

## DISABILITY WITHOUT DOCUMENTATION

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Disability exists regardless of whether a doctor has confirmed its existence. Yet in the American workplace, employees are not disabled, or entitled to reasonable accommodations, until a doctor says so. This Article challenges the assumption that requests for reasonable accommodations must be supported by medical proof of disability. It proposes an accommodation process that accepts individuals' assessments of their disabilities and defers to their accommodation preferences. A documentation-free model is not alien to employment law. In evaluating religious accommodations, employers—and courts—take a hands-off approach to employees' representations that their religious

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beliefs are sincere. Disability deserves the same deference. This Article also contributes a novel analysis of agency guidance by exploring how its support of medical documentation requirements conflicts with legislative intent and the Americans with Disabilities Act’s rejection of the medical model of disability.

Documenting disability has its price. It requires access to affordable health care and a relationship with a health care provider who is willing to confirm a disability’s existence. Documentation requirements may delay an urgently needed accommodation—one that would, for example, permit an employee to work from home. Until documentation requirements are relaxed—if not eliminated—disabled employees may be forced to work in dangerous conditions, or not work at all.

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## INTRODUCTION

Disability is idiosyncratic. It can be intensely private like the early morning moments during which an individual with disabilities transfers from bed to wheelchair. Disability can be unavoidably public: when the same person flags down a bus, other passengers bear witness as a platform lift raises the wheelchair and its user off the ground. Disabilities such as visual impairments are obvious if they require use of familiar adaptive equipment, like white walking sticks. Disabilities like lupus may hide in plain sight. To some, disability may feel like a prison. Others believe that disability is a gift—a pathway to empathy, a showcase for resilience.

Like disability, faith is not universal. It has its private moments like solitary, silent prayer. It has its public moments like a sacrament celebrated before friends and family. Faith may be obvious when it is accompanied by specific and identifiable attire, such as a vestment, or it may be invisible to others like a crucifix hidden beneath a high-collared shirt. Faith can be confining, or it can be freeing. Some may hide their religious beliefs, while others proudly assert them.

Disability, like faith, is often shaped by personal experience. An individual may assert that she is disabled because she knows that her spinal cord injury is a physical impairment that substantially limits her ability to stand and requires the use of a wheelchair. At work, she may ask for a reasonable accommodation that requires the purchase of a desk under which a wheelchair will fit. But an employer need not accept an employee's assertion that her disability requires a wheelchair or accept her recommendation that she be given an appropriate desk. In

evaluating a request for reasonable accommodations made pursuant to the Americans with Disabilities Act<sup>1</sup> (ADA), employers may require their disabled employees to prove that they are disabled by showing medical documentation. Employers may demand access to employees' medical records and test results or require detailed doctor's notes. If an employee asserts that she is disabled but cannot provide sufficient medical documentation to support her claim, her assertions are meaningless.

Not all requests for workplace accommodations are so closely scrutinized. An employee assigned to work on Saturday may ask to work a different day to accommodate his religious practices if the employee believes, as a result of his faith, that Saturday is a day of rest. In most instances, the employee will not be required to document his religious beliefs to support the accommodation request. The employee's beliefs need not be held by all members of the employee's faith. Whether the employee is doctrinally correct in his interpretation of the commands of his faith is also irrelevant. Religious beliefs are hands-off.

This Article uses the law of workplace accommodation to examine why employees must submit documentation to demonstrate that they are disabled but need not document their religious beliefs.

The need to revolutionize reasonable accommodations is urgent. First, the documentation-heavy reasonable accommodation process

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<sup>1</sup> Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

may be so onerous that it contributes to the underemployment of people with disabilities.<sup>2</sup> The medical documentation requirement is likely influenced by the widespread belief that people who claim disability are faking it. Doron Dorfman explains that American society suffers from a moral panic he labels the “fear of the disability con.”<sup>3</sup> This fear leads to “[t]he second-guessing of a person’s disability and of that person’s need for an accommodation.”<sup>4</sup> As a result, people with disabilities must constantly prove that they are disabled.<sup>5</sup> The proof required by

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<sup>2</sup> See Katie Eyer, Claiming Disability, 101 B.U. L. REV. 547, 561 (2021) (stating that “employment levels of people with disabilities remain very low, despite the desire of many people with disabilities to be employed”); Nicole Buonocore Porter, Mothers with Disabilities, 33 BERKELEY J. GENDER L. & JUST. 75, 77–78 (2018) (explaining that employment was key to realizing the ADA’s equal opportunity goal but that individuals with disabilities are still employed “at a much lower rate than nondisabled individuals”).

<sup>3</sup> Doron Dorfman, Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse, 53 L. & SOC’Y REV. 1051, 1051 (2019).

<sup>4</sup> Id. at 1078.

<sup>5</sup> See id. at 1079. The Trump administration also appeared to be motivated by fear of the disability con. See Robert Pear, On Disability and on Facebook?: Uncle Sam Wants to Watch What You Post, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/us/politics/social-security-disability-trump-facebook.html> [[https://perma.cc/ ZYA2-GQPC](https://perma.cc/ZYA2-GQPC)]. It threatened to surveil the social media posts of individuals receiving

the reasonable accommodation process may force individuals with disabilities to work without the accommodations they need to succeed or simply not work at all.<sup>6</sup> Disability itself is already significantly

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Social Security disability benefits in search of evidence that those who claimed to be disabled were actually active and happy—behavior supposedly inconsistent with disability. See id. The Trump administration also proposed subjecting recipients of Social Security disability benefits to frequent eligibility reviews, which the administration justified as a way of identifying disability fraud. See Jake Johnson, Applause as Biden Withdraws ‘Horrorific’ Trump Rule Attacking Social Security Disability Recipients, COMMON DREAMS (Jan. 28, 2021), <https://www.commondreams.org/news/2021/01/28/applause-biden-withdraws-horrific-trump-rule-attacking-social-security-disability> [<https://perma.cc/44UP-J7DP>]. On January 28, 2021, the Biden administration abandoned any such effort. See id.

<sup>6</sup> See, e.g., Susan G. Goldberg et al., The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment, 11 PSYCH. PUB. POL’Y & L. 463, 468 (2005) (describing how difficult the reasonable accommodations process can be for employees with hidden disabilities who must disclose the nature of their disabilities, a decision that “entails substantial risk to their careers” (quoting Sharon L. Harlan & Pamela M. Robert, The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation, 25 WORK & OCCUPATIONS 397, 411 (1998))); David B. Goldstein, Ethical Implications of the Learning-Disabled Lawyer, 42 S. TEX. L. REV. 111, 114–15

underclaimed by those who might in theory benefit from civil rights protections.<sup>7</sup>

Second, certain workplaces may be unsafe for people whose disabilities place them at high risk of severe cases of COVID-19. Streamlining the reasonable accommodation process, and separating it from medical documentation, would permit a new class of employees to continue to work safely from home.<sup>8</sup>

Almost one in four adult workers in the United States are at risk of severe illness from COVID-19, including those who have asthma.<sup>9</sup>

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(2000) (describing how a newly hired disabled attorney who requests reasonable accommodations may fear “ostracism, less responsibility and assumptions about incompetence” and explaining that if accommodations are not sought and disability is instead hidden, “the decision . . . may doom the attorney to failure by not getting the necessary support staff assistance, supervision or technical support”).

<sup>7</sup> See Eyer, supra note 2, at 551–52 (stating that society’s continued association of disability with “functional incapacity and an inability to work” may be the cause of this hesitancy to claim disability).

<sup>8</sup> Of course, many high-risk employees are also essential workers or otherwise unable to complete their work at home.

<sup>9</sup> See Gary Claxton et al., Almost One in Four Adult Workers is Vulnerable to Severe Illness from COVID-19, KAISER FAM. FOUND. (June 15, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/almost-one-in-four-adult-workers-is-vulnerable-to-severe-illness-from-covid-19/> [<http://perma.cc/6V84-QVN5>].

Though asthma is a disability recognized by the ADA,<sup>10</sup> before the pandemic, an individual with asthma may have given little thought to reasonable accommodations. Now, since asthma may increase the risk of severe illness from COVID-19,<sup>11</sup> employees with asthma or others who are high-risk may seek a reasonable accommodation permitting them to work from home.<sup>12</sup> But workfromhome requests are not automatically granted, even during a pandemic.<sup>13</sup> Employees may be required to prove, with a doctor's note, that their need to work from home is real.<sup>14</sup>

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<sup>10.</sup> See, e.g., Shine v. N.Y.C. Hous. Auth., No. 19-cv-04347, 2020 WL 5604048, at \*7 (S.D.N.Y. Sept. 18, 2020) (stating that “asthma can substantially limit one’s ability to engage in the major life activity of breathing and thus constitute a disability under the ADA”).

<sup>11.</sup> See COVID-19: People with Certain Medical Conditions, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<http://perma.cc/98XY-EN2L>] (last updated May 13, 2021).

<sup>12.</sup> See Transcript of March 27, 2020 Outreach Webinar, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17> [<http://perma.cc/3J4K-5TTJ>] (last visited Aug. 9, 2021).

<sup>13.</sup> See, e.g., Claudia Bellofatto, University of Florida Professors Speak Out on In-Person Classes Controversy, WCJB (Nov. 23, 2020, 7:27 PM), <https://www.wcjb.com/2020/11/24/university-of-florida-professors-speak-out-on-in-person-classes-controversy/> [<https://perma.cc/8XKH-32YP>].

<sup>14.</sup> See Transcript of March 27, 2020 Outreach Webinar, *supra* note 12.

On March 27, 2020, the Equal Employment Opportunity Commission (EEOC) held a webinar concerning the application of federal equal opportunity laws, including the ADA, during the pandemic.<sup>15</sup> The EEOC explained that employees with disabilities that put them at “greater risk of severe illness” if they contract COVID-19 may qualify for a reasonable accommodation pursuant to the ADA.<sup>16</sup> It also addressed medical documentation requirements but did not suspend them.<sup>17</sup> Instead, the EEOC cautioned that “many doctors may have difficulty responding quickly” and that disabilities can be verified in other ways—for example, with “a health insurance record or a prescription.”<sup>18</sup>

This Article is the first to question whether requests for reasonable accommodation in the workplace must be supported by medical documentation of disability. It proceeds in three parts. Following this introduction, Part I describes the ADA’s rejection of the medical model of disability and the way the reasonable accommodation requirement, in particular, embodies the ADA’s commitment to the social model of disability. Part I then explores how employers and courts, with the support of agency guidance, have nevertheless refused to recognize disability or adopt an employee’s proposed accommodations without

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15. See id.

16. Id.

17. See id.

18. Id. The EEOC suggested that employers provide requested accommodations on a temporary basis “where the request is for telework or leave from an employee whose disability puts them at higher risk.” Id.

supporting medical documentation. It contributes a novel analysis of agency guidance, exploring how the EEOC's medical documentation framework contradicts legislative intent.

In Part II, this Article proposes a simple solution: applying the hands-off approach courts currently take with respect to religious beliefs to disability. Part II reconceptualizes disability-based accommodations, envisioning a process in which an employee's representation that they are disabled establishes that they are disabled. The Article concludes by explaining how centering the experiences of individuals with disabilities might also revolutionize how reasonable accommodations are treated in education and beyond.

## I. DOCUMENTING DISABILITY AT WORK

This part reviews the ADA's embrace of the social model of disability. It explains how Title I of the ADA, which governs employment, illustrates the ADA's commitment to the social model. This part also describes the ADA drafters' vision of the "interactive process," which would be used to identify appropriate reasonable accommodations. Moreover, this part highlights that legislative history makes no mention of medical documentation. This part next explores how courts have nevertheless converted the interactive process into a medical inquisition. Finally, it attributes this error to interpretive guidance concerning the ADA's medical inquiries and examinations provisions.

### A. Divorcing Disability from the Medical Model

Like the Civil Rights Act of 1964,<sup>19</sup> the ADA was designed to bring about a “culture shift.”<sup>20</sup> A radical approach was necessary to end disabled Americans’ second-class citizenship. Indeed, the ADA’s legislative history is replete with examples of disabled Americans’ underprivileged status, including their poverty.<sup>21</sup>

Data regarding disabled Americans’ unemployment confirmed the need for the ADA’s employment provisions.<sup>22</sup> A 1986 poll revealed that about two-thirds of working-age individuals with disabilities were

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<sup>19</sup>. Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

<sup>20</sup>. Louis S. Rulli & Jason A. Leckerman, Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor, 8 J. GENDER RACE & JUST. 595, 599 (2005). The disability rights movement was informed by the African American civil rights movement and borrowed its ingenuous strategies. See Laura L. Rovner, Disability, Equality, and Identity, 55 ALA. L. REV. 1043, 1059 (2004) (explaining that “disability advocates have ‘employ[ed] the language from [other civil rights] movements, decrying patterns of hierarchy and subordination based upon physical differences’” (alterations in original) (quoting Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 660 (1999))).

<sup>21</sup>. See, e.g., Arlene Mayerson, Title I—Employment Provisions of the Americans with Disabilities Act, 64 TEMP. L. REV. 499, 499 (1991).

<sup>22</sup>. See id.

unemployed, a rate exceeding that “of all other demographic groups under age sixty-five of any significant size.”<sup>23</sup> The same poll documented that most nonworking people with disabilities wanted to work.<sup>24</sup>

Committee reports noted that “about 8.2 million people with disabilities want to work but cannot find a job.”<sup>25</sup>

Gainful employment is key to independence and dignity, and it is essential to facilitating self-sufficiency.<sup>26</sup> After all, “[a] good job contributes to our self-worth, offers membership in a community, provides benefits like health insurance, and is critical to financial stability and independence.”<sup>27</sup> Inaccessible workplaces made gainful employment impossible for individuals with disabilities. To meaningfully impact unemployment, the ADA would need to permanently alter the American workplace.

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<sup>23</sup>. Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 420 (1991).

<sup>24</sup>. Id. at 421.

<sup>25</sup>. Id. at 422 (quoting S. REP. NO. 101–116, at 9 (1989)).

<sup>26</sup>. See, e.g., *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018) (stating that the ADA was concerned with providing individuals with disabilities gainful employment to facilitate “dignity, financial independence, and self-sufficiency”).

<sup>27</sup>. Alison Barkoff & Emily B. Read, Employment of People with Disabilities: Recent Successes and an Uncertain Future, 42 HUM. RTS., no. 4, 2017, at 8, 8.

The ADA aimed to change the workplace in two ways. First, it prohibited adverse employment decisions based on disability.<sup>28</sup> Second, unlike traditional civil rights laws, the ADA also imposed an affirmative obligation on employers, requiring that they “assist employees in satisfactorily performing the essential functions of the job” by making reasonable accommodations in the workplace.<sup>29</sup> Therefore, failing to make a reasonable accommodation for an applicant or employee who is “otherwise qualified” constitutes disability discrimination prohibited by the ADA.<sup>30</sup>

Carrie Griffin Basas has described the ADA as a “social project” that would “dismantle the systemic economic and employment discrimination faced by people with disabilities in all work settings.”<sup>31</sup> Reasonable

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<sup>28</sup>. 42 U.S.C. § 12112(b)(1) (defining the term “discriminate against a qualified individual on the basis of disability” as including “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee”).

<sup>29</sup>. Stephen F. Befort & Tracey Holmes Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?, 57 WASH. & LEE L. REV. 1045, 1047–48 (2000).

<sup>30</sup>. 42 U.S.C. § 12112(b)(5)(A).

