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Toward an "Unqualified" Otherwise Qualified Standard: Job Prerequisites and Reasonable Accommodation under the Americans with Disabilities Acts

John E. Rumel
University of Idaho College of Law, jrumel@uidaho.edu

TOWARD AN "UNQUALIFIED" OTHERWISE QUALIFIED STANDARD: JOB PREREQUISITES AND REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

BY
JOHN E. RUMEL*

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* Associate Professor of Law, University of Idaho College of Law. J.D., 1981, University of California Hastings College of Law; B.A., 1977, University of California, Santa Cruz. The author would like to thank the participants at the inaugural Inland Northwest Junior Scholars workshop, including law faculty members from the University of Idaho College of Law and Gonzaga University School of Law, who made helpful comments concerning an earlier version of this article. The author would also like to thank his University of Idaho College of Law colleague Professor Monique Lillard for her always sage contributions concerning his scholarship in the employment law area. Lastly, the author would like to thank the College of Law for supporting his work on this article with a summer research stipend. In the interest of full disclosure, the author notes that he was one of the attorneys of record for plaintiff and appellant Trish Johnson in her action in the District Court for the District of Idaho and on her appeal to the Ninth Circuit Court of Appeals; however, his role in the case was minimal: he was not lead counsel at either the district court or on appeal and did not draft the briefs or participate in oral argument at either level.

I. INTRODUCTION

Much has been written about the Americans with Disabilities Act's (ADA) requirement that an employer provide qualified, but disabled, individuals with a reasonable accommodation, if accommodation is necessary to allow the individual to perform the essential functions of the position that he or she holds or seeks.[1] For example, it is beyond cavil under the ADA that a school district would be required to provide a teacher who possesses the necessary education, skills, and certification, but who suffers from a degenerative disease that impairs his or her ability to walk, with a classroom near the first floor entrance to the building or, if the teacher is assigned to an upper floor, a classroom near an elevator. Much less, however, has been said about the converse of this issue. Specifically, scant case law and commentary exists concerning whether an employer must provide a reasonable accommodation to

1. *See, e.g.*, W. Robert Gray, *The Essential Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Justice*, 22 N.M. L. REV. 295 (1992); Michel Lee, *Searching for Patterns and Anomalies in the ADA Employment Constellation: Who Is a Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?* 13 LAB. LAW. 149 (1997); Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 544 n.93 (2013) (collecting scholarship on the duty to provide reasonable accommodation under the ADA); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2011); 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 (1991); Bruce M. Familant, Comment, *The Essential Functions of Being a Lawyer with a Non-Visible Disability: On the Wings of a Kiwi Bird*, 15 T.M. COOLEY L. REV. 517 (1998). For the view of a vocational expert on the essential function and reasonable accommodation issue, see ROBERT A. THRUSH, ADA ESSENTIAL FUNCTION IDENTIFICATION: A DEFINITIVE APPLICATION OF TITLE I (1993).

an employee or applicant who is qualified in that he or she can perform the essential functions of a position, with or without reasonable accommodation, but who needs a reasonable accommodation to satisfy job prerequisites – such as education, experience, skills, or licensing – mandated by the employer or state or federal authorities.[2] Thus, there has been far less discussion – and both the Equal Employment Opportunity Commission (EEOC) and courts addressing the issue have been far less clear – about whether that same school district would be required to provide a teacher who indisputably can present lessons, manage a classroom, and interact with colleagues and students' parents and guardians with an accommodation so that he or she could obtain additional education in order to satisfy internal school district or state-imposed licensing requirements.[3] This Article will discuss this job prerequisite qualification issue and will ultimately conclude that the ADA imposes a reasonable accommodation requirement on an employer under these latter circumstances – albeit under certain limitations consistent with the ADA's other substantive requirements.

