AN INVISIBLE TRUTH: HOW COURTS, CONGRESS, & THE ADA HAVE FAILED TO SUPPORT REASONABLE ACCOMMODATIONS IN THE WORKPLACE FOR PEOPLE WITH MENTAL ILLNESS

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ABSTRACT

Today, a significant percentage of the American population is affected by mental illness. Conditions like depression and anxiety are

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qualifying mental disabilities under the Americans with Disabilities Act (ADA or the "Act"). A serious stigma surrounding anxiety and depression exists in modern society. The stigma makes it difficult for the mentally ill to participate in the labor force, and even more difficult to obtain reasonable accommodations. Rates of anxiety and depression are particularly high in the legal profession. These conditions often develop or are exacerbated in law school and follow people into the working world. The stress of the legal profession is a major contributing factor to these heightened rates of depression and anxiety. Untreated and unmitigated, depression and anxiety can lead to suicide.

In 1990, Congress enacted the ADA, which was received as a great leap forward in the disability rights movement. Congress, calling on its power to enforce the Fourteenth Amendment and its ability to regulate interstate commerce, sought to set forth a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Unfortunately, courts interpreted the Act in a manner inconsistent with Congressional intent, and individuals were left unprotected because the courts narrowly construed the ADA's definition of disability. Congress, endeavoring to enforce the original purpose of the Act, amended the ADA in 2008. The Americans with Disabilities Act Amendments Act (ADAAA or "the Amendments") provided new definitions to promote clarity, consistency, and broad interpretation of the ADA.

Congressional intentions were good, but the amendments were ultimately short sighted. While more people were qualified as disabled under the ADA, Congress neglected to consider what additional enforcement powers may be necessary to protect this newly legally qualified group of people. Ultimately, more people qualified to eventually lose their lawsuits because courts frequently hold that reasonable accommodations for persons with qualifying mental illness cause undue hardship for employers. Thus, accommodations granted to a person in university are later denied in the workplace.

Under Title I of the ADA, the granting of reasonable accommodations is limited by the Undue Hardship Standard. Courts often deny reasonable accommodations sought by people with mental disabilities where employers claim it would be unreasonable or cost prohibitive to ask them to change their policy or procedures. Courts give greater weight to the undue hardship than they do to the reasonableness of the accommodations requested. In contrast, under Title II and III of the ADA, reasonable accommodations must be granted, in general, and can be denied only if they would fundamentally alter the nature of the program being implemented. In these cases, the court gives deference to the person seeking accommodation.

This Note provides a detailed explanation and examination of why Congress should amend the ADA and adopt the Fundamentally Alters Standard for Title I institutions. Additionally, this Note examines alternate solutions which have been proposed and argues that they are ultimately insufficient to address the problem.

INTRODUCTION

On October 14, 2018, Gabe MacConaill shot himself in the parking garage of his office building.[1] Gabe was a successful partner in the bankruptcy department at Sidley Austin, a major law firm.[2] Like many other attorneys, Gabe struggled with mental illness.[3] He had a condition known as maladaptive perfectionism—an illness that is linked to depression.[4] Maladaptive perfectionism presents as feelings of unworthiness of love and belonging, which results in perceived social isolation.[5] Gabe's time in big law made him feel insecure, vulnerable, and isolated; there are others who share those feelings.[6] While Gabe MacConaill's story is heartbreaking, his death, however, is an important reminder that mental health is a highly relevant issue for attorneys.

Lawyers have an important role to play in breaking the silence on critical issues, such as mental illness, that marginalize members of the profession.[7] Advocating for the issue can empower others to advocate for mental health awareness with confidence.[8] There are issues that affect persons with mental illness that are prevalent in our current society, issues which affect lawyers and non-lawyers alike, that merit recognition and advocacy. There is one particular issue that requires heightened attention:

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1. *See* Joanna Litt, '*Big Law Killed My Husband': An Open Letter From a Sidley Partner's Widow*, LAW.COM (Nov. 12, 2018, 9:00 AM), https://www.law.com/americanlawyer/2018/11/12/big-law-killed-my-husband-an-open-letter-from-a-sidley-partners-widow/.

2. *See id.*

3. *See id.*

4. *See id.*; Christopher Bergland, *Self-Compassion Counterbalances Maladaptive Perectionism*, PSYCHOL. TODAY (Feb. 26, 2018), https://www.psychologytoday.com/us/blog/the-athletes-way/201802/self-compassion-counterbalances-maladaptive-perfectionism.

5. Bergland, *supra* note 4.

6. *See* Vivia Chen, *There's a Bit of Gabe MacConaill in All of Us*, LAW.COM (Nov. 15, 2018, 11:41 AM), https://www.law.com/americanlawyer/2018/11/15/theres-a-bit-of-gabe-macconaill-in-all-of-us/.

7. *See generally* Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805 (2019) (arguing that underrepresented groups within the legal community should be encouraged to speak up on prevalent issues within the profession so as to make the legal community as a whole more inclusive).

8. *See* Kassidy Mi'chal, *Why It's Important to Talk Openly About Mental Health*, MEDIUM (Dec. 25, 2017), https://medium.com/@KassidyCreates/why-its-important-to-talk-openly-about-mental-health-3c954dfc6d2a.

courts have failed to interpret the Americans with Disabilities Act (ADA or "The Act")[9] in a manner that protects employees with mental illness.[10]

It is not a novel idea to say that people with qualifying mental health disabilities (sometimes referred to as psychiatric disabilities)[11] deserve equal protection under the law. Unfortunately, the very legislation which seeks to protect them is inherently flawed. While Congress's clear goal was to provide equal opportunity to persons with disabilities, they neglected to provide a standard of enforcement which would permit a person with a qualifying mental disability to prevail in court.[12] Employers often resist providing certain accommodations to employees with mental disabilities,[13] and the ADA, in effect, allows them to do so by claiming undue hardship to their business.[14] People with mental disabilities benefit from accommodations, which definitively improve their ability to perform in the workplace, yet their requests are still denied.[15] Mental health issues pervade our own profession, and they must not be ignored.[16] As trained advocates, lawyers must recognize the extent of this problem and advocate to Congress for change. Attorneys can help ensure that

9. *See generally* 42 U.S.C. §§12101–12213 (2021) (these sections of the U.S.C. compose the Americans with Disabilities Act).

10. The American Psychiatric Association (APA) defines mental illnesses as "health conditions involving changes in thinking, emotion or behavior" (or a combination of these). *What Is Mental Illness?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/what-is-mental-illness (last visited May 22, 2020); Both the International Classification of Diseases (ICD-11), a publication of the World Health Organization, and the diagnostic statistical manual, published by the APA, outline three main types of mental illnesses: anxiety disorders (such as panic disorders), mood disorders (such as bipolar disorder), and schizophrenia disorders. *See What are Psychiatric Disabilities?*, NAT'L REHABILITATION INFOR. CTR, https://www.naric.com/?q=en/FAQ/what-are-psychiatric-disabilities (last visited Sept. 13, 2021); *see also International Classification of Diseases and Related Health Problems (ICD)*, WORLD HEALTH ORG., http://www.who.int/classifications/icd/en/ (last visited May 22, 2021).

11. *See What are Psychiatric Disabilities?*, *supra* note 10 (noting that it is common for different terms to be used interchangeably when discussing mental illness).