<sup>31</sup>. Carrie Griffin Basas, Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA, 29 BERKELEY J. EMP. & LAB. L. 59, 67 (2008).

accommodations would accomplish the repurposing of the American workplace.<sup>32</sup> After all, as Mark Weber has explained, the accommodation mandate “requires changes in the way things have always been done in order to permit people with disabilities to integrate into society on a plane equal to that of others.”<sup>33</sup>

Employers are required to make reasonable accommodations when an individual with disabilities seeks employment, and employers must also provide access to the privileges associated with employment.<sup>34</sup> If an employer provides “cafeterias, lounges, gymnasiums, auditoriums, transportation and the like,” each must be accessible.<sup>35</sup> In some cases, making reasonable accommodations may require employers to implement physical or structural changes.<sup>36</sup> For example, an employer may need to provide a ramp for an employee who uses a wheelchair.<sup>37</sup> Making reasonable accommodations may also alter how a job is performed by, for example, “reallocating or redistributing marginal job

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<sup>32</sup>. Id. at 67.

<sup>33</sup>. Mark C. Weber, Unreasonable Accommodation and Due Hardship, 62 FLA. L. REV. 1119, 1122 (2010).

<sup>34</sup>. See Mayerson, supra note 21, at 516.

<sup>35</sup>. 29 C.F.R. pt. 1630, app., § 1630.9 (2020).

<sup>36</sup>. See Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 945 (9th Cir. 2011) (stating that the ADA may require altering employers’ “difficult-to-navigate restrooms and hardtoopen doors”).

<sup>37</sup>. See Michael Ashley Stein & Michael E. Waterstone, Disability, Disparate Impact, and Class Actions, 56 DUKE L.J. 861, 880 (2006).

functions that an employee is unable to perform because of a disability” or “altering when and/or how a function, essential or marginal, is performed.”<sup>38</sup>

The duty to make reasonable accommodations is only owed to employees who are qualified, defined by the ADA as those who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>39</sup> Also, employers are not required to make accommodations that would impose an undue hardship on a business’s operation.<sup>40</sup>

The ADA does not describe how accommodations are to be identified and implemented.<sup>41</sup> However, courts have uniformly required employers

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<sup>38</sup>. Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the American with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002), 2002 WL 31994335.

<sup>39</sup>. 42 U.S.C. § 12111(8). Relevant regulations arguably define “qualified” more narrowly. See 29 C.F.R. § 1630.2(m) (2020) (defining a qualified employee as one who “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires” and can, “with or without reasonable accommodation, . . . perform the essential functions of such position”).

<sup>40</sup>. See Mayerson, supra note 21, at 513–14. A discussion of what constitutes an undue hardship is beyond the scope of this Article.

<sup>41</sup>. See Dallan F. Flake, Interactive Religious Accommodations, 71 ALA. L. REV. 67, 74 (2019). Flake argues that the ADA’s interactive process should be required in the religious accommodations context. See id. at

and employees to engage in what is termed the “interactive process” to determine what accommodations will be made.<sup>42</sup> Scholars have traced the interactive process to a 1989 Senate committee report.<sup>43</sup> The report envisioned a “problem-solving approach” to accommodations.<sup>44</sup> It emphasized that the employee’s experience and knowledge should be centered. For example, the report provided that “[a]fter receiving a request for an accommodation by an employee, employers are encouraged to solicit suggestions for reasonable accommodations from the employee/applicant.”<sup>45</sup> It also highlighted how an employee’s accommodation suggestion “is often simpler and less expensive than the accommodation the employer may have envisioned, resulting in a win-win situation for the employee and employer.”<sup>46</sup>

According to the report, a more involved process is required only if “the person with the disability is not familiar enough with the job and

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107–14; see also infra Part III.A (discussing Flake’s argument).

<sup>42</sup>. Flake, supra note 41, at 74.

<sup>43</sup>. The ADA’s “committee reports were considered extensively and relied upon as an accurate statement of the meaning of the ADA,” which “reflects a very open and honest legislative debate.” Ruth Colker, The ADA’s Journey Through Congress, 39 WAKE FOREST L. REV. 1, 47 (2004); Flake, supra note 41, at 74.

<sup>44</sup>. Flake, supra note 41, at 74 (quoting S. REP. NO. 101–116, at 34 (1989)); see also Mayerson, supra note 21, at 515–16.

<sup>45</sup>. Mayerson, supra note 21, at 515 (citing S. REP. NO. 101–116, at 34).

<sup>46</sup>. Flake, supra note 41, at 74.

the employer is not familiar enough with the disability to devise an appropriate accommodation.”<sup>47</sup> In that scenario, the report envisioned a process that would first identify the “barriers to equal opportunity.”<sup>48</sup> Employer and employee would then work together to identify “the essential and nonessential tasks of the position” and “the abilities and limitations of the employee,” settling on “tasks or aspects of the job that the employee is precluded from performing effectively.”<sup>49</sup> Next, “possible accommodations must be identified.”<sup>50</sup> Again, the employee’s preferences control. The report instructed employers to “first consult the employee, followed by consultations with various employment agencies familiar with the needs of disabled workers.”<sup>51</sup> The Senate report does not contemplate resorting to medical documentation during the interactive process. The present approach to reasonable accommodations ignores this key legislative history, instead mandating an experience that is punitive, adversarial, and humiliating. The present approach betrays the drafters’ vision.

In 1991, the EEOC issued regulations implementing Title I of the ADA, which provided that an interactive process “may be necessary” to determine “the appropriate reasonable accommodation.”<sup>52</sup> The

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47. Mayerson, supra note 21, at 516.

48. Id.

49. Id.

50. Id.

51. Id.

52. 29 C.F.R. § 1630.2(o)(3) (2020).

regulations explained that the interactive process “should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>53</sup> The regulations also do not reference providing medical documentation of disability during the interactive process. Whereas the regulations provide that the interactive process “may” be necessary, the EEOC’s interpretive guidance states that “[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.”<sup>54</sup> The process outlined by the guidance “closely tracks” the process outlined by the Senate Committee report “but places even greater emphasis on the employee’s role in the process.”<sup>55</sup> Indeed, the EEOC requires that an employer consult with an employee “not only to identify possible accommodations but also to assess their potential effectiveness.”<sup>56</sup> If “two equally effective accommodations are available,” the EEOC gives the employee’s preference “primary consideration.”<sup>57</sup>

If consultation with the employee does not identify feasible accommodations, the employer is directed to consider whether “technical assistance” may help determine “how to accommodate the particular

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53. Id.

54. Flake, supra note 41, at 76 (alteration in original) (emphasis added) (quoting 29 C.F.R. pt. 1630, app., § 1630.9 (2019)).

55. Id.

56. Id. at 77.

57. Id. (quoting 29 C.F.R. pt. 1630, app., § 1630.9 (2019)).

individual in the specific situation.”<sup>58</sup> Technical assistance “could be sought from the Commission, from State or local rehabilitation agencies, or from disability constituent organizations.”<sup>59</sup>

Like the ADA’s legislative history and relevant regulations, the EEOC’s guidance does not reference medical documentation in its description of the interactive process. The employee’s own suggestions regarding accommodations serve as the starting point. Healthcare providers are not identified as individuals from whom technical expertise might be sought.

This Article reveals the central role health care providers and medical records play in the interactive process, despite the legislative history, regulations, and guidance that treat a disabled person’s expertise as controlling. In addition to this conflict, reliance on health care providers and medical records converts the interactive process into one that is steeped in the medical model of disability.

The drafters of the ADA intended to reject the medical model, which focuses on diagnoses, treatment, and rehabilitation. The medical model sidelines individuals with disabilities, giving them little say over their own identities. Before the ADA’s passage, federal disability law and policy “focused on changing, fixing, or training the disabled person to help him overcome his disability and adapt to the ways of ‘normal’ society.”<sup>60</sup>

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<sup>58</sup>. 29 C.F.R. pt. 1630, app., § 1630.9 (2020).

<sup>59</sup>. Id.

<sup>60</sup>. Miranda Oshige McGowan, Reconsidering the Americans with Disabilities Act, 35 GA. L. REV. 27, 56 (2000).

Disability was treated as a biological condition. Pursuant to the medical model, a disabled individual is helped through either “rehabilitation efforts to enable the individual to overcome the effects of the disability, or medical efforts to find a cure for the individual.”<sup>61</sup> The medical model perceives an individual’s disability as “personal misfortune” with no social cause.<sup>62</sup>

The medical model of disability grants tremendous power to health care professionals. Physicians “validate the existence of disability” and serve as gatekeepers to social assistance.<sup>63</sup> Pursuant to the medical model, “[t]he individual’s own subjective experience of impairment or limitation is irrelevant unless it can be professionally validated.”<sup>64</sup> Validation requires a physician, who alone can “diagnose or categorize the cause of an impairment” and also “measure and document its functional impact.”<sup>65</sup>

The ADA’s modern view of disability “is a dramatic change in perspective, from a medical state to be cured and pitied, or tolerated when ‘worthy,’ towards acceptance and accommodation of difference

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<sup>61</sup>. Bradley A. Areheart, When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma, 83 IND. L.J. 181, 186 (2008).

<sup>62</sup>. See id.

<sup>63</sup>. Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 650 (1999).

<sup>64</sup>. Id.

<sup>65</sup>. Id.

as part of the human experience and individual identity.”<sup>66</sup> The ADA conceptualizes disability through a social model, in which disability is a “multi-faceted societal oppression . . . distinguished from the physiological notion of impairment.”<sup>67</sup>

This social model of disability treats the obstacles encountered by the disabled as “social structures and practices” which society should remedy.<sup>68</sup> As Carrie Griffin Basas explains, the social model of disability “promotes the idea that people with disabilities become disabled by societal perceptions of their difference or ‘deviance’ from the norm, rather than by any intrinsic difference in worth, ability, or potential.”<sup>69</sup> Disability is a social construct “crafted and advanced by non-disabled people,” who influence society’s “architecture and infrastructure.”<sup>70</sup> If institutions and structures are not designed for universal access, accounting for “the spectrum of human needs and ways of doing things,” they will

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<sup>66</sup>. Peter Blanck, Why America Is Better Off Because of the Americans with Disabilities Act and the Individuals with Disabilities Education Act, 35 *TOURO L. REV.* 605, 609 (2019).

<sup>67</sup>. Areheart, supra note 61, at 188; see also Naomi Schoenbaum, The Case for Symmetry in Antidiscrimination Law, 2017 *WIS. L. REV.* 69, 120 (“[T]he ADA was meant to create a new way of thinking about disability—that those with disabilities are not intrinsically limited, but instead have been held back by environmental features that can be changed.”).

<sup>68</sup>. Areheart, supra note 61, at 189.

<sup>69</sup>. Basas, supra note 31, at 95–96.

<sup>70</sup>. See id. at 96.

exclude anyone who does not “look, act, think, move, read, or behave ‘normally.’”<sup>71</sup>

Title I’s requirement that employers make reasonable accommodations reflects the social model. It “calls for employers to recognize that they collectively have created an employment environment that makes some mental and physical conditions disabling.”<sup>72</sup>

Writing in 2007, Deidre Smith found that in most ADA litigation, plaintiffs must introduce medical evidence to prove that they are disabled so they can avoid summary judgment.<sup>73</sup> The insistence on medical proof of disability reinforces a “deep-seated skepticism of those ‘claiming disability’ generally and ADA plaintiffs specifically.”<sup>74</sup> In 2008, Brad Areheart theorized that the medical model of disability remained entrenched and that the ADA’s social view of disability was

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<sup>71</sup>. Rovner, supra note 20, at 1062.

<sup>72</sup>. Elizabeth Dalton, The Overall Financial Interest of Individuals with Disabilities: Justifying the Motivating Factor Standard, 12 J.L. ECON. & POL’Y 231, 247 (2016); see also Samuel R. Bagenstos, Subordination, Stigma, and “Disability,” 86 VA. L. REV. 397, 435 (2000) (“By requiring individualized accommodation, these provisions . . . remove socially contingent barriers to the full integration of people with physical and mental impairments.”).

<sup>73</sup>. See Deirdre M. Smith, Who Says You’re Disabled?: The Role of Medical Evidence in the ADA Definition of Disability, 82 TUL. L. REV. 1, 3 (2007).

<sup>74</sup>. Id.

only a “symbolic victory” over the medical model.<sup>75</sup> “Despite the ADA’s conceptual bent,” Areheart explained, “a social view of disability has not taken root in America.”<sup>76</sup>

Over ten years later, the medical model of disability endures. As explained below, the medical model shapes the interactive process. When disabled employees do not provide medical documentation of disability, courts hold that they have not participated in good faith in the interactive process and therefore cannot bring failure-to-accommodate claims against their employers. An employer need not accommodate disabled employees who cannot back up their self-proclaimed disabilities with medical proof.

#### B. Medical Documentation and the Interactive Process

Failure-to-accommodate cases reveal the sharp contrast between how the interactive process was intended to function and how it actually proceeds. The cases discussed below demonstrate that though conceived as informal, the interactive process through which employers evaluate employees’ reasonable accommodation requests has become burdensomely formal for the disabled employees. In practice, employees cannot explain what their own “precise limitations” are, nor can they suggest “potential reasonable accommodations,” as the ADA’s legislative history recommends. Rather, a medical provider, typically a doctor, must verify that an employee is disabled and identify what accommodations are needed.

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<sup>75</sup>. Areheart, supra note 61, at 183.

<sup>76</sup>. Id. at 192.

A failure to provide medical documentation of disability during the interactive process has significant legal consequences. When disabled employees do not provide their employers with medical documentation, employers need not provide requested accommodations, and the interactive process ends. Courts assign responsibility for a breakdown in the interactive process to disabled employees who fail to provide medical documentation of their disabilities.<sup>77</sup> When an employee is deemed responsible for this kind of breakdown, the employee cannot claim disability discrimination based on a failure to accommodate.

When courts assess failure-to-accommodate claims, suspicion abounds about whether an employee is in fact disabled and entitled to accommodations. The leading cases described below highlight courts' willingness to doubt employees' accounts of their disabilities. The cases underscore the belief that a failure to provide medical documentation of disability is suggestive of disability fraud.<sup>78</sup> The documentation-heavy

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<sup>77</sup>. See Stacy A. Hickox & Keenan Case, Risking Stigmatization to Gain Accommodation, 22 U. PA. J. BUS. L. 533, 573 (2020) (“An employee’s failure to provide requested medical information is commonly used to justify either an employer’s termination of the interactive process and/or the employee’s discharge.”); see also John F. Birmingham, Jr., The Interactive Accommodation Process: Cooperate or Pay the Price, 77 MICH. BAR J. 1044, 1045 (1998).

<sup>78</sup>. See Dorfman, supra note 3, at 1055 (explaining how “the suspicion of fakery has been engrained in the legal treatment of disability”). Dorfman found that “the suspicion of disability con has a pernicious effect

interactive process that courts endorse bears almost no resemblance to the employee-centric process outlined by the ADA's legislative history and relevant guidance.

The oft-cited EEOC v. Prevo's Family Market, Inc.<sup>79</sup> is emblematic. There, the Sixth Circuit concluded that a grocery store did not violate the ADA when it required employee Steven Sharp, a produce clerk who informed Prevo's that he was HIV positive, to submit to a medical examination to confirm his diagnosis.<sup>80</sup> Prevo's endorses an employer's refusal to accept an employee's own assertion that he is disabled.

In January 1993, Sharp informed his employers that he planned to speak at a local high school event focused on AIDS awareness.<sup>81</sup> Because the children of several Prevo's employees attended the school, Sharp shared his HIV status with Prevo's to ensure that his employer would hear the news first.<sup>82</sup> Following a conversation with the grocery chain's president regarding Sharp's HIV status, Sharp was reassigned from the produce area to the store's receiving area.<sup>83</sup> After his

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on the lives of many people with disabilities." Id. at 1079. "People with disabilities often need to prove their disabilities daily, not only to health professionals or judges but also to ordinary people," a process that "takes its toll." Id.

<sup>79.</sup> 135 F.3d 1089 (6th Cir. 1998).

