

## COMMENTS

### THE INTERACTIVE PROCESS DISABLED: IMPROVING THE ADA AND STRENGTHENING THE EEOC THROUGH THE ADOPTION OF THE INTERACTIVE PROCESS<sup>†</sup>

#### INTRODUCTION

For the over ten percent of Americans with a disability,<sup>1</sup> the Americans with Disabilities Act of 1990 (ADA) promised “far-reaching reforms”<sup>2</sup> to aid in overcoming the challenges encountered in daily life, including the workplace.<sup>3</sup> Over fifteen years later, the ADA, as currently applied, falls short of fulfilling that promise.<sup>4</sup> The ADA requires employers to make adjustments or modifications, called reasonable accommodations, for disabled but otherwise qualified individuals.<sup>5</sup> The Equal Employment Opportunity Commission’s (EEOC) ADA regulations lay out a flexible and practical framework, called the “interactive process,” to aid employers in determining reasonable accommodations.<sup>6</sup>

The interactive process purports to provide a means by which both the employer and the disabled individual can work together to determine the best reasonable accommodation for the individual.<sup>7</sup> Unfortunately, a combination

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<sup>1</sup> In 2005, 12.6% of all working age individuals, aged 21 through 64, reported a disability, and 38.1% of those individuals were employed. REHAB. RESEARCH AND TRAINING CTR. ON DISABILITY DEMOGRAPHICS AND STATISTICS, 2005 DISABILITY STATUS REPORTS, UNITED STATES, at S (2005), [www.disabilitystatistics.org](http://www.disabilitystatistics.org) (click on “Get PDF” under “Status Reports: PDF”).

<sup>2</sup> Press Release, President of the United States, Anniversary of the Americans with Disabilities Act, 2006 (July 25, 2006), available at <http://www.whitehouse.gov/news/releases/2006/07/20060725-3.html>.

<sup>3</sup> See 42 U.S.C. § 12101(a)(8) (2006) (“[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”). It is estimated that the inability of people with disabilities to work costs the United States “\$111.6 billion every year in medical costs and lost wages.” WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT 1 (2d ed. 2006).

<sup>4</sup> See *infra* Part III. For an overview of the history of disability rights and the coverage of the ADA, see JOHN PARRY, HANDBOOK ON DISABILITY DISCRIMINATION 1–34 (2003).

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> See 29 C.F.R. § 1630.2(o)(3) (2005).

<sup>7</sup> See *id.*

of unclear drafting by Congress, lackluster implementation of the statute by a less-than-ambitious agency (the EEOC), and a split among the federal courts regarding the mandatory nature of the interactive process has severely limited the use of the interactive process as a vehicle to help attain the ADA's goals.<sup>8</sup> But the full potential of the ADA can be achieved. This Comment utilizes theories of flexible regulation, particularly a form of New Governance theory called "Experimentalism," to explain not only why the interactive process should be mandatory, but also to suggest how the outcomes of these interactive processes can, through the establishment of a Reasonable Accommodation Database,<sup>9</sup> operate as a toolkit of information to help aid future employers and employees, as well as the EEOC and the courts.

The ADA has certainly made improvements for many in America's disabled population; however, the ambiguous language of the statute has led to a great deal of confusion and litigation concerning its proper application.<sup>10</sup> The ADA's goal of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to address "major areas of discrimination faced day-to-day"<sup>11</sup> by those with disabilities is diminished by confusion in the courts and among the public concerning the meaning of the statute and its application. Such confusion stems from the ADA's textual ambiguities and subsequent poorly drafted regulations by the EEOC. As a result, employers struggle to understand how to what the ADA requires of them; similarly, disabled individuals find it difficult to articulate what accommodations they need in order to participate in the workforce.

The ADA's application raises many questions. This Comment leaves the issues of the scope and coverage of the ADA to other scholars.<sup>12</sup> This

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<sup>8</sup> There is also a lack of scholarship concerning the general nature of the interactive process. Many treatises, handbooks and other works about disability law and the ADA do not spend many pages, if any, covering the interactive process. *See, e.g.*, GOREN, *supra* note 3; JOHN PARRY, *HANDBOOK ON DISABILITY DISCRIMINATION* (2003) (an American Bar Association publication that fails to discuss the interactive process)

<sup>9</sup> *See infra* Part V.C.

<sup>10</sup> In a speech at Georgetown University Law Center, Justice Sandra Day O'Connor expressed her displeasure with the drafting of the ADA, commenting that the ADA was "an example of what happens when the sponsors [of a bill] are so eager to get something passed that what passes hasn't been as carefully written . . . leaving lots of ambiguities and gaps and things for courts to figure out." William C. Smith, *Drawing Boundaries*, A.B.A. J., Aug. 2002, at 49, 49 (quoting Justice O'Connor).

<sup>11</sup> 42 U.S.C. § 12101(b) (2006).

<sup>12</sup> *See, e.g.*, Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act?: Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 *BERKELEY J. EMP. & LAB. L.* 323, 323-80 (2006) (arguing that courts should review accommodation claims based on whether they

Comment instead focuses on the interactive process and how to bolster its effect through the EEOC monitoring and maintenance of a Reasonable Accommodation Database.<sup>13</sup>

While other scholars have written about why the interactive process should be adopted, this Comment takes this assertion one step further. This Comment proposes that the EEOC strengthen itself and help advance the promise of the ADA by monitoring the outcomes of the interactive processes and maintaining a database. Further, this Comment fills in gaps in the literature by suggesting a flexible approach to issues concerning the current regulatory framework of reasonable accommodations under the ADA.<sup>14</sup>

This Comment grapples with the confusion caused by the ADA's ambiguous language, the Supreme Court's interpretation of the ADA, and the Equal Employment Opportunity Commission's regulations.<sup>15</sup> The present regulatory scheme has produced confusion not only for disabled individuals and employers, but also among the federal circuit courts.<sup>16</sup> Currently, the circuit courts are split on how to best deal with the issue of the interactive process.<sup>17</sup>

Such confusion thwarts the ADA's ability to maximize its effect on disabled individual's rights in the workplace. The uncertainty also makes it difficult for courts to settle on which accommodations are reasonable and

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are reasonable and not on whether they amount to undeserved windfalls); Daniel P. Dalton & Brett J. Miller, *The Ever Expanding Scope of the Americans with Disabilities Act: Whether Title II of the ADA Applies to Zoning Issues*, 38 URB. LAW. 613, 613–26 (2006) (examining whether the ADA applies to zoning matters and, if it does, whether it requires a locality to accommodate disabilities); Kelly Cahill Timmons, *Limiting "Limitations": The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 313–55 (2005) (contending that the duty of reasonable accommodation should apply only when there is a substantial conflict between the individual's disability-related limitation and the challenged workplace practice or structure).

<sup>13</sup> Recently, regulation by government agencies has emerged as a hot topic, resulting in a wealth of literature focusing primarily on regulation that is efficient and responsive. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343–50 (2004) (citing a multitude of new scholarship concerning regulation).

<sup>14</sup> Very few scholars have focused on agencies applying uses of best practices or other New Governance themes such as experimentalism. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 306 (2006) (noting that Charles Sabel and Michael Dorf are the only scholars that have "spent any time considering" the best practices "phenomenon").

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *id.*

<sup>17</sup> See *infra* Part III.D.

which are not.<sup>18</sup> Applying theories of “New Governance,” which advocate the flexible regulations that encourage learning through monitoring and information sharing, to the EEOC’s ADA regulations would help diffuse the confusion. In this context, New Governance, would counsel the wholesale adoption of the interactive process, while also weighing in favor of bolstering the resources provided to parties engaged in the interactive process.<sup>19</sup> By laying out the current status of reasonable accommodations, as well as advocating the mandatory application of the interactive process, this Comment applies theories of New Governance to the duty to provide reasonable accommodations.

Although this Comment urges the adoption of a rigid rule that requires parties to engage in the interactive process, it also offers a flexible solution for obtaining reasonable accommodations. Through this mixture of mandatory requirements and flexible solutions, the EEOC will be better equipped to assist parties engaged in the interactive process, ultimately strengthening the EEOC as a regulatory agency. For an agency often criticized as weak and ineffective, this proposal presents an opportunity to improve its effectiveness as well as its public image. Further, by eliminating confusion concerning the requirement to engage in the interactive process and increasing access to information about possible accommodations, this framework will encourage better, more appropriate accommodations for disabled workers. Ultimately, this new approach has the potential to provide greater benefits for disabled individuals and employers at both the workplace and regulatory level.

Part I of this Comment provides an overview of the ADA. Part II addresses the Equal Employment Opportunity Commission’s regulations concerning the ADA. Specifically, that Part considers regulations related to the use of the interactive process. Part III explores issues of deference and the current confusion surrounding the mandatory nature of the interactive process. Part IV discusses why the interactive process benefits employers, employees, and society. Lastly, Part V introduces the body of scholarship concerning regulations called New Governance and, through the lens of flexible regulatory schemes, argues in favor of similar applications to EEOC regulations.

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<sup>18</sup> See Polly Beth Proctor, *Determining ‘Reasonable Accommodation’ Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 SW. U. L. REV. 51, 69 (2003) (“Circuit courts have struggled to pinpoint exactly which workplace adaptations or modifications will actually be required.”).

<sup>19</sup> See *infra* Part V.

Specifically, Part V proposes the establishment of a Reasonable Accommodation Database.

## I. THE AMERICANS WITH DISABILITIES ACT OF 1990

In 1990, Congress passed the Americans with Disabilities Act.<sup>20</sup> Cognizant of historical and ongoing isolation, segregation, and discrimination against individuals with disabilities,<sup>21</sup> Congress clearly sought to establish that discrimination against the disabled is unacceptable.<sup>22</sup> The ADA is divided into five titles.<sup>23</sup> This Comment focuses on Title I, which prohibits discrimination in the employment context.<sup>24</sup> This Part lays out the definition of “disability” under the ADA and the general concept of reasonable accommodations.