12. *See* Courtney Abbott Hill, *Enabling The ADA: Why Monetary Damages Should Be a Remedy Under Title III of The Americans with Disabilities Act*, 59 SYRACUSE L. REV. 101, 101–02 (2008).

13. *See* Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities*, 55 AM. BUS. L.J. 537, 572 (2018).

14. *See id.* at 539.

15. Society benefits as well because individuals with disabilities are given the same opportunity to succeed and our aims of equality are furthered. *See id*. at 538.

16. *See* Staci Zaretsky, *The Struggle: Law Students Suffer From High Rates Of Depression And Binge Drinking*, ABOVE THE LAW (May 12, 2016, 2:46 PM), https://abovethelaw.com/2016/05/the-struggle-law-students-suffer-from-high-rates-of-depression-and-binge-drinking/?rf=1. While law students are generally granted accommodations for anxiety and depression, the same protections are not offered to them once they enter the working world. It is possible that young attorneys can be stripped of the accommodations that protected them—and helped them succeed—in law school.

persons with a qualifying mental illness are better protected by a statute with real enforcement mechanisms.

This Note will make the argument that the Undue Hardship defense should be removed from the ADA by Congress and replaced with the Fundamentally Alters Standard, presently used by public and private universities.[17] Specifically, the Note will make a case that a legislative solution is the only option, as the courts have failed in their duty to interpret the law in-line with legislative intent. Further, courts give disproportional deference to employers on the questions of reasonableness and undue hardship through arguments that rely primarily on stereotypes and stigma.[18]

Part I will demonstrate the expansiveness of the mental health crisis in society. The section looks specifically at the anxiety and depression epidemic as an illustration of one small part of the issue. This section examines mental health in legal education and the legal profession as a prime example of why this issue merits recognition. Finally, it discusses how stigma associated with having a mental disability makes it more difficult for persons with disabilities to successfully fight for protections on their own.

Part II will provide an overview of the historical development of the ADA and its predecessors. An examination of the disability rights movement, the Rehabilitation Act, and the ADA will evidence that Congress intended to eliminate oppression faced by people with disabilities. Subsequently, it will explain how the courts narrowly interpreted the ADA, which led Congress to amend the legislation in 2008, further showcasing how even the recent amendments left gaps in the legislation.

Part III explains how employers and courts use the Undue Hardship Standard to deny reasonable accommodations to people with mental disabilities. Courts have disproportionately given deference to employers during litigation regarding the denial of reasonable accommodation requests. Subsequently, this section contrasts the Undue Hardship Standard with the Fundamentally Alters Standard by analyzing how the latter affords better protection to university students than the Undue Hardship Standard provides employees.

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17. The Undue Hardship Standard and The Fundamentally Alters Standard are terms created for this Note. They are formal names for defenses that can presently be asserted under the ADA by an institution seeking to oppose the implementation of reasonable accommodations. *See infra* Part III.B., E. (comparing reasonable accommodations under the workplace and university standards).

18. Hickox & Hall, *supra* note 13, at 570.

Finally, Part IV will make an argument that Congress is in the best position to solve this problem by amending the ADA and removing the Undue Hardship Standard. It presents the alternative solution that the fundamentally alters defense would provide superior protection for disabled persons, but still allow employers to raise a defense based on burdensome costs.

I. THE MENTAL HEALTH CRISIS

The United States is presently experiencing a mental health crisis.[19] While there are many different mental disorders, by examining a few of the more widely diagnosed illnesses, specifically anxiety and depression, a portion of the larger issue can be illustrated in detail.[20] For the same reason, mental health in legal education and the legal profession are simply demonstrative of a significantly more widespread issue.

A. Anxiety & Depression

According to the National Institute of Mental Health, serious mental illness (SMI) is defined as "a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities."[21] Nearly one in five U.S. adults live with a mental illness.[22] In 2017, out of 46.6 million adults with any mental illness, only 19.8 million (42.6%) received mental health services.[23] In 2017, among the 11.2 million adults with SMI, 7.5 million (66.7%) received mental health treatment in the past year.[24] These figures demonstrate the widespread nature of SMI. Focusing on a small portion of the problem, the statistics below reveal the extent of the anxiety epidemic.

The term "anxiety disorder" refers to specific psychiatric disorders that involve extreme fear or worry, and includes generalized anxiety disorder (GAD), panic disorder and panic attacks, agoraphobia, social anxiety disorder, selective mutism, separation anxiety, and specific

19. *See* Cynthia Koons, *Latest Suicide Data Show the Depth of U.S. Mental Health Crisis*, BLOOMBERG (June 20, 2019, 6:00 AM), https://www.bloomberg.com/news/articles/2019-06-20/latest-suicide-data-show-the-depth-of-u-s-mental-health-crisis.

20. *See Mental Disorders*, WORLD HEALTH ORG. (Nov. 28, 2019), https://www.who.int/news-room/fact-sheets/detail/mental-disorders (last visited May 22, 2021); *Facts & Statistics*, ANXIETY & DEPRESSION ASS'N AM., https://adaa.org/about-adaa/press-room/facts-statistics (last visited May 22, 2021).

21. *See Mental Illness*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml (last visited May 22, 2021).

22. *Id.*

23. *Id.*

24. *Id.*

phobias.[25] GAD affects 6.8 million adults, or a little over 3% of the population of the United States, but only 43.2% of those affected currently receive treatment.[26] These surprising numbers are not limited to anxiety; the figures below demonstrate how depression is even more prevalent in our society.

The Anxiety and Depression Association of America defines depression as a condition in which a person "feels discouraged, sad, hopeless, unmotivated, or disinterested in life in general for more than two weeks and when the feelings interfere with daily activities."[27] They explain that major depression is a treatable illness that affects the way a person thinks, feels, behaves, and functions.[28] Major Depressive Disorder is the leading cause of disability in the United States for people ages 14 to 44, and affects 16.1 million Americans aged 18 or older.[29] These statistics illustrate a perturbing problem, and exemplify the number of people who may qualify as a protected person under the ADA. Large numbers of people in American society are potentially eligible for ADA protection, and it is more important than ever to ensure their protection.

B. Mental Illness & the Legal Field

While the numbers above are convincing of the widespread frequency of SMI in the United States, the prevalence of mental illness in the legal community can provide a greater illustrative example of the depth of this crisis. The rates of mental illness amongst law students have been referred to as "disturbing."[30] It is reported that law students suffer from depression, anxiety, and substance abuse at "unusually" high rates.[31] Research indicates that depression rates among law students is 8–9% prior to matriculation, 27% after one semester, 34% after two semesters, and 40% upon graduation.[32] Law students experience more stress than many of their contemporaries— "stress among law students is 96%, compared to 70% in medical students, and 43% in graduate

25. *See Understanding The Facts Of Anxiety Disorders And Depression Is The First Step*, ANXIETY & DEPRESSION ASS'N AM., https://adaa.org/understanding-anxiety (last visited May 22, 2021).

26. *See Facts & Statistics*, *supra* note 20.

27. *See Understanding The Facts Of Anxiety Disorders And Depression Is The First Step*, *supra* note 25.

28. *See id.*

29. *See Facts & Statistics*, *supra* note 20.

30. Zaretsky, *supra* note 16.

31. *Id.*

32. *Lawyers & Depression*, DAVE NEE FOUND., http://www.daveneefoundation.org/scholarship/lawyers-and-depression/ (last visited May 22, 2021).

students."[33] Furthermore, chronic stress can trigger the onset of clinical depression.[34] For example, stress can be created by the pressure of law school exams and bar preparation.

