

**ONE NOT LIKE THE OTHER:  
AN EXAMINATION OF THE USE OF THE AFFIRMATIVE  
ACTION ANALOGY IN REASONABLE  
ACCOMMODATION CASES UNDER THE AMERICANS  
WITH DISABILITIES ACT**

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I. INTRODUCTION

In 1990, Congress enacted the Americans with Disabilities Act (ADA), a statute enacted with the purpose of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>1</sup> The ADA was the culmination of decades of advocacy on behalf of individuals with disabilities and represented a tremendous achievement for the disability rights movement.<sup>2</sup> At the heart of the statute is the reasonable-accommodation mandate, which requires employers to provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.”<sup>3</sup> Employers are required to accommodate reasonable requests “unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”<sup>4</sup> Under the ADA, a qualified individual refers to “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>5</sup>

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<sup>1</sup> 42 U.S.C. § 12101(b)(1) (2012).

<sup>2</sup> See Arlene B. Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (July 1992), <https://dredf.org/news/publications/the-history-of-the-ada/> [<https://perma.cc/6U47-FC4B>].

<sup>3</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>4</sup> *Id.*

<sup>5</sup> 42 U.S.C. § 12111(8).

While expanding the scope of protections for individuals with disabilities, the statute also ushered in a new framework for equality—one that focused on treating individuals differently to ensure their equality.<sup>6</sup> By including in the definition of discrimination failure to make reasonable accommodations for individuals with disabilities, Congress signaled its intention to require employers to take *affirmative* steps towards ensuring the integration of disabled individuals into the workplace,<sup>7</sup> subject of course to the limitation that accommodations be reasonable and not impose an undue hardship on employers.<sup>8</sup>

Despite these clear limitations on the scope of the employer's particular accommodation duties, some courts have expressed strong reservations about the precise nature of these duties mandated by the ADA, particularly when the reasonable accommodation requests are depicted as a form of preferential treatment.<sup>9</sup> Other courts have focused in on the reasonableness of the accommodation request and have emphasized the affirmative, yet neutral, requirements of the ADA as essential components ensuring the statute's effectiveness in integrating disabled individuals into the workforce.<sup>10</sup> Still others have regarded the statutory requirements as mandating the removal of structural barriers and have acknowledged that such mandates may indeed require preferential treatment in some cases.<sup>11</sup>

This Article discusses the debate within the courts regarding the employer's affirmative obligations under the ADA's reasonable accommodation clause by focusing on the use of the affirmative action analogy. The purpose of this Article is to examine the evolution of the affirmative-action analogy in reasonable-accommodation case law over time and to decipher its meaning and relevance. At the onset, it is

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<sup>6</sup> See Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996).

<sup>7</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

<sup>8</sup> EEOC v. Sara Lee Corp., 237 F.3d 349, 353 (4th Cir. 2001) (“Independently of the undue hardship provision, an employer is required to make only those accommodations that are ‘reasonable.’”) (citation omitted).

<sup>9</sup> Stephen F. Befort, *Accommodating an Employee's Commute to Work Under the ADA: Reasonable, Preferential, or Both?*, 63 DRAKE L. REV. 749, 750–51 (2015).

<sup>10</sup> E.g., *Barnett*, 535 U.S. at 401.

<sup>11</sup> Befort, *supra* note 9, at 784.

important to establish a few definitions and assumptions. First, the affirmative-action analogy refers to cases where courts liken or compare the plaintiff's reasonable-accommodation request to affirmative action. Specifically, the Article examines cases where the term "affirmative action" explicitly appears in the text of a court opinion where a reasonable-accommodation claim is at issue in the case. Second, the Article does not present a stance on whether reasonable accommodation is a type of affirmative action. Instead, the Article presents an overview of case law and legal scholarship to support both sides of the debate regarding that question. Rather than contribute to what is already an extensive debate on that question, this Article seeks to demonstrate that there are several different definitions of affirmative action at play in the reasonable-accommodation case law, and not all uses are based on the preferential-treatment definition—a focus of much of the commentary on the matter.<sup>12</sup> Although these different definitions of affirmative action are present in court opinions, they are regarded as one monolithic definition, which confuses the analysis across cases and obscures the actual context of the reasonable-accommodation request.

This Article is divided into four main parts. Part II describes the origins of the affirmative-action analogy both in disability case law as well as cases concerning reasonable accommodations—the focus of this Article. Part III tracks the frequency in usage of the affirmative-action analogy over time, starting after the passage of the ADA in 1990 and continuing to the present day. Part IV catalogues the various definitions of affirmative action utilized by courts. Part V attempts to decipher the various meanings of affirmative action in the reasonable-accommodation case law. In Part V, the Article demonstrates first, that the use of the affirmative-action analogy is frequently misplaced and rarely accompanied with sufficient analysis to justify its use; and second, that the definition of affirmative action varies across opinions and, as such, limits the analogy's general applicability. Ultimately, the Article closes by revealing the debate on preferential treatment under the ADA's reasonable-accommodation requirement as the most plausible explanation for the persistent presence of the affirmative-action analogy in reasonable-accommodation case law.

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<sup>12</sup> See *id.* at 754.

## II. ORIGINS OF THE AFFIRMATIVE-ACTION ANALOGY

To understand the use of the affirmative-action analogy over time, it is imperative to first know its origins. This Part provides an overview of the earliest references to the affirmative-action analogy in first, disability law, and then, reasonable-accommodation cases more specifically. In addition, this Part provides an overview of the legal scholarship animated by the question of whether reasonable accommodation is a type of affirmative action.

### A. Earliest References by Courts

#### I. *Southeastern Community College v. Davis*<sup>13</sup>

The earliest reference to affirmative action in disability law is found in the Supreme Court's opinion in *Southeastern Community College v. Davis*.<sup>14</sup> Davis sought admission to Southeastern's nursing program but was denied after Southeastern determined that she did not meet the requirements for the nursing clinical program.<sup>15</sup> Due to her serious hearing disability, Davis relied on lip-reading to comprehend speech, but the college found this insufficient to meet the standards of the clinical program.<sup>16</sup> Southeastern determined that Davis's disability would prevent her from safely completing the clinical program and hinder her from properly assisting patients as a professional in the field.<sup>17</sup> After being denied admission to Southeastern's nursing program, Davis brought suit under § 504 of the Rehabilitation Act, which prohibits discrimination in federally-funded programs against otherwise qualified disabled individuals solely on the basis of their disabilities.<sup>18</sup> Ruling in favor of Southeastern, the Supreme Court held that Davis was not a "qualified individual" within the meaning of § 504 and that the college was free to establish reasonable physical qualifications for its program.<sup>19</sup> The Court reasoned that, in

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<sup>13</sup> 442 U.S. 397 (1979).

<sup>14</sup> *Id.* at 411.

<sup>15</sup> *Id.* at 400–02.

<sup>16</sup> *Id.* at 401–02.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 400, 402 (citing Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2012)).

<sup>19</sup> *Id.* at 414.

contrast to § 503(a) of the Rehabilitation Act, which governs federal contractors, entities under § 504 were not required to adopt affirmative action to provide disabled individuals with educational and employment opportunities.<sup>20</sup> Specifically, the Court found that “neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.”<sup>21</sup>

Moreover, the Supreme Court noted in *Davis* that “the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons” will not always be clear.<sup>22</sup> The Court noted that there will be cases where the refusal to alter admissions standards will have the result of arbitrarily denying opportunities to individuals with disabilities.<sup>23</sup> Furthermore, advances in technology may enable some individuals with disabilities to readily meet the program requirements with the assistance of low-cost technical devices.<sup>24</sup> Accordingly, as the Court opined, “[S]ituations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”<sup>25</sup> Until then, the Court reasoned, requiring Southeastern to admit Davis would amount to Southeastern effectively lowering its standards for admissions.<sup>26</sup> Ultimately, as the Court concluded, “Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”<sup>27</sup>

The *Davis* Court’s concern that colleges and universities would have to lower their admissions standards in order to admit disabled students animates much of the *Davis* opinion and much of the disability case law in the employment and education context.<sup>28</sup> Indeed, similar concerns also

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<sup>20</sup> *Id.* at 410–11.

<sup>21</sup> *Id.* at 411.

<sup>22</sup> *Id.* at 412. This observation proved particularly prescient as will be described in greater detail below.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 412–13.

<sup>26</sup> *Id.* at 413.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 413–14. See also, e.g., *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) (“*Davis* used the term ‘affirmative action’ to refer to alteration of the standards or

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crept into cases in the reasonable-accommodation cases under the ADA,<sup>29</sup> despite the Supreme Court's later insistence that the reference to affirmative action in *Davis* was misleading.<sup>30</sup> Of course, it should be noted that the reference to affirmative action made sense in the context of a discussion on the Rehabilitation Act, where the term "affirmative action" is explicitly stated.<sup>31</sup> In *Davis*, the Court referred to affirmative action to distinguish the requirements under various sections of the Rehabilitation Act and to emphasize that affirmative action was required under § 503, for example, but not under § 504—the subsection at issue in *Davis*.<sup>32</sup> Even so, the Court sought to clarify in *Alexander v. Choate* what its reference to affirmative action actually meant in *Davis*.<sup>33</sup> In *Alexander v. Choate*, "the Court explained that 'affirmative action' as used in *Davis* '[r]eferred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental alteration[s]'" in the nature of a program . . . rather than to those changes that would be reasonable accommodations."<sup>34</sup> Despite the attempt at clarification, the language of affirmative action was exported to a variety of contexts within disability law, including the employment context for cases concerning reasonable accommodations.<sup>35</sup> Indeed, several conflicting and competing definitions of affirmative action began to appear in reasonable-accommodation cases brought pursuant to the ADA.<sup>36</sup>

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qualifications by which applicants to a program are selected, if those standards unfairly exclude a certain group.").

<sup>29</sup> See *infra* Section IV.C.

<sup>30</sup> *Alexander v. Choate*, 469 U.S. 287, 300–01 n.20 (1985).

<sup>31</sup> *Davis*, 442 U.S. at 410 (citing Rehabilitation Act of 1973 § 503(a), 29 U.S.C. § 793(a) (2012)).

<sup>32</sup> *Id.* at 410–11.

<sup>33</sup> *Alexander*, 469 U.S. at 300 n.20.

<sup>34</sup> *Helen L. v. DiDario*, 46 F.3d 325, 337 (3d Cir. 1995) (alterations in original) (quoting *id.*).

<sup>35</sup> See *infra* Part III tbls.1–2.

<sup>36</sup> See *infra* Part IV.

## 2. Daugherty v. City of El Paso<sup>37</sup>

After the passage of the ADA, the first reference to affirmative action in the reasonable-accommodation context by a court of appeals appeared in the *Daugherty* case, a case decided by the Fifth Circuit.<sup>38</sup> The plaintiff, Daugherty, was employed as a public coach bus operator.<sup>39</sup> After being diagnosed as an insulin-dependent diabetic, Daugherty was placed on a leave of absence without pay and released from his position.<sup>40</sup> Daugherty brought a reasonable accommodation claim under the ADA arguing that he was entitled to a reasonable accommodation from the City in one of two ways. First, Daugherty argued that, given his insulin-dependent diabetes, the City should have pursued a waiver to exempt him from the Department of Transportation's requirement to dismiss him from his position as a commercial motor vehicle operator due to that medical condition.<sup>41</sup> Second, Daugherty contended that the City should have reassigned him to another comparable position.<sup>42</sup> Although there were disputes in the case regarding whether the Department of Transportation (DOT) waiver was indeed possible,<sup>43</sup> the Fifth Circuit resolved the question on other grounds. Finding that Daugherty was not a "qualified individual with a disability" for the bus driver position, the court held that the City lacked the legal duty to accommodate him by obtaining a DOT waiver.<sup>44</sup>

After disposing of the plaintiff's first argument, the court then addressed Daugherty's contention that the City had a legal duty to find him another position within the City.<sup>45</sup> At the time, the City's charter governing the process for filling vacancies required that vacant positions be filled with full-time employees before the positions became available to

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<sup>37</sup> 56 F.3d 695 (5th Cir. 1995).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 696.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 697.

<sup>44</sup> *Id.* at 698 ("This essential element of his claim is lacking even if the city could have accommodated him by obtaining a waiver.").

<sup>45</sup> *Id.*

part-time employees like Daugherty.<sup>46</sup> The City argued that if it reassigned Daugherty to one of the vacant full-time positions, it risked a lawsuit from other full-time city employees.<sup>47</sup> In ruling for the City, the Fifth Circuit emphasized that the City's legitimate policy should not be altered to accommodate Daugherty, and furthermore, the City was not "required to find or create a new job for [Daugherty]."<sup>48</sup> Concluding that the City was not required to fundamentally alter its program, the court noted that Daugherty was not treated any differently from other employees and as such had no claim under the ADA.<sup>49</sup>

In closing, the court stated—in what has become a frequently-cited passage<sup>50</sup>—that affirmative action was not required under the ADA:

Stated another way, we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.<sup>51</sup>

That passage introduced into the reasonable-accommodation context both the affirmative-action narrative, as well as the corresponding debates regarding the intrusiveness of mandates that require different treatment for individuals with certain traits, such as disability. That debate extended beyond the walls of the courthouse and into legal academia.

*B. Debate: Is Reasonable Accommodation a Type of Affirmative Action?*

Soon after the passage of the ADA, legal scholars began to weigh in on the substantive meaning of the statute's reasonable-accommodation provisions, including how the statute aligned with previous anti-

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<sup>46</sup> *Id.* at 699.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 700 (quoting *Chiari v. City of League City*, 920 F.2d 311, 318 (5th Cir. 1991)).