### A. *Who is “Disabled” Under the ADA?*

Not all disabled individuals are protected under Title I of the ADA.<sup>25</sup> Rather, protection under Title I is limited to “qualified individual[s] with a disability.”<sup>26</sup> A “qualified individual with a disability” is an individual who,

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<sup>20</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2006)). The ADA passed by a vote of 377 to 28 in the House and 91 to 6 in the Senate. Library of Congress: Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SN00933:@@X>. On July 26, 1990, President George H. W. Bush signed the ADA into law. *Id.*

<sup>21</sup> *See* 42 U.S.C. § 12101(a)(2)–(3) (2006). Prior to the ADA, the Rehabilitation Act of 1973 provided some protection to disabled individuals. 29 U.S.C. §§ 701–796 (2006). However, the Rehabilitation Act only applied to programs or activities that received federal dollars. *Id.*

<sup>22</sup> 42 U.S.C. § 12101(b)(1). The ADA prohibits discrimination against qualified disabled individuals by employers who employ fifteen or more employees for twenty or more weeks in the current or preceding year. *Id.* § 12111(5)(A). Congressional findings pointed to forty-three million Americans with physical or mental disabilities who, prior to the ADA, had no “legal recourse to redress such discrimination.” *Id.* § 12101(a)(1)–(4).

<sup>23</sup> Title I prohibits discrimination “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” *Id.* § 12112(a). Title II prohibits discrimination by public entities. *Id.* §§ 12131–12165. Title III protects qualified individuals from discrimination in places of public accommodations and services operated by private entities. *Id.* §§ 12181–12189. Title IV addresses telecommunication services for the disabled. 47 U.S.C. § 225 (2006). Title V addresses miscellaneous provisions. 42 U.S.C. §§ 12201–12213.

<sup>24</sup> 42 U.S.C. §§ 12111–12117.

<sup>25</sup> *See id.* The ADA findings discuss “some 43,000,000 Americans [that] have one or more physical or mental disabilities.” *Id.* § 12101. The Supreme Court interpreted this statistic to preclude ADA protection of a broader class of disabled individuals. *See Sutton v. United Air Lines*, 527 U.S. 471, 482–85 (1999) (discussing that the number of disabled cited in the statute’s findings supports a narrower definition of disability).

<sup>26</sup> 42 U.S.C. § 12112(a).

“with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires.”<sup>27</sup> Congress defined the term “disability” to cover individuals who either had a record of,<sup>28</sup> or were regarded as having,<sup>29</sup> a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>30</sup> Thus, in order for an individual to establish that he is a “qualified individual with a disability,” he must satisfy two elements: (1) that he is “disabled” under the ADA’s definition of disability; and (2) that he is “otherwise qualified” to perform the job with or without reasonable accommodation.<sup>31</sup>

### *B. What is a Reasonable Accommodation?*

Assuming that an individual establishes that he is disabled under the ADA, the individual also must prove that he is otherwise qualified to perform the essential functions of the job that he currently holds or seeks to hold.<sup>32</sup> However, the qualification requirement is tempered by the phrase “with or without reasonable accommodation.”<sup>33</sup> An employer’s failure to make reasonable accommodations for an otherwise qualified disabled employee is a form of discrimination under the ADA.<sup>34</sup>

The ADA’s text does not define “reasonable accommodation” directly, but instead provides possible examples of such accommodations.<sup>35</sup> Employers

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<sup>27</sup> *Id.* § 12111(8).

<sup>28</sup> *Id.* § 12102(2)(B).

<sup>29</sup> *Id.* § 12102(2)(C).

<sup>30</sup> *Id.* § 12102(2)(A). This definition is “drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973, and the definition of ‘handicap’ contained in the Fair Housing Amendments Act of 1988.” *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

<sup>31</sup> See *supra* text accompanying notes 26–29. Unlike other claims of employment discrimination, where an individual’s membership in a protected class is generally self-evident, under the ADA an employee must “assert membership in the protected class.” Craig A. Sullivan, *The ADA’s Interactive Process*, 57 J. MO. BAR 116, 116 (2001).

<sup>32</sup> 42 U.S.C. § 12111(8). Consideration “shall be given to the employer’s judgment as to what functions of a job are essential.” *Id.* § 12111. “Written descriptions of the job shall be taken as evidence of the essential job functions.” *Id.* § 12111(8). Although the duty to provide reasonable accommodations applies to both potential and current employees, this Comment focuses on current employees who have informed their employer of their potential need for reasonable accommodation.

<sup>33</sup> *Id.* § 12111(8).

<sup>34</sup> *Id.* § 12112(b)(5)(A).

<sup>35</sup> *Id.* § 12111(9). Reasonable accommodations may include making existing facilities readily accessible, job restructuring, modifying work schedules, reassignment of the individual to vacant positions, modification or acquisition of equipment, adjustments to examinations, training materials or policies, and other similar accommodations. *Id.* Despite arguably clear statutory language asserting “accommodation” as a distinct

may get around their obligation to provide reasonable accommodations by establishing that the accommodation at issue would be unduly burdensome for the employer to implement.<sup>36</sup> The inquiry into whether an accommodation imposes an “undue hardship”<sup>37</sup> requires consideration of a wide range of factors, including the nature and cost of the accommodation, the size and resources of the employer, the effect on expenses and resources, and other effects of accommodation on the employer.<sup>38</sup>

In drafting and enacting the ambiguously worded ADA, “Congress recognized that its implementation would require administrative agencies to flesh out its terms.”<sup>39</sup> Given the ADA’s failure to specifically define the term “reasonable accommodation,” the task has fallen primarily<sup>40</sup> on the Equal Opportunity Employment Commission<sup>41</sup> to provide guidance on the issue of reasonable accommodations for individuals with disabilities in the workplace.<sup>42</sup>

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remedy, the ADA does not provide a one-size-fits-all accommodation for every situation that might arise. *See EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.2(o) (2005) (discussing that the examples of reasonable accommodations identified in the regulation are “not intended to be exhaustive of accommodation possibilities”). The interactive process serves as a way to fill that void and identify the correct reasonable accommodation.

<sup>36</sup> *See* 42 U.S.C. § 12112(5)(A). Reasonable accommodations must be made unless the employer can “demonstrate that the accommodation would impose an undue hardship on the operation of the business” of the employer. *Id.*

<sup>37</sup> “‘Undue hardship’ means an action requiring significant difficulty or expense.” *Id.* § 12111(10)(A).

<sup>38</sup> *See id.* § 12111(10)(B); *see also* Timmons, *supra* note 12, at 323 (“Even though there may be a cost-benefit limit on the scope of the duty . . . it is important to recognize the significance of the duty and its utility to disabled employees.”).

<sup>39</sup> Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 535 (2000).

<sup>40</sup> *See* White, *supra* note 39, at 533 (“[H]istorically [the EEOC has] been given short shrift by litigants and by the judiciary. . . . It is the courts, not the agency, that have given meaning to our nation’s employment discrimination statutes.”). *But see infra* Part III.B (describing how the Supreme Court does not always defer to the EEOC).

<sup>41</sup> The EEOC was established under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4(a). “[T]he EEOC has enforcement power over Title VII of the Civil Rights Act, Title I of the Americans with Disabilities Act, and the Age Discrimination in Employment Act.” Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1533–34 (1999).

<sup>42</sup> *See* 42 U.S.C. § 12117.

## II. THE EEOC AND THE ADA

Title I of the ADA grants the EEOC the authority to implement and make regulations.<sup>43</sup> Pursuant to this authority, the EEOC has issued regulations that define reasonable accommodation as (1) modifications or adjustments to a job application process that allow the disabled applicant to be considered for the position; (2) modifications to the work environment or job position that allow an otherwise qualified individual to perform the essential functions of the job; or (3) other adjustments that enable the disabled employee “to enjoy equal benefits and privileges of employment” as a similarly situated nondisabled employee.<sup>44</sup>

The definitions found in the EEOC’s Title I regulations do not provide much more guidance than Congress’s examples of reasonable accommodations found within the text of the ADA.<sup>45</sup> However, the EEOC regulations *also* state that in order to determine what appropriate reasonable accommodation an employer should implement,<sup>46</sup> “it *may* be necessary for the [employer] to initiate an informal, interactive process with the qualified individual.”<sup>47</sup> As this Comment explains, the language of this portion of the regulation does not clearly indicate whether and when this process is mandatory.<sup>48</sup> However, it is clear that the interactive process should clarify the precise effects of the disability on the job and “potential reasonable accommodations that could overcome those limitations” should emerge.<sup>49</sup>

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<sup>43</sup> *Id.* § 12116. EEOC “shall issue regulations” to carry out Title I. *Id.* The EEOC has issued such regulations, which now appear in the Code of Federal Regulations. *See* 29 C.F.R. § 1630 (2006).

<sup>44</sup> 29 C.F.R. § 1630.2(o)(1).

<sup>45</sup> *Compare id.* § 1630.2(o)(2), with *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.2(o) (2005).

<sup>46</sup> Generally, the employee, not the employer, is required to request reasonable accommodation. *See* *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005) (stating that under the ADA, the “initial duty” is on the employee to inform their employer of their disability); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001) (explaining that “[t]he employer has no duty to divine the need for a special accommodation where the employee” does not ask for reasonable accommodations because of their disability); *see also* *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58, 64 (1st Cir. 2004) (“[A]n employer need not provide accommodations where it does not know an employee has a disability . . . .”); *Smith v. Henderson*, 376 F.3d 529, 535–37 (6th Cir. 2004) (finding that the employer knew, or should have known, of the employee’s disabled status based on a letter the employee sent).

<sup>47</sup> 29 C.F.R. § 1630.2(o)(3) (emphasis added).

<sup>48</sup> *See infra* notes 123–33 and accompanying text.

<sup>49</sup> 29 C.F.R. § 1630.2(o)(3).