Anxiety is prevalent amongst law students and has long term negative effects. For example, 37% of law students screened positive for anxiety, and 14% of them met the definition for severe anxiety.[35] Law school itself may be a contributing factor to poor mental health—at the outset of law school, law students have a psychological profile that mirrors the general public; however, after law school, 20–40% have some sort of psychological issue, such as depression, which would qualify as a disability under the ADA.[36] Many of these conditions follow graduates into practice—psychological distress, dissatisfaction, and substance abuse.[37]

Mental illness problems persist in the legal profession; lawyers are 3.6 times as likely to suffer from depression when compared to people in other jobs.[38] A study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs found that 21% of licensed, employed attorneys qualify as problem drinkers, 28% struggle with depression, and 19% demonstrate symptoms of anxiety.[39] Furthermore, the study found that attorneys in the first decade of practice are more likely to be affected.[40] Some believe this research demonstrates how the pressure faced by lawyers manifests as health risks.[41] Pressure in the legal profession can manifest itself in unique ways, and it comes in many forms, including the stress of handling deals, working in offices where mistakes are not tolerated, and managing

33. *Id.*

34. *Id.*

35. Zaretsky, *supra* note 16.

36. *See* DAVE NEE FOUND., *supra* note 32; Amy Broadway, *What is a Psychological Disorder?*, PSYCHOL. TODAY (Mar. 12, 2015), https://www.psychologytoday.com/us/blog/the-mysteries-love/201503/what-is-psychological-disorder (explaining that psychological dysfunction refers to the "cessation of purposeful functioning of cognition, emotions or behavior.").

37. DAVE NEE FOUND., *supra* note 32.

38. Dina Roth Port, *Lawyers Weigh in: Why is there a Depression Epidemic in the Profession?*, AM. BAR ASS'N J. (May 11, 2018, 7:00 AM), http://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession.

39. Press Release, Hazelden Betty Ford Found., ABA, Hazelden Betty Ford Foundation Release First National Study on Attorney Substance Use, Mental Health Concerns (Feb. 3, 2016), https://www.hazeldenbettyford.org/about-us/news-media/press-release/2016-aba-hazelden-release-first-study-attorney-substance-use.

40. *Id.*

41. *Id.*

unhappy clients, among other circumstances.[42] Most notably, lawyers are fifth in suicide incidents by profession.[43]

Some have noted that the data indicates a professional culture which seems "unsustainable" due to the number of people it harms.[44] There are risks associated with this kind of widespread attorney impairment—for "the struggling individuals themselves and to our communities, government, economy, and society."[45] Gabe MacConaill was a casualty of this unsustainable culture. His wife, Joanna Litt, explained that suicide is her new world.[46] Stories like Gabe's often leave the friends and families of the deceased desperately searching for answers.[47] It does not have to be this way. When society chooses to recognize that a problem exists, we can work toward a solution.

C. The Stigma Problem

The stigma surrounding people with mental disabilities impacts employment rates and overall enjoyment of work.[48] One study found a statistically significant inverse relationship between the severity of a person's mental illness and their employment rate.[49] Those with serious mental illnesses, such as major depressive disorder, have an employment rate of just 54.5%.[50] For comparison, the employment rate of working age people with no mental illness was 75.9%.[51] People with mental disabilities face additional stigma due to the concept of "sanism—an irrational prejudice against anyone diagnosed with a mental disability."[52] People without symptoms can suffer the effects of stigma regardless of impressive credentials and work history.[53] One psychologist observed

42. *See* Litt, *supra* note 1; Gaston Kroub, *Beyond Biglaw: Embracing Stress*, ABOVE THE LAW (Sep. 20, 2016, 10:04 AM), https://abovethelaw.com/2016/09/beyond-biglaw-embracing-stress/; Leslie A. Gordon, *How Lawyers can Avoid Burnout and Debilitating Anxiety*, AM. BAR ASS'N J. (July 1, 2015, 6:00 AM), http://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety.

43. DAVE NEE FOUND., *supra* note 32.

44. Press Release Hazelden Betty Ford Found., *supra* note 39.

45. *Id.*

46. *See* Litt, *supra* note 1.

47. *See id.*

48. Hickox & Hall, *supra* note 13, at 566.

49. *See* Alison Luciano & Ellen Meara, *The Employment Status of People with Mental Illness: National Survey Data from 2009 and 2010*, 65 PSYCHIATRIC SERV. 1201, 1201–09 (2014).

50. *Id.* ("Employment rates decreased with increasing mental illness severity (none = 75.9%, mild = 68.8%, moderate = 62.7%, serious = 54.5%, $p<0.001$).").

51. *Id.*

52. Hickox & Hall, *supra* note 13, at 568.

53. *Id.*

that society commonly condemns people with mental illness and opines "they should be held morally responsible for their behaviors."[54] In other words, society tends to perceive mental illness as internally generated and tied to poor character.[55] One author suggested this notion of fault may "explain the unwillingness of both employers and courts to require broader accommodations for people with psychiatric disabilities."[56]

Evidence of stigma and stereotyping against people with a qualifying mental disability is demonstrated by the deference courts give to employers' beliefs that those employees pose a direct threat.[57] This defense "is only as valid as the accuracy of the employer's prediction that the employee does have a 'potential of future violence.'"[58] Employers often rely on stereotypes to prove threats.[59] Courts have deferred to this position without challenging the reliance on stereotypes.[60] The reality is that the majority of people with mental illness are no more likely to be violent than anyone else.[61] This kind of deference does not advance the purposes of the ADA, and it is further evidence that a change is necessary.

II. CONGRESSIONAL INTENT: EQUAL OPPORTUNITY FOR ALL

In large part, the ADA endeavors to overcome, and even combat, the stigma associated with having a disability, "which often resulted in employer's unwillingness to hire such individuals."[62] Yet, despite the ADA, people with mental disabilities still face stigma from employers who assume their illness impacts their ability to work.[63] There is an assumption that mental illness is virtually untreatable, which presents difficulty to applicants in overcoming any stigma.[64] Additionally, employers may make assumptions about the unwillingness of other employees, "actual or perceived unwillingness . . . to work with . . . someone with a psychiatric disability."[65]

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54. *Id.* at 569 (quoting G.E. Zuriff, *Medicalizing Character*, 123 PUB. INT. 94, 99 (1996)).

55. *Id.*; Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 54 (2005).

56. *Id.*

57. Hickox & Hall, *supra* note 13, at 570.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Mental Health Myths and Facts*, MENTALHEALTH.GOV, https://www.mentalhealth.gov/basics/mental-health-myths-facts (last visited May 22, 2021).

62. Hickox & Hall, *supra* note 13, at 569.

63. *Id.*

64. *Id.* at 569–70.

65. *Id.* at 570.