<sup>49</sup> *Id.*

<sup>50</sup> See cases cited *infra* note 96.

<sup>51</sup> *Daugherty*, 56 F.3d at 700.

discrimination statutes like Title VII of the Civil Rights Act of 1964.<sup>52</sup> Scholars noted that the ADA, contrary to previous anti-discrimination statutes, “assumes that individuals who possess the quality or trait at issue are different in a relevant respect from individuals who don’t and that ‘treating [them] similarly can itself become a form of oppression.’”<sup>53</sup> Scholars noted that in some cases the ADA required that disabled individuals be treated differently from other nondisabled individuals to ensure that the nondisabled individuals had equal access employment opportunities. Karlan and Rutherglen clearly articulated this point by noting that “[r]easonable accommodation clearly rests on a difference model of discrimination since it requires employers to treat some individuals—those disabled persons who would be qualified if the employer modified the job to enable them to perform it—differently than other individuals.”<sup>54</sup>

Although scholars accepted what Karlan and Rutherglen dubbed as the difference model of equality, scholars disagreed first on whether the ADA’s reasonable-accommodation requirements constituted a form of affirmative action,<sup>55</sup> and second, accepting that reasonable accommodation constituted affirmative action, whether the reasonable accommodation constituted preferential treatment as that term is defined in the race- and sex-based affirmative action context.<sup>56</sup>

In their responses to these questions, legal scholars aligned into four respective camps. The first group of scholars argued that reasonable accommodation was in fact a form of affirmative action, with affirmative

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<sup>52</sup> 42 U.S.C. §§ 2000e–2000e-17 (2012).

<sup>53</sup> Karlan & Rutherglen, *supra* note 6, at 10 (quoting Daniel R. Ortiz, *Feminisms and the Family*, 18 HARV. J.L. & PUB. POL’Y 523, 524 (1995) (alteration in original)).

<sup>54</sup> *Id.* at 10–11; Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1431 (1991) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part)) (“Reasonable accommodation and affirmative action do stem from a common belief, namely that ‘in order to treat some persons equally, we must treat them differently.’”).

<sup>55</sup> *Id.* at 14.

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

action defined as preferential treatment.<sup>57</sup> A second group of scholars also argued that the ADA's requirements, including reasonable accommodation, were a form of affirmative action. They defined affirmative action not as preferential treatment but as the removal of structural barriers to employment.<sup>58</sup> The third group of scholars argued that the reasonable-accommodation requirements were not a form of affirmative action, with affirmative action defined as a remedy for past societal discrimination.<sup>59</sup> The final group of scholars also argued that reasonable accommodations are not a form of affirmative action; rather, they defined affirmative action as preferential treatment.<sup>60</sup>

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<sup>57</sup> *E.g., id.* ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").

<sup>58</sup> *See, e.g.,* CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 108 (1997) (arguing that the ADA is "the most radical affirmative action program in the nation's history").

<sup>59</sup> *E.g.,* Sharon Rennert, Note, *All Aboard: Accessible Public Transportation for Disabled Persons*, 63 N.Y.U. L. REV. 360, 380 (1988) (discussing affirmative action in the context of § 504 of the Rehabilitation Act) ("[A]ffirmative action refers to a remedy for systemic discrimination, and involves a policy of active recruitment of members of a victimized group. Accommodation, on the other hand, refers to the modification of programs, facilities, or operations to allow disabled people to gain access. . . . By confusing these two concepts, the Court unfortunately created the impression that the duty of accommodation is limited.") (footnotes omitted); Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 477 (2009) ("Requiring employers to make reasonable accommodations, including reassignments, is not 'affirmative action' to employ disabled individuals because of their class status; rather, it is an embodiment of the idea that society cannot challenge environmental and attitudinal discrimination in the same ways it countered biases against other marginalized groups.").

<sup>60</sup> *See, e.g.,* 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, 1049 (2000) ("Despite some similarities with conventional forms of affirmative action, the concept of reasonable accommodation as embodied in the ADA is significantly different from affirmative action in other contexts."); Cooper, *supra* note 54, at 1431–32 ("Affirmative action involves more than merely allowing the members  
(continued)

As the debates on the question of whether reasonable accommodation constitutes affirmative action suggest, there are valid arguments to support and reject the claim that reasonable accommodation is a type of affirmative action.<sup>61</sup> Even within the scholarship, however, there are varied and sometimes conflicting definitions of affirmative action, which make it difficult to utilize the term without clarifying which definition is being used. For example, although Karlan & Rutherglen argue that “[r]easonable accommodation is affirmative action in the sense that it requires an employer to take account of the individual’s disabilities and to provide special treatment to him for that reason,”<sup>62</sup> the authors continue their argument by distinguishing the type of affirmative action operating in the reasonable accommodation context from the affirmative action in the race and sex context.<sup>63</sup> In short, each author addressing the question does not necessarily have the same definition of affirmative action in mind.

In the context of legal scholarship, it is perfectly reasonable to have authors set the definitions for the terms they plan to reference in the course of their arguments. When citing to these arguments, other legal scholars would be wise to list the assumptions and definitions that inform the particular arguments made. Yet, as described below, courts deciding cases in the reasonable accommodation context utilize differing definitions of affirmative action, often without acknowledging these differences or the context in which the term is employed.

### III. USE OF THE AFFIRMATIVE-ACTION ANALOGY OVER TIME

This Part maps the usage of the affirmative-action analogy over time. All reasonable-accommodation cases brought pursuant to the ADA from

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of a protected class to compete on equal terms with others; rather, it affords the protected class the advantage of different selection criteria with the explicit goal of increasing the participation of the protected class. . . . In contrast to affirmative action, reasonable accommodation is in theory not remedial. Instead of looking to overcome the effects of past discrimination, it focuses on overcoming present obstacles to employment.”).

<sup>61</sup> For a discussion on the relationship between affirmative action and reasonable accommodation, see Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 697–98 (2001).

<sup>62</sup> Karlan & Rutherglen, *supra* note 6, at 14.

<sup>63</sup> *Id.* at 14–16.

1990 to 2017 that included explicit references to affirmative action were included in this data set. The data is separated into two categories: appellate cases and district court cases. Cases were included if they specifically referenced affirmative action in denying a reasonable-accommodation claim or referenced affirmative action in upholding or granting a reasonable-accommodation request.

As the data<sup>64</sup> presented in the charts below demonstrate, the majority of appellate and district court opinions that included references to the term “affirmative action” were decided from 1996 to 1998 and 1999 to 2001, respectively.<sup>65</sup> There are several explanations for the initial increase in cases referencing affirmative action; two will be mentioned here. First, the

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<sup>64</sup> A note regarding the data: This data set includes all court opinions that referenced the term “affirmative action” in a case dealing with reasonable accommodation requests under Title I of the ADA—that is, a challenge to the denial of a reasonable-accommodation request or an appeal challenging the district court’s finding that either a reasonable accommodation was required under the ADA or that the employer was not under a statutory duty to grant the reasonable-accommodation request.

The data set includes both published and unpublished opinions. Cases that were later appealed or decided again on rehearing were counted as individual cases for each opinion published or unpublished. Cases were also included even if they were subsequently reversed.

Cases were included if they referenced the term “affirmative action” at least once *and* if the term was employed to refer to either the denial of a reasonable-accommodation request or to respond to rebuttals either by defense counsel or other courts that challenged the accommodation partly on the grounds that the ADA is not an affirmative-action statute. Given the politically charged nature of the words “affirmative action,” only cases explicitly stating “affirmative action”—and not cases that only referenced words like “preference” or “special treatment”—were included in the data set. Admittedly, the data set is under-inclusive as it would be difficult to capture all cases where affirmative action is floating in the minds of judges in either granting—but most likely denying—a reasonable-accommodation request.

Cases where the plaintiff incorporated “affirmative action” into his or her own legal claims were excluded because the focus of the analysis is on the inclusion of the affirmative-action analogy by courts. Similarly, if a defendant corporation incorporated the term “affirmative action” into its defense, the case was excluded.

<sup>65</sup> See *infra* Part III tbls.1–2.

surge in cases referencing affirmative action after 1996 may have been influenced by the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*<sup>66</sup> In *J.A. Croson*, the Supreme Court held that a minority set-aside program established by the City of Richmond to support minority-owned businesses was invalid under the Equal Protection Clause, subjecting affirmative-action programs to strict scrutiny in the process.<sup>67</sup> As such, in the legal realm, the Supreme Court's opinion in *J.A. Croson* may have ignited discussion on affirmative action and spurred efforts by some courts to eliminate what it perceived as unjustified preferences, even outside the race and sex context.<sup>68</sup>

Furthermore, by 1996, affirmative action was becoming an exceedingly controversial and politically-charged issue, spurring statewide referenda banning its use by public entities in states like California, which enacted Proposition 209.<sup>69</sup> Ultimately, the findings suggest that the use of the "affirmative action" term in reasonable accommodation law surged at a point when affirmative action was the source of considerable political and social controversy.

At the district court level, a sizable proportion of opinions cite *Daugherty* when referencing affirmative action,<sup>70</sup> with *EEOC v. Humiston-Keeling*<sup>71</sup> following in a distant second.<sup>72</sup> The problem with frequent citations to the *Daugherty* opinion in particular will be discussed below.

For now, it is important to note that for the majority of cases referencing affirmative action at the district court level, by the time the opinion referenced affirmative action, the case had already been decided on

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<sup>66</sup> 488 U.S. 469 (1989).

<sup>67</sup> *Id.* at 507–08, 511.

<sup>68</sup> See, e.g., Jill B. Scott, Note, *Will the Supreme Court Continue to Put Aside Local Government Set-Asides as Unconstitutional?: The Search for an Answer in City of Richmond v. J.A. Croson Co.*, 42 BAYLOR L. REV. 197, 229 (1990); L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 283 (1997).

<sup>69</sup> Weeden, *supra* note 68, at 282.

<sup>70</sup> See *infra* Part III tbl.3.

<sup>71</sup> 227 F.3d 1024 (7th Cir. 2000).

<sup>72</sup> See *infra* Part III tbl.3.

alternative grounds.<sup>73</sup> In these cases, for example, the reviewing courts had already determined that the individual with a disability was not qualified or that the accommodation request constituted an undue burden.<sup>74</sup>

Furthermore, despite the decline in total references to affirmative action over time, courts continue to cite some of the earliest cases—namely, *Daugherty* and *Turco*—discussed in greater detail below.<sup>75</sup> The consistent references to these same few opinions over time suggest that courts have not yet critically examined the use of affirmative action within this body of law. Here again, it is important to note that the majority of opinions citing to *Daugherty* at both the appellate and district court levels do so in the course of denying a reasonable accommodation request.<sup>76</sup> Although, as demonstrated below, not all definitions of affirmative action indicate an unfavorable outcome for plaintiffs, references to either *Daugherty* or *Turco* rarely bode well for the plaintiff.<sup>77</sup>

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<sup>73</sup> E.g., *Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 838 (E.D. Tex. 2004); *Bettis v. Dep't of Human Servs.*, 70 F. Supp. 2d 865, 868 (C.D. Ill. 1999).

<sup>74</sup> *Bennett*, 324 F. Supp. 2d at 840 (“Bennett has failed to show that he has a disability cognizable under the ADA, that he has a record of such an impairment, or that he was regarded as disabled in violation of the ADA.”); *Bettis*, 70 F. Supp. 2d at 868 (“Defendant was not required to place Plaintiff into the Stationary Fireman position as a ‘reasonable accommodation’ because the ADA does not require Defendant to provide a promotion as an accommodation.”).

<sup>75</sup> See discussion *infra* Part V.

<sup>76</sup> E.g., *Humiston-Keeling*, 227 F.3d at 1026; *Smith v. Midland Brake, Inc.*, 138 F.3d 1304, 1308–09 (10th Cir. 1998).

<sup>77</sup> See *infra* Part IV.

**Table 1. Total Federal Courts of Appeals Cases Referencing the Term “Affirmative Action” in ADA Reasonable Accommodation Cases**

| <b>Date Range</b> | <b>Total Cases</b> |
|-------------------|--------------------|
| 1990-1992         | 0                  |
| 1993-1995         | 1 <sup>78</sup>    |
| 1996-1998         | 10 <sup>79</sup>   |
| 1999-2001         | 7 <sup>80</sup>    |
| 2002-2004         | 1 <sup>81</sup>    |
| 2005-2007         | 3 <sup>82</sup>    |
| 2008-2010         | 2 <sup>83</sup>    |
| 2011-2013         | 1 <sup>84</sup>    |
| 2014-2016         | 1 <sup>85</sup>    |
| 2017              | 0                  |
| <b>Total</b>      | <b>26</b>          |

<sup>78</sup> Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).

<sup>79</sup> *Midland Brake*, 138 F.3d at 1309; *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996); *Malabarba v. Chi. Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1311 (D.C. Cir. 1998); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998); *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 385 (2d Cir. 1996); *Barnett v. U.S. Air, Inc.*, 196 F.3d 979, 983 (9th Cir. 1998); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997).

<sup>80</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168 (10th Cir. 1999); *Humiston-Keeling*, 227 F.3d at 1028; *Williams v. United Ins. Co. of Am.*, 253 F.3d 280, 282 (7th Cir. 2001); *Guerra v. UPS, Inc.*, 250 F.3d 739 (5th Cir. 2001); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1126 (9th Cir. 2000) (Trott, J., dissenting); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir. 2001); *Hernandez v. Aldine Indep. Sch. Dist.*, 192 F.3d 125 (5th Cir. 1999).