Part II of this article delineates the statutory and regulatory scheme underlying the ADA as it pertains to defining qualified individuals with disabilities and the duty to reasonably accommodate such individuals, focusing on the ADA's statutory text and the EEOC's regulations interpreting it.[4] Part III discusses the relatively scant case law addressing the job prerequisites and reasonable accommodation issue, with emphasis on the district court's and Ninth Circuit Court of Appeals' decisions in *Johnson v. Board of Trustees of Boundary County School District No. 101*.[5] Part IV analyzes the ADA

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2. The few articles written on the subject are cursory, practitioner-oriented, and either summarize the Ninth Circuit's recent decision in *Johnson v. Board of Trustees of Boundary County School District No. 101*, 666 F.3d 561 (9th Cir. 2011) (holding that an employer has no duty to reasonably accommodate an employee who did not satisfy a job prerequisite – in that case, hold a current state-issued teaching certificate), *see, e.g.*, Frank C. Morris, Jr., *Selected Developments Under the Americans with Disabilities Act*, *in* 1 AM. LAW INST., CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 131 (2012), *available at* <http://files.ali-cle.org/files/coursebooks/pdf/CU004_chapter_56.pdf>, or discuss cases that blur (arguably, appropriately) the difference between job prerequisites and essential functions. *See* Morris, *supra* (citing Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17 (1th Cir. 2011)).

3. The above-discussed examples are taken from the school district employment context – a milieu where, because of state- or employer-mandated education, training and/or licensing requirements, both the job prerequisites issue and the essential function issue are invariably present. However, the issue of whether an employer must provide a reasonable accommodation to employees to assist them in satisfying job prerequisites may arise in any employment context where the employer or state imposes job-related prerequisites.

4. *See infra* notes 14-27 and accompanying text.

5. No. CV-09-61-N-BLW, 2010 WL 530070 (D. Idaho Feb. 9, 2010), *aff'd*, 666 F.3d 561

statutory and regulatory scheme concerning the issue.[6] It concludes that, although the plain language of the ADA and its legislative history, including the House and Senate Reports accompanying the statute and its statutory predecessor, section 504 of the federal Rehabilitation Act, militate in favor of a conclusion that an individual is qualified under the ADA if he or she can satisfy all job prerequisites (and essential functions of a position) with a reasonable accommodation, neither the ADA's plain language nor legislative history definitively resolve the job prerequisites/reasonable accommodation issue.[7] It further concludes that, like the ADA's plain language and legislative history, the EEOC's regulations and guidances are less than clear on the job prerequisites/reasonable accommodation issue, but that the position taken by the EEOC in its amicus curiae brief during appellate proceedings in the *Johnson* case is, in essence and with only slight modification, the standard that should be used to resolve the issue.[8] Part V proposes that standard, i.e. that individuals with a disability will be otherwise qualified under the ADA – and employers will have a duty to reasonably accommodate such individuals – when they can meet all job prerequisites of the position they hold or seek, except for any job prerequisite that they are unable to satisfy because of their disability, where a reasonable accommodation will enable them to satisfy the job prerequisite.[9] It also discusses why this proposed standard is consistent with the purposes of the ADA and remedies the recurrent judicial tendency to improperly narrow the class of ADA claimants and thereby avoid reasonable accommodation analysis.[10] It further discusses why the standard would balance the legitimate interests of employers and individuals with disabilities.[11] And, it discusses how the factual circumstances underlying the relevant judicial decisions would be resolved under the proposed standard.[12] Part VI concludes by suggesting that, at the very least, the EEOC should make clear that the ADA requires that employers reasonably accommodate employees or applicants vis-à-vis job prerequisites by affirming and

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(9th Cir. 2011); *see infra* notes 28-111 and accompanying text.