The ADA has evolved over time in furtherance of Congress's goal to protect individuals with disabilities—because they are a "discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."[66] The disability rights movement greatly influenced congressional recognition of people with disabilities as an identifiable group.[67]

A. The Disability Rights Movement

In the 1970s, the U.S.'s then-prevalent approach to disability focused on various support methods—medical treatment, physical rehabilitation, and public assistance.[68] Disability rights activists believed that approach inappropriate because of its characterization of disability as an intrinsic personal trait that required fixing, while their view was that the characteristic draws its meaning from social context.[69] As a result, society viewed disability as a "personal tragedy."[70] The disability rights movement sought a remedy, in the form of civil rights legislation, to eradicate stigma and practices that exclude people with impairments—actual or perceived—from opportunities to partake in society.[71] Advocates sought to avoid social stigma and systemic oppression created by an able-bodied majority.[72]

The true predecessor of the ADA was the Rehabilitation Act of 1973.[73] The Act required the federal government to develop affirmative action plans for the advancement in employment of the disabled.[74] Additionally, the Act prohibited discrimination on the basis of disability

66. *See* Paul A. Race & Seth M. Dornier, *ADA Amendments Act Of 2008: The Effect On Employers And Educators*, 46 WILLAMETTE L. REV. 357, 357–58 (2009); Samuel R. Bagenstos, *Subordination, Stigma, And "Disability"*, 86 VA. L. REV. 397, 419–20 (2000) (quoting 42 U.S.C. § 12101(a)(7)).

67. Bagenstos, *supra* note 66, at 420; JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 5 (1993); Sara D. Watson, *A Study in Legislative Strategy: The Passage of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 25, 27–33 (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

68. Bagenstos, *supra* note 66, at 427.

69. *Id.*

70. *Id.*; MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32 (1996).

71. Bagenstos, *supra* note 66, at 426.

72. *Id.* at 427–28.

73. Race & Dornier, *supra* note 66, at 362.

74. *Id.*; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in
29 U.S.C. § 701 et. seq.).

by government agencies and agencies who received federal funding.[75] The ADA requires the Supreme Court to construe the statute to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.[76] Notwithstanding, the ADA has surpassed the level of protection offered by the Rehabilitation Act.[77]

B. The Americans with Disabilities Act of 1990

Congress sought to pass more comprehensive legislation in its effort to combat various forms of discrimination faced by people with disabilities.[78] Congress desired a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities.[79] Under the ADA, people with disabilities—those with physical or mental impairments that substantially limit one or more major life activities—are guaranteed broad antidiscrimination protection.[80]

The ADA's legislative history demonstrates Congress's intent. Congress heard testimony on disabled persons in the workplace, and on their potential to contribute more if given protections and accommodations.[81] Congress wanted to bring persons with disabilities into the economic and social mainstream of American life.[82] As the Court in *Garcia v. United States* explained, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'"[83] There is nothing in the committee reports that indicates any congressional intent to exclude groups of people with medically recognized disabilities from ADA protection.[84] Congress intentionally left open the list of recognized physical and mental impairments to allow for new recognition of disabilities under the ADA.[85]

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75. *See* 29 U.S.C. § 794 (2021).

76. Bragdon v. Abbott, 524 U.S. 624, 632 (1998).

77. Race & Dornier, *supra* note 66, at 363; Smith v. Midland Brake, Inc., 138 F.3d 1304, 1312 (10th Cir. 1998), *reh'g granted*, 158 F.3d 1060 (10th Cir. 1999), *rev'd*, 180 F.3d 1154 (10th Cir. 1999).

78. Race & Dornier, *supra* note 66, at 364–65.

79. 42 U.S.C. § 12101(a)(2)–(7), (b)(1) (2021).

80. David W. Lannetti, *Extending Coverage of the Americans with Disabilities Act to Individuals with Attention Deficit-Hyperactivity Disorder: A Demonstration of Inadequate Legislative Guidance*, 35 TORT & INS. L.J. 155, 157 (1999).

81. Race & Dornier, *supra* note 66, at 365.

82. *Id.*

83. 469 U.S. 70, 76 (1984) (citing Zuber v. Allen, 396 U.S. 168, 186 (1969)).

84. Race & Dornier, *supra* note 66, at 366; *see* H.R. Rep. No. 101-485, pt. 2 (1990).

85. *Id.*

In court cases following the passing of the ADA, the plaintiffs urged federal courts to adopt an expansive take on who qualifies as an individual with a disability under the statute.[86] Nevertheless, the Supreme Court construed the definition narrowly.[87] The Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* resulted in a heightened standard of proof for individuals to demonstrate they had a disability.[88] The Court held: an employee cannot establish that they are disabled based solely on evidence of a medical diagnosis.[89] The employee must present evidence that long-term impairment caused by the disability is substantial in their own experience, as the effects of medical conditions are not uniform from person to person.[90]

The circuit courts had difficulty uniformly applying the ADA.[91] For example, the Fifth, Sixth, Eighth, and Ninth Circuits have held that people merely "regarded as" disabled are not entitled to reasonable accommodations.[92] In opposition, the Third, Sixth, and Tenth Circuits have held that, where an employee is regarded as disabled by the employer, then reasonable accommodations must be provided.[93] Inconsistent judicial interpretation led to questions about whether the ADA fulfilled its purpose.[94] Employers prevailed in more than 93% of reported ADA employment discrimination cases decided at the trial court level.[95] Moreover, where the plaintiffs appealed the court's decision, the trial court judgment was affirmed in 84% of cases.[96]

The circuit splits and narrow interpretation led Congress to amend the ADA in 2008.[97] The new legislation explicitly reversed the ruling of

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86. Race & Dornier, *supra* note 66, at 379.

87. *Id.*

88. *See* 534 U.S. 184, 198 (2002).

89. *Id.*

90. *Id.* at 198–99.

91. Race & Dornier, *supra* note 66, at 380–81.

92. *See id.*; Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231 (9th Cir. 2003) (citing Weber v. Strippit, Inc. 186 F.3d 907, 916–17 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000)); 42 U.S.C. § 12102(3)(A) (2021) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.).

93. *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005) (citing Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004)); Moorer v. Baptist Mem'l Health Care Sys., 398 F.3d 469, 477–80 (6th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005).

94. *See* Race & Dornier, *supra* note 66, at 390.

95. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999).

96. *Id.*

97. Race & Dornier, *supra* note 66, at 391.

the Supreme Court in *Toyota Motor Manufacturing Kentucky, Inc*.[98] Congress intended the amendments to give authority to broadminded expansion of the ADA's terms, such as the definition of a disability.[99] Thus, the Americans with Disabilities Act Amendments (ADAAA) provided new definitions.[100] The ADAAA mandates that the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by its terms.[101]

The ADAAA took a step in the right direction because it legislatively rejected much Supreme Court precedent that determined (among other factors) what qualifies as a disability, and the level of impairment necessary to qualify as disabled.[102] Unfortunately, Congressional focus on a broadly applied definition of disability was shortsighted because they failed to consider how they would guarantee protections to all the newly qualified people. Congress did not revisit the enforcement mechanisms available to people with disabilities who face discrimination.[103] Congresses did not meaningfully consider situations when the defendant could refuse to grant accommodations even if the plaintiff was disabled.[104] This creates a problem because of the stigma already targeted at people with mental illness, and the difficulty of proving an invisible disability. Effectively, Congress qualified more people to lose their lawsuits.[105]

III. ANXIETY, DEPRESSION, & THE DENIAL OF ACCOMMODATIONS

While the original ADA left ambiguity with respect to what qualified as a disability, the ADAAA has provided clarity on that issue. More qualifying disabilities means more people eligible for reasonable accommodations. Yet, while one could assume that more people were protected under this new legislation, the opposite was true. Whereas courts previously construed the term disability in a narrow fashion, now