<sup>81</sup> *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004).

<sup>82</sup> *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 867 (7th Cir. 2005); *Rehrs v. Iams Co.*, 486 F.3d 353, 358 (8th Cir. 2007); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483–84 (8th Cir. 2007).

<sup>83</sup> *Schneider v. Giant of Md., LLC*, 389 F. App'x 263, 271 (4th Cir. 2010); *Lors v. Dean*, 595 F.3d 831, 835 (8th Cir. 2010).

<sup>84</sup> *Toronka v. Cont'l Airlines, Inc.*, 411 F. App'x 719, 726 n.7 (5th Cir. 2011).

**Table 2. Total Federal District Court Cases Referencing the Term “Affirmative Action” in ADA Reasonable Accommodation Cases**

| <b>Date Range</b> | <b>Total Cases</b> |
|-------------------|--------------------|
| 1990-1992         | 0                  |
| 1993-1995         | 3 <sup>86</sup>    |
| 1996-1998         | 16 <sup>87</sup>   |
| 1999-2001         | 15 <sup>88</sup>   |
| 2002-2004         | 4 <sup>89</sup>    |
| 2005-2007         | 3 <sup>90</sup>    |
| 2008-2010         | 9 <sup>91</sup>    |
| 2011-2013         | 9 <sup>92</sup>    |
| 2014-2016         | 4 <sup>93</sup>    |
| <b>Total</b>      | <b>63</b>          |

<sup>85</sup> EEOC v. St. Joseph’s Hosp., Inc., 842 F.3d 1333, 1346–47 (11th Cir. 2016).

<sup>86</sup> Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397–98 (E.D. Tex. 1995); Fussell v. Ga. Ports Auth., 906 F. Supp. 1561, 1571 (S.D. Ga. 1995); Turco v. Hoechst Celanese Chem. Grp., Inc., 906 F. Supp. 1120, 1135–36 (S.D. Tex. 1995).

<sup>87</sup> Andress v. Nat’l Pizza Co. Int’l, 984 F. Supp. 475, 486 (S.D. Miss. 1997); Taylor v. Dover Elevator Sys., Inc., 917 F. Supp. 455, 463 (N.D. Miss. 1996); Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895, 901 (D. Ariz. 1997); Cannizzaro v. Neiman Marcus, Inc., 979 F. Supp. 465, 475 (N.D. Tex. 1997); Daigre v. Jefferson Par. Sch. Bd., No. Civ. A. 96-0856, 1997 WL 16621, at \*4 (E.D. La. Jan. 16, 1997); Hunt v. Boyd Gaming Corp., No. Civ. A. 96-1909, 1997 WL 369617, at \*7 (E.D. La. June 30, 1997); Vanderford v. Parker Hannifin Corp., 971 F. Supp. 1079, 1080 (N.D. Miss. 1997); Gomez v. Am. Bldg. Maint., 940 F. Supp. 255, 260 (N.D. Cal. 1996); Martinez v. Lennox Int’l, Inc., No. CIV.A.3:96-CV-0702, 1997 WL 209306, at \*5 (N.D. Tex. Apr. 18, 1997); Niece v. Fitzner, 941 F. Supp. 1497, 1509 (E.D. Mich. 1996); Nihiser v. Ohio EPA, 979 F. Supp. 1168, 1174 (S.D. Ohio 1997); Thoms v. ABF Freight Sys., Inc., 31 F. Supp. 2d 1119, 1130 (E.D. Wis. 1998); Jackan v. N.Y. State Dep’t of Labor, No. 97-CV-0483, 1998 WL 760266, at \*12 (N.D.N.Y. Oct. 26, 1998); Rodriguez v. Roadway Express, Inc., No. CIV. A. L-96-11, 1997 WL 839014, at \*6 (S.D. Tex. Dec. 2, 1997); Bowers v. NCAA, 974 F. Supp. 459, 466 (D.N.J. 1997); Newman v. Chevron U.S.A., 979 F. Supp. 1085, 1091 (S.D. Tex. 1997); Ferguson v. Texasgulf, Inc., No. Civ. A. H-94-0710, 1996 WL 454987, at \*11 (S.D. Tex. Mar. 12, 1996).

<sup>88</sup> Bettis v. Dep’t of Human Servs., 70 F. Supp. 2d 865, 868 (C.D. Ill. 1999); Felix v. N.Y.C. Transit Auth., 154 F. Supp. 2d 640, 659 (S.D.N.Y. 2001); Petty v. Freightliner  
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Corp., 122 F. Supp. 2d 666, 668 (W.D.N.C. 2000); EEOC v. Humiston-Keeling, Inc., 54 F. Supp. 2d 798, 813 (N.D. Ill. 1999); Connolly v. Bidermann Indus. U.S.A., Inc., 56 F. Supp. 2d 360, 365 (S.D.N.Y. 1999); Ladenheim v. Am. Airlines, Inc., 115 F. Supp. 2d 225, 231 (D.P.R. 2000); Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1356 (S.D. Fla. 1999); Quick v. Tripp, Scott, Conklin & Smith, P.A., 43 F. Supp. 2d 1357, 1363 (S.D. Fla. 1999); Petty v. Freightliner Corp., 123 F. Supp. 2d 979, 985 (W.D.N.C. 2000); Hartsfield v. Miami-Dade Cty., 90 F. Supp. 2d 1363, 1375 (S.D. Fla. 2000); Pfeifer v. Caterpillar Inc., No. 98 C 542, 2000 WL 310312, at \*12 (N.D. Ill. Mar. 24, 2000); Vinson v. Grant/Riverside Methodist Hosps., No. C2-99-1358, 2001 WL 1681125, at \*12-15 n.11 (S.D. Ohio Aug. 30, 2001); Aponte Diaz v. Navieras P.R., Inc., 130 F. Supp. 2d 246, 254 (D.P.R. 2001); Khan v. Universal Imaging Sols., Inc., No. 99 CIV.10678 (BSJ), 2001 WL 1029408, at \*7 (S.D.N.Y. Sept. 6, 2001).

<sup>89</sup> Alamo Rodriguez v. Pfizer Pharm., Inc., 286 F. Supp. 2d 144, 162 (D.P.R. 2003); Bennett v. Calabrian Chems. Corp., 324 F. Supp. 2d 815, 838 (E.D. Tex. 2004); Hines v. Chrysler Corp., 231 F. Supp. 2d 1027, 1050 (D. Colo. 2002); Swonke v. Sprint Inc., 327 F. Supp. 2d 1128, 1138 (N.D. Cal. 2004).

<sup>90</sup> Huber v. Wal-Mart Stores, Inc., No. 04-2145, 2005 WL 3690679, at \*4 (W.D. Ark. Dec. 7, 2005); Stopka v. Med. Univ. of S.C., No. CIV.A. 2:05-1728-CWH, 2007 WL 2022188, at \*12 (D.S.C. July 11, 2007); Willnerd v. First Nat'l of Neb., Inc., No. 805CV482, 2007 WL 2746866, at \*14 (D. Neb. Sept. 19, 2007).

<sup>91</sup> Jackson v. FUJIFILM Mfg. USA, Inc., No. CIV.A. 8:09-1328-RBH, 2010 WL 5778218, at \*7 (D.S.C. June 18, 2010); Brown v. Kastle Sys. of Tex. LLC, No. CIV.A H-08-02888, 2010 WL 3342219, at \*13 (S.D. Tex. Aug. 25, 2010); McGregor v. United Healthcare Servs., Inc., No. CIV.A. H-09-2340, 2010 WL 3082293, at \*9 (S.D. Tex. Aug. 6, 2010); Haynes v. AT&T Mobility, LLC, No. 1:09-CV-450, 2010 WL 5789050, at \*9 (M.D. Pa. Nov. 17, 2010); Walker v. Putnam Cty., Ga., No. 5:08-CV-00452 CAR, 2010 WL 3732111, at \*8 (M.D. Ga. Sept. 14, 2010); Garcia v. Whirlpool Corp., No. 3:08-CV-02944, 2010 WL 4628627, at \*6 (N.D. Ohio Nov. 5, 2010); Smith v. Shinseki, 716 F. Supp. 2d 556, 566 (S.D. Tex. 2009); Austin v. Bell S., No. CIV. A. 06-7464, 2008 WL 215565, at \*6 n.11 (E.D. La. Jan. 24, 2008); Woodruff v. Sch. Bd. of Seminole Cty., Fla., No. 606CV-1937-ORL-22KRS, 2008 WL 786794, at \*8 (M.D. Fla. Mar. 20, 2008).

<sup>92</sup> Franklin v. City of Slidell, 969 F. Supp. 2d 644, 655 (E.D. La. 2013); Minnihan v. Mediacom Commc'ns Corp., 987 F. Supp. 2d 918, 938 (S.D. Iowa 2013); Morton v. Cooper Tire & Rubber Co., No. 1:12CV028-SA-DAS, 2013 WL 3088815, at \*5 (N.D. Miss. June 18, 2013); Williams v. U.S. Servs., Inc., No. CIV.A. 2:10-1546-RMG, 2012 WL 590049, at \*7 (D.S.C. Jan. 31, 2012); Jackson v. FUJIFILM Mfg. USA, Inc., No. 8:09-CV-01328-

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**Table 3. Total Courts of Appeals Cases Cited in Federal District Court Opinions**

| Case Cited                             | Total Citations <sup>94</sup> |
|--|-------------------------------|
| <i>Daugherty</i> <sup>95</sup>         | 59 <sup>96</sup>              |
| <i>Turco</i> <sup>97</sup>             | 15 <sup>98</sup>              |
| <i>Terrell</i> <sup>99</sup>           | 11 <sup>100</sup>             |
| <i>Humiston-Keeling</i> <sup>101</sup> | 7 <sup>102</sup>              |
| <i>Malabarba</i> <sup>103</sup>        | 7 <sup>104</sup>              |
| <i>Huber</i> <sup>105</sup>            | 5 <sup>106</sup>              |
| <i>Wernick</i> <sup>107</sup>          | 3 <sup>108</sup>              |
| <i>Smith</i> <sup>109</sup>            | 3 <sup>110</sup>              |
| <i>Aka</i> <sup>111</sup>              | 1 <sup>112</sup>              |

JMC, 2011 WL 494281, at \*2 (D.S.C. Feb. 7, 2011); *Montana v. Donahoe*, No. EP-10-CV-212-KC, 2011 WL 3862213, at \*12 (W.D. Tex. Sept. 1, 2011); *Marshall v. AT&T Mobility*, 793 F. Supp. 2d 761, 768 (D.S.C. 2011); *Cmtys. Actively Living Indep. & Free v. City of Los Angeles*, No. CV 09-0287 CBM RZX, 2011 WL 4595993, at \*14 (C.D. Cal. Feb. 10, 2011); *Allen v. Babcock & Wilcox Tech. Servs. Pantex, LLC*, No. 2:12-CV-00225-J, 2013 WL 5570192, at \*8 (N.D. Tex. Oct. 9, 2013).

<sup>93</sup> *United States v. Woody*, 220 F. Supp. 3d 682, 688 (E.D. Va. 2016); *MTC E. v. Int'l Longshoremen's Ass'n*, No. 4:14-CV-175, 2015 WL 12698455, at \*5 (S.D. Ga. Feb. 10, 2015); *Moore v. CVS Rx Servs., Inc.*, 142 F. Supp. 3d 321, 341 (M.D. Pa. 2015); *Wilkerson v. Boomerang Tube, LLC*, No. 1:12-CV-198, 2014 WL 5282242, at \*8 (E.D. Tex. Oct. 15, 2014).

<sup>94</sup> The total number includes cases that were cited in one opinion. For example, if *Daughtery* and *Humiston-Keeling* were cited in one opinion, they were counted individually.