6. *See infra* notes 112-60 and accompanying text.
7. *See infra* notes 112-43 and accompanying text.
8. *See infra* notes 144-60 and accompanying text.
9. *See infra* note 161 and accompanying text.
10. *See infra* notes 162-68 and accompanying text.
11. *See infra* notes 169-80 and accompanying text.
12. *See infra* notes 181-205 and accompanying text.

restating its litigation position in *Johnson* by including the proposed standard in its regulations and guidances.[13]

II. THE ADA AND THE EEOC REGULATIONS: THE STATUTORY AND REGULATORY SCHEME RELATING TO QUALIFIED INDIVIDUALS WITH DISABILITIES, QUALIFICATION STANDARDS/JOB SELECTION CRITERIA AND REASONABLE ACCOMMODATIONS

Congress enacted the ADA in 1990,[14] with an effective date in 1992,[15] and amended the Act in 2008[16] in response to several restrictive Supreme Court decisions.[17] In both instances, Congress assigned the administration of the Act to the EEOC.[18] In its most fundamental aspect, the ADA was designed to remedy and eliminate discrimination – particularly in the workplace, but also in other critical facets of everyday life – against disabled, but qualified, individuals by requiring that employers provide reasonable accommodations to individuals covered by the Act.[19] Thus, in the Findings and Purposes provision of the ADA, Congress found, among other things, "that discrimination against individuals with disabilities persists in such critical areas as employment," and "that the continu[ed] existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and

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13. *See infra* notes 206-212 and accompanying text.

14. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-213 (Supp. II 2008)).

15. *Id.* § 108, 104 Stat. at 337; *see also* 42 U.S.C. § 12111 note – Effective Date.

16. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

17. *See* H.R. REP. NO. 110-730, at 5 (2008), *cited in* Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 861 (9th Cir. 2009); *see also* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L. J. 187, 201-02 (2010).

18. 42 U.S.C. § 12116 (Supp. II 2008) provides that "the Commission shall issue regulations in an acceptable format to carry out [the ADA] in accordance with subchapter II of chapter 5 of title 5, United States Code." 42 U.S.C. § 12111 defines "Commission" as "the Equal Employment Opportunities Commission."

19. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstruction of the Definition of Disability*, 42 VILL. L. REV. 409, 583 n.869 (1997) (quoting Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993) ("The ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society.")), *aff'd*, 9 F.3d 1067 (3d Cir. 1993); *see also* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 22 (2005) (stating that once a plaintiff proves he or she is disabled and qualified, the plaintiff "is within the ADA's protected class and . . . the employer is required to redesign workplace policies, practices, equipment, and procedures").

nonproductivity."[20] Specifically, the ADA's anti-discrimination provisions state as follows:

> (a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[21]
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> (b) As used in subsection (a), the term "discriminate" includes
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> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
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> . . .
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> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.[22]

The ADA further provides a defense to a charge of discrimination under the Act, stating that

> [i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.[23]

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20. 42 U.S.C. § 12101; *see also* Laura F. Rothstein, *Reflections on Disability Discrimination Policy – 25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147, 158 (2000).

21. 42 U.S.C. § 12112(a). Under the ADA, "[t]he term 'disability' means, with respect to an individual . . . a physical or mental impairment that substantially limits one or more major life activities of such individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment . . . ." *Id.* § 12102(1)(A). Under the 2008 amendments to the ADA, "'[m]ajor life activities' include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id.* § 12102(1)(B). Under those same amendments, Congress provided that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." *Id.* § 12102(4)(A).

22. *Id.* §§ 12112(b)(5)(A), (b)(6). The EEOC has essentially replicated §§ 12112(b)(5) and (b)(6) in regulations promulgated at 29 C.F.R. § 1630.9 (2013) and § 1630.10, respectively.

23. 42 U.S.C. § 12113(a).

The ADA defines "qualified individual with a disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.... [C]onsideration shall be given to the employer's judgment as to what functions of the job are essential."[24] The EEOC has expanded upon this statutory definition, defining "qualified individual with a disability" as one who "satisfies the requisite skills, experience, education and other job-related requirements of the employment position such individual holds or desires, and [who], with or without reasonable accommodation, can perform the essential functions of such position."[25] According to the EEOC, the "essential functions" of a job are the "fundamental job duties," not including "the marginal functions of the position."[26]

Under the ADA, a "reasonable accommodation" includes, among other things, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[27]

III. THE CASES

Four reported case, with varying factual scenarios, illustrate the complexities and nuances inherent in analyzing the essential function, job prerequisite, qualification standards/job selection criteria, and reasonable accommodation issues under the ADA and the EEOC regulations interpreting it.