98. *Id.* at 391.
99. *Id.* at 391–92.
100. *Id.* at 392–93.
101. *Id.*; ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3(4)(a).
102. Race & Dornier, *supra* note 66, at 404–05.
103. *See generally id.* at 371 (noting that Congress did not revisit enforcement mechanisms under the broad definition of disability).
104. *Id.* at 401.
105. For example, under the ADAAA definitions, our hypothetical student Jane Doe may qualify for a mental disability for her entire life through law school. If Jane requires extra time for exams because she suffers from generalized anxiety disorder, the law school must accommodate. Sadly, for Jane, after graduation, while she still has a qualifying disability, a law firm can easily argue that extra time for Jane would cause undue hardship to the employer and, just like that, no more reasonable accommodations for Jane. This hypothetical illustrates the problem of the ADAAA. *See* Race & Dornier, *supra* note 66, at 372.

courts have adopted a broad view of the Undue Hardship Standard; in turn, this has hindered people in their quest to receive accommodations.[106]

A. Mental Disabilities Under the ADA

Under the ADA, disability is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[107] Major life activities are defined as, but not limited to, the following: performing manual tasks, learning, reading, concentrating, thinking, communicating, and working.[108] When making a determination of whether an impairment substantially limits a major life activity, evaluators cannot consider mitigating measures, including medication, assistive technology, and reasonable accommodations.[109] Regarded as having an impairment is defined as "the individual establishing that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment."[110] Mental health conditions like major depression "should easily qualify, and many others will qualify" as a disability under the ADA.[111]

An individual can get a reasonable accommodation for any mental health condition that would, "if left untreated, substantially limit [their] ability to concentrate, interact with others, communicate, eat, sleep, care for [themselves], or regulate [their] thoughts or emotions."[112] The condition does not need to be permanent or severe in order to qualify.[113] Rather, it can qualify simply by making activities more difficult, uncomfortable, or time-consuming to perform.[114] The qualifying factor is how limiting the symptoms are when present in the individual.[115]

106. Race & Dornier, *supra* note 66, at 377–79.
107. 42 U.S.C. § 12102(1) (2021).
108. *Id.* § 12102(2) (defining other major life activities as: caring for oneself, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, and breathing).
109. *Id.* § 12012(4)(1)(E)(i)(I)–(IV).
110. *Id.* at § 12102(3).
111. *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/mental_health.cfm (last visited May 22, 2021).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

B. Reasonable Accommodations in the Workplace

Under Title I of the ADA, "no covered entity"—an employer, employment agency, labor organization, or joint labor-management committee—"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."[116] According to the statutory provision, discrimination includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . "unless such covered entity can demonstrate that the accommodation would impose an undue hardship" on the operation of their business.[117]

The ADA provides definitions for reasonable accommodation and undue hardship.[118] The ADA defines reasonable accommodation as:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[119]

Further, undue hardship is defined as "an action requiring significant difficulty or expense" when considering the enumerated factors.[120] Factors for consideration include, but are not limited to, nature and cost of the accommodation, overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, overall financial resources of the covered entity, and the type of operation or operations of the covered entity.[121]

The needs and disability of an employee determine the reasonableness of an accommodation.[122] An employee can demonstrate the reasonableness of an accommodation by showing that other

116. 42 U.S.C. § 12112(a) (2021).
117. *Id.* § 12112 (b)(5)(A).
118. *Id.* § 12111.
119. *Id.* § 12111(9).
120. *Id.* § 12111(10)(A).
121. 42 U.S.C. § 12111(B)(i)–(iv).
122. Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKLEY J. EMP. & LAB. L. 59, 68, 110 (2008).

employers in the industry provide either similar accommodations or an indication that the accommodation is "facially practicable."[123]

C. Judicial Deference to Employers

People with mental illness have struggled to obtain accommodations through ADA litigation,[124] and have been significantly less likely to receive accommodations than employees with physical disabilities.[125] According to the Equal Employment Opportunity Commission's (EEOC) charge statistics, almost one-fourth of all ADA charges in 2016 involved mental illness or psychiatric disorder.[126] Half of those charges alleged a failure to provide reasonable accommodation.[127] In December 2016, the EEOC issued guidelines regarding employees with mental health conditions highlighting the importance of providing accommodations for them.[128] Since the issuance of those guidelines, mental health condition litigation has risen, possibly due to a heightened awareness of guaranteed protections.[129] In 2018, 7.7% of ADA claims resolved by the EEOC cited anxiety and 6.8% cited depression,[130] eighteen-year highs.[131]

According to the ADA, an individual is qualified to do their job if they satisfy the necessary skill, experience, education, and other job-related requirements of the employment position.[132] Furthermore, they must be able to complete the essential functions of the job with or without reasonable accommodation.[133] The essential nature of the function is determined by looking at whether an employer actually requires that an employee perform a particular function.[134] The ADAAA made it easier for claimants to acquire reasonable accommodations for their qualified disability, but the statute still requires them to show they have a substantial limitation and that they are still able to perform the

123. Seth D. Harris, *Re-thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Markets Theory*, 89 IOWA L. REV. 123, 145 (2003).

124. Hickox & Hall, *supra* note 13, at 546.

125. *Id.*; Caitlin McDowell & Ellie Fossey, *Workplace Accommodations for People with Mental Illness: A Scoping Review*, 25 J. OCCUPATIONAL REHAB. 197, 198 (2014).

126. *Id.*

127. *Id.*

128. *Id.* at 547.

129. David S. Fryman & Michael G. Greenfield, *Update on Mental Health Issues in the Workplace*, LAW.COM, https://www.law.com/native/?mvi=f8dd007f17384571b6fbf718620d05bb (last visited May 22, 2021).

130. *Id.*

131. *Id.*

132. Hickox & Hall, *supra* note 13, at 552.

133. *Id.*

134. *Id.*

responsibilities of the job.[135] This creates added difficulty, in terms of proving their case, for people with mental disabilities, and the resulting lack of accommodation can result in job loss.[136]

To illustrate, in *Russell v. Phillips 66 Company*, the district court granted summary judgment to the employer because the plaintiff could not prove that "he was substantially limited in his ability to perform a major life activity because of his depression."[137] The court held the plaintiff needed to do more than solely assert that he suffers from depression.[138] It held simply having a recognized mental illness does not make you disabled under the ADA—the plaintiff needed to show additional limits on his ability to perform a major life activity.[139]

Since the ADAAA, courts increasingly find that claimants are "not otherwise qualified,"[140] often based on the employer's argument that the impairment interferes with the performance of "essential job duties."[141] The EEOC has warned against consideration of subjective characteristics as essential job duties—happiness or optimism, for example.[142] Yet, courts continue to give deference to the judgment of the employers, even when the judgments are based on stigma or stereotypes associated with mental illness.[143] This deference essentially allows employers to make mental health a job requirement.[144] Employers can, for example, define

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135. *Id.*

136. *See id.*; Margaret E. Vroman, *Mentally Disabled Employees and the ADAAA: What's an Employer to Do?*, 16 QUINNIPIAC HEALTH L.J. 149, 179 (2013); McDowell & Fossey, *supra* note 125, at 200.

137. Shaun Abreu, *Navigating Choppy Waters: Reasonable Accommodations in Standardized Testing and the Workplace for Individuals with ADHD*, 22 QUINNIPIAC HEALTH L.J. 1, 22 (2018); 184 F. Supp. 3d 1258, 1270 (N.D. Okla. 2016).

138. *Russell*, 184 F. Supp. 3d at 1268 (citing Johnson v. Sedgwick Cty. Sheriff's Dep't, 461 Fed. Appx. 756, 759 (10th Cir. 2012)).