<sup>80.</sup> Id. at 1090–91.

<sup>81.</sup> Id. at 1091.

<sup>82.</sup> Id.

<sup>83.</sup> Id.

transfer, other employees asked questions about his reassignment and commented about their “disrupted work schedules.”<sup>84</sup> To “get Sharp out of the situation of being asked questions and to give Prevo’s a chance to get the information that they needed to properly handle the situation,” Sharp and Prevo’s agreed that Sharp would be placed on paid leave.<sup>85</sup>

While discussing his leave of absence, “Sharp promised his employer that he would obtain verification of his HIV condition from his personal physician and furnish the information to his employer.”<sup>86</sup> By November 1993, Sharp had yet to provide the promised information.<sup>87</sup> Prevo’s asked Sharp to submit to a medical examination by an infectious disease expert at Prevo’s expense.<sup>88</sup> Prevo’s wanted the expert, Dr. Baumgartner, to assess whether “future treatment would require Sharp

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<sup>84.</sup> Id.

<sup>85.</sup> Id. While recounting these facts, the court interjects commentary that undercuts Sharp’s experience, writing that “[i]t was not at all clear why Sharp experienced discomfort at being asked about the reason for the change in his work assignment since Sharp had indicated his desire to perform public speaking in connection with an AIDS awareness and education program.” Id. The court cannot imagine that an employee may wish to speak about his disability on his own terms in a supportive environment, as opposed to being subjected to intrusive questions in the workplace. There is a difference.

<sup>86.</sup> Id.

<sup>87.</sup> Id. at 1091–92.

<sup>88.</sup> Id. at 1092.

to be absent from work” and “whether Prevo’s should consider assigning Sharp to office work.”<sup>89</sup> Prevo’s also wanted the expert to provide an opinion about “the transmittal of HIV on tools and produce” and “the degree of risk Sharp posed to customers and co-workers in the produce position.”<sup>90</sup> Despite Sharp’s assertion that he was HIV positive, Prevo’s also wanted Dr. Baumgartner to “provide a complete diagnosis and prognosis concerning whether Sharp tested positive for HIV,” as well as “hepatitis or any related conditions.”<sup>91</sup>

Though he was never examined by Dr. Baumgartner, Sharp provided a letter from his physician confirming his negative hepatitis and tuberculosis tests.<sup>92</sup> Prevo’s deemed the information insufficient as it did not address Sharp’s HIV “diagnosis, prognosis, or suitability for employment.”<sup>93</sup> In December 1993, after refusing to schedule an appointment with Dr. Baumgartner, Sharp was terminated.<sup>94</sup>

At issue in Prevo’s was the ADA’s general prohibition on employermandated medical examinations and inquiries that seek to establish that an employee “is an individual with a disability” or to obtain information about “the nature or severity of the disability.”<sup>95</sup>

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89. Id.

90. Id.

91. Id.

92. Id.

93. Id.

94. Id.

95. 42 U.S.C. § 12112(d)(4)(A).

Such examinations or inquiries are only permitted when they are “job-related and consistent with business necessity.”<sup>96</sup> According to Prevo’s, a medical examination would determine whether Sharp “could safely perform the function of his job involving cuts and scrapes without exposing others to HIV infection.”<sup>97</sup> The EEOC argued that a medical examination was unnecessary, as the same information could be obtained from the employee himself or by consulting health care officials.<sup>98</sup> But the Sixth Circuit agreed with Prevo’s. A “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation” is a direct threat.<sup>99</sup> The court explained that “[b]ecause of the frequency of bleeding in the produce area, Prevo’s needed to verify Sharp’s medical condition, determine whether he had other conditions associated with HIV, and determine whether he was aware of and able to follow safety procedures to reduce or eliminate any risk of infection.”<sup>100</sup> Therefore, Prevo’s could require Sharp to submit to a

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<sup>96.</sup> Id.

<sup>97.</sup> Prevo’s, 135 F.3d at 1095.

<sup>98.</sup> Id.

<sup>99.</sup> Id. (first citing 42 U.S.C. § 12111(3); then citing 29 C.F.R. § 1630.2(r) (1996)).

<sup>100.</sup> Id. at 1094. This statement was powerfully countered in Judge Kimberly A. Moore’s dissent, which noted that since the ADA’s enactment, “neither HIV nor AIDS has ever appeared on the list of infectious diseases that could be communicated through the handling of food,” choosing “fear, prejudice, and ignorance” instead of medical evidence. Id. at 1099–100.

medical examination because the examination would determine whether he posed a “significant risk to the health or safety of others” that could not be eliminated by reasonable accommodation.<sup>101</sup>

Prevo’s addresses what an employer may require of an employee when the employer believes that the employee may pose a direct threat to others in the workplace.<sup>102</sup> It is not a case about the interactive process, as Sharp never asked for a reasonable accommodation.<sup>103</sup> Still,

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<sup>101.</sup> Id. at 1101 (quoting 42 U.S.C. § 12111(3)). An employer does not commit disability discrimination when the employer denies a job or benefit to an individual with a disability who poses a direct threat to the health or safety of others in the workplace. See 42 U.S.C. § 12113(a), (b); see also Elisa Y. Lee, Note, An American Way of Life: Prescription Drug Use in the Modern ADA Workplace, 45 COLUM. J.L. & SOC. PROBS. 303, 324–25 (2011) (“Courts have consistently recognized that a person cannot be considered a qualified individual with a disability under the ADA if the person poses a direct threat to the health or safety of others in the workplace that cannot be eliminated by a reasonable accommodation.”).

<sup>102.</sup> For a discussion of the court’s direct threat analysis, see Rebecca Trapp, Medical Examination or Objective Medical Evidence: What Is the Correct Procedure to Determine If an Employee Infected with the HIV Virus Presents a Direct Threat Under the Americans with Disabilities Act—EEOC v. Prevo’s Family Market, Inc., 32 CREIGHTON L. REV. 1585, 1586–87 (1999).

<sup>103.</sup> Prevo’s, 135 F.3d at 1097 (expressly declining to address Prevo’s argument that there was no way to reasonably accommodate Sharp in

Prevo's mentions accommodations in dicta, stating that an employer "need not take the employee's word . . . that the employee has an illness that may require special accommodation."<sup>104</sup> Though not germane to its holding, this statement has had a lasting impact on reasonable accommodation law.

The case explains why an employee's own account of disability should not suffice, warning that "[i]f this were not the case, every employee could claim a disability warranting a special accommodation yet deny the employer the opportunity to confirm whether a need for the accommodation exists."<sup>105</sup> The court characterized documentation of disability as essential to "employer-employee co-operation" and stated that it would "promote an interactive dialogue between an employer and employee to discover to what extent the employee is disabled and how the employee may be accommodated, if at all, in the workplace."<sup>106</sup>

Prevo's not only suggests that an employee's own statement that they are disabled is not sufficient but also further treats as a lie Sharp's claim that he is HIV positive.<sup>107</sup> Despite Sharp's statement that he was HIV positive, the court contended that "it is unknown by all of the

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the workplace).

<sup>104.</sup> Id. at 1094.

<sup>105.</sup> Id. at 1094–95.

<sup>106.</sup> Id. at 1095.

<sup>107.</sup> Id. at 1096 ("[Sharp's] refusal to submit to a company-paid examination prevented Prevo's from ever knowing Sharp's HIV status.").

parties that have ever been associated with this case whether Sharp is HIV positive.”<sup>108</sup>

Prevo’s has been criticized on several grounds.<sup>109</sup> It is an opinion that reads at best as dated and, at worst, as representative of the thinly veiled homophobia surrounding HIV and AIDS. And, as the dissenting opinion emphasized, information about the “likelihood and imminence of infection could be determined without resort to a medical examination of Sharp.”<sup>110</sup> Rather than requiring a medical examination, Prevo’s could have consulted with the Centers for Disease Control and Prevention.<sup>111</sup>

Far less attention has been paid to the pronouncement in Prevo’s that an “employer need not take the employee’s word for it that the employee has an illness that may require special accommodation.”<sup>112</sup> Though rooted in the court’s desire to malign Sharp and discredit his representations about his own health, this aspect of Prevo’s survives.

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<sup>108.</sup> Id.

<sup>109.</sup> See, e.g., Steven H. Aden, HIV/AIDS and the Public Accommodations Provisions of the Americans with Disabilities Act, 9 TEMP. POL. & CIV. RTS. L. REV. 395, 414 (2000); Ann Hubbard, Understanding and Implementing the ADA’s Direct Threat Defense, 95 NW. U. L. REV. 1279, 1318–19 (2001); Melanie D. Winegar, Note, Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers, 34 HOFSTRA L. REV. 1267, 1295 (2006).

<sup>110.</sup> Prevo’s, 135 F.3d at 1102 (Moore, J., dissenting).

<sup>111.</sup> Winegar, supra note 109, at 1295.

<sup>112.</sup> Prevo’s, 135 F.3d at 1094.

It has taken on a life of its own, despite its problematic origins. The language has been used to justify medical examinations and inquiries outside of the direct threat context. It is arguably one of the most influential—and harmful—federal Title I opinions.

Yet, over time, Prevo's has been repackaged as an interactive process case.<sup>113</sup> The Southern District of Ohio has cited Prevo's in holding that “[n]o discrimination occurs where employment is terminated as a result of an employee’s refusal to engage in the interactive process” by refusing to submit to a medical examination.<sup>114</sup> The Eastern District of Tennessee has cited Prevo's in support of its conclusion that an employee impeded the interactive process when the defendant employer “requested substantiating medical information, and plaintiff did not provide it.”<sup>115</sup> The Western District of Kentucky has cited Prevo's in

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<sup>113.</sup> See Sloan v. Repacorp, Inc., 310 F. Supp. 3d 891, 900 (S.D. Ohio 2018).

<sup>114.</sup> Id. (citing Prevo's, 135 F.3d at 1096).

<sup>115.</sup> Harvey v. Am.'s Collectibles Network, Inc., No. 09-CV-523, 2011 WL 182864, at \*8 (E.D. Tenn. Jan. 20, 2011) (holding that because of plaintiff’s failure to participate in the interactive process, she “cannot claim that defendant failed to accommodate her under the ADA”); see also Mynatt v. Morrison Mgt. Specialist, Inc., No. 12-CV-303, 2014 WL 619601, at \*13 (E.D. Tenn. Feb. 18, 2014); Israel v. Tenn. Dep’t of Mental Health & Developmental Disabilities, No. 04-CV-314, 2006 WL 2559710, at \*7 (E.D. Tenn. Sept. 5, 2006) (citing Prevo's in concluding that during the interactive process, the defendant employer “was entitled to require

connection with its conclusion that defendant employers did not violate the ADA “by requiring medical proof of her need for accommodations.”<sup>116</sup>

The Fifth Circuit has cited Prevo’s in assessing whether an employee participated in the interactive process.<sup>117</sup> Prevo’s has also been cited in reasonable accommodation cases decided by district courts outside of the Sixth Circuit.<sup>118</sup> The Sixth Circuit itself has quoted and misapplied Prevo’s, using its proviso that an employee’s own contention that the employee is disabled need not be taken at face value in the context of the interactive process.<sup>119</sup>

Just as Prevo’s endorses rejecting employees’ claims that they are disabled, courts have also rejected failure-to-accommodate claims when the accommodations were suggested by the employee instead of a doctor. In both instances, the employee-centric approach envisioned by the ADA’s legislative history, regulations, and interpretive guidance

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that plaintiff provide some substantiation of his alleged disability” before granting an accommodation to permit him to work an earlier shift).

<sup>116</sup>. Gardner v. W. Kentucky Univ., No. 11-cv-79, 2015 WL 5299451, at \*3 (W.D. Ky. Sept. 9, 2015), aff’d, No. 15–6121 (6th Cir. July 5, 2016).

<sup>117</sup>. See Delaval v. PTech Drilling Tubulars, L.L.C., 824 F.3d 476, 482 (5th Cir. 2016).

<sup>118</sup>. See, e.g., Blackmon v. Ingalls, No. 15CV313, 2016 WL 4120751, at \*7 (S.D. Miss. July 28, 2016).

<sup>119</sup>. See Kirilenkolson v. Bd. of Educ. of Danville Indep. Schs., 974 F.3d 652, 670 (6th Cir. 2020); Kennedy v. Superior Printing Co., 215 F.3d 650, 656 (6th Cir. 2000).

has been abandoned. For example, in Reyes v. Krasdale Foods, Inc.,<sup>120</sup> the court rejected a failure-to-accommodate claim because the disabled employee's requested accommodation was not specifically supported by documentation provided by the employee's doctor.<sup>121</sup> Wilfredo Reyes brought a failure to accommodate claim alleging that his employer, Krasdale, "improperly denied his request to shift his schedule forward by thirty minutes, from a 9:00 a.m. to 5:30 p.m. shift, to a 8:30 a.m. to 5:00 p.m. shift."<sup>122</sup> The schedule shift was Reyes's preferred accommodation and the one he suggested.<sup>123</sup>

The parties agreed that Reyes was disabled as a result of Type 1 diabetes.<sup>124</sup> The thirty-minute schedule change would have permitted Reyes to administer an injection that rendered him dizzy and nauseous while he was at home, instead of forcing him to inject himself while driving home.<sup>125</sup> Reyes's doctor had advised him "to alter his meal and injection schedule to achieve the best results."<sup>126</sup> However, because Reyes did not believe he had to provide his employer with "details about his medical condition," the doctor's note Reyes provided to Krasdale

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<sup>120.</sup> 945 F. Supp. 2d 486 (S.D.N.Y. 2013).

<sup>121.</sup> Id. at 492–93.

<sup>122.</sup> Id. at 487.

<sup>123.</sup> Id. at 489.

<sup>124.</sup> Id. at 488.

<sup>125.</sup> Id.

<sup>126.</sup> Id. at 492.

stated that Krasdale should “accommodate [plaintiff’s] working hours” but did not recommend a specific adjustment.<sup>127</sup>

The court found that, despite the doctor’s note, Reyes failed to provide sufficient medical documentation justifying the schedule change.<sup>128</sup> The letter did not state that Reyes’s work schedule should be altered “for whatever variety of reasons,” and, therefore, Krasdale did not have enough medical documentation to agree to the thirty-minute accommodation.<sup>129</sup> That is, despite agreeing that the plaintiff was disabled and receiving a note from a health care provider recommending schedule alterations, the employer was excused from granting a request to change the employee’s schedule by thirty minutes.

Courts have also denied failure-to-accommodate claims even though disabled employees provided medical documentation of disability on the grounds that the documentation provided was insufficient. In Beck v. University of Wisconsin Board of Regents,<sup>130</sup> the Seventh Circuit

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<sup>127.</sup> Id. (alteration in original).

<sup>128.</sup> Id.

<sup>129.</sup> Id.; see also Shivakumar v. Abbott Lab’s, No. 99 C 7861, 2001 WL 775967, at \*11 (N.D. Ill. July 10, 2001) (holding that although plaintiff identified the accommodations she sought, she “[bore] responsibility for failure to isolate the necessary specific accommodations” because she did not “point to an instance in which she asked for an accommodation which her doctors recommended and was not granted”).

<sup>130.</sup> 75 F.3d 1130 (7th Cir. 1996).

blamed Lorraine Beck for the breakdown of the interactive process.<sup>131</sup> It rejected her claim that the University of Wisconsin failed to reasonably accommodate her osteoarthritis and depression despite her providing several doctor's notes recommending that her workload be adjusted and tailored to account for her limitations.<sup>132</sup>

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<sup>131.</sup> See id. at 1132–33.