In *McDonald v. Menino*,[28] two municipal employees, one who suffered from kidney disease and one who was blind and confined by cerebral palsy to a wheelchair, moved outside of the city of Boston so that they could obtain necessary care and accessible housing for their medical conditions which they could not affordably obtain in the city.[29] After the city fired them for failing to comply with a municipal

24. 42 U.S.C. § 12111(8).
25. 29 C.F.R. § 1630.2(m).
26. 29 C.F.R. § 1630.2(n)(1).
27. 42 U.S.C. § 12111(9)(B).
28. No. 96-10825-RGS, 1997 WL 106955 (D. Mass. Jan. 3, 1997).
29. *Id.* at *1.

ordinance requiring city employees to reside within the city limits, the two employees brought ADA claims against the city of Boston and various city officials.[30] The defendants moved to dismiss on the ground that the ordinance was facially neutral because it did not exclude disabled individuals from city employment. The district court denied the motion, finding and concluding that the plaintiffs were disabled,[31] and addressing the qualified individual – and, specifically, essential function – issue as follows:

> A person with a disability must be able to perform the essential functions of the job that he or she holds or desires, with or without reasonable accommodation, in order to merit the protections of the ADA.... Defendants argue that because residency is such a function, plaintiffs are unable "to meet all of [their job] requirements in spite of [their] handicap." This is the heart of the defendants' case. Can a residency requirement be defined as an "essential job function" for purposes of the ADA?... Some job requirements, like regular attendance, punctuality, and sobriety, are so fundamental to the workplace that they are, for all practical purposes, deemed essential as a matter of law. However, other requirements, like residency or the payment of local property taxes, might not be deemed as indispensable by a factfinder viewing the matter from the perspective of the ADA.... The issue, it should be stressed, is not whether the City has acted reasonably or unreasonably in promulgating the residency requirement as a condition of municipal employment. The case law seems to place the City well within its rights in doing so. The issue rather is whether the ADA might compel the granting of the plaintiffs' request for an accommodation (waiver).[32]

The court next discussed the special nature of the ADA's reasonable accommodation requirement in the broader context of anti-discrimination laws, as well as the ADA's impact on otherwise neutral job selection criteria:

> The ADA mandate that employers must accommodate sets it apart from most other anti-discrimination legislation. Race discrimination statutes mandate equality of treatment... In contrast, an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether a reasonable accommodation could eliminate that barrier. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability... because of their disability, may not be used unless the employer demonstrates

30. *Id.*
31. *Id.* at *2.
32. *Id.* at *3 (citations omitted).

> that criteria, as used by the employer, are job-related to the position . . . and are consistent with business necessity.[33]

Lastly, the court quickly dispatched the defendants' factual arguments, stating as follows:

> [D]efendants claim that granting the plaintiffs a waiver would violate the residency policy, subject the City to liability, and impose an undue hardship. That an exception to a policy that allows no exceptions would be a violation of that same policy is, of course, a tautology. How an exemption of the plaintiffs would inflict liability on the City, the defendants do not explain. Nor do they identify the specific hardship that the City will endure. There is no claim that the City would incur a significant expense in adapting the working conditions of either job to the plaintiffs' needs. Both plaintiffs successfully performed their jobs for ten years without any accommodation of this kind. More likely, the City fears the deleterious precedent that an exception for these plaintiffs might pose in its efforts to enforce the residency policy on other employees. Nothing in the record, at least as yet, demonstrates that the City has in fact attempted such enforcement on a citywide basis.[34]

Thus, because plaintiffs had sufficiently alleged a claim for relief under the ADA, the court denied the defendants' motion to dismiss.[35]

In *Williams v. United Insurance Co. of America*,[36] plaintiff Williams, who had been discharged from her job as a door-to-door insurance salesperson after a series of leg injuries prevented her from continuing to work in a job that required walking, filed suit against her former employer under the ADA.[37] Williams alleged that the company should have promoted her to sales manager and that, if she were not qualified for that job, it should have trained her for the position.[38] The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the employer, reasoning that

> [i]f an otherwise disabled person can perform to the employer's satisfaction with a reasonable accommodation to her disability, the employer is required to provide the accommodation. . . . But the employer is not required to give the disabled employee preferential treatment, as . . . by waiving his normal requirements for the job in question. That is what the plaintiff is seeking. She wants a job, that of sales manager, for which she is not qualified.