139. *Id.* at 1268 (citing Doyal v. Okla. Heart, Inc., 213 F.3d 492, 495 (10th Cir. 2000)).

140. Hickox & Hall, *supra* note 13, at 553; Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031–32 (2013); Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMP. RTS. & EMP. POL'Y J. 293, 374 (2005).

141. Hickox & Hall, *supra* note 13, at 553; *see, e.g.*, Kelley v. Amazon.com, Inc., 652 Fed. Appx. 524, 526 (9th Cir. 2016) (stating that migraines interfered with ability to perform duties); Stevens v. S. Nuclear Operating Co., 209 F. Supp. 3d 1372, 1378–79 (S.D. Ga. 2016) (concluding that the employee was unqualified to serve as nuclear security officer because of emotional instability).

142. *See* Hickox & Hall, *supra* note 13, at 553.

143. Paetzold, *supra* note 140, at 340–41, 370–71; Ami C. Janda, *Current Public Law and Policy Issues: Keeping a Productive Labor Market: Crafting Recognition and Rights for Mentally Ill Workers*, 30 HAMLINE J. PUB. L. & POL'Y 403, 418–19 (2008); *see also* Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 239 (2016) (courts give deference to employer's determination).

144. *See* Hickox & Hall, *supra* note 13, at 553.

the essential skills of a job, such as the appropriate way to interact with co-workers and supervisors.[145] Courts have denied accommodation for people with mental disabilities based on the employer's assumption that they will fail to meet a company's expectations on social behavior.[146]

D. Courts Deny Facially Practicable Requests for Accommodation

Courts have denied reasonable accommodation requests such as those that would help workers avoid stress and manage difficult people.[147] These types of accommodations are considered practical, in that healthcare professionals acknowledge that they will help the disabled person perform better.[148]

Stress is a triggering factor for certain qualifying mental disabilities such as anxiety and depression.[149] Yet, the ability to tolerate stress without accommodation "is increasingly deemed a prerequisite for work,"[150] and this requirement negatively impacts the disabled person.[151] Courts will accept an employer's argument that stress is an intrinsic portion of any job, and that reasonable accommodations for stress would cause undue hardship.[152] Courts have noted that there is no requirement, under the ADA, to provide "a work environment without aggravation," nor is there a duty to mitigate it.[153] In *Hill v. Walker*, the court ruled against the plaintiff, holding that a family service caseworker could not refuse to handle a particularly difficult case that aggravated her depression and anxiety because "allowing her to refuse cases would undermine the management of the agency."[154] In *Williams v. New York State Department of Labor*, where an employee requested an accommodation which would help avoid profanity in the office, which triggered their anxiety, the court did not even make the employer prove undue hardship.[155] Rather, the court concluded that an accommodation of

145. *Id.* at 554.

146. *Id*. (citing Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 454 (2006) (stating that essential job functions can include not "offending customers" and "getting along with others")).

147. *Id.* at 555.

148. *Id.* at 543.

149. Hickox & Hall, *supra* note 13, at 578.

150. *Id*. at 555 (citing Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 824–25 (1998)); *see, e.g.*, Koessel v. Sublette Co. Sheriff's Dep't, 717 F.3d 736, 744 (10th Cir. 2013) (determining that the sheriff's office employee was required to handle stressful situations).

151. *Id.*

152. *Id.* at 555–56; Stefan, *supra* note 150, at 805.

153. *Id.* at 556.

154. Hickox & Hall, *supra* note 13, at 556; 737 F.3d 1209, 1217 (8th Cir. 2013).

155. No. 98 Civ. 3816 (RMB), 2000 U.S. Dist. LEXIS 9540, at *24 (S.D.N.Y. May 24, 2000).

that type would "impose an extraordinary administrative burden on the employer."[156] In contrast, a minority of courts have required employers to reorganize employment obligations to mitigate stress, at the request of a mentally disabled employee.[157]

Some diagnosed mental disabilities are triggered by particular behavior or harassment from another.[158] A bad relationship with a supervisor can have negative consequences for a person with GAD, for example.[159] Courts consistently refuse to require employers to change their employee's supervisor.[160] One court explained, it would be unreasonable to require an employer to "juggle personnel so as to entirely remove the possibility that a supervisor may offend a particular employee."[161] There has been limited success in getting a new supervisor, and plaintiffs have been successful "only if a request for a change in supervision is presented as a request for a transfer to a vacant position for which the employee is qualified."[162]

One can only imagine that if the standard for undue hardship was changed, and the courts gave less deference to employers and more deference to the disabled person—the class the ADA intends to protect—then perhaps some of these reasonable accommodations would actually qualify as reasonable in the eyes of the court.

E. Reasonable Accommodations Under the University Standard

"It is far less likely in the workplace than at university that a person with a mental disability will be legally entitled to the same accommodation that the person had received pre-university."[163] In other words, you can enter law school with a reasonable accommodation for your depression and be denied that exact same accommodation when you are practicing as an attorney at a firm. As illustrated above in Gabe

156. *Id.*

157. Hickox & Hall, *supra* note 13, at 557.

158. *Id.* at 561.

159. *Id.* at 561–62.

160. *Id*. at 562; *see, e.g.*, Pack v. Ill. Dep't of Healthcare & Family Servs., No. 13-cv-8930, 2015 U.S. Dist. LEXIS 13689, at *23 (N.D. Ill. Feb. 5, 2015); Roberts v. Kaiser Found. Hosp., No. 2:12-cv-2506-CKD, 2015 U.S. Dist. LEXIS 16169, at *22 (E.D. Cal. Feb. 10, 2015), *aff'd*, 690 Fed. Appx. 535 (9th Cir. 2017); Gazzano v. Stanford Univ., No. 5:12-cv-05742-PSG, 2014 U.S. Dist. LEXIS 26379, at *15 n.59 (N.D. Cal. Feb. 27, 2014).

161. *Id.* (quoting Boldini v. Postmaster Gen. U.S. Postal Serv., 928 F. Supp. 125, 131 (D.N.H. 1995)).

162. Hickox & Hall, *supra* note 13, at 563; *see, e.g*., Lozano v. Cty. of Santa Clara, No. 5:14-cv-02992-EJD, 2017 U.S. Dist. LEXIS 5734, at *26 (N.D. Cal. Jan. 13, 2017) (treating request for change in supervision as request for transfer to another position).

163. Marianne DelPo Kulow & David Missirian, *Building STEPs Down the Precipitous Cliff from University to Workplace: A Proposal to Modify Regulation of Higher Education Mental Disability Accomodations*, 24 TEX. J. ON C.L. & C.R. 157, 164 (2019).

MacConaill's case, this is dangerous because of the high-pressure environments and unsustainable cultures that law firms often create.