<sup>132.</sup> Id. In 2001, the Supreme Court held that the ADA does not permit state employees to recover damages against state employers because Title I of the ADA did not abrogate Eleventh Amendment immunity. See Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001). Garrett affected plaintiffs' ability to recover damages against state employers. Id. This Article cites cases brought against state employers before Garrett involving medical documentation requirements because their logic is consistent with the medical-documentation-based holdings in cases involving private employers. Also, Garrett does not bar two categories of actions against state employers: actions for money damages brought by the United States and actions brought by private individuals seeking injunctive relief pursuant to Ex parte Young, 209 U.S. 123 (1908). See Garrett, 531 U.S. at 374 n.9. In 2002, Judith Olans Brown and Wendy E. Parmet identified several cases in which federal courts recognized disabled plaintiffs' use of Ex parte Young "to obtain prospective relief against state officials." Judith Olans Brown & Wendy E. Parmet, The Imperial Sovereign: Sovereign Immunity & the ADA, 35 U. MICH. J.L. REFORM 1, 15 & n.105 (2001) (citing, inter alia, Randolph v. Rodgers, 253 F.3d 342 (8th Cir. 2001) and Frazier v. Simmon, 254 F.3d 1247

Beck began working for the university in 1967.<sup>133</sup> In 1991, she was assigned to the Department of Health Maintenance in the School of Nursing and began to suffer from osteoarthritis.<sup>134</sup> In February 1992, Beck’s doctor recommended that Beck “avoid repetitive keyboard use,” which could “quite possibly” resolve her osteoarthritis symptoms.<sup>135</sup> In May 1992, Beck was hospitalized for depression and anxiety.<sup>136</sup> When she returned to work on June 9, 1992, her doctor wrote that “[s]he is to

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(10th Cir. 2001)). In Frazier, the Tenth Circuit held that Title I claims are cognizable under Ex parte Young. 254 F.3d at 1254–55 (rejecting claims for prospective relief on grounds that the employee was not qualified). In Randolph, the Eighth Circuit recognized a state prisoner’s Ex parte Young-based ADA Title II claim for prospective relief based on a request that he be provided with a sign-language interpreter. 253 F.3d at 343, 348 (dismissing claims as against some named parties to the suit but allowing others to proceed). But see Seth A. Horvath, Note, Disentangling the Eleventh Amendment and the Americans with Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination Under Title I and Title II, 2004 U. ILL. L. REV. 231, 253 (describing the significant limitations on ADA Title I plaintiffs’ claims for injunctive relief, especially with respect to reinstatement, using the example of Rizzato-Reines v. Kane County Sheriff, 149 F. Supp. 2d 482 (N.D. Ill. 2001)).

<sup>133</sup>. Beck, 75 F.3d at 1132.

<sup>134</sup>. Id.

<sup>135</sup>. Id.

<sup>136</sup>. Id.

work one half day on Thursday and she is to work full days thereafter. She has suffered recurrent major depression. This is a serious medical illness and may require some reasonable accommodation so that she does not have a recurrence of this condition.”<sup>137</sup>

The university requested access to her medical records, but Beck refused to sign a release.<sup>138</sup> Following a July 1992 hospitalization, Beck returned to work and provided the following additional information from her doctor:

Lorraine Beck has completed (9) days of hospitalization for depression and medication readjustment. In returning to work on 8/10/92 she may require appropriate assistance with her work load. An adjustable computer keyboard would be helpful in preventing further difficulties with her hands. All in all, tayloring [sic] her work load to what she & your staff feel she can realistically accomplish, would do much to assist in her transition back to work, and future productivity.<sup>139</sup>

The assistant dean of the university’s nursing school informed Beck that, despite her doctor’s note, he did not understand what accommodations she needed and that Beck would work with him directly until additional information was received.<sup>140</sup> Beck was moved to a small

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<sup>137.</sup> Id. at 1133.

<sup>138.</sup> Id.

<sup>139.</sup> Id. (alteration in original).

<sup>140.</sup> Id.

office with no windows.<sup>141</sup> She received a wrist pad but not an adjustable keyboard.<sup>142</sup> Following a third medical leave, Beck requested a transfer to a different department but was denied.<sup>143</sup> When she refused to report to her assigned department, she was terminated.<sup>144</sup>

The court concluded that Beck obstructed the interactive process when she failed to release her medical records, which would have provided her employer with necessary additional information regarding exactly what accommodations she needed.<sup>145</sup> Only the medical records could have “isolate[d] the necessary specific accommodations,” and because only Beck could provide access to the medical records, the interactive process breakdown was her fault.<sup>146</sup> According to the court, “the University never knew exactly what action it needed to take.”<sup>147</sup>

The court penalized Beck for failing to provide her employer with access to her complete medical records, even though not all of her records were likely relevant to her accommodation request. Moreover, Beck might have had good-faith reasons to keep the entirety of her medical records from her employer. Her physicians had presumably reviewed them and decided what kind of relevant information needed

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<sup>141.</sup> Id.

<sup>142.</sup> Id.

<sup>143.</sup> Id.

<sup>144.</sup> Id.

<sup>145.</sup> Id. at 1136.

<sup>146.</sup> Id.

<sup>147.</sup> Id.

to be shared in their notes. But Beck's doctor's notes did not suffice. The court penalized Beck for withholding, during the accommodations process, records that she would have arguably been entitled to withhold during discovery and to move in limine to exclude at trial. Beck has been cited frequently by courts rejecting failure to accommodate claims due to a disabled employee's failure to provide sufficient medical documentation of their disability and limitations.<sup>148</sup>

In Tatum v. Hospital of the University of Pennsylvania,<sup>149</sup> the Eastern District of Pennsylvania reached a similar result. Joyce Tatum, a nurse's assistant, was fired following her refusal to lift heavy patients.<sup>150</sup> Like

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<sup>148.</sup> See, e.g., Allen v. City of Raleigh, 140 F. Supp. 3d 470, 485 (E.D.N.C. 2015) (citing Beck in support of the conclusion that "medical documentation allows the employer to determine the precise nature and extent of the employee's restriction due to a disability under the ADA and to assess potential reasonable accommodations"); Roberts v. Kaiser Found. Hosp., No. 12-cv-2506, 2015 WL 545999, at \*11 (E.D. Cal. Feb. 10, 2015) (citing Beck in support of its conclusion that a disabled employee has not adequately engaged in the interactive process when the employee's doctor provides "proposed accommodations" but does not discuss "plaintiff's actual limitations"), aff'd sub nom. Roberts v. Permanente Med. Grp., Inc., 690 F. App'x 535 (9th Cir. 2017).

<sup>149.</sup> 57 F. Supp. 2d 145 (E.D. Pa. 1999), aff'd, 216 F.3d 1077 (3d Cir. 2000).

<sup>150.</sup> Id. at 148 (granting employer's motion for judgment as a matter of law).

Beck, she provided medical documentation of her disability—a cyst that caused her severe pain when she lifted heavy objects<sup>151</sup>—but the documentation was deemed insufficient.<sup>152</sup> She alleged disability discrimination as a result of her employer’s failure to accommodate her disability.<sup>153</sup>

Though Tatum’s responsibilities included lifting heavy patients, she was able to perform her essential job functions from 1973 until 1995 because the hospital provided her with lifting assistance.<sup>154</sup> In 1994, Tatum informed her supervisor, Elizabeth Craig, that it was difficult to lift and pull “heavy” patients.<sup>155</sup> Craig asked for a note, from Tatum’s gynecologist who had treated the cyst, to verify Tatum’s assertions.<sup>156</sup> Her gynecologist, Dr. Parrot, wrote a note stating that “Mrs. Tatum is unable to lift or pull heavy patients.”<sup>157</sup> Craig asked for more information from Parrot.<sup>158</sup> Parrot, however, informed Tatum that “she did not need

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<sup>151.</sup> Id. at 147.

<sup>152.</sup> Id. at 147–48.

<sup>153.</sup> Id. at 146.

<sup>154.</sup> Id.

<sup>155.</sup> Id.

<sup>156.</sup> Id.

<sup>157.</sup> Id.

<sup>158.</sup> Id.

another note”<sup>159</sup> and refused to complete a “Physical Capabilities Form” because Tatum “could work.”<sup>160</sup>

Craig then suggested that Tatum take the form to the hospital’s occupational health department.<sup>161</sup> There, a nurse practitioner refused to fill out the form.<sup>162</sup> Craig next suggested that Tatum take the form to her family physician, Dr. Gratz.<sup>163</sup> She returned to Craig and explained that Gratz would not fill out the form either.<sup>164</sup>

On March 28, 1995, Tatum reported to work and told the evening coordinator that she could not lift heavy patients. Tatum was informed that if she would not lift heavy patients, she should leave and would not be paid.<sup>165</sup> Tatum left but reported to work the following day, at which time she was suspended for three days without pay.<sup>166</sup> Nonetheless, she continued to work until August 1995 when she was terminated.<sup>167</sup>

In rejecting her failure-to-accommodate claim and her suggestion that the hospital failed to participate in the interactive process, the court criticized the lack of information provided by Tatum:

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<sup>159.</sup> Id.

<sup>160.</sup> Id.

<sup>161.</sup> Id.

<sup>162.</sup> Id.

<sup>163.</sup> Id.

<sup>164.</sup> Id.

<sup>165.</sup> Id. at 148.

<sup>166.</sup> Id.

<sup>167.</sup> Id.

Dr. Parrot's cryptic note of September 21, 1994 did not describe in detail the nature of the disability, its cause, whether the disability was permanent or temporary, or what treatments plaintiff was receiving. In short, the note did not provide sufficient information to determine whether the disability was protected under the ADA. Furthermore, Dr. Parrot provided no details as to the restrictions needed to accommodate plaintiff's disability. For example, there is no information as to the amount of weight plaintiff was restricted from lifting. The only clarifying information provided to Ms. Craig by plaintiff regarding Dr. Parrot's opinion, was that Dr. Parrot indicated that plaintiff "could work."<sup>168</sup>

Moreover, the court characterized Craig's repeated requests for medical documentation as evidence of the hospital's good-faith participation in the interactive process. According to the court, the hospital could not discuss what accommodations Tatum wanted because Tatum failed to provide "necessary medical information."<sup>169</sup> By contrast, the court lauded the hospital's efforts, noting that it "gave plaintiff at least four opportunities to produce the required information."<sup>170</sup> According to

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<sup>168</sup>. Id. at 148–49 (footnote omitted).

<sup>169</sup>. Id. at 149.

<sup>170</sup>. Id. at 150 (quoting *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 737 (5th Cir. 1999)).

the court, there was nothing more for the hospital to do, as the hospital was not required to negotiate “with a brick wall.”<sup>171</sup>

But Tatum was not a brick wall. She provided a note from a doctor who identified the relevant limitations: Tatum could not lift or pull heavy patients. The hospital could have offered to provide Tatum with assistance any time Tatum believed that a patient would be too heavy for her to lift.<sup>172</sup>

Additionally, courts have treated the failure to provide medical documentation of disability as suggestive of fraud. In Mudra v. School City of Hammond,<sup>173</sup> Linda Mudra, a high school teacher with thirty years of experience, was fired for absenteeism following her failure to report to work while suffering from depression.<sup>174</sup> Acting on the recommendation of her physician Dr. Goodman, Mudra did not report to teach on August 20, 2000, the first day of the academic year, as she “needed some time off to test the medications [Dr. Goodman] was trying out on her to treat her depression.”<sup>175</sup> Mudra provided written instructions for a substitute

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<sup>171.</sup> Id.

<sup>172.</sup> See Mark C. Weber, Disability Discrimination in Higher Education, 27 J. COLL. & U.L. 417, 430 (2000) (“A different case might have been presented had the plaintiff been unable to afford the required medical review and the employer persisted in refusing to conduct the review itself or negotiate accommodations in the absence of the review.”).

<sup>173.</sup> No. 2:02CV260, 2004 WL 3318761 (N.D. Ind. Feb. 6, 2004).

<sup>174.</sup> Id. at \*2.

<sup>175.</sup> Id. at \*1.

teacher and gave the school a note from Dr. Goodman stating that she was “unable to return to work until further notice.”<sup>176</sup>

On August 21, the school’s insurance coordinator asked Mudra for her medical records, but “Mudra did not want to bring her records to the school for privacy reasons.”<sup>177</sup> On August 31, the school asked Mudra to be examined by Dr. Kemp, a doctor selected by the school, who would provide a second opinion regarding Mudra’s illness.<sup>178</sup> Mudra was examined by Dr. Kemp and gave him permission to discuss his findings with Dr. Goodman but did not give Dr. Kemp her medical records.<sup>179</sup> Dr. Kemp concluded that Mudra suffered from generalized anxiety disorder and hypertension.<sup>180</sup> He attempted, but was unable, to contact Dr. Goodman.<sup>181</sup>

On September 29, the school informed Mudra that her failure to provide Dr. Kemp with the information he needed was “noncompliance with their request for a second opinion” and would result in loss of compensation until her medical condition was verified or until she reported to teach.<sup>182</sup>

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176. Id.

177. Id.

178. Id.

179. Id.

180. Id.

181. Id.

182. Id. at \*2.

On October 16, Dr. Goodman sent the school another note stating that Mudra would not return to teach “until further notice.”<sup>183</sup> On October 31, the school sent Mudra a letter stating that Dr. Goodman’s notes were “insufficient to explain her absence” and that she would not be paid unless she verified her medical condition or reported to work.<sup>184</sup> On November 30, an additional doctor wrote a letter to the school on behalf of Mudra explaining that her absence was caused by “Major Depressive Disorder, Moderate.”<sup>185</sup> In response, the school wrote Mudra and explained that she would need to obtain a second opinion from a doctor selected by the school.<sup>186</sup> On June 4, 2001, Mudra was terminated after she refused to obtain the second opinion.<sup>187</sup>

The court rejected Mudra’s failure-to-accommodate claim because she “did not engage in the interactive process.”<sup>188</sup> According to the court, the interactive process “is supposed to aid an employer in determining the precise limitations resulting from a disability.”<sup>189</sup> Here, the breakdown in the interactive process was Mudra’s responsibility. Mudra “did very little to provide the school or its doctor with information from which they could make a reasonable assessment of what sort of accommodation

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183. Id.

184. Id.

185. Id.

186. Id.

187. Id.

188. Id. at \*5.

189. Id.

would be necessary.”<sup>190</sup> When the school made a “simple request for a second opinion regarding her depression,” Mudra “complied, but only partially.”<sup>191</sup>

The court also rejected Mudra’s arguments that the medical examinations requested by the school were barred by the ADA. The court acknowledged statutory and regulatory language requiring that medical examinations of an employee be “job-related and consistent with business necessity.”<sup>192</sup> Still, the court explained that “cases have held that asking for more information regarding the nature of an illness is part of the interactive process that is part of finding reasonable accommodations for a disabled employee.”<sup>193</sup> The school needed to know “the nature and extent” of Mudra’s illness to know “who is going to be showing up to work.”<sup>194</sup> Without the medical documentation, Mudra and other employees would have “an easy way of circumventing policies aimed at preventing absenteeism.”<sup>195</sup> The court stated that “[t]

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<sup>190.</sup> Id.

<sup>191.</sup> Id.

<sup>192.</sup> Id. at \*6 (first citing 42 U.S.C. § 12112(d)(4)(A); then citing 29 C.F.R. § 1630.14(c)).

<sup>193.</sup> Id. (“The real purpose of this statute is to prevent employers from requiring examinations of employees that they suspect of having some disability.”).

<sup>194.</sup> Id.

<sup>195.</sup> Id.

his is especially true in light of the very limited amount of information that Mudra provided the School on her own.”<sup>196</sup>

However, the school did have information regarding Mudra’s ability to work. Dr. Goodman explained that she would be unable to work “until further notice” as a result of depression.<sup>197</sup> Instead of requiring Mudra to submit to additional examinations, the school could have requested periodic updates regarding her ability to work. Not every disability has a clear end date. A disability that prohibits an employee from working “until further notice” is not necessarily a disability invented to evade work.