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33. *Id.* (citations and quotation marks omitted).

34. *Id.* at *4 (citations omitted). Indeed, counsel for the defendants acknowledged at oral argument on the motion to dismiss that many city employees were exempt from the residency requirement under provisions of a collective bargaining agreement. *Id.* at *4 n.11.

35. *Id.* at *4.

36. 253 F.3d 280 (7th Cir. 2001).

37. *Id.* at 281.

38. *Id.* at 281-82.

> But here is the novelty in the case. The plaintiff wants training that will equip her with the qualifications for the job of sales manager that at present she lacks. If all she 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 [ADA] 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, though it does of course create an entitlement that disabled employees and applicants for employment would not otherwise have to consideration of ways of enabling them to work despite their disability. 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.[39]

In *Bates v. United Parcel Services, Inc.*,[40] a class of hearing-impaired employees and job applicants who could not pass a Department of Transportation (DOT) hearing standard imposed by United Parcel Services (UPS) on all of its package-car drivers sued UPS, alleging violations of the ADA and California state law.[41] The district court found in favor of the plaintiffs on the ADA liability issues and eventually awarded them injunctive relief.[42] Reviewing the matter en banc, the Ninth Circuit vacated in part, reversed in part, and remanded the matter to the district court for further consideration.[43]

The court of appeals first characterized the UPS job selection

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39. *Id.* at 282-83 (citations omitted); *see also* Warren v. Volusia Cnty., 188 F. App'x 859, 863 (11th Cir. 2006) ("retraining is not a reasonable accommodation" under the ADA); Riley v. Weyerhaeuser Paper Co., 898 F. Supp. 324, 328 (W.D. N.C. 1995) ("[I]t appears to the Court that imposing an obligation on an employer to retrain a disabled employee in a new line of work goes far beyond the intended scope of the ADA to prevent employment discrimination against qualified individuals with disabilities."); Howell v. Michelin Tire Corp., 860 F. Supp. 1488, 1492 (M. D. Ala. 1994) ("Obviously, the employer is not required to reassign a disabled person to a vacant position unless the disabled person is qualified for the position.").

40. 511 F.3d 974 (9th Cir. 2007) (en banc).

41. *Id.* at 981-82.

42. *Id.* at 982.

43. *Id.*

criteria and delineated the ADA's qualified individual and discrimination standards as follows:

> The hearing standard at issue here is a *facially discriminatory* qualification standard because it focuses directly on an individual's disabling or potentially disabling condition.
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> . . .
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> A "qualified individual" is "an individual with a disability who, *with or without reasonable accommodation,* can perform the *essential functions* of the employment position that such individual holds or desires." . . . "If a disabled person cannot perform a job's 'essential functions' (even with a reasonable accommodation), then the ADA's employment protections do not apply." "If, on the other hand, a person can perform a job's essential functions, and therefore is a qualified individual, then the ADA prohibits discrimination" with respect to the employment actions outlined in 42 U.S.C. § 12112(a).
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> Discrimination under the ADA includes the use of "*qualification standards,* employment tests or other selection criteria that screen out or *tend to screen out* an individual with a disability or a *class of individuals with disabilities* unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity."
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> Where an across-the-board safety "qualification standard" is invoked, the question then becomes what proof is required with respect to being a "qualified individual," that is, one who can perform the job's essential functions. Before an employee can challenge an employer's qualification standard, however, an employee must first prove that he is a "qualified individual" within the meaning of the ADA, that is, one who can perform the job's essential functions with or without reasonable accommodation.[44]