<sup>95</sup> *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

<sup>96</sup> *Rodriguez v. Roadway Exp., Inc.*, No. CIV. A. L-96-11, 1997 WL 839014, at \*6 (S.D. Tex. Dec. 2, 1997); *Vanderford v. Parker Hannifin Corp.*, 971 F. Supp. 1079, 1080 (N.D. Miss. 1997); *Hunt v. Boyd Gaming Corp.*, No. CIV.A. 96-1909, 1997 WL 369617, at \*7 (E.D. La. June 30, 1997); *Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 900 (D. Ariz. 1997); *Pfeifer v. Caterpillar, Inc.*, No. 98 C 542, 2000 WL 310312, at \*12 (N.D. Ill. Mar. 24, 2000); *Ladenheim v. Am. Airlines, Inc.*, 115 F. Supp. 2d 225, 231 (D.P.R. 2000); *Hartsfield v. Miami-Dade Cty.*, 90 F. Supp. 2d 1363, 1375 (S.D. Fla. 2000); *Aponte Diaz v. Navieras P.R., Inc.*, 130 F. Supp. 2d 246, 254 (D.P.R. 2001); *Alamo Rodriguez v. Pfizer Pharm., Inc.*, 286 F. Supp. 2d 144, 162 (D.P.R. 2003); *Garcia v. Whirlpool Corp.*, No. 3:08-

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CV-02944, 2010 WL 4628627, at \*6 (N.D. Ohio Nov. 5, 2010); *Tyler v. La-Z-Boy Corp.*, No. 3:09-CV-688-WHB-LRA, 2011 WL 13134279, at \*3 (S.D. Miss. Apr. 26, 2011); *Williams*, 2012 WL 590049, at \*7; *Franklin*, 969 F. Supp. 2d at 655; *Morton*, 2013 WL 3088815, at \*5; *EEOC v. McLeod Health, Inc.*, No. CV 4:14-3615-BHH, 2017 WL 4173601, at \*8 (D.S.C. Sept. 21, 2017); *Stockton v. Christus Health Se. Texas*, No. 1:15-CV-333, 2017 WL 1287550, at \*10 (E.D. Tex. Feb. 3, 2017); *MTC E. v. Int'l Longshoremen's Ass'n*, No. 4:14-CV-175, 2015 WL 12698455, at \*5 (S.D. Ga. Feb. 10, 2015); *Pomerantz v. Houston Methodist Hosp.*, No. CIV.A. H-12-3479, 2014 WL 5090278, at \*2 (S.D. Tex. Oct. 9, 2014); *Allen v. Babcock & Wilcox Tech. Servs. Pantex, LLC*, No. 2:12-cv-00225-J, 2013 U.S. Dist. LEXIS 146251, at \*29 (N.D. Tex. Oct. 9, 2013); *Andress v. Nat'l Pizza Co. Int'l*, 984 F. Supp. 475, 486 (S.D. Miss. 1997); *Austin*, 2008 WL 215565, at \*6 n.11; *Bennett v. Calabrian Chems. Corp.*, 324 F. Supp. 2d 815, 837 (E.D. Tex.2004); *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 475 (N.D. Tex. 1997); *Chollett v. Patterson-UTI Drilling Servs., LP*, No. V-08-27, 2011 U.S. Dist. LEXIS 113113, at \*34 (S.D. Tex. Sept. 30, 2011); *Cravens v. Blue Cross & Blue Shield*, No. 98-0410-CV-W-2, 1999 U.S. Dist. LEXIS 21874, at \*17 (W.D. Mo. Mar. 18, 1999); *Daigre v. Jefferson Par. Sch. Bd.*, No. 96-0856 SECTION "N", 1997 U.S. Dist. LEXIS 494, at \*11 (E.D. La. Jan. 15, 1997); *Davis v. Chao*, No. 06 C 1066, 2008 U.S. Dist. LEXIS 32380, at \*40 (N.D. Ill. Mar. 31, 2008); *Davoll v. Webb*, 943 F. Supp. 1289, 1300 (D. Colo. 1996); *Diaz v. Navieras P.R., Inc.*, 130 F. Supp. 2d 246, 254 (D.P.R. 2001); *EEOC v. Methodist Hosps. of Dallas*, No. 3:15-CV-3104-G, 2017 U.S. Dist. LEXIS 33970, at \*6 (N.D. Tex. Mar. 9, 2017); *Ellis v. Shannon Med. Ctr.*, No. 6:01-CV-091-C, 2002 U.S. Dist. LEXIS 20671, at \*13 (N.D. Tex. Oct. 25, 2002); *F.F. v. City of Laredo*, 912 F. Supp. 248, 253 (S.D. Tex. 1995); *Felix v. N.Y.C. Transit Auth.*, 154 F. Supp. 2d 640, 659 (S.D.N.Y. 2001); *Ferguson v. Texasgulf, Inc.*, No. H-94-0710, 1996 U.S. Dist. LEXIS 21922, at \*34 (S.D. Tex. Mar. 12, 1996); *Fussell v. Ga. Ports Auth.*, 906 F. Supp. 1561, 1571 (S.D. Ga. 1995); *Gomez v. Am. Bldg. Maint.*, 940 F. Supp. 255, 260 (N.D. Cal.1996); *Haynes*, 2010 WL 5789050, at \*9; *Jackan v. N.Y. State DOL*, No. 97-CV-0483, 1998 U.S. Dist. LEXIS 17202, at \*35 (N.D.N.Y. Oct. 23, 1998); *Jackson*, 2011 WL 494281, at \*2; *Johnson v. Equicom, Inc.*, No. 1:00-CV-249-C, 2001 U.S. Dist. LEXIS 18032, at \*12 (N.D. Tex. Nov. 1, 2001); *Khan v. Universal Imaging Sols., Inc.*, No. 99 Civ. 10678 (BSJ), 2001 U.S. Dist. LEXIS 13743, at \*23 (S.D.N.Y. Aug. 28, 2001); *Marshall v. AT&T Mobility*, 793 F. Supp. 2d 761, 768 (D.S.C. 2011); *Donahoe*, 2011 WL 3862213, at \*12; *Newman v. Chevron U.S.A.*, 979 F. Supp. 1085, 1088 (S.D. Tex. 1997); *Preston v. Victoria Indep. Sch. Dist.*, No. V-09-20, 2010 U.S. Dist. LEXIS 69049, at \*36 (S.D. Tex. July 12, 2010); *Przybylak v. N.Y. State Thruway Auth.*, No. 95-CV-0707E(F), 1997 U.S. Dist. LEXIS 16477, at \*5 (W.D.N.Y. Oct.

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15, 1997); *Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F. Supp. 2d 1357, 1369 (S.D. Fla. 1999); *Rodriguez v. Pfizer Pharm., Inc.*, 286 F. Supp. 2d 144, 162 (D.P.R. 2003); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1364 (S.D. Fla. 1999); *Taylor v. Dover Elevator Sys.*, 917 F. Supp. 455, 463 (N.D. Miss. 1996); *Thoms v. ABF Freight Sys., Inc.*, 31 F. Supp. 2d 1119, 1130 (E.D. Wis. 1998); *Turco v. Hoechst Celanese Chem. Group*, 906 F. Supp. 1120, 1129 (S.D. Tex. 1995); *EEOC v. Humiston-Keeling, Inc.*, 54 F. Supp. 2d 798, 812 (N.D. Ill. 1999); *Woody*, 220 F. Supp. 3d at 694; *Vinson v. Grant/Riverside Methodist Hosps.*, No. C2-99-1358, 2001 U.S. Dist. LEXIS 26372, at \*35–36 (S.D. Ohio Aug. 30, 2001); *Walker*, 2010 WL 3732111, at \*8; *Wilkerson*, 2014 WL 5282242, at \*7; *Williams v. UPS*, No. 2:10-1546-RMG-BHH, 2012 U.S. Dist. LEXIS 23079, at \*22 (D.S.C. Jan. 31, 2012); *Woodruff*, 2008 WL 786794, at \*8.

<sup>97</sup> *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996).

<sup>98</sup> *Martinez v. Lennox Int'l, Inc.*, No. CIV.A.3:96-CV-0702-G, 1997 WL 209306, at \*5 (N.D. Tex. Apr. 18, 1997); *Wohler*, 2009 WL 4891942, at \*3; *EEOC v. Methodist Hosps. of Dallas*, No. 3:15-CV-3104-G, 2017 WL 930923, at \*2 (N.D. Tex. Mar. 9, 2017); *Bennett*, 324 F. Supp. 2d at 837; *Brown v. Kastle Sys. of Tex. LLC*, No. H-08-02888, 2010 U.S. Dist. LEXIS 87641, at \*42 (S.D. Tex. Aug. 25, 2010); *Franklin v. City of Slidell*, 969 F. Supp. 2d 644, 653 (E.D. La. 2013); *Hunt v. Boyd Gaming Corp.*, No. 96-1909 SECTION "D" (4), 1997 U.S. Dist. LEXIS 9361, at \*18 (E.D. La. June 30, 1997); *Kallail v. Alliant Energy Corp. Servs.*, No. C10-0063, 2011 U.S. Dist. LEXIS 51705, at \*48 (N.D. Iowa May 13, 2011); *McGregor v. United Healthcare Servs.*, No. H-09-2340, 2010 U.S. Dist. LEXIS 79521, at \*24 (S.D. Tex. Aug. 6, 2010); *Montana v. Donahoe*, No. EP-10-CV-212-KC, 2011, U.S. Dist. LEXIS 98814, at \*34 (W.D. Tex. Sept. 1, 2011); *Newman v. Chevron U.S.A.*, 979 F. Supp. 1085, 1091 (S.D. Tex. 1997); *Rodriguez v. Roadway Express*, No. L-96-11, 1997 U.S. Dist. LEXIS 22075, at \*9 (S.D. Tex. Dec. 2, 1997); *Smith v. Shinseki*, 716 F. Supp. 2d 556, 566 (S.D. Tex. 2009); *Thoms v. ABF Freight Sys., Inc.*, 31 F. Supp. 2d 1119, 1130 (E.D. Wis. 1998); *Wilkerson v. Boomerang Tube, LLC*, No. 1:12-CV-198, 2014 U.S. Dist. LEXIS 146695, at \*20 (E.D. Tex. Oct. 15, 2014).

<sup>99</sup> *Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998).

<sup>100</sup> *Felix*, 154 F. Supp. 2d at 662; *Marshall*, 793 F. Supp. 2d at 784; *Bennett*, 324 F. Supp. 2d at 837; *Garcia*, 2010 WL 4628627, at \*6; *Hartsfield*, 90 F. Supp. 2d at 1371; *Jackson*, 2011 U.S. Dist. LEXIS 13426, at \*4; *Quick*, 43 F. Supp. 2d at 1363; *Schwertfager*, 42 F. Supp. 2d at 1356; *Walker*, 2010 U.S. Dist. LEXIS 95593, at \*21; *Wohler v. St. Tammany Par. Sch. Bd.*, 2009 WL 4891942, at \*3 n.9 (E.D. La. Dec. 10, 2009); *Woodruff*, 2008 U.S. Dist. LEXIS 22179, at \*20.

<sup>101</sup> *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000).

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<sup>102</sup> *Castro-Medina v. Procter & Gamble Commercial Co.*, 565 F. Supp. 2d 343, 374 (D.P.R. 2008); *Jackson v. FUJIFILM Mfg. USA, Inc.*, No. CIV.A. 8:09-1328-RBH, 2010 WL 5778218, at \*7 (D.S.C. June 18, 2010); *Woody*, 220 F. Supp. 3d at 693; *McLeod Health*, 2017 WL 4173601, at \*8 n.3; *Garcia*, 2010 WL 4628627, at \*6 n.3; *Haynes*, 2010 WL 5789050, at \*9; *Huber v. Wal-Mart Stores, Inc.*, No. 04-2145, 2005 U.S. Dist. LEXIS 40251, at \*8 (W.D. Ark. Dec. 7, 2005); *Petty v. Freightliner Corp.*, 122 F. Supp. 2d 666, 668 (W.D.N.C. 2000); *Petty v. Freightliner Corp.*, 123 F. Supp. 2d 979, 985 (W.D.N.C. 2000); *Vinson*, 2001 U.S. Dist. LEXIS 26372, at \*28.

<sup>103</sup> *Malabarba v. Chi. Tribune Co.*, 149 F.3d 690 (7th Cir. 1998).

<sup>104</sup> *Pfeifer v. Caterpillar Inc.*, No. 98 C 542, 2000 U.S. Dist. LEXIS 5733, at \*20 (N.D. Ill. Mar. 23, 2000); *Alitovski v. Elgin Corrugated Box Co.*, No. 99 C 5018, 2001 U.S. Dist. LEXIS 2070, at \*16 (N.D. Ill. Feb. 21, 2001); *Jackan v. N.Y. State DOL*, No. 97-CV-0483, 1998 U.S. Dist. LEXIS 17202, at \*36 (N.D.N.Y. Oct. 23, 1998); *Ladenheim v. Am. Airlines, Inc.*, 115 F. Supp. 2d 225, 231 (D.P.R. 2000); *Bettis v. Dep't of Human Servs.*, 70 F. Supp. 2d 865, 868 (C.D. Ill.1999); *K.P. v. City of Chicago*, No. 14 C 7296, 2014 U.S. Dist. LEXIS 146082, at \*25 (N.D. Ill. Oct. 14, 2014); *EEOC v. Humiston-Keeling, Inc.*, 54 F. Supp. 2d 798, 816 (N.D. Ill. 1999).

<sup>105</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).

<sup>106</sup> *Haynes v. AT&T Mobility, LLC*, No. 1:09-CV-450, 2010 U.S. Dist. LEXIS 141104, at \*27 (M.D. Pa. Nov. 17, 2010); *EEOC v. McLeod Health, Inc.*, No. 4:14-3615-BHH, 2017 U.S. Dist. LEXIS 154156, at \*23 (D.S.C. Sept. 21, 2017); *Jackson*, 2011 WL 494281, at \*2; *Willnerd v. First Nat'l of Neb., Inc.*, No. 8:05CV482, 2007 U.S. Dist. LEXIS 69837, at \*36 (D. Neb. Sept. 19, 2007); *Marshall v. AT&T Mobility, LLC*, 793 F. Supp. 2d 761, 784 (D.S.C. 2011).

<sup>107</sup> *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379 (2d Cir. 1996).

<sup>108</sup> *Marshall*, 793 F. Supp. 2d at 784; *Khan v. Universal Imaging Sols., Inc.*, No. 99 CIV.10678 (BSJ), 2001 WL 1029408, at \*7 (S.D.N.Y. Sept. 6, 2001); *Cravens v. Blue Cross & Blue Shield*, No. 98-0410-CV-W-2, 1999 U.S. Dist. LEXIS 21874, at \*17 (W.D. Mo. Mar. 18, 1999).