### C. The Medical Documentation Mistake

Courts treat a doctor’s assessment of disability as “critical” to the interactive process, finding that without it, “[a]n employer cannot be expected to propose reasonable accommodation.”<sup>198</sup> A system in which doctors, but not disabled individuals themselves, are consulted to determine whether a disability exists and how it should be accommodated embraces the medical model of disability. In such a system, disability only exists if a doctor has recorded its existence in medical records. Requiring medical documentation of disability during

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<sup>196.</sup> Id.

<sup>197.</sup> Id. at \*1.

<sup>198.</sup> See, e.g., Templeton v. Neodata Servs., Inc., 162 F.3d 617, 619 (10th Cir. 1998) (holding that “the employee’s failure to provide medical information necessary to the interactive process precludes her from claiming that the employer violated the ADA by failing to provide reasonable accommodation”).

the interactive process betrays the social model of disability on which the ADA rests and is inconsistent with legislative history and the EEOC's own interactive process guidance.

This inconsistency can be traced to guidance regarding an employer's ability to require medical examinations and make disability-related inquiries. That guidance has developed separate from, and without reference to, interactive process guidance. The medical examination and inquiries guidance endorses employer requests for medical documentation when those requests for documentation are made in response to an employee's reasonable accommodation requests. As explained below, this guidance should be disregarded.

The ADA treats medical examinations and inquiries as presumptively prohibited disability discrimination.<sup>199</sup> An employer cannot require a medical examination or ask an employee whether the employee "is an individual with a disability" or how severe the employee's disability is unless the examination or inquiry is "job-related and consistent with business necessity."<sup>200</sup>

Chai Feldblum, who played a leading role in drafting the ADA and served as legal counsel for the disability and civil rights communities in Washington, D.C., during the ADA's three-year negotiations,<sup>201</sup> has

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<sup>199</sup>. 42 U.S.C. § 12112(d)(2)(A), (d)(4)(A).

<sup>200</sup>. Id. § 12112(d)(4)(A).

<sup>201</sup>. Chai Feldblum, Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside, 64 TEMP. L. REV. 521, 521 n.\* (1991).

described the ban on medical examinations and inquiries as a “key aspect[]” of the ADA’s employment title.<sup>202</sup> Pre-employment examinations could facilitate disability discrimination and thus needed to be curtailed. Feldblum explains that “Congress sought to prevent employers from using preemployment medical inquiries ‘to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer—before their ability to perform the job was even evaluated.’”<sup>203</sup> For example, if an employer asked a candidate if they were being treated for cancer, the employer might choose to immediately rely on the cancer-related information to reject the candidate. When a disability is “identified early in the application process,” it “taints the remainder of the application process.”<sup>204</sup>

A current employee also should not be required to submit to medical examinations and inquiries. As Feldblum noted, employees’ actual performance, as opposed to information about their health, “is the best measure of [their] ability to do the job.”<sup>205</sup> As a result, the ADA provides that an employee who uses increased amounts of sick leave or appears sickly, for example, cannot be required to submit to an examination that

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<sup>202.</sup> Id. at 531.

<sup>203.</sup> *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213 (11th Cir. 2010) (quoting H.R. REP. NO. 101–485, pt. 2, at 1).

<sup>204.</sup> Feldblum, supra note 201, at 532.

<sup>205.</sup> Id. at 538.

would test her “for AIDS, HIV infection, or cancer,” unless the “testing is job-related and consistent with business necessity.”<sup>206</sup>

Relevant regulations repeat the ADA’s requirement that medical examinations and inquiries of current employees must be job-related and consistent with business necessity.<sup>207</sup> The regulations also contemplate how the information acquired through permitted examinations and inquiries may be used, explaining that “[s]upervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.”<sup>208</sup> They do not otherwise link medical examinations and inquiries to the interactive process.

EEOC guidance goes further. It identifies three circumstances in which medical examinations and inquiries of employed individuals are “[s]pecifically [p]ermitted.”<sup>209</sup> First, “fitness for duty exams” are permissible “when there is a need to determine whether an employee is still able to perform the essential functions of his or her job.”<sup>210</sup> Second, employers may require “periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by

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<sup>206.</sup> Id. at 539 n.107 (quoting Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,750 (July 26, 1991) (codified at 29 C.F.R pt. 1630 (2020)) (interpretive guidance related to 29 C.F.R. § 1630.13)).

<sup>207.</sup> 29 C.F.R. § 1630.14(c) (2020).

<sup>208.</sup> Id. § 1630.14(c)(1)(i).

<sup>209.</sup> 29 C.F.R. pt. 1630, app., § 1630.14 (2020).

<sup>210.</sup> Id.

medical standards or requirements established by Federal, State, or local law that are consistent with the ADA.”<sup>211</sup> Third, employers may “make inquiries or require medical examinations necessary to the reasonable accommodation process described in” the regulations implementing the ADA.<sup>212</sup> Yet the “reasonable accommodation process” is the interactive process, which has its own specific guidance and does not mention examinations and inquiries.<sup>213</sup> Guidance that allows employers to require employees to undergo medical examinations or answer medical inquiries regarding disability is inconsistent with the informal vision of the interactive process.

Nevertheless, in 2000, the EEOC provided additional guidance regarding disability-related inquiries and medical examinations and again justified injecting them into the interactive process.<sup>214</sup> Inquiries and examinations that “follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious” may be “jobrelated and consistent with business necessity.”<sup>215</sup> It specified exactly when the request would satisfy the standard: “when

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<sup>211.</sup> Id.

<sup>212.</sup> Id.

<sup>213.</sup> See 29 C.F.R. § 1630.2(o)(3) (2020); supra Part II.A.

<sup>214.</sup> Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), EEOC Notice No. 915.002 (July 27, 2000), 2000 WL 33407181 [hereinafter “Enforcement Guidance”].

<sup>215.</sup> Id. at \*6.

the **disability or the need for the accommodation is not known or obvious.**<sup>216</sup> **In that case,** an employer can ask the employee for “reasonable documentation about [the] disability and its functional limitations that require reasonable accommodation.”<sup>217</sup>

As a result of this guidance, medical documentation requests will almost always be job-related and consistent with business necessity. Disability is not well understood. Whether disabilities are visible, invisible, common, or rare will depend on an employer’s own subjective understanding of disability. An employer who has never experienced disability will likely treat most disabilities as unknown and therefore in need of documentation. Very few, if any, will be considered obvious.<sup>218</sup>

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<sup>216.</sup> Id. at \*9 (emphasis omitted).

<sup>217.</sup> Id.

<sup>218.</sup> Courts acknowledge that “[a]n individual seeking accommodation need not provide medical evidence of her condition in every case,” including cases in which the disability is obvious. *Ward v. McDonald*, 762 F.3d 24, 31 (D.C. Cir. 2014). However, courts generally identify only one example of obvious disabilities: those involving wheelchair users. See, e.g., id.; *J.H. ex rel. J.P. v. Bernalillo County*, No. CIV 12–0128, 2014 WL 3421037, at \*113 (D.N.M. July 8, 2014) (characterizing a paraplegic wheelchair user’s disability as “obvious”), aff’d, 806 F.3d 1255 (10th Cir. 2015); *Sabal Palm Condos. of Pine Island Ridge Ass’n. v. Fischer*, 6 F. Supp. 3d 1272, 1286 (S.D. Fla. 2014) (describing the obviously disabled person as “someone confined to a wheelchair”). Unless an individual uses a wheelchair, and the accommodation relates to the wheelchair,

Thus, the guidance opens the door to an interactive process in which requests for medical documentation are the norm.

The guidance also encourages employers and courts to be suspicious about an employee's assertions that they are disabled. The guidance permits medical documentation requests because an employer "is entitled to know that an employee has a covered disability that requires a reasonable accommodation."<sup>219</sup> That is, employees' accounts of their disabilities are never enough.

The EEOC's guidance sets demanding standards for the documentation that an employee must provide. The documentation must describe "the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities" and substantiate "why the requested reasonable accommodation is needed."<sup>220</sup> Requiring such detailed documentation

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disabilities will likely require documentation. See Ward, 762 F.3d at 31 (stating that "an employer needs information about the nature of the individual's disability and the desired accommodation—information typically possessed only by the individual or her physician"). Indeed, in light of the discretion the interpretive guidance gives employers who seek medical documentation and assumptions that people with disabilities are faking their disabilities, even individuals who use wheelchairs might be required to prove their disabilities.

<sup>219</sup>. Enforcement Guidance, supra note 214, at \*9.

<sup>220</sup>. Id.

converts the interactive process into a complicated and adversarial negotiation that is more akin to the discovery phase of litigation than an informal process intended to result in an accommodation that each party endorses.

The guidance has shaped reasonable accommodation decisions. Courts have relied on it to conclude that employees who fail to provide medical documentation to support reasonable accommodation requests have caused the interactive process to fail and cannot claim that their employers failed to accommodate them.<sup>221</sup> The guidance has been

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<sup>221</sup>. See, e.g., *Hoskins v. GE Aviation*, No. 17-CV-224, 2019 WL 1339246, at \*7 (N.D. Miss. Mar. 25, 2019) (citing Enforcement Guidance, supra note 214, at \*10); *Turcotte v. Comcast Cable Commc'ns Mgmt., LLC*, No. 17-cv-150, 2019 WL 635409, at \*13 (D.N.H. Feb. 14, 2019) (citing Enforcement Guidance, supra note 214, at \*9), appeal dismissed, No. 19-1438, 2019 WL 5598352 (1st Cir. July 3, 2019); *Tavares v. Enter. Rent-A-Car Co. of R.I.*, C.A. No. 13-521, 2016 WL 7468130, at \*18 (D.R.I. June 16, 2016) (citing Enforcement Guidance, supra note 214, at \*9), report and recommendation adopted, C.A. No. 13-521, 2016 WL 6988812 (D.R.I. Nov. 29, 2016); *Heit v. Aerotek Inc.*, No. C15-1805, 2016 WL 6298771, at \*4 (W.D. Wash. Oct. 27, 2016) (citing Enforcement Guidance, supra note 214, at \*9, \*11); *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 482 (5th Cir. 2016) (citing Enforcement Guidance, supra note 214, at \*10); *Ali v. McCarthy*, 179 F. Supp. 3d 54, 79 (D.D.C. 2016) (citing Enforcement Guidance, supra note 214, at \*10-11); *Allen v. City of Raleigh*, 140 F. Supp. 3d 470, 485-86 (E.D.N.C. 2015) (citing Enforcement Guidance,

relied on to justify requests for medical documentation establishing that an employee is disabled, as well as requests for doctors' notes identifying which accommodations, if any, must be provided.<sup>222</sup> One

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supra note 214, at \*10).

<sup>222</sup>. See, e.g., *Neal v. Kraft Foods Glob., Inc.*, No. 08-CV-92, 2009 WL 799644, at \*8 (D. Or. Mar. 23, 2009) (finding that medical recommendations provided by employee “limited Plaintiff to working eight hours per day due to ‘sciatica’ and a ‘lower back condition’” but “did not set out specific reasons why either of those diagnoses prohibited Plaintiff from working more than eight hours per day” and, therefore, “Defendant required Plaintiff to undergo an IME as permitted under the ADA in an attempt to facilitate the accommodation and interactive process”), aff’d on other grounds, 379 F. App’x 632 (9th Cir. 2010); id. (“The ADA ‘permits employers . . . to make inquiries or require medical examinations necessary to the reasonable accommodation process.’” (alteration in original) (quoting 29 C.F.R. pt. 1630, app., § 1630.14(c))); *McCoy v. Geico Gen. Ins. Co.*, 510 F. Supp. 2d 739, 754 (M.D. Fla. 2007) (stating that “[a]n employer may require a medical examination in order to ascertain reasonable accommodations” (citing 29 C.F.R. pt. 1630, app., § 1630.14(c))); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 656 (6th Cir. 2000) (stating that the ADA “permits employers . . . to make inquiries or require medical examinations necessary to the reasonable accommodation process” (alteration in original) (quoting 29 C.F.R. pt. 1630, app., § 1630.14(c))).

court characterized disabled employees who do not provide medical documentation during the interactive process as unreasonable.<sup>223</sup>

The guidance has also led employers to draft policies and forms which treat medical documentation as a mandatory prerequisite to any kind of reasonable accommodation. The University of California, which employs the largest proportion of the state's workforce,<sup>224</sup> illustrates this trend.

The University of California has drafted a policy and procedures governing the interactive process.<sup>225</sup> The relevant policy provides that

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<sup>223</sup>. *Mynatt v. Morrison Mgt. Specialist, Inc.*, No. 12-CV-303, 2014 WL 619601, at \*14 (E.D. Tenn. Feb. 18, 2014) (“Defendant requested substantiating medical information, and plaintiff did not provide it. By not submitting the requested information, plaintiff did not participate in the interactive process in good faith, and thus impeded that interactive process. A reasonable employee would have obtained the medical documentation, continued to discuss options, and allowed the interactive process to proceed.”); see also *Gardner v. W. Kentucky Univ.*, No. 11-cv-79, 2015 WL 5299451, at \*3 (W.D. Ky. Sept. 9, 2015), aff'd, No. 15–6121\_ (6th Cir. July 5, 2016) (rejecting employee’s contention “that the defendants violated the ADA by requiring medical proof of her need for accommodations”).

<sup>224</sup>. Rachel Gillett, The Largest Employers in Each U.S. State, BUS. INSIDER (June 11, 2017, 1:31 PM), <https://www.businessinsider.com/largest-employers-each-us-state-2017-6> [<http://perma.cc/C7Z2-PWZF>].

<sup>225</sup>. See UNIV. OF CAL., POLICY PPSM-81: REASONABLE

“[w]hen the University requests that the employee provide documentation from the employee’s health care provider to confirm that the employee has a disability and to identify the employee’s functional limitations, the employee has an obligation to promptly comply with such requests.”<sup>226</sup> Moreover, the University of California may determine that the information provided by an employee is insufficient; if confirmation is necessary, “the University may require that the employee be examined by a University-appointed licensed healthcare provider.”<sup>227</sup>

Publicly available human resources material and forms indicate that the University of California treats medical documentation of disability as a mandatory part of the interactive process. The University of California Office of the President, for example, has created a chart identifying “[t]he employee’s role” in the reasonable accommodation process.<sup>228</sup> An employee must “[r]equest job accommodation.”<sup>229</sup> Under a column labeled “How to do it,” the chart states that an employee must “[p]rovide

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ACCOMMODATION § I (2018), <https://policy.ucop.edu/doc/4010420/PPSM-81> [<https://perma.cc/UA3Z-ZEZ4>].

<sup>226.</sup> Id.

<sup>227.</sup> Id.

<sup>228.</sup> See UCOP Human Resources, OP Life, Reasonable Accommodation, The Employee’s Role, UNIV. OF CAL. OFF. OF THE PRESIDENT, <https://www.ucop.edu/local-human-resources/op-life/leaves-of-absence/reasonable-accommodation-employee-role.html> [<https://perma.cc/5JSY-MKPU>] (last visited Aug. 9, 2021).

<sup>229.</sup> Id.

Accommodation and Leave Services with a written licensed healthcare provider’s statement describing your job-related limitations.”<sup>230</sup> The health care provider, not the employee, “will identify if limitations are temporary or permanent.”<sup>231</sup>

At UC Santa Barbara, the “Process to Request Workplace Accommodations” requires an employee to “have their medical provider fill out The Medical Response for a Reasonable Accommodation Request form.”<sup>232</sup> The interactive process does not commence until the “supporting medical information” has been received.<sup>233</sup> The Medical Response form requires a “Physician” or “Medical Provider” to determine whether the employee has a disability; identify the disability’s duration; identify “specific work restrictions and/or functional limitations” and how long the restrictions will “be in place”; and list the job functions the employee is “having trouble performing because of the limitation(s).”<sup>234</sup>

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<sup>230.</sup> Id.