The EEOC's approach to reasonable accommodations treats the request for reasonable accommodations<sup>50</sup> as the beginning of a shared journey undertaken by the employer and the employee.<sup>51</sup> The EEOC's Interpretive Guidance, which appears in an appendix directly following the EEOC's Title I regulations, further fleshes out the concept of the interactive process.<sup>52</sup> The Interpretive Guidance specifically recognizes that the ADA "establishes a process in which the employer must assess a disabled individual's ability to perform the essential functions of the specific job held or desired."<sup>53</sup> The Interpretive Guidance further emphasizes that the interactive process should be a flexible case-by-case inquiry<sup>54</sup> that involves both the employer and the individual.<sup>55</sup>

According to the Interpretive Guidance, when a disabled individual requests reasonable accommodations, the employer should adopt a "problem solving approach."<sup>56</sup> With this "problem solving" mindset, the Interpretive Guidance instructs that the employer should (1) conduct a job analysis to identify the job's purpose and essential functions; (2) collect more information from the disabled individual concerning the disability and its relationship to the job; (3) consult with the disabled individual to identify potential reasonable accommodations; and (4) "consider the preference of the individual" concerning the reasonable accommodation and then implement the accommodation that is most appropriate for both the disabled individual and the employer.<sup>57</sup>

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<sup>50</sup> The ADA only requires reasonable accommodations for "known physical or mental limitations." 42 U.S.C. § 12112(b)(5)(A). An employee bears the burden of disclosing a disability to the employer. *See supra* note 46.

<sup>51</sup> *See* EEOC, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES, <http://www.eeoc.gov/facts/accommodations-attorneys.html> (last visited May 15, 2007) [hereinafter EEOC, REASONABLE ACCOMMODATIONS] ("A request is the beginning of the reasonable accommodation process, not the end.") [hereinafter EEOC, REASONABLE ACCOMMODATIONS]

<sup>52</sup> *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.2(o), at "Background."

<sup>53</sup> *Id.*

<sup>54</sup> This emphasis on the "case-by-case" nature of reasonable accommodations separates the ADA from other civil rights statutes. Proctor, *supra* note 18, at 56. In the Interpretive Guidance, the EEOC stresses that there is no "correct" answer to decisions regarding the disabled individual. *See EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.2(o), at "Background."

<sup>55</sup> *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.9 ("The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.")

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; *see also* EEOC, REASONABLE ACCOMMODATIONS, *supra* note 51 (explaining that while the ADA requires that "any accommodation chosen be reasonable and effective in eliminating the workplace barrier," the employer is not obligated to adopt the employee's preferred accommodation).

To illustrate the problem-solving process envisioned by the EEOC, the Interpretive Guidance offers a simplistic example of how the interactive process should ideally work.<sup>58</sup> This example involves an employee who is disabled by a back impairment and requests reasonable accommodations for his job that requires him to lift and carry fifty-pound sacks.<sup>59</sup> The interactive process begins once the employer receives the request for reasonable accommodations.<sup>60</sup> The employer then analyzes the sack-handler position and determines the essential functions of the job.<sup>61</sup> After the job analysis, the employer meets with the employee to determine the “barrier” that the employee’s disability poses to his job performance.<sup>62</sup> The employee and employer then brainstorm potential accommodations, and the employer determines the feasibility of those accommodations, ultimately choosing one.<sup>63</sup> While the employer is obligated to give the disabled individual effective accommodations,<sup>64</sup> the employer has ultimate discretion over which effective accommodation to implement.<sup>65</sup>

The Interpretive Guidance recognizes that in some situations the inquiry will be truncated due to the relative ease of identifying reasonable accommodations for certain jobs and disabilities.<sup>66</sup> However, in cases where the disabled individual and the employer have difficulty identifying appropriate accommodations, the Interpretive Guidance states that the employer may need “to initiate a more defined problem solving process.”<sup>67</sup>

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<sup>58</sup> *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.9 (Reasonable Accommodation Process illustrated).

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

<sup>60</sup> *Id.*

<sup>61</sup> In the example, the employer’s job analysis leads it to conclude that the essential job function is not that the employee physically lift and carry the sacks but instead that the sacks *somehow* move from one location to another. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 400 (2002) (“An *ineffective* ‘modification’ or ‘adjustment’ will not *accommodate* a disabled individual’s limitations.”).

<sup>65</sup> See *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.9 (2005); see also EEOC, REASONABLE ACCOMMODATIONS, *supra* note 51 (explaining that while the ADA requires that “any accommodation be reasonable and effective in eliminating the workplace barrier,” the employer is not obligated to adopt the employee’s preferred accommodation).

<sup>66</sup> *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.9; see also EEOC, REASONABLE ACCOMMODATIONS, *supra* note 51 (explaining that “a simple conversation between the employer and the [employee]” may be sufficient to resolve the matter of reasonable accommodations); Sullivan, *supra* note 31, at 117 (noting that while the interactive process can “take a short period of time,” it “can also be long, time-consuming and frustrating”).

<sup>67</sup> *EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. § 1630.9 (Process of Determining the Appropriate Reasonable Accommodation). Although the Guidelines recognize that each inquiry should focus

While the Interpretive Guidance seemingly indicates that the interactive process is mandatory, employers and courts have not accepted its command, creating widespread confusion.

### III. CURRENT CONFUSION SURROUNDING THE INTERACTIVE PROCESS

Confusion among employers, employees, and the courts diminishes the potential for the interactive process to allow employers and employees to tailor reasonable accommodations to meet their specific needs. At the heart of the uncertainty lies the question of the proper level of deference that lower courts should afford the EEOC's regulations and Interpretive Guidance.<sup>68</sup> In order to understand the chaos surrounding the interactive process, this Comment first explores the courts' general reticence to defer to the EEOC regulations.

The EEOC's authority to enforce and interpret the anti-discrimination statutes is not uniform.<sup>69</sup> Under Title VII of the Civil Rights Act of 1964, the EEOC lacks "the authority to promulgate rules with the force of law."<sup>70</sup> In contrast, Congress expressly granted the EEOC rulemaking authority under the ADA.<sup>71</sup> Despite this explicit authority to issue regulations and provide guidance, the issue of deference remains far from settled.<sup>72</sup> This Part first discusses the general basis for examining judicial deference to agency regulations and then considers deference in the context of the EEOC and its ADA regulations.

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on the individual who is disabled and that neither the EEOC regulations nor the ADA can provide the "correct answer" concerning the appropriate reasonable accommodations for each employee, it would still be in the EEOC's interest and within its authority to track the results of individualized inquiries. *Id.*; *see also infra* Part V.C.

<sup>68</sup> *See* Barbara Hoffman, *Reports of Its Death Were Greatly Exaggerated: The EEOC Regulations that Define "Disability" Under the ADA After Sutton v. United Air Lines*, 9 TEMP. POL. & CIV. RTS. L. REV. 253, 253 (2000) ("The Title I regulations issued by the Equal Employment Opportunity Commission . . . have been the focus of intense scrutiny by courts, which have given those regulations widely varying degrees of deference."). More simply stated, the courts currently disagree on whether the EEOC's ADA regulations and Interpretive Guidance that discuss the interactive process operate as requirements or as merely suggestions

<sup>69</sup> Wern, *supra* note 41, at 1534.

<sup>70</sup> *Id.* at 1533-34.

<sup>71</sup> *See* 42 U.S.C. § 12116 (2006).

<sup>72</sup> White, *supra* note 39, at 535-38; *see also* Wern, *supra* note 41, at 1534 ("With differing grants of authority to the EEOC under different statutes, and varying views regarding the amount of judicial deference that should be given to administrative agencies in general . . . the standard of deference for EEOC guidelines is undefined . . .").

### A. *General Principles of Deference*

Issues of deference often arise in problems of statutory construction where a court must decide whether to defer to an agency's interpretation of the statute.<sup>73</sup> Generally, once Congress grants rulemaking authority to an administrative agency, courts must examine two issues to arrive at the proper level of deference to give an agency regulation.<sup>74</sup> In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Court laid out a two-step test.<sup>75</sup> First, the court must determine whether the language of the statute is clear.<sup>76</sup> If the language is clear, then the court must follow that statutory language regardless of the content of the agency's regulations.<sup>77</sup> However, if the statute is unclear, then the court must determine "whether the agency's answer is based on a permissible construction of the statute."<sup>78</sup> Under this paradigm, the court is "compelled" to defer to the agency's regulation "except in the rare cases in which the regulation is deemed arbitrary, capricious, or manifestly contrary to the statute."<sup>79</sup>

In contrast to heightened *Chevron* deference, an "earned deference standard applies when delegation of rulemaking authority to an agency is not clear from the empowering statute or when delegation exists but the agency does not exercise its delegated authority to promulgate binding rules."<sup>80</sup> When an agency acts in one of these ways, it "must earn judicial deference by satisfying certain judicially-crafted standards."<sup>81</sup> In arriving at the appropriate weight to give an agency's interpretation, the court "may look to factors" laid out in *Skidmore v. Swift*.<sup>82</sup>

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<sup>73</sup> See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.")

<sup>74</sup> Wern, *supra* note 41, at 1541 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). For a more in-depth explanation of the *Chevron* test, see JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 492–506 (2006).

<sup>75</sup> *Chevron*, 467 U.S. at 842.

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

<sup>77</sup> *Id.* at 842–43. Wern, *supra* note 41, at 1541. Despite the fact that *Chevron* was highly cited in the years after it was published, the "rate of Supreme Court deference to agency interpretations did not change significantly after *Chevron*." *Id.* at 1545–46.

<sup>78</sup> *Chevron*, 467 U.S. at 842–43.

<sup>79</sup> Wern, *supra* note 41, at 1541 (citing *Chevron*, 467 U.S. at 842–43).

