerative circulatory disorder, to use a cart.[222]

Replacing the employment provisions' "qualified individual" and "essential functions" phrases with a "fundamental alteration" defense would make clear that disability discrimination plaintiffs, like their counterparts challenging race, sex, or age discrimination, may recover for disparate treatment and harassment regardless of their need for accommodations, such as leaves of absence or part-time schedules. While the undue hardship and fundamental alteration defenses will ensure that employers need not provide these accommodations in situations where they are infeasible, a disabled person's need for them should not prevent

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[214] Alexander v. Choate, 469 U.S. 287, 299 n.19 (1985).

[215] *Id.*

[216] 42 U.S.C. § 12182(a).

[217] *Id.*; *see also id.* §§ 12181–12189.

[218] *Id.* § 12182(b)(2)(A)(i), (iii).

[219] *Id.* § 12182(b)(2)(A)(ii)–(iii).

[220] *See* Weber, *supra* note 169, at 1167 (observing that the Supreme Court has "treated reasonable modification and fundamental alteration as one term, two sides of the same coin").

[221] AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL III-4.3600 (2022), https://archive.ada.gov/taman3.htm [https://perma.cc/3KNL-KBYY].

[222] PGA Tour, Inc. v. Martin, 532 U.S. 661, 686–91 (2001).

them from accessing the ADA to bring other types of ADA claims, such as claims alleging disability-based disparate treatment or harassment.

VI. CONCLUSION

Left unchecked, the currently expanding judicial imposition of the "essential functions" hurdle relegates ADA plaintiffs to a second-class status. It transforms the ADA's unique features into an arbitrary barrier that does not exist in parallel statutes that address discrimination on the basis of sex and age. The "essential functions" hurdle also reinforces the stereotypical assumption that, unless proven otherwise, disability negatively impacts performance. Disability discrimination law, which is designed to eliminate this stereotype, should not contribute to its retrenchment.