<sup>231.</sup> Id.

<sup>232.</sup> See Workplace Accommodations: Employee Services, UNIV. OF CAL., SANTA BARBARA HUM. RES., <https://www.hr.ucsb.edu/hr-units/employee-services/workplace-accommodations> [<http://perma.cc/ZYM3-RHSU>] (last visited Aug. 9, 2021).

<sup>233.</sup> Id.

<sup>234.</sup> See Medical Response for a Reasonable Accommodation Request Form, UNIV. OF CAL., SANTA BARBARA HUM. RES., <https://www.hr.ucsb.edu/sites/default/files/docs/Medical%20Response%20for%20Reasonable%20Accommodation.pdf> [<http://perma.cc/2QB4-BMV8>] (last

Finally, it asks the individual completing the form if they have “any suggestions as to possible accommodation(s).”<sup>235</sup>

At UC Davis, managers and supervisors track reasonable accommodations that are made for employees on forms that require them to identify the medical documentation the employees have submitted from their physicians.<sup>236</sup> At UCLA, employees seeking reasonable accommodations must complete a form which instructs them to “attach any current medical documentation that describes [their] functional limitations.”<sup>237</sup> The form makes clear that the documentation “will be requested as part of the interactive process,” even if it is not available at the time the employee submits the form.<sup>238</sup>

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visited Aug. 9, 2021) (typeface altered).

<sup>235.</sup> Id.

<sup>236.</sup> See Permanent Accommodation, UNIV. OF CAL., DAVIS, <https://ucdavis.app.box.com/s/f5tdpsyqrgf9basal3tbsr98s0ojspkn> [<http://perma.cc/T5AW-L9D4>] (last visited Aug. 9, 2021); Temporary Accommodation, UNIV. OF CAL., DAVIS, <https://ucdavis.app.box.com/s/2949v02huhx6qkkyndy45csh0za7i0gj> [<http://perma.cc/HK6P-MD7Y>] (last visited Aug. 9, 2021).

<sup>237.</sup> See Request for Reasonable Accommodation, UNIV. OF CAL., L.A. INS. & RISK MGMT., <https://ucla.app.box.com/v/reasonable-accomm-request-form> [<https://perma.cc/F6RF-B4EL>] (last visited Aug. 9, 2021) (typeface altered).

<sup>238.</sup> Id. (typeface altered).

At UC Santa Cruz, medical documentation is mandatory.<sup>239</sup> An employee “must complete a medical release form” to permit UC Santa Cruz’s “Disability Management Coordinator” to communicate with the employee’s healthcare provider.<sup>240</sup> Moreover, UC Santa Cruz may question the documentation itself and require that “a University-appointed licensed health care provider” verify its accuracy.<sup>241</sup>

UC Santa Cruz has set up a multistep reasonable accommodations process. It requires the participation of a licensed health care provider and the execution of a medical release form. And, UC Santa Cruz may reject what the employee provides. The university permits its own health care provider to “verify” whatever the employee provides.

As described, UC Santa Cruz’s reasonable accommodations process is time-consuming. By contrast, the University of California’s religious accommodations process is a breeze. To request a religious accommodation from flu vaccine mandates, University of California employees must identify their “sincerely held religious belief, practice, or observance” that informs their accommodation request and explain

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<sup>239</sup>. Staff Human Resources: Reasonable Accommodation, UNIV. OF CAL., SANTA CRUZ, [https://shr.ucsc.edu/procedures/reasonable\\_accomodation/index.html](https://shr.ucsc.edu/procedures/reasonable_accomodation/index.html) [<http://perma.cc/3WGU-G82T>] (last visited Aug. 9, 2021) (“Medical documentation from a licensed health care provider must be provided by the employee to assist in understanding the nature of the employee’s functional limitations.”).

<sup>240</sup>. Id.

<sup>241</sup>. Id.

how the belief, practice or observance “conflicts with the University’s flu vaccine mandate.”<sup>242</sup> No documentation is required. No expert must vouch for the employees’ representations. No university-affiliated expert can challenge what the employees represent.

Injecting medical documentation into the interactive process has a tremendous impact at the University of California and beyond. To obtain a reasonable accommodation, disabled employees must have access to a medical provider—often a doctor—who can verify and document their disabilities. Medical providers may be asked to describe an employee’s disability, to suggest accommodations and their duration, or both. Not all medical providers are familiar with their patients’ workplaces or their patients’ work. When the doctors make accommodations suggestions, they may guess the type of accommodations that would be best suited to their patients’ needs or provide incomplete or vague recommendations that employers need not follow.

Individuals with disabilities are so sidelined that they may be prohibited from transmitting medical documentation of disability to their employers directly. For instance, UC Santa Barbara requires health care providers to send medical documentation of disability directly to the

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<sup>242</sup>. Employee Religious Accommodation Request Form (Accommodation to Flu Vaccine Mandate), UNIV. OF CAL., [https://hr.berkeley.edu/sites/default/files/employee\\_religious\\_accommodation\\_request\\_form\\_for\\_flu\\_vaccine\\_mandate\\_berkeley.pdf](https://hr.berkeley.edu/sites/default/files/employee_religious_accommodation_request_form_for_flu_vaccine_mandate_berkeley.pdf) [<http://perma.cc/5C3G-CTEG>] (last visited Aug. 9, 2021).

university,<sup>243</sup> as though employees cannot be trusted to deliver their own medical records without altering them.

Medical documentation requirements endorsed by the guidance may make reasonable accommodations impossible for some employees to obtain, and there is no guidance for employees who lack health insurance. Similarly, there is no guidance for employees whose physicians either have no idea whether an employee is disabled for purposes of the ADA or cannot determine the kind of accommodations that would be most appropriate in a particular workplace. The guidance also offers no solution for employees whose physicians refuse to complete a form documenting disability or suggesting accommodations or who charge fees that employees cannot pay. These are foreseeable obstacles, yet the guidance does not address them.

This Article's recommendation to disregard guidance endorsing medical documentation requirements is not a lofty policy goal. Rather, it is rooted in fundamental principles governing agency action.

EEOC interpretive guidance does not receive "full Chevron deference"<sup>244</sup> but may instead be entitled to less deferential respect,<sup>245</sup> as

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<sup>243</sup>. UNIV. OF CAL., SANTA BARBARA HUM. RES., supra note 234.

<sup>244</sup>. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." Michigan v. E.P.A., 576 U.S. 743, 751 (2015).

<sup>245</sup>. Richardson v. Chi. Transit Auth., 926 F.3d 881, 889 (7th Cir. 2019) (quoting Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008)).

established in Skidmore v. Swift & Co.<sup>246</sup> Agency guidance documents generally reflect “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>247</sup> However, agency guidance is not entitled to even Skidmore deference<sup>248</sup> when it contradicts congressional intent<sup>249</sup> or “a regulation’s plain language.”<sup>250</sup> Agency guidance that is internally inconsistent also carries little weight.<sup>251</sup>

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But see Flake, supra note 41, at 78–79 (concluding that the EEOC’s interactive process guidance is consistent with the ADA’s legislative history and is therefore entitled to Chevron deference).

<sup>246.</sup> 323 U.S. 134 (1944).

<sup>247.</sup> Richardson, 926 F.3d at 889 (quoting Fed. Express Corp., 552 U.S. at 399).

<sup>248.</sup> Kent Barnett et al., Administrative Law’s Political Dynamics, 71 VAND. L. REV. 1463, 1526 n.11 (2018) (defining “Skidmore deference” as a review in which “the courts retain interpretive primacy” but “defer to an agency’s interpretation based on several factors, including the thoroughness of the agency’s interpretation and its consistency with the agency’s prior pronouncements”).

<sup>249.</sup> See, e.g., Jones v. Allstate Ins. Co., 281 F. Supp. 3d 1211, 1221–22 (N.D. Ala. 2016), aff’d, 707 F. App’x 641 (11th Cir. 2017); Bull v. United States, 479 F.3d 1365, 1376 (Fed. Cir. 2007).

<sup>250.</sup> Springfield Parcel C, LLC v. United States, 124 Fed. Cl. 163, 184 (2015).

<sup>251.</sup> See Jones, 281 F. Supp. 3d at 1221–22.

The EEOC's medical examination and inquiries guidance, which permits employers to require that employees provide extensive and detailed medical documentation in connection with a reasonable accommodations request, should be disregarded for two reasons. First, it contradicts the ADA's clear legislative intent. The ADA's drafters described an interactive process that relied on an employee's expertise and accommodations preferences, not the expertise of a health care provider's recommendations. If the employer and employee cannot settle on an acceptable accommodation, then the legislative history suggests the employer consult with "various employment agencies familiar with the needs of disabled workers."<sup>252</sup> Moreover, the guidance's resort to medicine and medical records betrays the ADA's rejection of the medical model of disability.

Second, the medical documentation guidance is inconsistent with the agency's own interactive process guidance. Like relevant legislative history, interactive process guidance instructs employers to consider the employee's own accommodations preferences. If additional assistance is needed, then technical expertise should be sought from the EEOC itself, "[s]tate or local rehabilitation agencies, or from disability constituent organizations."<sup>253</sup> Interactive process guidance makes no reference to medical documentation.<sup>254</sup>

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<sup>252</sup>. Mayerson, supra note 21, at 516.

<sup>253</sup>. See 29 C.F.R. pt. 1630, app., § 1630.9 (2020) (describing the "Process of Determining the Appropriate Reasonable Accommodation").

<sup>254</sup>. See id. The related "Reasonable Accommodation Process

Thus, to the extent the EEOC's guidance surrounding medical examinations and inquiries conditions the receipt of reasonable accommodations on medical documentation of disability or a health care provider's recommendations regarding which accommodations are necessary, courts and employers should disregard the guidance.

## II. ACCOMMODATION WITHOUT DOCUMENTATION

This part first explores how existing scholarship characterizes the interactive process as a positive exchange of information between employees and employers. Yet, in practice, medical documentation requirements strip the interactive process of its original collaborative purpose. This part next turns to religious accommodations, focusing on how employers and courts do not meaningfully question an employee's assertion that they hold certain religious beliefs. It considers a similar hands-off approach to employees' assertions that they are disabled. It envisions reasonable accommodations that defer to employees' understandings of their own disabilities and identities and the accommodations the employees recommend.

### A. Accommodation Theory

Scholars generally praise the interactive process, treating it as one that facilitates collaboration and leads to reasonable accommodations suitable to both employers and employees.<sup>255</sup> Dallan Flake's study of

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Illustrated" also makes no mention of medical documentation. See id.

<sup>255</sup>. See, e.g., Stacy A. Hickox & Angela Hall, Atypical Accommodations for Employees with Psychiatric Disabilities, 55 AM. BUS. L.J. 537,

how the ADA's interactive reasonable accommodations process differs from Title VII's religious accommodations framework is instructive.<sup>256</sup>

Flake argues that the interactive process allows for more significant employee involvement<sup>257</sup> and also permits employers and employees

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573–75 (2018); Susan D. Carle, Analyzing Social Impairments Under Title I of the Americans with Disabilities Act, 50 U.C. DAVIS L. REV. 1109, 1142 (2017); Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 4–5 (1996). Elsewhere, Hickox has taken a more critical approach, noting that the interactive process requires employees to reveal otherwise hidden psychiatric disabilities. See Hickox & Case, supra note 77, at 573. The fear of stigma and stereotypes may deter employees with psychiatric disabilities from seeking reasonable accommodations, depriving them of the adjustments that would render their workplaces accessible. Id. at 536–37 (“[M]any employees and applicants with disabilities are still reluctant to reveal their disability, even if it means foregoing their right to reasonable accommodations.”). Hickox and Case conclude that courts have endorsed arguably overbroad requests for medical documentation of employees’ disabilities and suggest mitigating measures, including prohibiting employers from seeking employees’ entire medical records. Id. at 588. They do not, however, question the validity of medical record requests.

<sup>256.</sup> Flake, supra note 41.

<sup>257.</sup> Id. at 69–70.

to “work together in good faith.”<sup>258</sup> When an employee participates meaningfully in the accommodations process, he explains, it is more likely that the employee will receive “a suitable accommodation.”<sup>259</sup> The interactive process allows the employee to “discuss with the employer his precise job limitations and also suggest potential accommodations the employer may not have otherwise considered.”<sup>260</sup> Therefore, even when an accommodation is denied on the basis of being unreasonable, “the interactive process can provide the employee with greater confidence that the employer’s decision was justified because the employer properly solicited and considered the employee’s input.”<sup>261</sup> That is, the interactive process’s inherent fairness can soften the blow of an accommodations denial.<sup>262</sup>

Flake describes how employers benefit from the interactive process. Employers and employees share responsibility for the ultimate accommodation decided.<sup>263</sup> Flake contends that, as a result, the

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<sup>258.</sup> Id. at 69.

<sup>259.</sup> Id. at 70.

<sup>260.</sup> Id.

<sup>261.</sup> Id.

<sup>262.</sup> Though not central to Flake’s thesis, this conclusion does not consider that employees may be terminated if they cannot perform a job’s essential function without accommodation. Terminated employees will not find comfort in knowing that the interactive process solicited their input.

<sup>263.</sup> Flake, supra note 41, at 70.

interactive process will either decrease the risk of litigation or better position an employer, who has participated in good faith, to prevail.<sup>264</sup> Flake goes as far as suggesting that the interactive process “can boost employee morale, and in turn, productivity.”<sup>265</sup> Flake concludes that religious accommodations should also involve an interactive process.<sup>266</sup>

Flake’s survey of interactive process cases includes those that require employees to submit medical information or documentation requested by an employer.<sup>267</sup> He explains that courts have held that “the employee has a duty to cooperate with the employer throughout the interactive process,” and that when employees fail to do so, their

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<sup>264.</sup> Id.

<sup>265.</sup> Id.

<sup>266.</sup> Id. at 71. Flake has drawn additional thoughtful connections between religious accommodations and disability accommodations, arguing, for example, that those who experience discrimination because they are regarded as holding certain religious beliefs should receive the same protection as the ADA affords those who experience discrimination because they are mistakenly perceived as being disabled. Dallan F. Flake, Religious Discrimination Based on Employer Misperception, 2016 WIS. L. REV. 87, 89–90. Religious discrimination and disability discrimination are both “intentional and harmful”; therefore, misperceptionbased discrimination, whether rooted in religion or disability, should always be prohibited. Id. at 108.

<sup>267.</sup> See Flake, supra note 41, at 96–97.

accommodation claims are dismissed.<sup>268</sup> Flake describes the holding in Ali v. McCarthy,<sup>269</sup> in which an employer failed to accommodate environmental allergies because the employee failed to provide medical documentation beyond a “six-year-old doctor’s note” and a “copy of a prescription he previously submitted.”<sup>270</sup> In Ali, Flake writes, the employer’s request for additional information “was highly reasonable and [the court found] that it was Ali who abandoned the interactive process by refusing to cooperate.”<sup>271</sup> Flake also explains that courts fault employees for “break[ing] off the interactive process prematurely.”<sup>272</sup>

Flake identifies Ward v. McDonald<sup>273</sup> as an example of a case in which the employee was responsible for the early failure of the interactive process.<sup>274</sup> In Ward, the employee failed to provide her employer with precise information from her doctors regarding “what accommodation she needed and whether she could even perform the essential functions of her job.”<sup>275</sup>

Flake’s account of the interactive process’s origins is detailed and instructive. He describes relevant legislative history and regulations,

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<sup>268.</sup> Id. at 96.

<sup>269.</sup> 179 F. Supp. 3d 54 (D.D.C. 2016).