<sup>80</sup> *Id.* at 1539.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1539–40 (citing *Skidmore v. Swift*, 323 U.S. 134 (1944)). In *Skidmore*, the Court found that agency "rulings, interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may

*B. The Deference Issue as Applied to the EEOC's ADA Regulations and Interpretive Guidance*

Courts should afford *Chevron* deference to both the EEOC's ADA regulations and Interpretive Guidance. The regulations *and* the Interpretive Guidance underwent the proper notice and comment procedure,<sup>83</sup> as required by the Administrative Procedure Act.<sup>84</sup> The Interpretive Guidance concerning the ADA appears in the appendix to the EEOC's Title I regulations.<sup>85</sup> Unlike other EEOC "guidance" documents, the Interpretive Guidance should be afforded *Chevron* deference because the rules were a result of notice and comment rulemaking<sup>86</sup> that the EEOC conducted pursuant to Congress' grant of rulemaking power under the ADA.<sup>87</sup>

Congress did not intend to give any less weight to the Interpretive Guidance than the regulations that precede them.<sup>88</sup> Congress knew about the EEOC's practice of supplementing its regulations with an interpretive appendix.<sup>89</sup> Because Congress clearly expressed its intent, courts should not

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properly resort for guidance." 323 U.S. at 140. Further, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

<sup>83</sup> Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 8578 (Feb. 28, 1991) (to be codified at 29 C.F.R. pt. 1630) (stating that "comments must be in writing and must be received on or before April 29, 1991"); *see also* Advanced Notice of Proposed Rulemaking, Title I of Americans with Disabilities Act; Implementation, 55 Fed. Reg. 31192 (Aug. 1, 1990). The notice in the Federal Register specifically stated that the "Commission believe[d] that it [was] essential to issue interpretive guidance concurrently with the issuance of these regulations in order to ensure that the qualified individuals with disabilities understand their rights under th[e] regulations." Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. at 8591-92.

<sup>84</sup> 5 U.S.C. § 553(b)-(c) (2006); *see also* Hoffman, *supra* note 68, at 259 ("The only distinction between the regulations and its appendix [which contain the Interpretive Guidance] is nomenclature.").

<sup>85</sup> *See EEOC Interpretive Guidance*, 29 C.F.R. § 1630 app. (2005) (Appendix to Part 1630 Interpretive Guidance on Title I of the Americans with Disabilities Act).

<sup>86</sup> *See supra* text accompanying note 83; *see also* Wern, *supra* note 41, at 1539, n.34 ("The fact that the EEOC followed the notice and comment procedures . . . suggests that [the EEOC] was attempting to exercise its delegated rulemaking authority."). *Id.* at 1562.

<sup>87</sup> *See supra* text accompanying note 43. An agency's action "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

<sup>88</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 156 (1999). (Congress "offered no signal that the interpretive appendix should be given less weight than the regulations to which [they were] attached.")

<sup>89</sup> *See id.* at 156 ("Presumably, when Congress instructed the EEOC to promulgate regulations to enforce the ADA, it was aware that the agencies had a practice of publishing regulations with an interpretive appendix as part of the regulatory process.").

treat the Interpretive Guidelines following the Title I regulations any differently from the regulations themselves.<sup>90</sup>

Despite the appearance that the ADA's regulations concerning Title I and its companion Interpretive Guidance should be entitled to heightened *Chevron* deference, the courts have reached a different result in practice. In *Sutton v. United Air Lines*,<sup>91</sup> the Court did not defer to the EEOC's interpretation of the term "disability" under the ADA.<sup>92</sup> The Court stated that no agency "ha[d] been given authority to issue regulations implementing the generally applicable provisions of the ADA, which fall outside Titles I–V. Most notably, no agency has been delegated authority to interpret the term 'disability.'"<sup>93</sup>

The same day as the Court's decision in *Sutton*, the Court also decided *Albertson's, Inc. v. Kirkinburg*.<sup>94</sup> The *Albertson's* majority explicitly declined to rule on the EEOC's definitions contained in the EEOC's Interpretive Guidance that related to the ADA's "definitional section,"<sup>95</sup> stating that "for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due."<sup>96</sup>

Despite the Supreme Court's decisions in *Sutton* and *Albertson's*, federal courts "continued to accept the EEOC's disability regulations as valid and persuasive"<sup>97</sup> until the Supreme Court once again addressed the EEOC regulations in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>98</sup> In *Toyota*, the Court "sidestep[ped] around the EEOC['s]'" interpretation of the

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<sup>90</sup> *Id.*

<sup>91</sup> 527 U.S. 471 (1999).

<sup>92</sup> *See id.* at 482; *see also* White, *supra* note 39, at 535–38 ("At least as troubling, however, is the Court's refusal to defer to the EEOC's statutory interpretation.").

<sup>93</sup> *Sutton*, 527 U.S. at 479 (internal citations omitted). *But see* Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 194 (2004) (arguing that this "pronouncement ignores the nature of the power Congress delegated to the EEOC" and "given the threshold requirement that an ADA plaintiff prove a disability, and given the statute's ambiguous definition of that term, the EEOC could not possibly" enforce Title I without interpreting the term); *see also* Hoffman, *supra* note 68, at 253 (pointing out that the Court in *Sutton* specifically rejected the part of the EEOC regulation that it had adopted in *Bragdon v. Abbott*, 524 U.S. 624 (1998)).

<sup>94</sup> 527 U.S. 555 (1999). On the same day, the Court also decided another ADA related case. *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999).

<sup>95</sup> The definitional section of the ADA does not pertain to any specific title, but instead precedes Title I. *See* 42 U.S.C. § 12102 (2006) (defining terms used throughout the statute, including the term "disability").

<sup>96</sup> *Albertson's*, 527 U.S. at 563 n.10 (internal citations omitted).

<sup>97</sup> Eichhorn, *supra* note 93, at 198.

<sup>98</sup> 534 U.S. 184 (2002).

term “substantially limits” even though the regulations were “entitled to a high degree of deference.”<sup>99</sup> The outcome of these cases resulted in a “general hostility toward the [EEOC] regulations [that] invites defendants to . . . question the viability of any and all language in the regulations.”<sup>100</sup>

### *C. Insight into the Supreme Court’s Failure to Defer*

In order to argue that employers *must* engage in the interactive process, this Comment must confront the reality that the courts—especially the Supreme Court—may fail to afford appropriate deference to regulations by the EEOC regarding the interactive process. This section examines potential reasons for courts’ past hesitancy to defer to EEOC regulations. After shedding light on these reasons, this Comment asserts that the interactive process falls within the agency’s authority, and any attempt by the EEOC to further elaborate and mandate the interactive process should be given deference by courts.

#### *1. The Structural Argument for Less Deference to EEOC Regulations*

The courts’ reticence to defer to the EEOC may partially stem from the fact that the ADA’s grant of rulemaking authority<sup>101</sup> is a broader type of authority than Congress granted the EEOC under Title VII of the Civil Rights Act of 1964.<sup>102</sup> In sharp contrast to the EEOC’s power under the ADA, the agency does not have “substantive rulemaking authority” under Title VII.<sup>103</sup> The “weak enforcement power [under Title VII] . . . may have cast a shadow over EEOC guidance that has drifted in to the ADA context,” despite the fact that the EEOC should, under the ADA, possess a great deal of enforcement power.<sup>104</sup> These showdowns may “signif[y] the Court’s reluctance to surrender interpretive authority to an administrative agency” when dealing with civil rights issues.<sup>105</sup> Scholars currently debate whether recent Court

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<sup>99</sup> Eichhorn, *supra* note 93, at 177. Issues of deference concerning the EEOC and its ADA regulations, at the Supreme Court level, have been limited to interpretations of terms that appear in the general provisions of the ADA. The issues of deference to regulations concerning terms appearing only under Title I of the ADA has not been addressed and may come out differently. *See infra* note 106.

<sup>100</sup> Hoffman, *supra* note 68, at 281.

<sup>101</sup> 42 U.S.C. § 12116 (2006).

<sup>102</sup> White, *supra* note 39, at 545. The EEOC, prior to the enactment of the ADA, primarily focused on Title VII issues. *Id.*; *see also* Eichhorn, *supra* note 97, at 194 (noting that courts may “reflexively strike down EEOC guidance under the ADA because those courts have grown accustomed, under Title VII, to viewing the EEOC as a weak agency”).

<sup>103</sup> White, *supra* note 39, at 545.

<sup>104</sup> Wern, *supra* note 41, at 1578.

<sup>105</sup> White, *supra* note 39, at 538.

cases such as *Sutton* signal the true death knell of judicial deference to all EEOC regulations.<sup>106</sup>

## 2. *The EEOC as a “Weak” Agency*

In addition to the structural arguments, some scholars believe “that courts may reflexively strike down EEOC guidance” concerning the ADA because they view the EEOC as a “weak agency.”<sup>107</sup> That is to say, the EEOC’s less-than-impressive past may cause courts to “attach a mild presumption of invalidity to the EEOC guidance, and ultimately strike [guidance] down . . . in a reflexive manner.”<sup>108</sup>

Years of backlog and an ever-growing number of charges filed with the EEOC have only perpetuated the notion of the EEOC as a weak and mismanaged agency.<sup>109</sup> Although the agency has attempted to “streamline” the process of EEOC charges on several occasions, including the use of mediation programs, the EEOC has had only limited success in “reducing the horrendous EEOC backlog.”<sup>110</sup> Given the EEOC’s perceived weakness, this Comment argues that the EEOC can bolster its role in enforcing the ADA by mandating the interactive process and collecting information from the process’s outcomes.<sup>111</sup>

While the ADA envisions an active role for the EEOC in enforcing the statute,<sup>112</sup> the reality differs starkly.<sup>113</sup> The EEOC’s purported role consists of

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<sup>106</sup> See Hoffman, *supra* note 68 at 254. However, it is important to note that the terms in the regulations in these cases did not appear exclusively in Title I, but instead in the general definition section of the ADA. A regulation dealing squarely with an issue solely in Title I, and therefore under EEOC authority, may come out differently. For a more thorough discussion, see Hoffman, *supra* note 68, at 253–55; and Eichhorn, *supra* note 97, at 194.

<sup>107</sup> Eichhorn, *supra* note 97, at 194.

<sup>108</sup> Wern, *supra* note 41, at 1578. Additionally, the “non technical nature of the subject matter” that the EEOC deals with may also lead to a lack of deference. *Id.* at 1579. Professor Wern further discusses other potential reasons for this lack of deference that has established the EEOC as a “second-class agency.” *Id.* at 1579–80.