There is a legal explanation for this phenomenon. The ADA only requires employers to accommodate where it will not create an undue hardship—either through extreme cost to the employer or an unworkable burden placed on the organization.[164] In contrast, post-graduate schools must, in general, provide a reasonable accommodation to those with a disability.[165] While employers fall under Title I of the ADA, public post-graduate universities fall under Title II, and private post-graduate universities fall under Title III.[166]

Like employers, the ADA grants post-graduate universities a mechanism by which to deny reasonable accommodation requests, however, the standard is more stringent.[167] Where a request for a reasonable accommodation "would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered" by that post-graduate institution, then the university may deny that modification.[168] The ADA does not require universities to provide an accommodation that would create an undue financial or administrative burden on the program.[169] The qualifying measure is that the ADA requires that costs become significant or very difficult to perform before it can be used as a defense by a post-graduate institution.[170]

University students with anxiety disorders are most likely to request and utilize academic accommodations.[171] However, adults with mental disabilities often choose not to disclose their disabilities to their employers "due to embarrassment caused by lingering stigma associated with these types of disabilities."[172] Interestingly, awareness of the Undue Hardship Standard may give pause to adults with mental disabilities, particularly anxiety, in seeking reasonable accommodations.[173] Accommodation requests like extra time or assistance in completing a task may meet the legal definition of undue hardship.[174] These accommodation requests, however, typically do not create a burden, whereas employers frequently overestimate the cost and impact of

164. *Id.*
165. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (2021).
166. 42 U.S.C. §§ 12131–12132; 12182(a) (2021).
167. *Id.*
168. 42 U.S.C. § 12182(b)(2)(A)(iii).
169. Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 382 (2008).
170. *Id.*
171. Kulow & Missirian, *supra* note 163, at 176.
172. *Id.*
173. *Id.* at 176–77.
174. *Id.* at 177.

accommodations.[175] Commonly requested accommodations include flexible schedules, support animals, and remote work.[176] In rare cases where a person with a mental disability requests an accommodation, for example extra time, employers are likely to instantly refuse such requests as undue hardship—even when they are not.[177] Often, employees are too embarrassed to push back once told no.[178] The negative result is a high unemployment rate of adults with mental disabilities, "despite a significant increase in the number of students with mental disabilities in post-secondary education."[179]

To illustrate: in *EEOC v. Direct Optical Inc.*, an employee sued their employer for denial of a request for reasonable accommodation—bringing her service dog to work.[180] The worker had generalized anxiety disorder, and the dog alerted her to oncoming panic attacks.[181] The employer disciplined and ultimately fired the employee following her request.[182] The court found in favor of the employee in the sum of $53,000.[183] Her first accommodation request should have been granted.

In contrast, the Office of Civil Rights (OCR) insists that universities do all that they can to "provide academic adjustments that will permit students with disabilities' full participation in their programs."[184] It seems unfair to put forth this kind of effort to help assist persons with disabilities in post-secondary education only to remove assistance when they reach the workforce. After all, both cases deal with legal adults. Thus, disparate treatment is unwarranted. Outside of an argument based on cost to businesses, there is no good reason for the change when one considers the intent of Congress when passing the ADA and ADAAA. Consider the

175. *Id.* (citing JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (2018), https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf (providing annually updated research findings addressing the costs and benefits of job accommodations)); Katheleen Conti, *Correcting the Misconceptions About Workers with Disabilities*, BOS. GLOBE (Nov. 16, 2017), https://www.bostonglobe.com/business/specials/top-places-to-work/2017/11/16/correcting-misconceptions-about-workers-with-disabilities/D9j655r8O7cDchbSABb5eP/story.html.

176. *Accommodation and Compliance: Anxiety Disorder*, JOB ACCOMMODATION NETWORK, https://askjan.org/disabilities/Anxiety-Disorder.cfm (last visitied May 22, 2020).

177. Kulow & Missirian, *supra* note 163, at 177.

178. *Id.*

179. *Id.* at 177–78.

180. *Id.* at 181 (citing Verdict and Settlement Summary, EEOC v. Direct Optical Inc., 2014 WL 2120600 (E.D. Mich. Apr. 14, 2014) (JVR No. 1405220081)).

181. Kulow & Missirian, *supra* note 163, at 181.

182. *Id.*

183. *Id.*; Press Release, U.S. Equal Emp. Opportunity Comm'n, Direct Optical to Pay $53,000 to Settle Disability Discrimination Suit (Apr. 14, 2014), https://www.eeoc.gov/eeoc/newsroom/release/4-14-14.cfm.

184. Kulow & Missirian, *supra* note 163, at 182.

statistics for law student anxiety and depression, and how they do not disappear post-graduation. It seems counter-productive to our societal goals to strip those people of assistance in the workplace.

IV. A LEGISLATIVE SOLUTION

Advocating for mental health issues is the right thing to do, but more importantly, the legal profession has an obligation to combat silence, and speak up against discrimination of oppressed groups, including people with disabilities.[185] The American Bar Association aims to eliminate bias in the legal profession and the justice system.[186] These goals take aim at overt discrimination, but endeavor to achieve true inclusion and acceptance of all people within the profession.[187] Awareness of subtle, less detectable forms of discrimination is imperative.[188] Attorneys within the legal profession—those who have faced discrimination—often remain silent, rather than speaking up.[189] When lawyers do express concerns, the consequences are often negative; they are advised to "move on."[190] Understandably, many who face discrimination for a mental disability may struggle to exercise their voice in the legal profession. Therefore, it is evident why lawyers must step up and advocate for mental health support, and a better standard of protection under the ADA.

A. Fundamentally Alters: the Superior Standard

Considering the shocking statistics on mental illness, the associated stigma, and its negative impact on people with mental disabilities, it is time to do away with the Undue Hardship Standard. Instead, the Fundamentally Alters Standard should be adopted for business and institutions which fall under Title I. It is apparent that courts give disproportionate deference to employers throughout the ADA litigation process,[191] and, as such, we need a change that will shift the balance toward those with disabilities—the people the ADA, and Congress by association, intends to protect.

Under the Fundamentally Alters Standard, a reasonable accommodation must not fundamentally alter the nature of the

185. *See* Martinez, *supra* note 7, at 811.
186. *See id.* at 807–08.
187. *ABA Mission and Goals*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited May 22, 2021).
188. Martinez, *supra* note 7, at 835–36.
189. *Id.* at 841.
190. *Id.* at 842.
191. Hickox & Hall, *supra* note 13, at 549.

program.[192] The Supreme Court has differentiated between altering an "essential" and "peripheral" aspect of a program in determining whether it was "fundamentally altered."[193] There are two approaches to a determination of what is essential and what is peripheral.[194] First, analyze the history of the program and the stated program objectives, and look for the main threads that define the program.[195] Take education, for example—some parts are deemed essential, "such as the use of teachers who create their own lesson plans," but other parts could easily be deemed peripheral, "such as the ways in which class notes are available."[196]

The second method is to look at the benefits conferred by the program—essential components currently confer a benefit, while a program component is peripheral "if it could be modified without the loss of a benefit for the program recipients."[197] The focus on not losing benefits is key—this fundamentally alters inquiry looks to see if the proposed modifications would diminish the program benefits received by others.[198] Society cares about the benefits we gain from a program, and an approach that focuses on protecting that for all participants, including the person with a disability, would be superior to the current approach. Use of this method avoids concerns of downgrading a program for the sake of accessibility.[199]

Compare this with the focus of the undue hardship defense, which is on cost.[200] Under the Fundamentally Alters Standard, employers could still make an argument that the granting of an accommodation would be cost prohibitive, but it would be a greater burden on them to produce evidence to support their claims. Further, it is a heightened standard, and courts would likely be more cautious in denying accommodation requests in the face of baseless cost defense. We already know that people are more likely to be granted accommodations under this standard. If Congress wants to guarantee protection for as many people with disabilities as possible, then the adoption of this standard would further those aims.

192. Nathaniel Counts, *Accommodating One Another: Law And The Social Model Of Mental Health*, 25 KAN. J.L. & PUB. POL'Y 1, 18 (2015).
193. PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001).
194. Counts, *supra* note 192, at 19.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. Counts, *supra* note 192, at 19–20.
200. 42 U.S.C § 12111(10)(A) (2021).