The Court next summarized the contentions of the parties.[45] The named plaintiffs and other plaintiff class members contended that they were qualified individuals under the ADA in that they were able to perform all of the essential functions of the package-car driver position, including being a safe driver, notwithstanding that they could not meet DOT hearing standards due to their disability.[46] The plaintiffs also contended that meeting DOT hearing standards, although a job requirement, was not an essential function of the position.[47] In contrast, UPS contended that that the plaintiffs were not

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44. *Id.* at 988, 989 (citations omitted).
45. *Id.* at 989-90.
46. *Id.*
47. *Id.*

qualified individuals under the ADA because they could not meet UPS's job requirement that all drivers satisfy the DOT hearing standard and because they could not perform an essential function of the job, i.e. obtain DOT certification to drive commercial vehicles.[48] UPS also argued that plaintiffs were required to demonstrate they were safe drivers, not only in the sense that they had clean driving records but also in the sense that they were safe drivers despite being hearing impaired.[49]

The court then adopted the EEOC's two-step approach for determining whether an individual is qualified under the ADA, stating that:

> [q]ualification for a position is a two-step inquiry. The court first examines whether the individual satisfies the "requisite skill, experience, education and other job-related requirements" of the position. The court then considers whether the individual "can perform the essential functions of such position" with or without a reasonable accommodation.[50]

Applying this standard, the court upheld the district court's determination that the relevant named and class member plaintiffs satisfied UPS's job selection criteria.[51] Specifically, the court found that "[t]he package-car driver job requires an applicant to meet UPS's threshold seniority requirements for the package-car driver position, complete an application, be at least twenty-one years of age, possess a valid driver's license, and have a clean driving record by UPS's local standards."[52] Based on these findings, the court concluded that the district court's determination that the named plaintiffs had met these prerequisites was not clearly erroneous.[53]

Drawing a critical distinction between qualifications standards for and the essential functions of a position, the court delineated the applicable legal standard as follows:

> To prove that he is "qualified," the applicant also must show that he can perform the "essential functions" of the job.... "Essential functions" are not to be confused with "qualification standards," which an employer may establish for a certain position. Whereas "essential functions" are basic "duties," "qualification standards" are "personal and professional attributes" that may include "physical, medical [and] safety" requirements. The

48. *Id.* at 990.
49. *Id.*
50. *Id.* at 990.
51. *Id.*
52. *Id.*
53. *Id.*

difference is crucial.

> The statute does not require that a person meet each of an employer's established "qualification standards," however, to show that he is "qualified." And, indeed, it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge.[54]

The court further noted:

> While the plain language of the statute suffices to support our conclusion, it bears noting that the legislative history favors our reading as well. One of the Senate committee reports states that the qualification standard section of the ADA was meant to apply to "a person with a disability [who] applies for a job and meets all selection criteria *except one that he or she cannot meet because of a disability.*" S.Rep. No. 101–116, at 37 (1989) (emphasis added). The legislative history also cites with approval *Prewitt v. U.S. Postal Serv.,* 662 F.2d 292, 306 (5th Cir.1981) (cited by H. Rep. No. 101–485(III), at 42) (1990) *reprinted in* 1990 U.S.C.C.A.N. 445, 446, a Rehabilitation Act case that adopted the same prima facie case standard adopted here. *See Prewitt,* 662 F.2d at 306 (requiring the plaintiff to prove as part of his prima facie case "that he is qualified for the position under all *but the challenged criteria*" (emphasis added)).[55]

The court then upheld the district court's determinations concerning the essential functions of the package-car position, stating:

> At trial the parties agreed that two of the "essential functions" of the package-car driver position are (1) "the ability to communicate effectively" and (2) "the ability to drive safely."
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> . . .
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> Only the second essential function, "safe driving," is at issue in this appeal. UPS argues that "hearing" at a level sufficient to pass the DOT hearing standard is either a stand-alone essential job function or part and parcel of being a safe driver. This point illustrates the critical difference between a job's essential functions – "effective communication" or "safe driving" – versus a qualification standard based on "personal or professional attributes," such as hearing at a certain level. The question, then, is whether plaintiffs established that they meet the essential function of safe driving.[56]