<sup>109</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

<sup>110</sup> *Bennett v. Henderson*, 15 F. Supp. 2d 1097, 1104 (D. Kan. 1998); *Jackan v. N.Y. State DOL*, No. 97-CV-0483, 1998 U.S. Dist. LEXIS 17202, at \*36 (N.D.N.Y. Oct. 23, 1998); *Jackson v. FUJIFILM Mfg. USA, Inc.*, No. CIV.A. 8:09-1328-RBH, 2010 WL 5778218, at \*7 (D.S.C. June 18, 2010).

<sup>111</sup> *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998).

#### IV. DEFINITIONS OF “AFFIRMATIVE ACTION” EMPLOYED BY COURTS

As noted above, there are several competing and conflicting definitions of affirmative action at play in court opinions within the reasonable-accommodation context. Even the Supreme Court in the *Davis* case, referenced above as one of the first cases employing the affirmative-action analogy in the disability law context, clarified its use of the term in a later opinion.<sup>113</sup> Within the reasonable-accommodation context, there are five definitions of affirmative action found within the court opinions examined: (1) the neutral definition;<sup>114</sup> (2) the lack of qualifications definition;<sup>115</sup> (3) the fundamental alteration definition;<sup>116</sup> (4) the preferential treatment definition;<sup>117</sup> and (5) the removal of structural barriers definition.<sup>118</sup> Each of these definitions is described in greater detail below. These definitions can be found within the reasonable-accommodation opinions that reference affirmative action;<sup>119</sup> in some opinions, more than one definition is discussed.<sup>120</sup> This Part attempts to catalogue the various definitions of affirmative action to demonstrate the complexity of the term within the reasonable-accommodation context.

##### A. *The Neutral Definition*

References to affirmative action often conjure up terms such as “preference,” “special treatment,” or other politically-charged terminology from the race- and-sex-based context.<sup>121</sup> The earliest references to affirmative action, however, reflected a more neutral connotation.<sup>122</sup> The neutral definition of affirmative action refers to any affirmative step that an

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<sup>112</sup> *Haynes v. AT&T Mobility, LLC*, No. 1:09-CV-450, 2010 U.S. Dist. LEXIS 141104, at \*29 (M.D. Pa. Nov. 17, 2010).

<sup>113</sup> *Alexander v. Choate*, 469 U.S. 287, 300–01 n.20 (1985).

<sup>114</sup> *See, e.g., Olmstead v. L.C.*, 527 U.S. 581, 619 (1999) (Thomas, J., dissenting).

<sup>115</sup> *See, e.g., Malabarba v. Chi. Tribune Co.*, 149 F.3d 690, 699–700 (7th Cir. 1998).

<sup>116</sup> *See, e.g., Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982).

<sup>117</sup> *See, e.g., Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

<sup>118</sup> *See, e.g., Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997).

<sup>119</sup> *See, e.g., cases cited supra* notes 114–18.

<sup>120</sup> *See, e.g., U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400–01, 406 (2002).

<sup>121</sup> *E.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978).

<sup>122</sup> *E.g., Barnett*, 535 U.S. at 401.

employer must take to ensure that disabled employees have the opportunity to integrate into the workforce. One of the earliest references to affirmative action is found in Executive Order 11246, which referred to affirmative action to describe the duties of government contractors and subcontractors in ensuring nondiscrimination in employment.<sup>123</sup>

The Supreme Court has also embraced the neutral definition of affirmative action within the disability law context.<sup>124</sup> In *U.S. Airways, Inc., v. Barnett*, Justice Breyer, writing for the majority, affirmed that the ADA's statutory objectives "will sometimes require *affirmative* conduct to promote entry of disabled people into the workforce."<sup>125</sup> Similar examples of the neutral definition can be found in lower court opinions within the reasonable-accommodation context.<sup>126</sup>

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<sup>123</sup> Executive Order 11246, 30 Fed. Reg. 12319, 12320 (Sept. 28, 1965) ("The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.").

<sup>124</sup> *E.g.*, *Olmstead v. L.C.*, 527 U.S. 581, 619 (1999) ("Therefore, '[a] comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.'") (alteration in original) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 (1979)).

<sup>125</sup> 535 U.S. at 401 (emphasis added).

<sup>126</sup> *See, e.g.*, *Hines v. Chrysler Corp.*, 231 F. Supp. 2d 1027, 1050 (D. Colo. 2002) (arguing that in *Smith*, the Tenth Circuit required affirmative action, where affirmative action refers to an active effort on the part of the employer); *Williams v. Wasserman*, 937 F. Supp. 524, 528 n.4 (D. Md. 1996) (discussing *Davis* and the clarification made in *Alexander v. Choate*); *Schwarz v. Nw. Iowa Cmty. Coll.*, 881 F. Supp. 1323, 1345 (N.D. Iowa 1995) ("However, a request that an employer maintain the status quo for schedules or other working conditions may amount to a showing that the status quo is a possible and reasonable accommodation. Admittedly, reasonable accommodations usually require some affirmative action on the part of the employer."). *But see Dopico v. Goldschmidt*, 687 F.2d 644, 651 (2d Cir. 1982) ("*Davis* concluded that Congress had understood 'the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps,' and plainly had not intended 'to impose an affirmative-action obligation on all recipients of federal funds' when it enacted section 504.") (quoting *Davis*, 442 U.S. at 410–11); *Alamo Rodriguez v. Pfizer Pharm., Inc.*, 286 F.

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At its core, the neutral definition recognizes that employers have an active duty under the ADA to take affirmative steps to ensure the integration of disabled employees into the workforce.<sup>127</sup> Notably, the neutral definition of affirmative action embraces the difference model of equality, as discussed above, and embeds within the statute a requirement that employers treat disabled individuals differently from nondisabled individuals by, for example, incurring costs to provide reasonable accommodations like ergonomic chairs, flexible work hours, or reduced physical demands.<sup>128</sup>

*B. Lack of Qualifications*

As noted above, the ADA requires employers to provide reasonable accommodations to qualified individuals unless the accommodation imposes an undue burden.<sup>129</sup> Imbedded within the statute, therefore, is a limitation on the scope of a disabled employee's right to a reasonable accommodation.<sup>130</sup> To establish a prima facie case of discrimination, the employee requesting the accommodation must establish that he or she "(1) has a disability within the meaning of the ADA, (2) is a qualified individual, and (3) suffered an adverse employment action as a result of the disability."<sup>131</sup> Under the ADA, a qualified individual with a disability must "(1) possess the requisite skill, education, experience, and training for h[is]

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Supp. 2d 144, 162 (D.P.R. 2003) ("However, although the employer has the affirmative duty to transfer the employee to a vacant position, ADA is not read as to require affirmative action in favor of individuals with disabilities, in the sense of requiring disabled persons be given priority in hiring or reassignment over those who are not disabled.").

<sup>127</sup> See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) ("To begin with the statutory text, the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been 'reassigned'; the core word 'assign' implies some active effort on the part of the employer.").

<sup>128</sup> 42 U.S.C. § 12112(b)(5)(A) (2012); 29 C.F.R. § 1630.2(o)(2)(ii) (2017).

<sup>129</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>130</sup> See *id.*

<sup>131</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007) (footnote omitted).

position, and (2) be able to perform the essential job functions, with or without reasonable accommodation.”<sup>132</sup> Once the plaintiff-employee has made the required showing, in order to survive summary judgment, the plaintiff must also “show that an ‘accommodation’ seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”<sup>133</sup> At that point, the defendant-employer “must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”<sup>134</sup> The ADA provides a list of factors that the court may utilize to determine whether the reasonable accommodation imposes an undue hardship, including but not limited to the nature and cost of the accommodation, the overall financial resources of the employer, and the size of the business.<sup>135</sup>

Given the elaborate burden-shifting framework that is available, and the fact that the analysis hinges on reasonableness, it is particularly perplexing to find the language of affirmative action within this subset of opinions. After all, if the court determines that the accommodation poses an undue burden or is not reasonable on its face, the inquiry ends—the accommodation is therefore unreasonable.<sup>136</sup> Nonetheless, some courts have employed the term “affirmative action” to refer to accommodation requests that the particular court deems patently unreasonable given the individual’s lack of qualifications.<sup>137</sup> These opinions often turn on factors

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<sup>132</sup> *Fenney v. Dakota, Minn. & E.R.R. Co.*, 327 F.3d 707, 712 (8th Cir. 2003) (alteration in original) (quoting *Heaser v. Toro Co.*, 247 F.3d 826, 830 (8th Cir. 2001)).

<sup>133</sup> *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 401 (2002).

<sup>134</sup> *Id.* at 402.

<sup>135</sup> 42 U.S.C. § 12111(10)(B) (2012).

<sup>136</sup> *See* 42 U.S.C. § 12112(b)(5)(A).

<sup>137</sup> *E.g.*, *Malabarba v. Chi. Tribune Co.*, 149 F.3d 690, 699–700 (7th Cir. 1998) (upholding district court’s finding that plaintiff was not a qualified individual with a disability) (“In our view, these suggested accommodations are unreasonable; each one would have saddled the Tribune with a duty that is not compelled by the ADA. . . . Restated, the ADA does not mandate a policy of ‘affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled person be given priority in hiring or reassignment over those who are not disabled.’”) (quoting *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)); *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 867 (7th Cir. 2005); *Khan v. Universal Imaging Sols., Inc.*, No. 99 CIV.10678 (BSJ), 2001 WL 1029408, at \*7 (S.D.N.Y. Sept. 6, 2001) (“In addition, defendant has shown that

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separate from the nature of the accommodation itself. For example, in court opinions that refer to affirmative action to demonstrate the unreasonableness of an accommodation request, the plaintiff is usually an *unqualified* individual with a disability seeking a request that is not designated for other nondisabled employees.<sup>138</sup> In these cases, the unreasonableness of the accommodation inheres in the fact that the individual lacked the ability to perform the essential functions of the job with or without the accommodation.<sup>139</sup> The use of affirmative action in these opinions suggests a definition of affirmative action that is indeed troubling because it suggests that the provision of benefits accrues to individuals who wholly lack qualifications for the position.<sup>140</sup>

### C. *Fundamental Alteration*

Employers are not required to alter the essential functions of the job in question in order to accommodate individuals with disabilities.<sup>141</sup> In these

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such an accommodation is unreasonable. Plaintiff's disability does not qualify him to some form of affirmative action over other, nondisabled employees.”).

<sup>138</sup> *E.g.*, *Toronka v. Cont'l Airlines, Inc.*, 411 Fed. App'x 719, 726 (5th Cir. 2011) (affirming summary judgment against plaintiff where plaintiff was not qualified for any of the positions available at his employer) (“It is not an employer's responsibility to ‘fashion’ a new job, as *Toronka* asserts. For reassignment to be a reasonable accommodation, a position ‘must first exist and be vacant.’”) (quoting *Burch v. City of Nacogdoches*, 174 F.3d 615, 621 (5th Cir. 1999)); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997) (finding that plaintiff was not disabled under the ADA, plaintiff lacked qualifications for reassignment, and plaintiff's accommodation request was unreasonable); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093 (5th Cir. 1996) (finding that plaintiff was not a “qualified individual with a disability” under the ADA).

<sup>139</sup> *See, e.g.*, *Toronka*, 411 Fed. App'x at 724–25; *Foreman*, 117 F.3d at 809; *Turco*, 101 F.3d at 1093.

<sup>140</sup> *See, e.g.*, *Toronka*, 411 Fed. App'x at 724–25; *Foreman*, 117 F.3d at 809; *Turco*, 101 F.3d at 1093. It should be noted that these opinions tend to argue that the accommodation is unreasonable based on the finding that the accommodation constitutes preferential treatment. What distinguishes this definition from the preferential treatment definition is that plaintiff is not found to be a qualified individual with a disability in these cases.

<sup>141</sup> *EEOC v. Ford Motor Co.*, 782 F.3d 753, 764 (6th Cir. 2015).

cases, affirmative action refers to perceived attempts to fundamentally alter the employer's hiring program or policies or modify the essential functions of the particular position sought by the disabled employee.<sup>142</sup> In contrast to the structural definition of affirmative action described below, the fundamental alteration definition suggests a negative connotation. Frequently, these accommodation requests are portrayed as requiring the employer to substantially reconfigure its core human resource policies, including hiring procedures, reassignment protocols, or organizational structures.<sup>143</sup>

As noted above, the Supreme Court in *Alexander v. Choate* referred to the fundamental alteration definition of affirmative action in clarifying its use of the term:

In *Davis*, we stated that § 504 does not impose an “affirmative-action obligation on all recipients of federal funds.” . . . [I]t is clear from the context of *Davis* that the term “affirmative action” referred to those “changes,” “adjustments,” or “modifications” to existing programs that would be “substantial,” or that would constitute “fundamental alteration[s] in the nature of a program” . . . rather than to those changes that would be reasonable accommodations.<sup>144</sup>

Here, the Court defined affirmative action as a substantial change that would require a fundamental alteration in the employer's existing programs and policies.<sup>145</sup> Similarly, court opinions employing the

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<sup>142</sup> *E.g.*, *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982).

<sup>143</sup> Employers are not required to fundamentally alter their hiring and reassignment procedures if such changes would impose an undue burden. 42 U.S.C. § 12112(b)(5)(A) (2012). However, short of that, the employer may be required to change processes and procedures if it is determined that they operate in a discriminatory fashion. 29 C.F.R. § 1630.2(o)(2)(ii) (2017). In short, some reasonable accommodation requests may be fundamental yet reasonable.