B. Current Alternative Solutions Are Inadequate

Some suggest that the best way forward is to reduce support for students with mental disabilities during their university years.[201] The argument opines that, because businesses are less likely to hire someone whose mental disability causes a burden in the workplace,[202] universities should be responsible for teaching students how to adapt to a workplace without accommodations.[203] Further, proponents argue that accommodations in university harm students because they do not teach the students adaptive skills.[204]

The logic of this argument fails to line up with the desired public policy goals of the ADA. As previously discussed, Congress intended to remove discrimination and provide equal opportunity for people with disabilities. Weaning students off accommodations which they have a medical need for, simply because employers are resistant to it, is antithetical to the idea of equality, and could encourage further opposition to accommodations from employers. Notably, this argument ignores both that accommodations help people function successfully in the workplace,[205] and that the research shows there are viable solutions for many employers.[206] Thus, this argument would permit employers to continue to use great discretion in the denial of accommodations, and, ultimately, harm the mentally disabled.

Moreover, society cannot depend on courts or employers to rely on social science research when making a determination about the reasonableness of an accommodation. Some argue that reliance on social science to define reasonableness and undue hardship would promote an employer's obligation to analyze requests for accommodation on a case-by-case basis.[207] That, too, is an inadequate solution. As explained above, courts narrowly interpreted the ADA, which has failed Congressional goals.[208] Encouraging courts to incorporate the findings of research is likely an encouragement that would go unheeded due to the lack of any statutory requirement which would bind the courts to this process. Additionally, it would be near impossible to regulate which research courts were utilizing in their decision making. Nor would it be easy to make sure the research utilized was reliable. Ultimately, this suggestion

201. Kulow & Missirian, *supra* note 163, at 161.
202. *Id.* at 187.
203. *Id.* at 161.
204. *See id.* at 160.
205. Hickox & Hall, supra note 13, at 539.
206. *See id.* at 541.
207. *Id.* at 593.
208. *See supra* Part III.D.

still allows courts to use the Undue Hardship Standard—part of the underlying problem.

Additionally, things like wellness programs benefit many employees, and many law firms incorporate wellness and mindfulness into their operations.[209] Notwithstanding, these programs ultimately act as complementary to real treatment.[210] The focus of wellness programs is typically to encourage and incentivize healthy behavior among all employees,[211] or even to reduce turnover, increase employee engagement, and boost morale.[212] Simply, wellness programs are not implemented for the same purpose as reasonable accommodations, and should not be viewed as an acceptable alternative.

Mental health disorders can cause people to lack essential coping mechanisms, which can be helpful in dealing with high pressure situations.[213] Notwithstanding, the legal profession can create a culture where it is shameful to ask for help, be vulnerable, or be imperfect.[214] When these factors combine, this creates a dangerous environment for the mentally ill person, which can result in suicide if no help is given.[215] This is the worst-case scenario, but it is one that society should never risk.[216] The current system already places the burden on the disabled individual to ask for help—a distressing task in the face of stigma. When these people have the courage to ask for help, the response should not be to deny their request. Where an accommodation is proven to help someone and does not fundamentally alter the nature of the organization, we must recognize that it is the best solution.

C. The Legislature Holds the Key

When Congress saw the failure of the judiciary to interpret the ADA in line with its intended meaning and purpose, they stepped up and enacted the ADAAA. As discussed in Part I, the ADAAA was a direct

209. D. Finn Pressly & Judith Wethall, *Wellness Programs on the Run*, BEST LAW. (Nov. 9, 2017, 1:43 PM), https://www.bestlawyers.com/article/wellness-programs/1675.

210. *See Complementary Health Approaches*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Treatment/Complementary-Health-Approaches (last visited May 22, 2021).

211. *See* Pressly & Wethall, *supra* note 209.

212. Jessica L. Mazzeo, *Why Your Firm Needs An Employee Wellness Program*, LEGAL INTELLIGENCER (Sept. 20, 2018, 3:06 PM), https://www.law.com/thelegalintelligencer/2018/09/20/why-your-firm-needs-an-employee-wellness-program/.

213. *See* Litt, *supra* note 1.

214. *See id.*

215. *See id.*

216. Following her husband Gabe MacConaill's suicide, which Joanna Litt attributed to the stress of "Big Law," Ms. Litt reported that the death of her husband had left her with "infinite sadness." *See id.*

response to a failure in the system, and Congress had the authority to change the legislation to whatever degree they thought necessary to make it work as originally desired. Here, we have a similar failure by the courts to interpret the law as intended. There have been many suggested solutions to this problem, but no one is in a better position to make a change than the legislature. Unfortunately, the courts will not always interpret the law as intended. Congress can re-write the law and clarify the standards so they are less ambiguous, thereby decreasing reliance on the courts. An amendment to the text of the ADA, that eliminates and replaces the Undue Hardship Standard, would force courts to take a different approach to the determination of whether they must grant reasonable accommodations.

Where Congress has a specific public policy goal in mind, they should not wait on the courts to legislate from the bench. In particular, a piece of legislation that serves to protect a marginalized group should not be interpreted in an *a la carte* manner, but, rather, Congress should make these changes all at once for the sake of guaranteeing equal and continued protection. If Congress still believes that the fight for disability rights is an important one, as they have continuously done since the 1970s, then amending the ADA should be an obvious solution to a problem which requires action. Mental health activists, attorneys, and others should encourage Congress to make a change.

CONCLUSION

This year is the 30th anniversary of the ADA, and it is a perfect opportunity to re-examine its strengths and weaknesses. When President George H.W. Bush signed the ADA into law, he called it "powerful in its simplicity."[217] Yet, the simplicity of the legislation led to confusion by the courts, and their interpretation fell short of the intended goal. Congress intervened to solve the problem with the ADAAA, but their lack of foresight has left many without adequate protection under the legislation. While many more qualify as disabled, the legislation failed to adjust the enforcement mechanisms to ensure these people receive the protections they are entitled to. People with qualifying mental disabilities have been most affected by this oversight.

The legal profession is a perfect illustration of this problem. Anxiety and depression are a problem in the legal community that requires accommodation. Law schools do their best to provide reasonable accommodations to law students, so they can pursue their legal education with greater ease. Yet, once those same students enter the workforce, they

217. Race & Dornier, *supra* note 66, at 358.

can be stripped of those accommodations which they were previously entitled to by law. This does nothing to help mitigate the mental health problem we have in the legal profession, or in any other profession. It likely makes life worse for those who now must operate at a higher level of stress without the assistance they previously had. Our aim should be to make the transition from law student to lawyer as stress-free as possible.

Under the current iteration of the ADA, deference is given to employers when it comes to the granting of reasonable accommodations. It seems counterintuitive to give deference to the employer in legislation intended to protect disabled employees. We should have a standard that requires employers to prove any substantial cost, burden, and inconvenience, as opposed to the one we have now, which relies as much on stigma as it does on evidence.

The legislature can correct the problem in the most swift and efficient manner. They should adopt the Fundamentally Alters Standard for reasonable accommodations in the workplace. Most importantly, it gives greater deference to the person with a disability—the person the ADA intends to protect. Under this standard, more people will have their accommodation requests granted. Thus, the purpose of the ADA would be furthered, and persons with mental disabilities more greatly protected by the law.