<sup>109</sup> Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1414–15 (2004) (explaining that in the 1970’s, the EEOC was “already becoming better known for delay and backlog” than for investigating charges of discrimination).

<sup>110</sup> *Id.* at 1416–21.

<sup>111</sup> For additional recommendations about how to redeem the EEOC “from its inferior status,” see Wern, *supra* note 41, at 1581–84.

<sup>112</sup> See 42 U.S.C. § 12117 (2006).

<sup>113</sup> See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 1–12 (1996) (questioning the purpose and practical necessity of the EEOC’s role in employment discrimination claims).

processing and assessing the merits of claims.<sup>114</sup> Additionally, the EEOC helps facilitate the litigation of claims that might not otherwise be brought by the private bar.<sup>115</sup> Despite these lofty goals, in reality, most claimants do not get any relief.<sup>116</sup> The EEOC lacks the power to ensure that its rules and regulations provide an appropriate deterrent effect and are followed by employers.<sup>117</sup>

Further, the EEOC's current procedural structure of dealing with claims often impedes "meritorious cases [from] coming to judgment."<sup>118</sup> Impediments that prevent cases from advancing fully through the claims process result in a breakdown, which prohibits other employers and employees from learning of the outcome of the issue underlying the claim.<sup>119</sup> Under the current EEOC system, parties involved—and the public in general—receive a message that is a "far cry from . . . [one] . . . of governmental concern or a commitment to eradicating discrimination."<sup>120</sup>

*D. An Engagement Requirement?: The Circuit Split over the Mandatory Nature of the Interactive Process*

Whatever the Supreme Court's reasoning, its failure to specifically address the deference that the Title I Interpretive Guidelines are due has produced a split among the lower courts.<sup>121</sup> This split has spawned a great deal of confusion among parties concerning their obligation to engage in the interactive process, and as a result, the interactive process has failed to provide employers and employees many of its potential benefits.<sup>122</sup>

The EEOC regulations state that to determine the appropriate reasonable accommodations, it "*may be necessary*" for the employer to undertake the interactive process.<sup>123</sup> This seemingly permissive language,<sup>124</sup> coupled with

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<sup>114</sup> *Id.* at 6–11.

<sup>115</sup> *Id.* at 57.

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

<sup>117</sup> *Id.* at 49–50.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 57.

<sup>121</sup> See John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process?*, 79 CHI.-KENT L. REV. 665, 684 (2004) ("[T]he judiciary has had an extremely difficult time formulating a coherent interactive process jurisprudence.").

<sup>122</sup> See Proctor, *supra* note 18.

<sup>123</sup> 29 C.F.R. § 1630.2(o)(3) (2005) (emphasis added).

the difficulty in determining what amount of deference to afford the Interpretive Guidelines, has resulted in a split of authority.<sup>125</sup> This split concerns whether an employee's request for reasonable accommodation imposes a duty to engage in the interactive process upon an employer.<sup>126</sup> The Supreme Court has indicated interest in the split concerning the interactive process,<sup>127</sup> but specifically avoided this issue.<sup>128</sup> All circuits recognize that the employer has some responsibility to determine the proper accommodation, but after this initial recognition the courts take one of three approaches.<sup>129</sup>

### *1. Approach #1—A Duty to Interact*

A majority of the circuit courts view employer participation in the interactive process as mandatory.<sup>130</sup> One of the earliest cases concerning the

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<sup>124</sup> See *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 513 (1st Cir. 1996) (“The regulations’ use of ‘may’ clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to.”); see also *Autry*, *supra* note 121, at 676–77 (stating that “[t]he incongruity between the regulation’s permissive tone and the more conclusory characterizations included in the Interpretive Guidance” led to the development of a “circuit split over whether the ADA requires or merely encourages the interactive process”).

<sup>125</sup> *Autry*, *supra* note 121, at 676–77.

<sup>126</sup> *Id.* Although not discussed in this Comment, the circuits further split on the issue concerning the allocation of the burden of proof when establishing the existence of a reasonable accommodation. See, e.g., Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 939–40 (2003) (discussing the circuit split concerning the burden of proof in establishing the “appropriateness of a reasonable accommodation”).

<sup>127</sup> *Proctor*, *supra* note 18, at 58 (“Although the Supreme Court has not yet clarified requirements under the EEOC’s interactive process, our highest court has nonetheless indicated interest in the issue.”). Courts are also split on other issues involving the interactive process, such as notice to the employer and the good faith participation requirement. See *Proctor*, *supra* note 18, at 59–60.

<sup>128</sup> See *Barnett*, 535 U.S. at 407 (Stevens, J., concurring) (stating that the majority decision did not touch the Ninth Circuit’s conclusion that summary judgment was improper as to the issue of the interactive process)

<sup>129</sup> See *Autry*, *supra* note 121, at 677.

<sup>130</sup> The Third, Fifth, Seventh, and Ninth Circuits have found the interactive process to be mandatory. See *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc) (adopting the view that the interactive process is a mandatory, rather than a permissive obligation for the employer, which is triggered by the employee’s request for reasonable accommodations), *rev’d on other grounds*, *Barnett*, 535 U.S. 391; *Mengine v. Runyon*, 114 F.3d 415, 420 (3rd Cir. 1997) (stating that “both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith”); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (explaining that “it is the employee’s initial request for accommodation which triggers the employer’s obligation to participate in the interactive process” and “once an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer”); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) (noting that “the ADA and its implementing regulations require that the parties engage in an interactive process”). The Sixth Circuit has discussed in dicta of an unpublished opinion, its “propensity to join with its sister circuits in

mandatory nature of the interactive process was *Beck v. University of Wisconsin Board of Regents*.<sup>131</sup> In *Beck*, the Seventh Circuit considered a claim by an employee suffering from osteoarthritis and depression who alleged that her employer failed to provide her with reasonable accommodations.<sup>132</sup> The employer argued that it “never understood exactly what accommodations Beck required . . . and provided the best accommodations possible given its limited understanding” of the employee’s disability.<sup>133</sup> In response, the employee argued that she had provided her employer with enough information to allow the employer to determine the reasonable accommodation.<sup>134</sup> The Seventh Circuit phrased the issue of the case as whether the employer or the employee bore the “ultimate responsibility” for deciding what accommodations the ADA required.<sup>135</sup> The *Beck* court recognized that it may be difficult for employers to have “knowledge” of what appropriate accommodation to provide.<sup>136</sup> Despite this potential difficulty, the *Beck* court found that “‘accommodation’ within the meaning of the ADA was not some vague, ill-defined remedy,”<sup>137</sup> but rather, concrete and specific action that the ADA and its regulations *require* of the employer.<sup>138</sup>

*Beck* precipitated a “wave of judicial precedent requiring employers to engage in the interactive process.”<sup>139</sup> The Third Circuit, in *Taylor v. Phoenixville School District*,<sup>140</sup> cited EEOC regulations and interpretations of the Rehabilitation Act that required employers to engage in an interactive process as support for its holding that both parties had the obligation to

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holding that employers are required to participate in the interactive process.” Autry, *supra* note 121, at 680–81 (citing *Brown v. Chase Brass & Copper Co.*, 14 F. App’x 482 (6th Cir. 2001)).

<sup>131</sup> *Beck*, 75 F.3d 1130.

<sup>132</sup> *Id.* at 1130–33.

<sup>133</sup> *Id.* at 1134.

<sup>134</sup> *Id.* at 1137.

<sup>135</sup> *Id.* at 1134.

<sup>136</sup> *Id.* at 1134–35.

<sup>137</sup> *Id.* at 1134–35. Despite arguably clear language asserting “accommodation” as a distinct remedy, the ADA does not provide a one-size-fits-all accommodation for every individual situation that might arise, creating a void filled by the interactive process to arrive upon the correct reasonable accommodation.

<sup>138</sup> Although the court held that the interactive process was required, the *Beck* court also stressed that both parties must act in good faith and that “neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability.” *Id.* at 1135. *But see* Autry, *supra* note 121, at 678 (discussing the limitations of the Seventh Circuit’s decision).

<sup>139</sup> Autry, *supra* note 121, at 678.

<sup>140</sup> 184 F.3d 296, 312 (3rd Cir. 1999).

participate in the interactive process.<sup>141</sup> Similarly, the Ninth Circuit,<sup>142</sup> the Fifth Circuit,<sup>143</sup> and the Sixth Circuit<sup>144</sup> have all placed the obligation upon the employer.

## 2. Approach #2—No Obligation to Engage

Two circuits explicitly hold that the interactive process does *not* place any obligation upon the employer.<sup>145</sup> The Tenth Circuit held that the interactive process is merely an “EEOC *recommendation*,” not a “statutory *requirement*.”<sup>146</sup> The Tenth Circuit’s analysis focused on the language of the EEOC regulations that pointed to the interactive process only being triggered if the employee is otherwise qualified.<sup>147</sup> In finding that this “trigger” is required and that “qualification” is “defined to include the concept of reasonable accommodation,” the court held that the employer must first “make a threshold determination” about whether the employee can be accommodated at all.<sup>148</sup> According to the court, only after such a determination do the EEOC regulations *recommend* that the employer and employee “work together in order to identify how best to accommodate the employee.”<sup>149</sup> Similarly, in *Willis v. Conopco, Inc.*, the Eleventh Circuit held that the burden to recommend specific reasonable accommodations lay not with the employer as an affirmative duty, but instead with the employee.<sup>150</sup>

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<sup>141</sup> *Id.* at 312 (citing *Mengine v. Runyon*, 114 F.3d 415, 419–20 (3rd Cir. 1997)). The Third Circuit also adopted a “four-part proof scheme” for employees to prove that the employer did not engage in the interactive process. *Autry*, *supra* note 121, at 679.

<sup>142</sup> *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (adopting the view that the interactive process is a mandatory, rather than a permissive obligation for the employer, which is triggered by the employee’s request for reasonable accommodations).