<sup>270.</sup> See Flake, supra note 41, at 97 (citing Ali, 179 F. Supp. 3d at 68–69).

<sup>271.</sup> Id. at 97.

<sup>272.</sup> Id. at 98.

<sup>273.</sup> 762 F.3d 24 (D.C. Cir. 2014).

<sup>274.</sup> See Flake, supra note 41, at 96–97.

<sup>275.</sup> Id. (citing Ward, 762 F.3d at 33).

as well as courts' uniform requirement that employers and employees engage in the interactive process. I appreciate, and indeed rely on, Flake's account of the interactive process's legislative and regulatory history. However, whereas Flake assumes that the interactive process functions as intended, I conclude that, in practice, the interactive process is a failure, and I take a critical approach to cases like Ali and Ward.

This Article highlights how the interactive process is in fact not guided by an employee's own understanding of which accommodations are best. Rather, disability only exists if a medical provider, most often a doctor, says it does. A doctor, not an employee, must suggest the appropriate accommodation. Rather than empowering, the interactive process is exhausting.

As explained herein, the interactive process imposed on disabled employees is burdensome and betrays the ADA's purpose. The interactive process must be fixed before it is applied in another context. However, there are meaningful connections to be drawn between disability accommodations and religious accommodations. As explained below, the religious accommodations process accepts an employee's stated reason as to why an accommodation is necessary. Disability, of course, is questioned. Perhaps it, too, should be subject to a deferential hands-off approach.

## B. The Hands-Off Approach to Religious Beliefs

In 1972, Title VII was amended to require employers to accommodate their employees' sincerely held religious beliefs, including all aspects of employees' religious observances and practices, so long as the

accommodations would not cause the employers undue hardship.<sup>276</sup> The amendment responded to employers' refusals to hire or accommodate employees whose religious practices required them to abstain from working on certain days.<sup>277</sup> It was intended to give employees in the private sphere the same rights the Constitution affords federal, state, and local employees, reaching both beliefs and religious observances, including those that involve missing work.<sup>278</sup> As a result, Title VII protection extends to beliefs that require "missing work for Good Friday services and the Sabbath, wearing a Muslim headscarf or Hindu bindi, requesting excused absences for religious prayer based on atheism or

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<sup>276.</sup> See 42 U.S.C. § 2000e(j) (defining religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"); 42 U.S.C. § 2000e-2(a) (prohibiting employment discrimination); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977) (stating that "[t]he intent and effect of this definition was to make it an unlawful employment practice under [42 U.S.C. § 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees").

<sup>277.</sup> See Karen Engle, The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII, 76 TEX. L. REV. 317, 362–64 (1997).

<sup>278.</sup> Id. at 369–71.

for observance of the Wiccan New Year, and attending a Native American ritual ceremony.”<sup>279</sup>

Between 1972 and 1980, courts and employers “often questioned the sincerity or validity of employees’ claimed beliefs.”<sup>280</sup> Courts relied on Free Exercise Clause cases, following either Wisconsin v. Yoder’s<sup>281</sup> willingness to recognize institutional religion but not personal preference, or United States v. Seeger<sup>282</sup> and Welsh v. United States,<sup>283</sup> which recognized not only beliefs sanctioned by organized religion but also “sincerely held beliefs that are religious in one’s own ‘scheme of things.’”<sup>284</sup> The interpretive differences reflected a tension between

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<sup>279</sup>. Kimberly D. Phillips, Promulgating Conscience: Drafting Pharmacist Conscientious Objector Clauses That Balance a Pharmacist’s Moral Right to Refuse to Dispense Medication with Non-Beneficiaries’ Economic and Legal Rights, 15 MICH. ST. U. J. MED. & L. 227, 247 (2011).

<sup>280</sup>. Engle, supra note 277, at 361. The U.S. Supreme Court’s 1977 decision in Hardison defined undue hardship as “any burden on the employer that is ‘more than de minimis.’” Id. at 372 (quoting Hardison, 432 U.S. at 84). This Article focuses on how employers and courts examine the status and identity that give rise to accommodation requests based on religion and disability. A discussion of the difference between employers’ burden-based defenses to accommodation requests is beyond its scope.

<sup>281</sup>. 406 U.S. 205 (1972).

<sup>282</sup>. 380 U.S. 163 (1965).

<sup>283</sup>. 398 U.S. 333 (1970).

<sup>284</sup>. Engle, supra note 277, at 373 (quoting Seeger, 380 U.S. at 185 and

courts that treated religious beliefs as compelled and immutable, dictated by institutions, and those that instead accepted that religious beliefs could be idiosyncratic and personal.<sup>285</sup> The former did not extend Title VII protection to personal religious preferences, while the latter did, through a hands-off approach.<sup>286</sup>

The EEOC revised its Guidelines on Discrimination Because of Religion in 1980.<sup>287</sup> The revisions were made “in response to public confusion concerning the duty of employers and labor organizations to reasonably accommodate the religious practices of employees and prospective employees,”<sup>288</sup> and the guidelines endorsed the hands-off approach.<sup>289</sup>

Current agency guidance instructs employers that they “should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.”<sup>290</sup>

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Welsh, 398 U.S. at 339).

<sup>285.</sup> Id. at 373–74.

<sup>286.</sup> Id.

<sup>287.</sup> See Engle, supra note 277, at 385; see also Guidelines on Discrimination Because of Religion, 45 Fed. Reg. 72,610, 72,610 (Oct. 31, 1980) (codified as amended at 29 C.F.R. § 1605.1 (2020)).

<sup>288.</sup> Engle, supra note 277, at 385.

<sup>289.</sup> Id. at 362.

<sup>290.</sup> Compliance Manual on Religious Discrimination: EEOC Directives Transmittal No. 915.063 (Jan. 15, 2021) [hereinafter “EEOC Compliance Manual”], <http://www.eeoc.gov/policy/docs/religion.html> [<http://perma>.

Employees' representations regarding their religious beliefs and practices should be believed, the EEOC has explained, because "the employer may be unfamiliar" with the beliefs.<sup>291</sup> Indeed, beliefs may still be sincerely held religious beliefs even if "no religious group espouses such beliefs" or "the religious group to which the individual professes to belong may not accept such belief."<sup>292</sup>

Whether an employee's religious belief is "sincere" is rarely in dispute.<sup>293</sup> Certain factors might, however, undermine an assertion that a belief is sincerely held. For example, sincerity might be called into question when: an employee "has behaved in a manner markedly inconsistent with the professed belief," "the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons," and when "the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons)."<sup>294</sup>

Still, the EEOC cautions that if an employee's practice deviates from a religion's commonly followed tenets, that alone is not grounds to

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<sup>291.</sup> Id.

<sup>292.</sup> Drew D. Hintze, Mandatory Influenza Vaccination Policies in Colorado: Are Healthcare Employees with Religious Conflicts Exempt?, 90 DENV. U. L. REV. ONLINE 27, 38 (2013) (quoting 29 C.F.R. § 1605.1).

<sup>293.</sup> See EEOC Compliance Manual, supra note 290.

<sup>294.</sup> Id.

doubt the sincerity of the employee's beliefs.<sup>295</sup> Also, because religious beliefs may change over time, "newly adopted or inconsistently observed religious practice may nevertheless be sincerely held."<sup>296</sup> An employer may seek to verify an employee's stated beliefs, but the inquiry is only permitted "[w]here the accommodation request itself does not provide enough information to enable the employer to make a determination, and the employer has a bona fide doubt as to the basis for the accommodation request."<sup>297</sup> Further, such inquiry must be "limited."<sup>298</sup>

The EEOC provides a case-based example of circumstances that would justify a request for additional information:

Bob, who had been a dues-paying member of [a union] for fourteen years, had a work-related dispute with a union official and one week later asserted that union activities were contrary to his religion and that he could no longer pay union dues. The union doubted whether Bob's request was based on a sincerely held religious belief, given that it appeared to be precipitated by an unrelated dispute with the union, and he had not sought this accommodation in his prior fourteen years of employment.<sup>299</sup>

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<sup>295.</sup> Id.

<sup>296.</sup> Id.

<sup>297.</sup> Id.

<sup>298.</sup> Id.

<sup>299.</sup> Id. (citing *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Supp. 2d 1066, 1078 & n.18

Under those circumstances, the union could require Bob “to provide additional information to support his assertion that he sincerely holds a religious conviction that precludes him from belonging to—or financially supporting—a union.”<sup>300</sup>

Employees should provide information to resolve employers’ reasonable doubts.<sup>301</sup> But the information need not be presented in a particular form, and an employee’s own “first-hand explanation” may alleviate the employer’s doubts.<sup>302</sup> “[E]ven when third-party verification is requested, it does not have to come from a clergy member or fellow congregant, but rather could be provided by others who are aware of the employee’s religious practice or belief.”<sup>303</sup>

As Zachary Kramer has explained, “religious discrimination law embraces an attitude of liberal neutrality toward the particulars of a person’s religion.”<sup>304</sup> Just as the EEOC encourages employers to believe an employee’s representation that the employee holds a particular religious belief, courts resolving religious discrimination claims are also “reluctant to scrutinize an individual’s religious beliefs.”<sup>305</sup> Outside of the

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(N.D. Ind. 2001)).

<sup>300.</sup> Id.

<sup>301.</sup> Id.

<sup>302.</sup> Id.

<sup>303.</sup> Id.

<sup>304.</sup> Zachary A. Kramer, The New Sex Discrimination, 63 DUKE L.J. 891, 897 (2014).

<sup>305.</sup> Bushouse, 164 F. Supp. 2d at 1074.

employment context, the U.S. Supreme Court also follows the hands-off approach, “deferring to adherents’ characterizations of the substance and significance of a religious practice or belief.”<sup>306</sup>

In addition to respecting the intimate nature of an employee’s religious practice, the hands-off approach to religious beliefs also simplifies the accommodations process. It is a practical model.

### C. The Hands-Off Approach to Disability

This Article proposes borrowing only one aspect of the religious accommodations analysis: the hands-off approach to employees’ assertions that they hold certain religious beliefs.<sup>307</sup> The approach

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<sup>306</sup>. Samuel J. Levine, A Critique of Hobby Lobby and the Supreme Court’s Hands-Off Approach to Religion, 91 NOTRE DAME L. REV. ONLINE 26, 26–27 (2015). However, the Court is not equally protective of all religions. See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) (comparing the Court’s application of strict scrutiny to pandemic-related restrictions on Catholic and Jewish houses of worship to its refusal to apply strict scrutiny to “a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a ‘Muslim Ban’”); Trump v. Hawaii, 138 S. Ct. 2392, 2439, 2433 (2018) (Sotomayor, J., dissenting) (comparing the Court’s treatment of perceived hostility directed at a baker’s Christianity to its decision to “leave[] undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’”).

<sup>307</sup>. It does not propose incorporating the definition of “undue hardship”

contends that employees' representations regarding their disabilities should be treated the same way.

The justifications underlying the hands-off approach to religious beliefs also apply to disability. Just like religion, an employer may be unfamiliar with disability. In the context of religion, the hands-off approach instructs that beliefs that are not held by an identifiable religious group still enjoy legal protection. An employer may only have knowledge of disabilities that are visible, familiar, or experienced by an identifiable segment of the population. If an employee experiences disability in a way that the employer has never seen before, the employer's lack of knowledge should not trigger a documentation requirement.

Of course, there are differences between disability and religion. The free exercise of religion is a fundamental right expressly protected by the First Amendment.<sup>308</sup> Disability discrimination by state actors only triggers rational basis review.<sup>309</sup> However, Title VII reaches discrimination

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in religious accommodations contexts. An employer need not provide a religious accommodation nor a disability accommodation that causes an undue hardship. See Nicole Buonocore Porter, Accommodating Everyone, 47 SETON HALL L. REV. 85, 89 (2016). However, under the ADA, undue hardship "is defined as 'significant difficulty or expense,'" whereas "in the religious discrimination context . . . the Supreme Court defined it to mean anything more than a 'de minimis cost.'" Id.

<sup>308</sup>. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

<sup>309</sup>. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (stating that "States are not required by the Fourteenth Amendment to

in private employment, using the Commerce Clause to go beyond state action.<sup>310</sup> In that context, religious exercise and accommodations for religious practice lose their constitutional dimension. Therefore, borrowing one aspect of religious accommodations law does not transplant heightened scrutiny to disability discrimination. Rather, it applies a reasonable fix to a process in disarray. Adopting the hands-off model currently applied to religious accommodations would result in an interactive process that proceeds based on employees' own descriptions of their disabilities. "I have diabetes" would suffice. Employees would not need doctor's notes or medical records to support their own assertions that they have diabetes.

This would streamline and accelerate the interactive process. First, it would eliminate time spent on collecting and reviewing medical records. It would also avoid the expense created by medical documentation requests. Freeing reasonable accommodations from documentation requirements might also increase productivity. Employees would no longer miss work to obtain medical documentation.

The fear that people are faking their disabilities influences the legal rules surrounding disability, creating systems in which individuals who seek legal protection must go to great lengths to demonstrate

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make special accommodations for the disabled, so long as their actions toward such individuals are rational").

<sup>310</sup>. Ioanna Tourkochoriti, Revisiting Hosanna-Tabor v. EEOC: The Road Not Taken, 49 TULSA L. REV. 47, 82 (2013).

that they are worthy of it.<sup>311</sup> A system that requires extensive medical documentation may eliminate applicants who cannot obtain the documentation for a myriad of practical reasons that bear no relation to disability.<sup>312</sup> If reasonable accommodations return to their informal roots, more employees with disabilities might be inclined to seek them out. An interactive process that proceeds without medical documentation defers to employees' experiences. Accepting employees' description of their own disabilities would convert the interactive process from one controlled by suspicion into one steeped in trust.

To the extent that false claims of disability must be addressed, religious accommodations offer a solution that is also superior to the current disability practice. The EEOC instructs that an employee's assertion that religious beliefs are sincerely held should generally be accepted. That is, the default is acceptance. Disability should be treated the same way.

However, there are circumstances in which an employer is entitled to ask for some documentation to support a religious accommodations request. For example, when the timing of a request renders it suspect, an employer can ask for documentation to show that a religious belief is

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<sup>311.</sup> See generally Dorfman, supra note 3.

<sup>312.</sup> See Rabia Belt & Doron Dorfman, Reweighting Medical Civil Rights, 72 STAN. L. REV. ONLINE 176, 179, 183–85 (2020) (describing the cost of medicalizing civil rights and explaining how “medical status acts as a gatekeeper to narrow the number of people who can utilize benefits and rights”).

in fact sincere and that a related practice must be accommodated. Still, the employer's doubt has to be bona fide. In the disability context, a request for documentation might be reasonable when an employee first asks for time off for vacation, is denied, and then repeats the request through the reasonable accommodations process, claiming that the time off is needed as a result of a disability. The timing of such a request, not the disability itself, creates the need to investigate.

Even when employers may ask for documentation of an individual's religious belief, the documentation need not take any particular form. In the religious accommodations context, an employer should consider an employee's firsthand explanation regarding the employee's beliefs. To the extent third-party input is required, it need not come from a church official or church member. In the disability context, an employee's own detailed explanation of their disability should also suffice to relieve bona fide concerns. Others familiar with the employee's disability may also be called on to explain their understanding of the employee's disability. Expertise need not come from health care providers.

Finally, employees must be able to suggest their own accommodations. Legislative intent is clear that disabled employees' suggestions should be prioritized, as they reflect employees' own disability expertise and are often the least expensive option.<sup>313</sup> This, too, would avoid needless resort to medical documentation. If an employee requests an ergonomic keyboard, a doctor who has never

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<sup>313</sup>. See supra Part II.A.

entered the employee's workplace should not be required to endorse the keyboard request.