<sup>144</sup> *Alexander v. Choate*, 469 U.S. 287, 300–01 n.20 (1985) (citations omitted) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 (1979)). *See also* *Helen L. v. DiDario*, 46 F.3d 325, 337 (3d Cir. 1995).

<sup>145</sup> *Alexander*, 469 U.S. at 300–01 n.20.

fundamental alteration language reference affirmative action when the accommodation request is viewed as a mandate requiring the employer to lower its standards for job performance for a particular position.<sup>146</sup>

Under the ADA, employers are not required to create new positions for employees with disabilities. Rather, employers must assign these employees to vacant positions if the employee is able to complete the essential functions of the job with or without reasonable accommodation and if the employer can provide the accommodation without undue burden.<sup>147</sup> In this realm, references to affirmative action also appear in cases where courts find that only the creation of a new position would accommodate the employee.<sup>148</sup>

#### *D. Preferential Treatment*

As will be demonstrated in the next Part, the majority of courts employing the affirmative-action analogy in the reasonable-accommodation context do so based on the preferential treatment<sup>149</sup>

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<sup>146</sup> See, e.g., *Austin v. Bell S.*, No. 06-7464, 2008 WL 215565, at \*68 n.11 (E.D. La. Jan. 24, 2008) (quoting *Daugherty* for the proposition that employers are not required to fundamentally alter their hiring programs) (“Employers are not required to create light duty jobs to accommodate disabled employees. . . . As the Fifth Circuit has noted, the law does not ‘requir[e] affirmative action in favor of individuals with disabilities[; rather it] prohibits employment discrimination against qualified individuals with disabilities, no more and no less.’”).

<sup>147</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168–69 (10th Cir. 1999) (“However, the legislative history clearly distinguishes between the affirmative action of modifying the essential functions of a job (which is not required) and the duty to reassign a disabled person to an existing vacant job, if necessary to enable the disabled person to keep his or her employment with the company (which is required.)”; *Emrick v. Libbey-Owens-Ford Co.*, 875 F. Supp. 393, 398 (E.D. Tex. 1995) (“Moreover, the ADA does not require that an employer substantially modify its operations in order to ensure every disabled individual the benefits of employment.”).

<sup>148</sup> E.g., *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996).

<sup>149</sup> Within the preferential treatment context, it is assumed that modifications to employment criteria will be applied only to disabled individuals and not to individuals without disabilities. Of course, employers could alter standards for all employees, but by

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definition of affirmative action.<sup>150</sup> In these opinions, particular accommodation requests are regarded as requiring preferential treatment to the benefit of the disabled employee at the expense of the nondisabled employees.<sup>151</sup> Because the ADA does not require “mandatory preference”<sup>152</sup> but only mandates nondiscrimination, as the argument proceeds, the accommodation request must be denied.<sup>153</sup> These opinions emphasize equal opportunity as required by the ADA and focus their inquiry on whether disabled employees are provided the same opportunities as nondisabled employees. In short, these courts view the ADA as merely “prohibit[ing] employment discrimination against qualified individuals with disabilities, no more and no less.”<sup>154</sup>

The preferential-treatment argument takes many forms and is applied to a variety of contexts within reasonable-accommodation case law. Each version of the preferential-treatment argument is described in greater detail below.

### *1. No Preference for Disabled Employees*

Opinions adhering to the preferential-treatment definition of affirmative action emphasize that the ADA does not *require* employers to

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doing so the employer would not be showing a preference to the disabled employee on the basis of their disability.

<sup>150</sup> Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 994 (2004).

<sup>151</sup> Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties"*, 68 MO. L. REV. 863, 899.

<sup>152</sup> EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) (citing cases holding that the “Americans with Disabilities Act is not a mandatory preference act”).

<sup>153</sup> *Id.* at 1028–29.

<sup>154</sup> Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir.1995). *See also* Wernick v. Fed. Reserve Bank of N.Y., 91 F.3d 379, 384 (2d Cir. 1996) (“Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons.”); Rebecca Mastrangela, Comment, *Does the Americans with Disabilities Act of 1990 Impose an Undue Burden on Employers?*, 32 DUQ. L. REV. 269, 270 (1994) (“The ADA does not require affirmative action on the part of employers. It is intended only to enable disabled persons to compete in the workplace based on the same performance standards as nondisabled persons.”).

adopt preferences for disabled applicants or employees when making employment decisions. Stated succinctly, employers are not required to give preferences to disabled individuals over nondisabled individuals.<sup>155</sup> Courts adopting this perspective argue that the legislative history of the ADA supports this principle.<sup>156</sup> According to courts adhering to this view, such preferences would constitute affirmative action.<sup>157</sup>

Reassignment decisions are by far the most controversial, and they frequently invoke references to affirmative action based on preferential treatment.<sup>158</sup> Under the ADA, reassignment to vacant positions is included within the scope of possible reasonable accommodations.<sup>159</sup>

Reassigning employees to vacant positions may conflict with collective bargaining agreements, seniority systems, or legitimate nondiscriminatory employment policies. In *Barnett*, the Supreme Court held that reassignment requests that require the employer to violate a legitimate and consistently enforced seniority policy “ordinarily . . . [will] not require . . . [re]assignment.”<sup>160</sup> However, the Court granted the opportunity for plaintiffs to demonstrate “special circumstances [that] warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”<sup>161</sup> Outside the seniority context, courts have held that the ADA does not require

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<sup>155</sup> *Daugherty*, 56 F.3d at 700.

<sup>156</sup> See H.R. REP. NO. 101-485, pt. 2, at 56 (“In other words, the employer’s obligation is to consider applicants and make decisions without regard to an individual’s disability, or the individual’s need for a reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.”). *But see* *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (“Numerous courts have assumed that the reassignment obligation means something more than treating a disabled employee like any other job applicant.”).

<sup>157</sup> See *Daugherty*, 56 F.3d at 700 (“[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.”).

<sup>158</sup> Ball, *supra* note 150, at 958.

<sup>159</sup> 42 U.S.C. § 12111(9)(B) (2012).

<sup>160</sup> *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 406 (2002).

<sup>161</sup> *Id.* at 405.

reassignment in violation of a legitimate nondiscriminatory policy.<sup>162</sup> One court emphasized that such a requirement would constitute affirmative action.<sup>163</sup>

Similarly, courts addressing the question of whether disabled employees who are qualified but not the *most* qualified should receive a preference in filling vacant positions frequently reference the term “affirmative action.”<sup>164</sup> Courts adhering to this view argue that, in terms of qualifications, minimally—or unqualified—disabled employees should not “beat out” a more qualified nondisabled employee in hiring or reassignment decisions.<sup>165</sup> As one court emphatically stated:

[T]here is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group. *That is affirmative action with a vengeance.* That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or

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<sup>162</sup> *E.g.*, *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007).

<sup>163</sup> *Id.* at 484.

<sup>164</sup> *E.g.*, *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028–29 (7th Cir. 2000).

<sup>165</sup> *E.g.*, *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1311 (D.C. Cir. 1998) (Henderson, J., dissenting) (“As explained earlier, [Aka] did not [prove to be the more qualified candidate for the job]. Washington Hospital was under no duty to afford Aka a hiring preference—because of his disability—over a more qualified, non-disabled applicant.”); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996) (“Contrary to the suggestion by Wernick’s counsel in his brief and at oral argument, the Fed did not have an affirmative duty to provide Wernick with a job for which she was qualified; the Fed only had an obligation to treat her in the same manner that it treated other similarly qualified candidates.”).

requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing.<sup>166</sup>

These courts have emphasized that for both applicants and employees, preferences for disabled individuals are impermissible under the antidiscrimination aims of the ADA.<sup>167</sup> As noted earlier, however, the legislative history suggests that Congress only expressly acknowledged that preferences for applicants were not required.<sup>168</sup> Given that, the debate surrounding this particular issue rages on in the courts.<sup>169</sup>

## 2. No “Special” Treatment for Disabled Employees

Court opinions often refer to affirmative action to express disapproval of reasonable-accommodation requests that appear to grant disabled

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<sup>166</sup> *Humiston-Keeling*, 227 F.3d at 1028–29 (emphasis added). See also *Jackson v. Fujifilm Mfg. USA, Inc.*, No. 8:09-cv-01328-JMC, 2011 WL 494281, at \*2 (D.S.C. Feb. 7, 2011) (“The Fourth Circuit has not addressed whether the ADA requires an employer, as a reasonable accommodation, to give a current disabled employee preference in filling a vacant position when the employee is able to perform the job duties, but is not the most qualified candidate. However, most of the circuits . . . have found that the ADA is not an affirmative action statute and does not require such action.”). But see Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 469 (2002) (“Although affirmative action rhetoric has clouded this debate, the ADA’s central purpose of helping disabled individuals to participate fully in the American workplace supports preferring the reassignment rights of the disabled employee.”) (footnote omitted).

<sup>167</sup> E.g., *Humiston-Keeling*, 227 F.3d at 1028.

<sup>168</sup> H.R. REP. NO. 101-485, pt. 2, at 56 (1990).

<sup>169</sup> See, e.g., *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168 (10th Cir. 1999) (“However, the legislative history clearly distinguishes between the affirmative action of modifying the essential functions of a job (which is not required) and the duty to reassign a disabled person to an existing vacant job, if necessary to enable the disabled person to keep his or her employment with the company (which is required.)”); *Aka*, 156 F.3d at 1304 (citing H.R. REP. NO. 101-485, pt. 2, at 56) (“Although the ADA’s legislative history does warn against ‘preferences’ for disabled *applicants*, it also makes clear that reasonable accommodations for existing *employees* who become disabled on the job do not fall within that ban.”).

employees some form of special treatment.<sup>170</sup> Special treatment<sup>171</sup> may take many forms but may include providing disabled employees with additional privileges or perks compared with nondisabled employees. For example, as one federal district court opined, “[A] disabled employee has not earned the right to pick among reasonable accommodations because he would thereby gain greater rights than his nondisabled coworkers. Any other approach would require affirmative action on behalf of disabled employees at the expense of the nondisabled.”<sup>172</sup> In another reasonable-accommodation case, the Seventh Circuit rejected a request by a disabled employee to receive training from her employer to make her eligible for a position as sales manager.<sup>173</sup> Rejecting the plaintiff’s request, the court reasoned as follows:

If all [the plaintiff] wanted was an opportunity to compete for the job by enrolling in a training program offered to aspirants for sales manager positions, the employer could not refuse her on the ground that she was disabled unless her disability prevented her from participating in the program or serving in the job for which it is designed to qualify participants. But our plaintiff is seeking special training, not offered to nondisabled employees, to enable her to qualify. The Americans with Disabilities Act does not require employers to offer special training to disabled employees. It is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee’s disability . . . .<sup>174</sup>

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<sup>170</sup> See, e.g., *Walker v. Putnam Cty.*, No. 5:08-CV-00452 (CAR), 2010 WL 3732111, at \*8 (M.D. Ga. Sept. 14, 2010).

<sup>171</sup> Special treatment may also refer to preferences in hiring, for example. Here, special treatment, in terms of preferences in hiring or reassignment, is distinguished from special treatment in terms of job-specific privileges, perks, or exemptions.

<sup>172</sup> *Walker*, 2010 WL 3732111, at \*8.

<sup>173</sup> *Williams v. United Ins. Co. of Am.*, 253 F.3d 280, 282 (7th Cir. 2001).

<sup>174</sup> *Id.* (citations omitted). See also *Rehrs v. Iams Co.*, 486 F.3d 353, 358 (8th Cir. 2007) (“Here, P & G required all employees in Rehrs’s position to rotate shifts. Such a  
(continued)

The Seventh Circuit continued by emphasizing the burden to employers if such special treatment were afforded to disabled employees:

The burden that would be placed on employers if disabled persons could demand special training to fit them for new jobs would be excessive and is not envisaged or required by the Act. The duty of reasonable accommodation may require the employer to reconfigure the workplace to enable a disabled worker to cope with her disability, but it does not require the employer to reconfigure the disabled worker. A blind person cannot insist that her employer teach her Braille, though she may be able to insist that her employer provide certain signage in Braille to enable her to navigate the workplace.<sup>175</sup>

As the *Williams* opinion demonstrates, the unfairness of special treatment inheres not only in the so-called “greater rights” afforded to disabled individuals but also in attempts by individuals to obtain access to resources. Such resources may be available to nondisabled employees but remain disconnected from disability-related limitations on their ability to perform the job. In addition, affirmative action is referenced in cases where the requested accommodation is viewed as requiring less strenuous or less demanding essential job functions.<sup>176</sup> As one court made clear, even individualized supervision could render a reasonable accommodation request a form of preferential treatment:

To be sure, the ADA does not require an employer to accommodate a disabled employee by making special, individualized training or supervision available in order to shepherd that employee through what is an essential and

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generally applicable requirement was not discriminatory. The ADA does not require P & G to create a new straight shift position for Rehms.”).

<sup>175</sup> *Williams*, 253 F.3d at 282–83.

<sup>176</sup> *E.g.*, *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (“Additionally, Hoechst is not required to create light duty jobs to accommodate disabled employees.”).

legitimate requirement of the job. . . . [L]et us make clear that the ADA 'is not an affirmative action statute . . . .'"<sup>177</sup>

The tone of this subset of cases reveals that in most cases, special treatment serves as a proxy for requiring employers to lower their standards. Yet within the undue burden or reasonableness inquiry, courts should be able to decipher whether a particular accommodation request mandates that an employer lower its performance standards and expectations for disabled employees. Here, the affirmative-action reference seems especially superfluous.