<sup>143</sup> *See Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (holding that “the employee’s initial request for accommodation triggers the employer’s obligation to participate in the interactive process, and that both parties share the responsibility of fashioning an appropriate accommodation”).

<sup>144</sup> *See Brown v. Chase Brass & Copper Co.*, 14 F. App’x 482, 487 (6th Cir. 2001) (unpublished opinion) (“If an employer’s unwillingness to engage in such a process leads to a failure to reasonably accommodate an employee, the employer might be liable under the ADA”).

<sup>145</sup> *See Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (holding that the employer was not required to engage in an interactive process); *White v. York Int’l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995) (same).

<sup>146</sup> *White*, 45 F.3d at 363.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

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

<sup>150</sup> *Willis*, 108 F.3d at 284–85.

### 3. Approach #3—The Case-by-Case Method

The remaining two circuits, the First and the Eighth, have held that an employer's duty to engage in the interactive process should be determined on a case-by-case basis.<sup>151</sup> In *Jacques v. Clean-Up Group, Inc.*, the First Circuit reasoned that the “‘regulations’ use of ‘may’ clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to.”<sup>152</sup> While the court recognized that “[t]here may well be situations in which the employer’s failure” to participate in the interactive process results in the failure to provide reasonable accommodation in violation of the ADA, the First Circuit settled on a case-by-case standard.<sup>153</sup> The court explained that, because “cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties’ behavior,” the appropriate analysis is to examine the facts of each case and decide whether the employer should be liable for not participating in the interactive process.<sup>154</sup>

In *Fjellestad v. Pizza Hut of America, Inc.*, the Eighth Circuit further illustrated the disagreement among circuits.<sup>155</sup> In *Fjellestad*, the court employed a mixture of approaches to reach its final outcome.<sup>156</sup> First, the court agreed with the Eleventh and Tenth Circuits that the employer is not *necessarily* required to engage in the interactive process.<sup>157</sup> Such a failure, the court held, did not establish “per se liability under the ADA.”<sup>158</sup> However, the court then embraced the Interpretive Guidelines as rules establishing “when it is ‘necessary’ for an employer to initiate an informal interactive process.”<sup>159</sup> Further, the court held that, for purposes of summary judgment, “the failure of an employer to engage in an interactive process . . . [is] prima facie evidence that the employer may be acting in bad faith.”<sup>160</sup> Through this reasoning, the court seemingly adopted a case-by-case approach similar to that of the First

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<sup>151</sup> See *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944 (8th Cir. 1999); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 513 (1st Cir. 1996).

<sup>152</sup> *Jacques*, 96 F.3d at 513.

<sup>153</sup> *Id.* at 515.

<sup>154</sup> *Id.*

<sup>155</sup> 188 F.3d 944.

<sup>156</sup> See *id.*

<sup>157</sup> See *id.* at 952.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 953.

Circuit, but then it supplemented its analysis with the Third Circuit's factor test for proof of failure to engage in the interactive process.<sup>161</sup>

#### IV. WHY EMPLOYERS WOULD BENEFIT FROM ENGAGING IN THE INTERACTIVE PROCESS AND MAKING REASONABLE ACCOMMODATIONS

Although the Supreme Court remains silent on the mandatory nature of the interactive process, employers should not wait until they are required to engage in the process by congressional or judicial mandate. Regardless of the employer's reasons for not wanting to provide reasonable accommodations<sup>162</sup> and judicial disagreements about the nature of the obligation to engage in the interactive process, the interactive process is in the best interest of employers, employees, and society.<sup>163</sup> The interactive process is inexpensive and the employer should not be concerned with the accommodations that result from the process because, under the ADA, the employer will never be required to provide accommodations that impose undue burdens on the employer.

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<sup>161</sup> *Id.* at 952 (“A factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA.”); see *supra* notes 153–56 and accompanying text.

<sup>162</sup> “Irrational discrimination” is not efficient and given a perfect market it should never occur. Russell Powell, *Beyond Lane: Who is Protected by the Americans with Disabilities Act, Who Should Be?*, 82 DENV. U. L. REV. 25, 50 (2004) (citing GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 39–40 (1971)). However, studies show that irrational discrimination against individuals with disabilities is a reality. *Id.*

<sup>163</sup> The interactive process is inexpensive, and the employer should not be concerned with the accommodations that result from the process because the employer will never be required to provide accommodations that impose undue burdens. See Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 263 (1999); see also *Economics of the Employment Provisions of the ADA*, in *EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH* 201, 212 (Peter David Blanck ed., 2000) (explaining that Title I does “not require the employer to hire or retain a qualified individual with a covered disability, regardless of the need for accommodation, over an equally or more qualified individual without a disability”); Helen Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 926 (2006) (explaining that employers should provide accommodations that are of little or no cost regardless of legal obligation because of the benefits to the employer's workforce).

Despite scholars' contentions<sup>164</sup> and employers' fears<sup>165</sup> that the costs of reasonable accommodation costs outweigh the benefits, studies have shown otherwise.<sup>166</sup> Many accommodations can be implemented at little or no cost.<sup>167</sup> A recent study by the Job Accommodation Network (JAN)<sup>168</sup> examined the reasonable accommodations provided for disabled employees by over 770 employers that used JAN's resources.<sup>169</sup> The study found that more than half of the accommodations cost nothing.<sup>170</sup> Examples of potential reasonable accommodations ranged from modifying existing facilities to job restructuring.<sup>171</sup>

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<sup>164</sup> See *Economics of the Employment Provisions of the ADA*, *supra* note 163, at 212. "Critics of Title I have characterized an employer's obligation to provide reasonable accommodations . . . as a form of market distortion leading to economic inefficiencies" and creates employment privileges or subsidies for the disabled. *Id.* at 212. Other scholars have construed the duty of reasonable accommodation as an imposition of an "affirmative duty [on employers] to retain less economically efficient workers." *Id.* at 212 (internal citations omitted); see also Wilson G. Barneyer, Reasonable Accommodation for Employees with Perceived Disabilities: An Alternative Approach Based on Relationship, at 9 (2005–2006), <http://www.kentlaw.edu/academics/plel/REASONABLE%20ACCOMMODATION%20PAPER%20Wislon%20Barneyer%202005-06.pdf> (unpublished student comment, on file with Chicago-Kent College of Law Louis Jackson National Student Writing Competition in Employment and Labor Law) (providing an overview of arguments against reasonable accommodations with respect to individuals "'regarded as'" disabled, including "the 'Unfair Advantage' critique").

<sup>165</sup> *Economics of the Employment Provisions of the ADA*, *supra* note 163, at 215 ("One common criticism [of reasonable accommodation] is that the costs of accommodations outweigh the benefits.").

<sup>166</sup> Most criticism of reasonable accommodations is made "without reliance on data." *Id.* at 216; see also Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for a Second-Generation Civil Rights Statute*, in *EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH* 51, 56 (Peter David Blanck ed., 2000) [hereinafter *Stein, Employing People with Disabilities*] (discussing that a "lack of available information" makes "broad economic judgments" of the ADA's "efficiency . . . premature").

<sup>167</sup> See Stein, *Employing People with Disabilities*, *supra* note 166, at 56 (arguing that data supports the proposition that the "implementation of Title I is economically efficient").

<sup>168</sup> JAN is a free consulting service provided through the Department of Labor's Office of Disability Employment Policy.

<sup>169</sup> *Workplace Accommodations: Low Cost, High Impact*, FACT SHEET SERIES (Job Accommodation Network, Morgantown, W. Va.), 2005, at 4–5, <http://www.jan.wvu.edu/media/LowCostHighImpact.pdf> (summarizing the findings of a study by the University of Iowa's Law, Health Policy, and Disability Center). For similar findings, see Schartz et. al., *supra* note 163, at 939.

<sup>170</sup> *Workplace Accommodations: Low Cost, High Impact*, *supra* note 169; see also Peter D. Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278–80 (1996) (finding that out of Sears' 300,000 person workforce an estimated 20,000 were disabled, and that most of these accommodations did not "deviate substantially from the overall average cost of \$45"). *But see* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 109 (2003) [hereinafter Stein, *The Law and Economics*] (pointing out that studies, such as the Sears' "study[,] do not report the costs of sought—after accommodations" that the employer ultimately chose not to provide because of expense).

<sup>171</sup> See 29 C.F.R. § 1630.2(o)(2)(i)–(ii) (2006).

Furthermore, while the costs of providing accommodations are generally low, the benefits to employers are substantial.<sup>172</sup> For every dollar spent on accommodations, employers “realized an average of \$50 in benefits.”<sup>173</sup> Further, employers who made reasonable accommodations “experienced multiple direct and indirect benefits.”<sup>174</sup> These direct benefits included the retention of qualified employees and increased productivity of the disabled individual.<sup>175</sup> Indirect benefits included overall increases in the company’s productivity, morale, and employee interactions with each other and with customers.<sup>176</sup>

By employing and accommodating individuals with disabilities, employers not only benefit themselves but also benefit society as a whole.<sup>177</sup> For example, it is estimated that “for every one million disabled people employed, ‘there would be as much as a \$21.2 billion annual increase in earned income’” and a ““\$286 million annual decrease in the use of food stamps.””<sup>178</sup>

Employers over the past several years appear to have begun to shift their attitudes toward providing reasonable accommodations to disabled individuals.<sup>179</sup> Employers seemingly exhibit a greater willingness to “provide accommodations so they can retain valued and qualified employees.”<sup>180</sup> Additionally, the use of JAN as a resource by many employers is indicative of employers’ desire to implement reasonable accommodations in the workforce.<sup>181</sup> The low costs of accommodations, judicial protections for employers who in good faith engage in the interactive process, and the costs of

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<sup>172</sup> Schartz et al., *supra* note 163, at 926 (explaining that studies have found that the costs from turnover and injury tend to outweigh the costs from providing the reasonable accommodation).

<sup>173</sup> Blanck, *supra* note 170, at 280.

<sup>174</sup> *Workplace Accommodations: Low Cost, High Impact*, *supra* note 169.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Stein, *The Law and Economics*, *supra* note 170, at 104–09.