Eliminating medical documentation requirements is an approach consistent with disability justice, which is sensitive to the law's impact on marginalized individuals.<sup>314</sup> Those who are unable to use paid leave to visit a medical provider to obtain medical documentation of disability are impacted by a documentation requirement. The same is true of individuals whose doctors charge a fee to complete disability verification forms—a fee that the patient cannot afford to pay.

It takes a certain amount of privilege to have the opportunity to discuss disability documentation with a health care provider, let alone actually obtain it. Power dynamics between doctors and patients render that conversation difficult for some but not others, depending on, for example, the patient's race, gender, and class.<sup>315</sup> Moreover, systemic racism is deeply embedded in U.S. health care. Health care providers routinely disregard and undertreat the pain reported by people of color

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<sup>314</sup>. “Disability justice aims to expand from the individual rights framework to highlight the impact of disability on certain populations, especially the poor, people of color, and women.” Seema Mohapatra, Politically Correct Eugenics, 12 FIU L. REV. 51, 78 (2016).

<sup>315</sup>. Cf. Belt & Dorfman, supra note 312, at 176–77 (stating that the disability community “comprises people of different genders, classes, and races, and who experience different types of stigma and discriminatory patterns”).

and by Black women in particular.<sup>316</sup> A system that allows Black women to die from treatable conditions due to the suspicion that accompanies their self-reported symptoms is not one in which each individual has the same access to documentation that would suffice to prove disability. To the extent that medical documentation requirements ask doctors to believe that the individual requesting the documentation deserves it, people of color will be disproportionately affected by concerns that disabled people are faking their disabilities.<sup>317</sup>

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<sup>316.</sup> See Ada Stewart, Black Physician's COVID Death Underscores Health Disparities, AAFP: LEADER VOICES BLOG (Jan. 15, 2021, 7:00 AM), <https://www.aafp.org/news/blogs/leadervoices/entry/20210115lvcoviddisparities.html> [<http://perma.cc/PE69-XEUA>]; see also TRESSIE MCMILLAN COTTOM, THICK AND OTHER ESSAYS 86–89 (2019); Janika Best, Note, Where Is My Seat at the Table: How Informed Consent Laws Foster the Legacy of Slavery and Discrimination Against Black Women, 41 WOMEN'S RTS. L. REP. 1, 2 (2019).

<sup>317.</sup> In other contexts, identity documentation requirements have a disproportionate effect on people of color, the poor, and the elderly. See Tracey B. Carter, Post-Crawford: Were Recent Changes to State Voter ID Laws Really Necessary to Prevent Voter Fraud and Protect the Electoral Process?, 12 CONN. PUB. INT. L.J. 283, 301 (2013) (discussing how photo identification requirements impact voting rights); Julie Mitchell & Susan Bibler Coutin, Living Documents in Transnational Spaces of Migration Between El Salvador and the United States, 44 L. & SOC. INQUIRY 865, 886–87 (2019) (discussing how increases in anti-immigrant

Of course, abandoning medical documentation of disability is likely to cause great discomfort. There will be outcries about floodgates and fakery. Failure-to-accommodate claims will be more likely to succeed and will trigger new guidance and training for employers accustomed to questioning, rather than accepting, disability. But the ADA was intended to be radical, and radical change is uncomfortable.<sup>318</sup>

Frank conversations about disability are in order. But doctors do not need to mediate or even participate in them. After all, doctors are not omniscient. They can diagnose and treat impairments, but they have no specialized knowledge of “the social and political conditions that place barriers in the way of . . . impairment[s]”—the very barriers that create disability.<sup>319</sup> They may be ill-equipped to suggest accommodations in a workplace they have never entered and for work they have never observed.

“In everyday interactions, people with disabilities have, and need more, opportunities to educate employers, agencies, and peers about

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sentiment caused “increased documentation requirements” which have “spillover effects on US citizens,” creating obstacles for “women, the poor, the elderly, people of color, the US citizen children of immigrant parents, and anyone who does not have their identity documents at hand”).

<sup>318</sup>. Basas, supra note 31, at 65.

<sup>319</sup>. Rovner, supra note 20, at 1051–52 (quoting Lennard J. Davis, Bending Over Backwards: Disability, Narcissism, and the Law, 21 BERKELEY J. EMP. & LAB. L. 193, 210 (2000)).

their experiences of disability.”<sup>320</sup> As Carrie Griffin Basas explains, “people with disabilities need to be at the center of the ADA; it is their/our civil rights statute, about us, for us, and ultimately, an effort to be undertaken with us.”<sup>321</sup>

## CONCLUSION

This Article has highlighted the agency guidance that led to the current documentation-dependent interactive process. It also explained how medical documentation requirements conflict with the ADA’s legislative history and its purposeful abandonment of the medical model of disability. It proposes a familiar and simple fix: borrowing the hands-off approach already known to employers and courts who consider religious accommodations. Lessening or eliminating medical documentation requirements will make reasonable accommodations less expensive, less time-consuming, and easier to obtain. It will also center employees’ own expertise, empowering people with disabilities to create their own solutions. Guidance to the contrary should not be followed.

Freeing disability from documentation requirements could also revolutionize how accommodation requests are treated in higher education in general and legal education in particular. Laura Rothstein has highlighted unresolved issues surrounding disability documentation requirements imposed by the Law School Admissions Council (LSAC),<sup>322</sup>

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<sup>320</sup>. Basas, supra note 31, at 114.

<sup>321</sup>. Id.

<sup>322</sup>. The LSAC has, in the past, treated reasonable accommodation as a privilege rather than a tool that ensures equal opportunity for students

state bar examiners, and law schools.<sup>323</sup> For example, some law schools

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with disabilities. It also went to great lengths to undo the perceived benefit students with disabilities purportedly received as a result of extra-time accommodations. Until 2014, LSAC flagged the LSAT scores of students who received an extra-time accommodation, informing law schools that their test scores “may not be representative or accurate of a law school candidate’s abilities since it was not taken under standard timing conditions.” Haley Moss, Extra Time Is A Virtue: How Standardized Testing Accommodations After College Throw Students with Disabilities Under the Bus, 13 ALB. GOV’T L. REV. 201, 220 (2020). The practice ceased as a result of a consent decree entered in a lawsuit brought by the California Department of Fair Employment and Housing. See Jonathan Lazar, The Use of Screen Reader Accommodations by Blind Students in Standardized Testing: A Legal and Socio-Technical Framework, 48 J.L. & EDUC. 185, 201–02 (2019). Technical guidance issued in 2015 by the U.S. Department of Justice’s Civil Rights Division explains that “[f]lagging announces to anyone receiving the exam scores that the test-taker has a disability and suggests that the scores are not valid or deserved” and “discourages test-takers with disabilities from exercising their right to testing accommodations under the ADA for fear of discrimination.” Id. at 202 (quoting Testing Accommodations, U.S. DEP’T OF JUST., C.R. DIV., [https://www.ada.gov/regs2014/testing\\_accommodations.html](https://www.ada.gov/regs2014/testing_accommodations.html) [<https://perma.cc/PB6E-38FP>] (last visited Aug. 9, 2021)). It is difficult to comprehend how this ableist policy survived as long as it did or why it existed at all.

<sup>323</sup>. See Laura Rothstein, Forty Years of Disability Policy in Legal

reject documentation of disability that they consider outdated, even when past documentation establishes that a student has a permanent disability.<sup>324</sup> As a result, disabled students must obtain and pay for new documentation,<sup>325</sup> which may require submitting to a battery of tests.<sup>326</sup> When documentation can only be obtained following a medical appointment, students may miss class and waste valuable study time.<sup>327</sup>

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Education and the Legal Profession: What Has Changed and What Are the New Issues?, 22 AM. U. J. GENDER SOC. POL'Y & L. 519, 570–74 (2014).

<sup>324.</sup> Based on conversations with disabled law students and disabled alumni, it is my understanding that this is a common, albeit often unwritten, rule that treats certain learning disability diagnoses as stale three years after the diagnoses are obtained. It is also my understanding that this practice is intended to render accommodations based on learning disabilities harder, if not impossible, to obtain. It is not a rule based in science.

<sup>325.</sup> Rothstein, supra note 323, at 574.

<sup>326.</sup> Id. at 573.

<sup>327.</sup> I have previously argued that any “extra time” a student with disabilities receives to take a midterm or final exam is far outweighed by the time that student loses to the pursuit of medical documentation of disability. Katherine Macfarlane, Testing Accommodations Are Not a Gift of Extra Time, MS. JD (Jan. 10, 2019), <https://ms-jd.org/blog/article/testing-accommodations-are-not-a-gift-of-extra-time> [<http://perma.cc/6QW5-TWKX>].

Law students with disabilities also face unique obstacles in connection with their bar exam preparations. They must complete the same extensive paperwork as their peers in addition to paperwork related to their reasonable accommodations requests, including those that require medical documentation. Inconsistent and untimely decisions regarding the administration of state bar examinations during the COVID-19 pandemic were particularly burdensome for students with disabilities. Some students who received time-related accommodations were forced to choose between taking an accommodated examination in person or taking an unaccommodated test virtually.<sup>328</sup> Students who sought accommodations for the first time as a result of, for example, their compromised immune systems, had to procure medical documentation on unforgiving timelines. Abandoning medical documentation requirements would improve the experience of students with disabilities who take the LSAT, law students with disabilities, and law graduates with disabilities.

“Everyone who is born holds dual citizenship, in the kingdom of the well and in the kingdom of the sick,” and “sooner or later each of us is obliged, at least for a spell, to identify ourselves as citizens of that other

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<sup>328</sup>. See, e.g., Maria Dinzeo, Disabled Law Grads Get No Relief from Covid-Era State Bar Exam, COURTHOUSE NEWS SERV. (Sept. 30, 2020), <https://www.courthousenews.com/disabled-law-grads-get-no-relief-from-covid-era-state-bar-exam/> [<http://perma.cc/A8JT-7QL7>].

place.”<sup>329</sup> The same might be said of disability,<sup>330</sup> with the COVID-19 pandemic serving as a very long spell in which our understanding of disability and identity evolved. The pandemic not only highlighted the importance of streamlining the reasonable accommodations process, it created a new class of individuals with chronic, long-term disabilities known as COVID long haulers.<sup>331</sup> Long haulers experience the lingering effects of a COVID-19 infection long after they have recovered from it.<sup>332</sup> And like so many disabled people, long haulers have already had their disability questioned. The Wall Street Journal published an op-ed

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<sup>329</sup>. Susan Sontag, Illness as Metaphor, N.Y. REV. OF BOOKS (Jan. 26, 1978), <https://www.nybooks.com/articles/1978/01/26/illness-as-metaphor/> [<http://perma.cc/Y3RN-AGWV>].

<sup>330</sup>. See CDC: 1 in 4 US Adults Live with a Disability, CDC NEWSROOM (Aug. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0816-disability.html> [<http://perma.cc/7FWD-V2A4>] (“At some point in their lives, most people will either have a disability or know someone who has a one.”) .

<sup>331</sup>. See, e.g., Claire Pomeroy, A Tsunami of Disability Is Coming as a Result of ‘Long COVID,’ SCI. AM. (July 6, 2021), <https://www.scientificamerican.com/article/a-tsunami-of-disability-is-coming-as-a-result-of-lsquo-long-covid-rsquo/> [<http://perma.cc/4DQT-2A3K>].

<sup>332</sup>. See Tae Chung et al., COVID ‘Long Haulers’: Long-Term Effects of COVID-19, JOHNS HOPKINS MED. (Apr. 1, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-long-haulers-long-term-effects-of-covid19> [<http://perma.cc/W2P3-QFA5>].

describing long-term COVID-19 as “largely an invention of vocal patient activist groups.”<sup>333</sup>

I began this project in 2019, interested in uncovering the origins of the medical documentation requirement. The project took on greater significance as people around the country struggled to convince their employers that because they are high-risk for serious illness from COVID19, they must work from home. Based on my own anecdotal experience assisting friends, students, and colleagues, employers did not relax medical documentation requirements during the pandemic. And, perhaps due to political leanings, or sheer burnout, some doctors refused to back up a work-from-home request.

How did it get this bad? Cruelty may be the point—a system so intent on ferreting out fakery is not a system interested in access, let alone fairness. I was not surprised to find evidence of imposing medical documentation requirements in the case law, but I was surprised that no scholarship challenges it. I believe this is due to the relatively small number of people with disabilities in legal academia who also write about disability law.<sup>334</sup>

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<sup>333</sup>. Jeremy Devine, Opinion, The Dubious Origins of Long Covid, WALL ST. J. (Mar. 22, 2021), <https://www.wsj.com/articles/the-dubious-origins-of-long-covid-11616452583> [<http://perma.cc/S5EF-AT SX>].

<sup>334</sup>. I am grateful to disability law scholars like Nicole Buonocore Porter and Katie Eyer, who have written about their own experiences with disability. See generally, e.g., Nicole Buonocore Porter, What Disability Means to Me: When the Personal and Professional Collide, 5 HOUS. L.

The research undertaken in connection with this Article was inspired, in part, by my own experience with disability and reasonable accommodations. I am disabled due to a decades-long battle with rheumatoid arthritis (RA). My medical records could fill a room. Nevertheless, my reasonable accommodations requests have been delayed or denied for a myriad of reasons. The State Bar of California originally denied my bar exam accommodation request to take off-the-clock stretching breaks, away from the exam itself. The bar did not question my disability but rather rejected my accommodation submission because two different sets of handwriting appeared on one of the forms documenting my RA. On the form in question, I filled in my name and address, and my doctor filled in and signed the rest. That was unacceptable, and the form had to be redone on an accelerated timeline during the final, stressful weeks of bar exam study. Before I had a name for it, I was experiencing the consequences of fear of the disability con.

Another reasonable accommodations request denial bordered on the absurd. I once asked an employer for a keyboard tray, which I needed due to range of motion limitations in my left elbow. A keyboard tray

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REV. OFF THE REC. 119 (2015); Katie Eyer, Am I Disabled?: Disability Identity and Law Faculty, J. LEGAL EDUC. (forthcoming 2021). I also recognize and honor disabled scholars who write about disability without publicly identifying as disabled. There are many reasons why one may not claim disability, including the overwhelming discrimination still faced by people with disabilities in the workplace. Claiming my own disability has come at great professional expense.

renders computer work much more comfortable. Without it, I must hold my left arm at an angle that causes me significant pain. In connection with my keyboard tray request, I provided medical records establishing that I have RA, a disease that is not rare, and which is known to cause joint pain and limit the affected joints' range of motion. In other words, my disability, and my need for the accommodation, were obvious. Still, the keyboard tray accommodation was denied because I did not produce a letter from my doctor stating that I needed a keyboard tray.

At the time of my keyboard tray request, I had just moved to a new town in a rural part of the country. I had yet to establish care with a local rheumatologist—the closest one was located nearly two hours away from my new home. I did not know when I would find time to see a new rheumatologist. After all, I had just begun my tenure-track career, and I wanted to spend my time preparing for class and writing scholarship. I wanted to settle in. I also did not want my first visit with a new provider to be monopolized by a conversation about accommodations.

I tried to persuade my employer to give me a keyboard tray by sharing an x-ray of my left elbow and an accompanying radiologist's report detailing the bone spurs and edema plaguing the joint. But that, too, was not enough to secure a keyboard tray.

Finally, a rheumatologist whose care I was no longer under agreed to sign her name to a letter stating something akin to “please provide Katherine Macfarlane with ergonomic office furniture.” Soon after, the keyboard tray appeared. In the interim, I worked without a keyboard tray while my elbow throbbed with pain. I did not have the luxury of halting work until the tray arrived.

My story is not unique. Like many others, my accommodations have been hard fought. Still, to understand just how broken our reasonable accommodations regime has become, you may have to first suffer through a denied accommodations request. And even still, you need the fortitude to write about it.