### 3. *Third-Party Harms*

Opinions advancing the preferential treatment argument may also reference the possibility of third-party harms as a result of a particular accommodation request—in most cases, a reassignment to a vacant position.<sup>178</sup> In particular, references to affirmative action tend to appear in cases involving a legitimate nondiscriminatory policy, such as a seniority system or a policy of hiring the most qualified candidate for the job.<sup>179</sup> Most courts express strong reservations about pummeling the rights of third parties through accommodations that subvert the policies set in place by a legitimate and nondiscriminatory policy.<sup>180</sup> A passage from a Fourth Circuit opinion reflects this overall reservation:

The difference in this case is that requiring an employer to break a legitimate and non-discriminatory policy tramples on the rights of other employees as well. The ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers. . . . The ADA does not require reassignment when it would mandate that the employer bump another employee out of a particular position. Rather, an employer must be able to treat a disabled employee as it would any

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<sup>177</sup> *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 867 (7th Cir. 2005) (quoting *Williams*, 253 F.3d at 282).

<sup>178</sup> *E.g.*, *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001).

<sup>179</sup> *E.g.*, *id.*

<sup>180</sup> *E.g.*, *id.*

other worker when the company operates a legitimate, nondiscriminatory policy. A “contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.”<sup>181</sup>

In these cases, if the employer has a legitimate nondiscriminatory policy and consistently enforces that policy, it can defend against a charge of discrimination, alleging, for example, the failure to reassign.<sup>182</sup> For example, the employer could demonstrate that the disabled employee was treated no differently from nondisabled employees in the operation of that particular legitimate and nondiscriminatory reassignment policy.<sup>183</sup>

#### *E. Removal of Structural Barriers*

The structural-barriers definition of affirmative action focuses on the removal of barriers that hinder individuals with disabilities from equal access to employment opportunities.<sup>184</sup> Cases adopting the structural-barriers definition of affirmative action are few and far between. Despite their rarity, these cases reflect a firm commitment to ensuring that disabled individuals compete on a level playing field and that employers engage in active efforts to level that playing field by enabling the otherwise qualified employee to perform the job. As one court stated:

[T]hese provisions do not render the ADA an affirmative action program, but serve as a method of leveling the

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<sup>181</sup> *Id.* (quoting *Dalton v. Subaru–Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

<sup>182</sup> *E.g., id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See* Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 4 (1994) (“Our central thesis is that affirmative action is not a matter of affording ‘preferential treatment’ to its beneficiaries, but instead an attempt to offer them greater equality of opportunity in a social context marked by pervasive inequalities, one in which many institutional practices work to impede a fair assessment of the capabilities of those who are working class, women, or people of color.”).

playing field between disabled and nondisabled employees, in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer. In addition to providing individuals with disabilities an equal opportunity to pursue employment opportunities, the purpose of the ADA is to reduce societal costs of dependency and nonproductivity.<sup>185</sup>

The structural definition of affirmative action allows (or has the potential to allow) for more robust reasonable-accommodation claims when the scope of affirmative action is taken to its logical conclusion. Of course, courts must also take into account the reasonableness of the request and the undue-burden inquiry. At the core of the structural definition of affirmative action is a firm commitment to ensuring that employers take an active role in integrating individuals with disabilities into their work places.<sup>186</sup> Here, active efforts are required to eliminate the blatant and implicit forms of discrimination that function to exclude disabled individuals from the work force.<sup>187</sup>

#### V. AFFIRMATIVE ACTION IN REASONABLE ACCOMMODATION: DECIPHERING MEANING

As noted above, there are several definitions of affirmative action present in cases within the reasonable-accommodation context. Some definitions, such as the neutral and structural definition, serve as a proxy for the employer's duty—limited only by the undue-burden analysis, and in some cases, the overall reasonableness of the request.<sup>188</sup> Other references to affirmative action are included to suggest the unreasonableness of the request itself or the unreasonableness of the request vis-à-vis the effects on other employees.<sup>189</sup> Although these various

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<sup>185</sup> *Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997) (granting plaintiff's motion for summary judgment).

<sup>186</sup> *See Cooper*, *supra* note 54, at 1430.

<sup>187</sup> *Id.* at 1427–28.

<sup>188</sup> *See Williams v. United Ins. Co. of Am.*, 253 F.3d 280, 282 (7th Cir. 2001); *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 867 (7th Cir. 2005).

<sup>189</sup> *See EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Walker v. Putnam County*, No. 5:08-CV-00452, 2010 WL 3732111, at \*8 (M.D. Ga. Sept. 14, 2010).

definitions exist, there is little to no recognition by the courts referencing affirmative action in the reasonable-accommodation context that the multiple definitions of affirmative action may obscure the term's meaning across opinions. Given that, court citations to opinions referencing affirmative action that fail to recognize the differing contexts and definitions reduce the persuasiveness of the affirmative-action analogy. These two issues will be discussed in this Part to demonstrate that the affirmative-action analogy is often misplaced and rarely accompanied by analysis sufficient to justify its use in the reasonable-accommodation context.

*A. References to the Affirmative-Action Analogy are Misplaced and Rarely Accompanied by Sufficient Analysis*

Courts in a variety of contexts have referenced the affirmative-action analogy.<sup>190</sup> Although the contexts may vary considerably, the same few cases—and by and large one case—are consistently cited, and frequently without acknowledging either the different context or the different definitions of affirmative action.<sup>191</sup> In the vast majority of court opinions, references to affirmative action were cited as fleeting references in the course of denying reasonable-accommodation claims.<sup>192</sup> For example, a number of district court opinions referenced affirmative action—frequently citing to the *Daugherty* opinion or *Humiston-Keeling*—with little to no analysis justifying its inclusion in a discussion in the context of reasonable accommodation.<sup>193</sup>

A problem arises when the specific context in which the affirmative-action analogy is utilized is expanded beyond its intended scope. The justification of the affirmative-action analogy is very much built on the particular definition of affirmative action, but because there are several competing and conflicting definitions of affirmative action, a court's use of the term in one context will be based on the particular facts of the case. As such, expanding the analogy beyond the particular facts and context risks incorporating into reasonable accommodation opinions a term that may

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<sup>190</sup> See *supra* Part III tbls. 1–2.

<sup>191</sup> See *supra* Part III tbl. 3.

<sup>192</sup> E.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028–29 (7th Cir. 2000).

<sup>193</sup> See *supra* Part III tbl. 3.

carry more political controversy than actual relevance.<sup>194</sup> In some cases, the term refers to the affirmative obligations of employers,<sup>195</sup> while in other cases, the term refers to an illegitimate preference not supported by the statute.<sup>196</sup> Ultimately, at a global level, the failure to distinguish between contexts and definitional frames adds confusion to the reasonable-accommodation case law.

*Daugherty* regarded the plaintiff's reassignment request as requiring nothing less than a "fundamental alteration" of the City's existing hiring policy.<sup>197</sup> To the extent that the City was required to assign the plaintiff to full-time positions, such a reassignment would indeed require a fundamental alteration or subversion of existing City policy.<sup>198</sup> Furthermore, accepting the City's claim that it made good-faith efforts to inform Daugherty of available openings within the City, the plaintiff's lack of qualifications made it difficult to compete for these positions.<sup>199</sup> Finding that the City had no duty to accommodate, the Fifth Circuit held that, in order for the plaintiff's claim to survive, he had to demonstrate he was treated differently from other employees.<sup>200</sup> As the court noted:

Even viewing all the disputed evidence in favor of Daugherty, his ADA claim must fail because he did not show that he was treated differently from any other part-time employee whose job was eliminated. . . . There was no proof that the city treated him worse than it treated any other displaced employee.<sup>201</sup>

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<sup>194</sup> See, e.g., *Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F. Supp. 2d 1357, 1363 (S.D. Fla. 1999) (affirmative action cited under section discussing the "purposes" of the ADA) ("The statute was not designed to give disabled persons the power to invoke affirmative action . . .").

<sup>195</sup> E.g., *Hines v. Chrysler Corp.*, 231 F. Supp. 2d 1027, 1050 (D. Colo. 2002).

<sup>196</sup> E.g., *Quick*, 43 F. Supp. 2d at 1363.

<sup>197</sup> *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 699.

<sup>200</sup> *Id.* at 700.

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

Given the existence of the City's hiring policy and the plaintiff's lack of qualifications, the court's conclusion implies that nothing short of affirmative action would require the employer to reassign Daugherty. Hence, the oft-cited passage that affirmative action is not required by the ADA.<sup>202</sup>

There are reasons why the *Daugherty* opinion should not be so easily generalized to other contexts. First, *Daugherty* involved a plaintiff that was admittedly not a qualified individual with a disability for the position either held or desired.<sup>203</sup> Similarly, Daugherty was unable to meet the requirements for two of the three additional positions allegedly offered to him by the City's personnel office, including a toll booth position, fire dispatcher, and airport shuttle bus operator.<sup>204</sup> For the positions as a fire dispatcher and airport shuttle bus operator, Daugherty either failed to meet the civil service exam requirements or failed to take the exam.<sup>205</sup> For the toll booth position, Daugherty claimed the personnel office never informed him of the available position.<sup>206</sup> Given that, *Daugherty* should be distinguished in cases where the plaintiff is indeed a qualified individual with a disability under the ADA—that is, an individual able to meet the requirements of the position with or without a reasonable accommodation. Second, in *Daugherty*, there was a legitimate nondiscriminatory policy in place outlining the process for filling vacancies and requiring that full-time employees be given priority over part-time employees.<sup>207</sup> As a result, the third-party harms were much more relevant to the reassignment inquiry. Third, the court did little to address the question of whether the City need have only *considered* Daugherty for the other full-time positions, an issue of considerable disagreement in the circuits.<sup>208</sup> Similarly, the court opinion does not address the City's duty to reassign Daugherty to vacant part-time positions.<sup>209</sup>

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

<sup>203</sup> *Id.* at 698.

<sup>204</sup> *Id.* at 699.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

As one of the earliest ADA reasonable-accommodation cases, the case is not entirely responsive to the scope of the employer's duty to accommodate. The Fifth Circuit does not engage in substantive analysis to determine what the employer's duty should be but instead references affirmative action to describe what the employer's duty should not be.<sup>210</sup>

Perhaps the opinion discusses little relating to the employer's duty to accommodate in large part because the plaintiff's lack of qualifications rendered its duty a nullity. Ultimately, the affirmative-action analogy is employed to refer to an employee, who is admittedly unqualified, or at least ineligible, for his current position and other possible positions with the City, and who requests that the City disregard its legitimate policy and assign him to a full-time position ahead of other full-time employees, despite his lack of qualifications.<sup>211</sup> *Daugherty's* specific context reflects a particular definition of affirmative action that is centered on both the plaintiff's lack of qualifications *and* the disruption of the City's legitimate and nondiscriminatory policy.<sup>212</sup> Despite *Daugherty's* specific context, however, not all of the cases citing *Daugherty* adhere to its definition of affirmative action.<sup>213</sup>

#### *B. Definition of Affirmative Action Varies Across Opinions*

Failure to acknowledge and distinguish the differing definitions and contexts in which the affirmative-action analogy is utilized has led to confusing results across opinions. Cases that should be distinguished are treated as perfectly applicable. In other cases, facts and holdings are largely mischaracterized.

##### *1. Distinguishable Precedent*

In *EEOC v. Humiston-Keeling*, the court denied a reassignment reasonable-accommodation request by a disabled employee on the grounds that the chosen applicant was better qualified in terms of productivity.<sup>214</sup> In reaching its holding, the Seventh Circuit argued that as long as the

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<sup>210</sup> *Id.* at 700.

<sup>211</sup> *Id.* at 699–700.

<sup>212</sup> *Id.*

<sup>213</sup> *See, e.g.,* *Malabarba v. Chi. Tribune Co.*, 149 F.3d 690, 699–700 (7th Cir. 1998).

<sup>214</sup> 227 F.3d 1024, 1027 (7th Cir. 2000).

employer had a policy of hiring the better candidate, and that policy was consistently and honestly enforced, the employer did not have a mandatory duty to reassign the disabled employee to the vacant position.<sup>215</sup> The Seventh Circuit vigorously denounced the EEOC's argument that the employee was "entitled . . . to be given more consideration than nondisabled workers."<sup>216</sup> Furthermore, the court criticized the EEOC for interpreting reassignment as requiring that the disabled person receive a preference over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, and unless the employer can show undue hardship.<sup>217</sup>

In reaching its conclusion, the *Humiston-Keeling* opinion cited *Malabarba v. Chicago Tribune Co.*<sup>218</sup> as support for its claim that the ADA does not require affirmative action or mandatory preferences in hiring or reassignment over nondisabled candidates.<sup>219</sup> The *Malabarba* case, however, referenced affirmative action to emphasize the unreasonableness of the accommodation request given the plaintiff's total lack of qualifications, not necessarily for the proposition that the reassignment itself indicated preferential treatment vis-à-vis more qualified applicants.<sup>220</sup> As such, in *Humiston-Keeling*, affirmative action is defined as preferential treatment mandating "bonus points" to disabled applicants,<sup>221</sup> while in *Malabarba*, affirmative action is defined as an unreasonable accommodation given the plaintiff's lack of qualifications.<sup>222</sup>

## 2. Mischaracterizations

In an Eighth Circuit decision, *Huber v. Wal-Mart*, the court considered the question of whether Wal-Mart violated its duty under the ADA by

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<sup>215</sup> *Id.* at 1029.