<sup>178</sup> Patricia Digh, *People with Disabilities Show What They Can Do*, H.R. MAG., June 1998, at 140, 144 (quoting a report by economist Douglas Kruse).

<sup>179</sup> Data show that business leaders have “favorable attitudes toward the employment and accommodation of qualified employees with disabilities.” *Economics of the Employment Provisions of the ADA*, *supra* note 163, at 216 (pointing to a 1995 poll of business executives, which found that close to 80% of the executives surveyed held the belief that employing disabled individuals would be a “boost to the economy”).

<sup>180</sup> *Workplace Accommodations: Low Cost, High Impact*, *supra* note 169, at 4. It is important to note that such a finding is a result of surveys by employers that voluntarily choose to use JAN as a resource for accommodation assistance.

<sup>181</sup> In 1990–1991, directly after the enactment of the ADA, 14,000 calls and 18,000 contacts on a toll free bulletin board came into JAN. Barbara T. Judy, *Job Accommodation Network: 2000 Congressional Report* (2000), <http://www.jan.wvu.edu/media/2000Congress.html>. In 2000, JAN received approximately 40,000 contacts. *Id.*

litigation for failure to provide accommodations may explain and hopefully encourage this new trend.<sup>182</sup>

#### V. USING NEW GOVERNANCE TO REALIZE THE FULL POTENTIAL OF THE ADA AND THE INTERACTIVE PROCESS

New Governance theories, especially Experimentalism, advocate for regulation that is flexible and encourage problem-solving and information-sharing,<sup>183</sup> in contrast to fixed, unbending rules.<sup>184</sup> By its very nature, the interactive process, laid out in the EEOC's ADA regulations, embraces such goals. In fact, the term "interactive process" appears in many "New Governance" works completely unrelated to the ADA.<sup>185</sup>

In the presence of a relatively weak EEOC, the promise of the ADA to allow otherwise-qualified individuals access to reasonable accommodations in the workforce cannot be fully realized without the wholesale adoption of the interactive process.<sup>186</sup> Implementation of such an approach should not be particularly onerous, given that the contemporary workplace frequently requires employers to assess and reassess the nature of job tasks.<sup>187</sup> To elaborate on that rationale, this Part introduces the theories of New Governance and draws upon these theories, in particular Experimentalism, to suggest a possible way to strengthen both the ADA and the EEOC, and to bring about greater opportunities for the disabled.

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<sup>182</sup> Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 30 (1996). Additionally, the costs of the job search "make it likely that [disabled employees] will accept the employer's proffered accommodation." Both employers and employees have the incentive to stay at "the bargaining table" and "reach [an] agreement on an accommodation." *Id.*

<sup>183</sup> See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 463 (2001) (arguing that an experimentalist regulatory approach "fosters dynamic interactions that cut across established conceptual, professional, and organizational boundaries in reaction to observed problems").

<sup>184</sup> *Id.* at 475 (discussing the limits of a rule approach).

<sup>185</sup> See, e.g., Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 405 (2005) (advocating a change that would allow the prosecutor and jury to engage in an "interactive process" in order to arrive at an appropriate charge for a defendant).

<sup>186</sup> See *supra* Part III.B-C.

<sup>187</sup> See Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 674 (2005) (arguing that one way to combat discrimination in the workplace "is to devise a regulatory scheme that requires and then monitors a process of problem solving and self-regulation by employers"). Many employers have established problem solving systems to compact a different workplace discrimination issue, sexual harassment. See Sturm, *supra* note 183, at 458-568 (discussing companies, such as Intel, that have adopted a problem-solving approach to combat sexual harassment issues in its work force).

### A. *An Introduction to New Governance Theories*

There have been a growing number of academic articles exploring how government and regulations should operate across a broad range of regulated fields.<sup>188</sup> The terms *New Governance* and *Experimentalism*<sup>189</sup> refer to the school of thought that encourages a new way of examining the processes of making and implementing public policy.<sup>190</sup> New Governance scholarship advocates a fresh way to view and implement regulations that retreats from the current regime of “fixed-rule regulation by administrative fiat.”<sup>191</sup> Instead, New Governance envisions a “collaborative . . . problem-solving” paradigm<sup>192</sup> that “blur[s] the boundaries between external and internal regulators, legal and organizational norms, and practices pursuing equity and efficiency.”<sup>193</sup> In order to obtain this goal of flexibility, Congress, courts, and regulatory agencies should explore new ways to be more “open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic.”<sup>194</sup> Further, to reach such goals of developing more flexible and beneficial regulations, entities that might have “traditionally pursued separate or even competing agendas” must collaborate with each other.<sup>195</sup>

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<sup>188</sup> Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 478 (2004) (identifying New Governance literature as a “major trend”).

<sup>189</sup> Experimentalist scholars “advocate a shift to regulatory approaches that allow greater experimentation and information sharing.” William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 62 (2003); see also Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (introducing the general theory behind democratic experimentalism, a theory that embraces information sharing and flexible solutions to unique problems).

<sup>190</sup> Karkkainen, *supra* note 188, at 473. Karkkainen explains the term “New Governance” as a “related family of alternative approaches to governance.” *Id.* at 496. The article also points to the extreme variety among the New Governance theories and the lack of a “common nomenclature” as a source of confusion that has led to the under-appreciation of the body of scholarship. *Id.* at 476–78.

<sup>191</sup> *Id.* at 473; see also Susan Sturm, *Lawyering for a New Democracy: Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 291–96 (2002) (noting the “shift in the regulatory landscape . . . away from exclusive reliance on the judiciary and toward . . . a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas . . .”).

<sup>192</sup> Karkkainen, *supra* note 188, at 473.

<sup>193</sup> Sturm, *supra* note 191, at 291.

<sup>194</sup> Karkkainen, *supra* note 188, at 474. Examples of the New Governance currently implemented in some communities include “problem-solving courts,” “community policing,” and “health care reform.” *Id.* at 475.

<sup>195</sup> Sturm, *supra* note 191, at 297. For example, in Greensboro, North Carolina, a labor union and a civil rights group banded together to “redefine a dispute” and by doing so were able to work toward the most beneficial solution for the community. *Id.* at 297–98; see also Dorf & Sabel, *supra* note 188 (asserting that local groups and entities have the capacity to drive collective decisions).

Most pertinent to a discussion of the interactive process under the ADA, some New Governance theorists encourage Experimentalism, which envisions government action that embraces constant learning, information pooling, and the search for best practices.<sup>196</sup> According to Professors Michael Dorf and Charles Sabel, under such a framework, regulatory agencies will “set and ensure compliance with national objectives by means of best-practice performance standards based on information that regulated entities provide in return for the freedom to experiment with solutions they prefer.”<sup>197</sup> Drawing on lessons learned from the private sector,<sup>198</sup> Dorf and Sabel argue that government can use “institutional devices” to encourage “decentralized, collaborative design and development under conditions of volatility and diversity.”<sup>199</sup> In short, Dorf and Sabel propose a framework of shared information and a process that encourages the questioning of the status quo.<sup>200</sup>

Administrative agencies, such as the EEOC, can provide vital assistance in this process by establishing the “infrastructure of coordination”<sup>201</sup> and setting, through a form of benchmarking, regulatory standards.<sup>202</sup> Under such a framework, the agencies serve as links between parties, encouraging Experimentalism while engaging in benchmarking to identify the best practices as they surface.<sup>203</sup> This means that the agencies both monitor the regulated entities and pool the information derived from such monitoring. Additionally, this infrastructure encourages the “close working relationship between regulator and regulated entity that will facilitate the agency’s role as conduit of information.”<sup>204</sup> More simply stated, under an Experimentalism framework, collaboration and shared learning are linked so closely that the agency and

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<sup>196</sup> Dorf & Sabel, *supra* note 189, at 267 (introducing the concept of Democratic Experimentalism).

<sup>197</sup> *Id.* Professors Dorf and Sabel point to the regulation of nuclear power plants and community policing as examples of “self-government.” *Id.* In fact, the term “interactive process” appears in many “New Governance” works completely unrelated to the ADA. *See, e.g.*, Lanni, *supra* note 185, at 405.

<sup>198</sup> In the midst of volatile markets, United States companies have “increasingly adopt[ed], and even develop[ed]” new forms of collaboration and benchmarking systems in order to reestablish competitiveness with foreign companies. Dorf & Sabel, *supra* note 189, at 297–316.

<sup>199</sup> *Id.* at 286. Learning by monitoring and benchmarking, engaged in by firms, “spurs exploration” and has the possibility of identifying potential new solutions. *Id.* at 287. This model of public problem-solving is called “democratic experimentalism.” *Id.* at 288.

<sup>200</sup> Dorf and Sabel believe that alternatives should be explored through a process of benchmarking and that this exploration will constantly reevaluate the status quo. *Id.* at 316.

<sup>201</sup> *Id.* at 340.

<sup>202</sup> *Id.* at 345.

<sup>203</sup> *See id.*; *see also* Zaring, *supra* note 14, at 295 (“[R]egulation through best practices has increased sevenfold in the past ten years in the federal government alone . . .”).

<sup>204</sup> Dorf & Sabel, *supra* 189, at 354.

private actors “work literally side by side,” learning from, and working with, each other.<sup>205</sup>

*B. Making the ADA Stronger: How New Governance Theories Can Help*

Despite many employers’ perceptions and worst fears, reasonable accommodations adopted pursuant to the ADA are generally inexpensive, and such accommodations prove beneficial to those beyond the individual employee.<sup>206</sup> The interactive process can help employees and employers arrive at the best reasonable accommodation for both parties.<sup>207</sup> Given that revelation, how can the federal government, through the EEOC, aid employees and employers in participating in the interactive process? The interactive process can be a successful way of reaching the most beneficial result in situations when employers and employees need more data about alternatives and the experiences of others. To this end, theories of New Governance can help frame a discussion of how the interactive process can be applied with greater impact and, in the process, strengthen the ADA and the EEOC.