<sup>216</sup> *Id.* at 1027.

<sup>217</sup> *Id.* at 1028.

<sup>218</sup> 149 F.3d 690 (7th Cir. 1998).

<sup>219</sup> *Humiston-Keeling, Inc.*, 227 F.3d at 1028 (citing *Malabarba*, 149 F.3d at 699–700).

<sup>220</sup> *Malabarba*, 149 F.3d at 699–700.

<sup>221</sup> *Humiston-Keeling*, 227 F.3d at 1027.

<sup>222</sup> *Malabarba*, 149 F.3d at 700 ("In our view, these suggested accommodations are unreasonable; each one would have saddled the Tribune with a duty that is not compelled by the ADA.").

declining to grant an accommodation request to a disabled employee, where the employee was qualified but not the most qualified for the job.<sup>223</sup> Huber sustained an injury while working for her employer and, as a result, was no longer able to fulfill the essential functions of the job.<sup>224</sup> After her injury and subsequent disability, Huber requested a reassignment to another vacant and equivalent position in the company.<sup>225</sup> Wal-Mart, claiming adherence to its policy of hiring the most qualified individual for the job, declined the reassignment request and subsequently filled the position with another nondisabled applicant.<sup>226</sup> The Eighth Circuit held that Wal-Mart did not violate its duty to provide a reasonable accommodation under the ADA.<sup>227</sup> In reaching its holding, the court noted that requiring Wal-Mart to turn away a superior applicant for the position would constitute “affirmative action with a vengeance.”<sup>228</sup>

The court in *Huber* cited *Midland Brake*<sup>229</sup> for the proposition that reassignments are automatic even when there is a superior, non-disabled candidate for the position.<sup>230</sup> This claim, however, mischaracterizes the *Midland Brake* court’s conclusion. In fact, the *Midland Brake* court clearly stated that “[t]he right to reassignment . . . is not absolute.”<sup>231</sup>

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<sup>223</sup> 486 F.3d 480, 481 (8th Cir. 2007); Dustin J. Manning, *Employment Law—Huber v. Wal-Mart Stores, Inc.: Does Reasonable Accommodation Under the Americans with Disabilities Act Require Preferential Treatment of a Disabled Employee?*, 31 AM. J. TRIAL ADVOC. 437, 437 (2007) (“*Huber* furthered a circuit split regarding whether the [ADA] ‘requires an employer, as a reasonable accommodation, to give a current disabled employee preference in filling a vacant position when the employee is able to perform the job duties, but is not the most qualified candidate.’”) (quoting *id.* at 482).

<sup>224</sup> *Huber*, 486 F.3d at 481.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 484.

<sup>228</sup> *Id.* (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000)).

<sup>229</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

<sup>230</sup> *Huber*, 486 F.3d at 483 (“In the Tenth Circuit, reassignment under the ADA results in automatically awarding a position to a qualified disabled employee regardless whether other better qualified applicants are available, and despite an employer’s policy to hire the best applicant.”).

<sup>231</sup> *Midland Brake*, 180 F.3d at 1166.

Rather, the decision emphasizes the “interactive process” as necessary in determining “whether an employee desires reassignment; whether there are vacant positions available at an equivalent or lesser position; whether such positions are truly vacant, whether reassignment would interfere with the rights of other employees or important business policies of the company, etc.”<sup>232</sup> By doing so, the court emphasized that “[o]nly through consideration in a reasonably interactive way can it be determined whether an employee desires reassignment.”<sup>233</sup>

### *C. Uncovering the Preferential-Treatment Debate*

The vast majority of cases referencing affirmative action in reasonable accommodation opinions do so in the course of rejecting the reasonable accommodation claim.<sup>234</sup> Most of these cases deny the claim on preferential treatment grounds.<sup>235</sup> For the cases examined, the most vehement opposition to reasonable accommodation occurs in cases where the plaintiff is not a qualified individual with a disability as defined by the ADA,<sup>236</sup> the plaintiff’s request is perceived as requiring that the employer

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *E.g.*, *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093–94 (5th Cir. 1996).

<sup>235</sup> *E.g.*, *Terrell v. USAIR*, 132 F.3d 621, 627 (11th Cir. 1998) (ruling against the employee on the grounds that she should not receive preferential treatment in the form of a part-time job if it meant part-time agents without disabilities would be discriminated against); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (providing a hypothetical of a dyslexic worker competing for a job with a non-dyslexic worker, stating that it is not disability discrimination for the employer to give the promotion to the best worker even if it is the employee without the disability; to require the employer to hire based on criteria other than who can do the job better would place the employer at a disadvantage).

<sup>236</sup> *See, e.g.*, *Toronka v. Cont’l Airlines, Inc.*, 411 F. App’x 719, 726 (5th Cir. 2011) (affirming summary judgment against plaintiff where plaintiff was not qualified for any of the positions available at his employer) (“It is not an employer’s responsibility to ‘fashion’ a new job, as Toronka asserts. For reassignment to be a reasonable accommodation, a position ‘must first exist and be vacant.’”) (quoting *Burch v. City of Nacogdoches*, 174 F.3d 615, 620 (5th Cir. 1999)); *Foreman*, 117 F.3d at 810 (finding that plaintiff was not disabled

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create a new position entirely,<sup>237</sup> or the plaintiff requests some form of special treatment vis-à-vis other nondisabled employees.<sup>238</sup> For example, the Seventh Circuit noted its disapproval with such preferential treatment stating:

To require [the employer] to retain the least able because of disability would handicap the able-bodied, and that is not required by the Act. Such handicapping, such discrimination in favor of the disabled, would invite the same criticisms as “reverse” discrimination on racial and sexual grounds—especially in a RIF [reduction in force] case, where a better worker would lose a job to a worse one merely because the better worker had the good fortune not to be disabled.<sup>239</sup>

The language of the court suggests a particular hostility to preferences largely on the grounds that this form of special treatment would place the employer at a competitive disadvantage.

After the plaintiff’s reasonable-accommodation claim is dismissed, the plaintiff can only prevail by establishing a different basis for discrimination under the ADA.<sup>240</sup> At this point, much of the analyses within the preferential-treatment cases center on whether the plaintiff can demonstrate disparate treatment in the decision not to grant the particular accommodation request.<sup>241</sup> References to affirmative action often fail to reach the undue-burden analysis and instead focus on the alleged

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under the ADA, lacked qualifications for reassignment, and that plaintiff’s accommodation request was unreasonable); *Turco*, 101 F.3d at 1093–94 (finding that plaintiff was not a qualified individual with a disability under the ADA).

<sup>237</sup> *E.g.*, *Terrell*, 132 F.3d at 626 (“Although part-time work, as the statute and regulations recognize, may be a reasonable accommodation in some circumstances (particularly where the employer has part-time jobs readily available), we hold that USAir was not required to *create* a part-time position for Plaintiff where all part-time positions had already been eliminated from the company.”).

<sup>238</sup> *E.g.*, *id.* at 627.

<sup>239</sup> *Matthews*, 128 F.3d at 1196.

<sup>240</sup> *Id.* at 1195–96.

<sup>241</sup> *See id.*

preferences reflected in the accommodation request by regarding those preferences as a proxy for reasonableness—or unreasonableness.<sup>242</sup> One district court noted its disagreement with such analysis:

Instead of claiming undue hardship, Defendants argue that the “ADA [does not] require affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.” . . . This line of reasoning diminishes the undue hardship assessment and shifts a court’s focus to whether the disabled employee received the same opportunity to be reassigned to a vacant position as available to all employees without disabilities. . . . The Court finds that these provisions do not render the ADA an affirmative action program, but serve as a method of leveling the playing field between disabled and nondisabled employees, in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer.<sup>243</sup>

As this passage suggests, once the court identifies what it regards as preferential treatment, the accommodation is no longer required; it becomes patently unreasonable, and the burden shifts to the plaintiff to demonstrate disparate treatment.<sup>244</sup> In most cases, this will be an insurmountable barrier. The accommodation request is presumptively unreasonable, and the employer is not required to demonstrate undue

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<sup>242</sup> See *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (stating that the court does not interpret that disabled persons are to be given priority over those not disabled under the ADA, implying that the preference provided to a disabled employee over a nondisabled employee is a proxy for unreasonableness).

<sup>243</sup> *Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 900–01 (D. Ariz. 1997) (quoting *id.*) (granting summary judgment in favor of plaintiff and finding that defendant’s policy violated the ADA).

<sup>244</sup> *Matthews*, 128 F.3d at 1195–96.

burden.<sup>245</sup> In short, a finding of preferential treatment bypasses the burden-shifting framework established under the ADA and knocks out the plaintiff's claim on unreasonableness grounds. The response to the question of whether a particular accommodation constitutes preferential treatment and whether preferential treatment exists under the ADA is dispositive in these cases.<sup>246</sup> Given that, how the term "preferential treatment" is defined is essential to a court's analysis. Yet, if preferential treatment is at the heart of the debate, then the term "affirmative action" is an imprecise proxy that is more likely to add confusion than clarity and precision.

## VI. CONCLUSION

Proponents and advocates of disability rights may be concerned that some of the definitions utilized by the courts reflect a view of affirmative action—and possibly, reasonable accommodation—that is centered on the individual's lack of qualifications or preferential treatment at the expense of nondisabled individuals.<sup>247</sup> From a political standpoint, there is reason to be concerned with the use of the affirmative-action frame in court

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<sup>245</sup> See, e.g., *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288–89 (D.C. Cir. 1998) (explaining the test used to determine disparate treatment, emphasizing that the burden shifts to the employer to provide a nondiscriminatory reason for the employment decision; once provided, the burden again shifts to the employee to prove that the reason provided was merely a pretext).

<sup>246</sup> See, e.g., *Ransom*, 983 F. Supp. at 901; *Aka*, 156 F.3d at 1311.

<sup>247</sup> It should be noted that even employers have referenced affirmative action when refusing to grant an accommodation that the employer deems patently unreasonable. By doing so, these employers have equated unreasonableness to affirmative action. See, e.g., *Gile v. United Airlines, Inc.*, 213 F.3d 365, 374 (7th Cir. 2000) ("United is wrong to say that it constitutes 'affirmative action' to reassign Gile to a vacant position for which she was entitled by seniority and which would have accommodated her disability. If United had reassigned Gile as she requested, the only preferential treatment of Gile would have been that, unlike nondisabled employees who were not on medical leave, she did not have to fulfill the technical requirement of casting her November bid.").

opinions resolving reasonable-accommodation claims.<sup>248</sup> As prominent disability rights advocate Ruth Colker has argued:

Courts in the United States have undermined the affirmative treatment principles underlying disability discrimination law, despite the clear statutory language to the contrary. . . . Because the statute does not permit a symmetrical approach in which all individuals can claim disability discrimination, the courts have had to undermine the exclusive focus on people with disabilities by drastically limiting the scope of that class. . . . One can therefore find a common anti-affirmative action thread running through disability, race, and sex antidiscrimination law in the United States, despite differing statutory language.<sup>249</sup>

The use of the affirmative-action analogy in the disability context will indeed imbue cases with an air of political controversy as courts<sup>250</sup> and commentators<sup>251</sup> have noted. One court even went so far as to grant the

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<sup>248</sup> See Befort & Donesky, *supra* note 60, at 1081 (“But as the federal courts increasingly have used anti-affirmative action rhetoric in interpreting the ADA, the question arises whether the generally negative reaction toward affirmative action has fueled such attacks or whether a backlash specifically against the ADA is underway.”) (footnote omitted).

<sup>249</sup> Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness, and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 222 (1997).

<sup>250</sup> *E.g.*, *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) (discussing affirmative-action analogy in the context of § 504 of the Rehabilitation Act) (“In fact, the very use of the phrase ‘affirmative action’ in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term.”).

<sup>251</sup> *E.g.*, Befort & Donesky, *supra* note 60, at 1049 (“Accordingly, we believe that the debate should move away from the politically charged label of affirmative action and towards establishing workable boundaries for determining when an employer is required to reassign an employee with a qualifying disability as a reasonable accommodation. This

(continued)

plaintiff's request that the defense counsel be prohibited from using the term "affirmative action" at trial.<sup>252</sup> Given the highly controversial nature of the term, courts should exercise caution when referencing it in opinions.

Outside of the political connotations of the term, however, the use of the affirmative-action analogy by courts is both imprecise and lacking in sufficient clarity. If some courts are extinguishing plaintiffs' claims by finding preferential treatment, then the definition of preferential treatment should be more clearly defined. Similarly, as the debate continues on whether preferential treatment is required as opposed to permitted for employees—or more broadly, whether preferential treatment exists under the ADA at all—courts must acknowledge the contours of the debate and conduct careful analysis in resolving that question. Such analysis will require that courts carefully distinguish cases and thoroughly demonstrate the applicability of other cases. Given that, references to terms such as "affirmative action" must be sufficiently explained or else removed altogether. Without adopting a preferred definition of affirmative action, the multiple and conflicting definitions at work confuse doctrine and may prevent plaintiffs from prevailing on viable claims.

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shift in focus is necessary if the ADA is to fulfill its fundamental goal of assuring that individuals with disabilities are enabled to participate fully in the American workplace.”)

<sup>252</sup> See *Davoll v. Webb*, 194 F.3d 1116, 1136–37 (10th Cir. 1999) (finding district court's grant of plaintiff's motion to prohibit defense counsel from using terms like "affirmative action," "special rights," and "preferences" to be harmless error).