This Comment advocates an application of New Governance theory with a twist. The proposal below contends that the government, through the EEOC, should impose a rigid rule, making the interactive process mandatory and setting a level of expected behavior for employers. Despite this rigid rule, the very nature of the interactive process still allows for flexible and varying outcomes that underlie the very essence of New Governance theories. The reality of the ever-changing workplace, where employers must constantly assess and reassess the nature of job tasks as well as the bottom line, makes a flexible process for reasonable accommodations ideal.<sup>208</sup> The EEOC and the courts have taken similar approaches in the sexual harassment context, where

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<sup>205</sup> *Id.* at 355. A rolling regulatory regime ends up looking like this: the process begins when the government or a nongovernmental actor sets an initial goal and collects information from the regulated entities, then the government examines the results and adjusts the standards continually as “local experimentation reveals what is possible.” Michael C. Dorf, *Review Essay: The Domain of Reflexive Law Regulating Intimacy: A New Legal Paradigm*, 103 COLUM. L. REV. 384, 398–99 (2003) (citing Dorf & Sabel, *supra* note 189, at 350–54).

<sup>206</sup> *See supra* Part I.B.

<sup>207</sup> *See supra* Part II.

<sup>208</sup> *See Green, supra* note 187, at 674 (arguing that one way to combat discrimination in the workplace “is to devise a regulatory scheme that requires and then monitors a process of problem solving and self-regulation by employers”); *see also* Dorf, *supra* note 205, at 394 (stating that employers “shape their harassment policies to meet the unique circumstances of their particular workplaces”); Sturm, *supra* note 183, at 458–568 (discussing the use of employers who establish problem solving systems to combat workplace discrimination in the Title VII context).

they have laid out requirements concerning the existence of harassment policies but have not dictated their content.<sup>209</sup>

Ideally, by adopting a mandatory stance on the interactive process, a new paradigm of dealing with reasonable accommodations would emerge with new roles for the EEOC and the courts.<sup>210</sup> Under this framework, the employer and employee would be responsible for engaging in a good-faith attempt at the interactive process. The EEOC and the courts would act as both “a catalyst and a floor . . . [by encouraging the] formation of deliberative and participatory structure [the interactive process] aimed at solving problems,” as well as sanctioning those employers who “violate well-established minimum standards” identified from viewing results of other engagements by employers who have participated in the interactive process.<sup>211</sup>

### *C. A Reasonable Accommodation Database: Making the Interactive Process More Successful*

The interactive process provides employees, employers, and courts with the opportunity to further the promise of the ADA within the workforce. Specifically, it allows otherwise-qualified disabled individuals and their employers to work together to arrive at the most beneficial reasonable accommodations for both. Making the interactive process mandatory will go a long way to further the goal of arriving at reasonable accommodations for disabled employees.

While employers and employees possess valuable information about the specific situation giving rise to the request for reasonable accommodations, the interactive process would be strengthened, and resulting outcomes enhanced, if the parties could access information gleaned from the experiences of others with similar challenges. In order to collect such data, the EEOC should monitor, either willingly or by Congressional mandate, the results of the

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<sup>209</sup> See Dorf, *supra* note 205, at 394.

<sup>210</sup> The EEOC might “take the lead in disseminating the most successful strategies” relating to reasonable accommodations. *Id.* at 398 (citing Michael C. Dorf, *The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 77 (1998)). The proposed database may serve as a mechanism to disseminate such information.

<sup>211</sup> Sturm, *supra* note 191, at 294. This role would be similar to the role given to courts in the sexual harassment context where the laws are more “reflexive” than “command-and-control-ish” in the sense that the law allows employers to avoid liability unless the employer has failed to exercise “reasonable care to avoid harassment and to eliminate it.” Dorf, *supra* note 205, at 394 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998)).

interactive process in order to compile a database of potential reasonable accommodations. Employers, employees, and courts could then access and rely upon this database.<sup>212</sup>

The Reasonable Accommodation Database would be similar to, but far more comprehensive than, the database currently maintained by JAN,<sup>213</sup> called the Searchable Online Accommodation Resource (SOAR).<sup>214</sup> SOAR currently tracks accommodation recommendations given by staff when parties contact JAN.<sup>215</sup> This new national database would enable employers and employees to approach the interactive discussion, envisioned in the Interpretive Guidelines, with a tool kit of potential solutions that have worked in the past. Although the interactive process must always be cognizant of the need for individual solutions for the disabled individual,<sup>216</sup> the existence of information about prior reasonable accommodations will help give all parties a starting point for discussion. Additionally, the establishment of a best-practices approach to reasonable accommodations resulting from the interactive process will provide the EEOC and the courts with a point of comparison from which to judge employee and employer actions if the interactive process breaks down. In the circuits that currently require the interactive process, the collected data about reasonable accommodations would help provide courts, as well as the EEOC, with more information. This information about reasonable accommodations made by employers in the past, while not binding on courts or agencies, would still provide illustrative examples on which to base decisions. Such information would prove especially helpful to judges who currently do not have many ADA cases on which to rely.

The collection of information from the outcomes of the interactive process, which the public could access, is consistent with the current trend requiring agencies to provide information to those who request it.<sup>217</sup> This Comment envisions the process working in the following way: First, the EEOC shall

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<sup>212</sup> Similar proposals in the environmental law context have led to agencies setting goals and collecting information from “regulated entities about what works and what does not, and then disseminat[ing] that information back to the regulated entities so that they may learn from each other’s successes and failures.” Dorf, *supra* note 205, at 398–99.

<sup>213</sup> See *supra* note 169 and accompanying text.

<sup>214</sup> Job Accomodation Network, Searchable Online Accommodation Resource, <http://www.jan.wvu.edu/soar/> (last visited Dec. 3, 2007).

<sup>215</sup> *Id.*

<sup>216</sup> See 29 C.F.R. § 1630 app., at “Background” (2006) (Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act: Background).

<sup>217</sup> The Freedom of Information Act requires that each agency must make certain information available to the public. 5 U.S.C. § 552 (2006).

clearly give advanced notice to all parties about the mandatory nature of the interactive process. When an employee (or potential employee) requests reasonable accommodation, that request shall trigger the interactive process. Second, the EEOC will then require the employers to submit a quarterly report to the agency explaining the outcomes of any interactive processes undertaken during that time and any reasonable accommodation made. Third, the EEOC must enter these employer reports into a searchable database. Information in the database would include the general nature of the disability, the nature of the essential job functions, and the reasonable accommodation decided upon as a result of the interactive process. The maintenance of such a database should be similar to other agencies, such as the Internal Revenue Service and the Securities and Exchange Commission, which issue and make public documents that express outcomes of agency action in certain situations.<sup>218</sup> Information from these regulatory agencies about their prior actions and decisions allows businesses and individuals to structure their actions accordingly and it provides the courts with information necessary in adversarial proceedings.

The EEOC's increased role should significantly strengthen the impact of the agency while adding to the available knowledge base of employees, employers, the courts, and the agency itself. Admittedly, requiring a "weak" agency like the EEOC to monitor the outcomes of the interactive processes and maintain a database raises some concerns.<sup>219</sup> Given the its track-record in enforcement that led to its reputation as a "weak agency," it is unclear whether the EEOC would be a willing participant in this undertaking.<sup>220</sup> Short of Congressional action,<sup>221</sup> agency initiative would be required to support the mandatory nature of the interactive process and the establishment of a Reasonable Accommodation Database. However, should the EEOC mandate the interactive process and implement the database, such action would result in solidifying a valuable practice that would improve the lives of disabled individuals in the workplace.

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<sup>218</sup> "Most federal regulatory agencies have some procedure through which regulated entities can inquire . . . about the relevant agency's interpretation of law or fact." William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 85 n.165 (1995). Agencies that provide such guidance include the IRS through its opinion letters, the SEC through its no-action letter process, and the no-action process of the FTC and the Antitrust Division of the Department of Justice. *Id.* at 85.

<sup>219</sup> See *supra* Part III.A-C.

<sup>220</sup> See *supra* Part III.C.2.

<sup>221</sup> It is unclear whether it would be possible to create the political will in Congress necessary to make the interactive process mandatory even if it would benefit large numbers of disabled workers.

## CONCLUSION

The interactive process enables employers, employees, and society to fulfill the promise of the ADA by appropriately accommodating disabled individuals in the workforce and allowing them to capitalize on their contributions. Despite these benefits, the EEOC, Congress, and courts have failed to help make good on the ADA's pledge to disabled Americans. While it is true that the EEOC and some courts have encouraged, or even mandated, the interactive process, these institutions have not gone far enough. The EEOC's own regulations explicitly state the mandatory nature of the interactive process, and the courts should not stand in the EEOC's way by failing to defer to EEOC regulations concerning the interactive process.

This Comment argues that Congress, courts, and workplace participants *must* recognize the interactive process as mandatory. The EEOC should develop and maintain a Reasonable Accommodation Database to aid in the facilitation of the interactive process. As the appropriate lens through which to view flexible regulatory schemes such as the interactive process, the scholarship of New Governance, and particularly Experimentalism, favors the creation of a database that supports all involved parties by allowing future participants to learn from those in the past. Although, to date, the interactive process has itself been "disabled," the EEOC and the courts can rehabilitate the interactive process, and further strengthen the application of the ADA by mandating that employers engage in the process and by assembling a Reasonable Accommodation Database.

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\* J.D., Emory University School of Law, Atlanta, Georgia; M.B.A (2009); Goizueta Business School, Emory University, Atlanta, Georgia (2009); B.S., Cornell University, Ithaca, New York (2005). My sincerest thanks to my advisor, Professor William W. Buzbee, whose countless hours of counsel and coaching helped this Comment surpass even my greatest expectations. Many thanks to Andi Arias, Caroline Branch, Eric Swibel, John Mittelbach, and Liz Gould for their excellent suggestions and editing throughout the process. Last, but not least, my utmost gratitude to my family, especially my mother and sister, for their unwavering support. This Comment is in loving memory and tribute to Donald L. Rosenthal, a great lawyer, and the best father.