The court concluded that district court had correctly determined that the named plaintiffs had met UPS's threshold job requirements and were, therefore, otherwise qualified individuals under the ADA.[57]

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54. *Id.* at 990 (citations omitted).
55. *Id.* at 990 n.6 (citations omitted).
56. *Id.* at 991, 992.
57. *Id.* at 992.

The court remanded the matter for additional proceedings before the district court concerning whether the named plaintiffs, as qualified individuals, could perform the essential function of safely driving a package car and concerning reasonable accommodation issues.[58]

Finally, in *Johnson v. Board of Trustees of Boundary County School District No. 101*,[59] plaintiff Johnson filed a complaint against defendants Board of Trustees of Boundary County School District (the Board) and the Superintendent of the School District concerning the Board's decision to terminate her employment after a major depressive episode prevented her from completing the required course work to renew her teaching certificate.[60] Johnson asserted a number of claims, including claims for disability discrimination in violation of the Idaho Human Rights Act (IHRA), the Rehabilitation Act, and the ADA.[61] As to her disability discrimination claims, Johnson contended that the defendants discriminated against her in violation of the IHRA, the Rehabilitation Act, and the ADA by failing to reasonably accommodate her disability when they refused to seek provisional certification on her behalf from the Idaho State Board of Education (SBE). After Johnson and the defendants filed cross-motions for summary judgment, the district court granted summary judgment in favor of the defendants on each of Johnson's claims.[62]

As to Johnson's disability discrimination claims, the court dismissed Johnson's ADA claim, based on Johnson's admission that the claim was time barred.[63] Applying an ADA analysis to Johnson's IHRA and Rehabilitation Act claims, the court granted summary judgment to defendants on those claims as well.[64] The court held that, because Johnson did not possess a valid Idaho teaching certificate at the time she requested accommodation, she was not a "qualified" employee and, therefore, not entitled to a reasonable accommodation under the ADA.[65] In so holding, the court first stated as follows:

> The ADA prohibits employers from discriminating against a "qualified" employee with a disability, and requires employers to

58. *Id.* at 994. The court also remanded the matter to the district court for an evaluation of UPS's business necessity defense. *Id.* at 997.

59. No. CV-09-61-N-BLW, 2010 WL 530070 (D. Idaho Feb. 9, 2010).

60. *Id.* at *1.

61. *Id.*

62. *Id.* at *2.

63. *Id.* at *7.

64. *Id.* at *10.

65. *Id.* at **8-9.

> provide "reasonable accommodations" to the known physical or mental limitations of such an individual. Johnson asserts that approval of her request to seek provisional certification would have been a reasonable accommodation. . . .
>
> However, to survive summary judgment, an ADA plaintiff must first establish, inter alia, that she was a "qualified individual." Johnson's claim fails because at the time she requested accommodation, she was no longer "qualified" to hold a teaching position in the State of Idaho.[66]

The court next recited the two-step inquiry regarding job prerequisites and the ability to perform the essential functions of the position, with or without reasonable accommodation, set forth in EEOC regulations and Interpretative Guidance.[67] The court also noted that the two-step inquiry had been adopted by the Ninth Circuit in *Bates v. United Parcel Service, Inc.*,[68] and further acknowledged that, in *Bates*, "the Ninth Circuit held that the plain language of 42 U.S.C. § 12111(8) 'does not require that a person meet each of an employer's established "qualification standards" . . . to show that he is "qualified."'"[69]

The court, however, distinguished *Bates* and held that, because Johnson's teaching certificate had expired, she could no longer perform the essential functions of her teaching position, was therefore not a "qualified individual" within the meaning of the ADA, and, as such, was not entitled to a reasonable accommodation from the defendants:

> Johnson's reliance on *Bates* is misplaced. In this case, the qualification standard at issue was not established by the *employer.* Rather, it is a statutorily mandated certification requirement imposed by the Idaho Legislature. Thus, in this case, the first and second parts of the ADA qualification inquiry dovetail. Section 12111(8) defines a "qualified individual" as "an individual who, with or without reasonable accommodation, *can perform the essential functions of the employment position* that such individual holds or desires." . . . As noted above, every elementary and secondary school teacher[] in Idaho must possess a valid teaching certificate:
>
> > Every person who is employed to serve in any elementary or secondary school in the capacity of teacher, supervisor, administrator, education specialist, school nurse or school librarian shall be required to have and to hold a certificate

66. *Id.* at **7-8 (citations omitted).
67. *Id.* at **8-9; *see also* 29 C.F.R. §§ 1630.2(m), pt. 1630, app. § 1630.2(m) (2013).
68. 511 F.3d 974 (9th Cir. 2007).
69. *Johnson*, 2010 WL 530070, at *8 (quoting *Bates*, 511 F.3d at 990).

> issued under authority of the state board of education, valid for the service being rendered . . . .
>
> I.C § 33–1201. Accordingly, when Johnson's teaching certificate expired she could no longer perform the "essential functions" of the position because she was precluded by State law from doing so.
>
> Johnson nevertheless argues that she could have performed the essential functions of the position had the Board reasonably accommodated her disability by approving her request to seek provisional certification. However, reasonable accommodation is only due to qualified individuals. Whether or not an individual is a qualified under the ADA is determined at the time the adverse employment decision was made. It is undisputed that Johnson's teaching certificate expired on or before September 1, 2007, five days prior to the September 6 provisional certification hearing and 45 days before the October 16 due process hearing. Thus, at the time of any adverse employment decision, Johnson was unable to perform the essential functions of the position and was not a qualified individual within the meaning of the ADA, the IHRA, or the Rehabilitation Act. Accordingly, the Board was not obligated to reasonably accommodate her disability.[70]

Lastly, in dicta, the court addressed whether Johnson's request that the defendants seek provisional certification on her behalf constituted a reasonable accommodation under the disability discrimination law. The court first noted that the "ISBE did not require, as it could have, that the Board certify that there were no certificated persons available before it could request provisional certification,"[71] and further noted that "[a]s long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation."[72] The court concluded that the Board could have identified other certificated employees in the District, but still requested provisional certification for Johnson as a way of accommodating her disability under the disability discrimination statutes.[73] Based on these findings and conclusions, the district court believed "it [was] *plausible* that ISBE may have granted the provisional certification."[74]

The district court, however, concluded that, because Johnson was not a qualified individual under the ADA, the defendants had no

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70. *Id.* at **8-9 (citations omitted).
71. *Id.* at *9.
72. *Id.*
73. *Id.*
74. *Id.* (citations omitted).

duty to reasonably accommodate her.[75]

On appeal, the Ninth Circuit affirmed the district court's ruling on Johnson's disability discrimination claims, with two judges – Circuit Judge O'Scannlain and District Judge Kendall sitting by designation – agreeing to a majority opinion and one judge – Circuit Judge Paez –concurring in part and dissenting in part.[76] The majority first found and concluded that, because the ADAAA did not have retroactive effect, the version of the ADA in effect in 2007, i.e. when Johnson was terminated, applied to the case.[77] The majority also noted that, "[f]or purposes of summary judgment, the Board [did] not contest that Johnson [was] disabled"[78] and that "Johnson was physically and mentally capable of performing the functions of a special education teacher at the time it denied her request for provisional authorization."[79]

In addition, the majority agreed with the district court that Johnson's ADA claim was time-barred, but that her surviving Rehabilitation Act and IHRA claims should be construed under ADA law,[80] that Johnson had to show that she was a qualified individual under the ADA at the time of the Board's alleged discriminatory conduct,[81] and that, under *Bates*, the Ninth Circuit had adopted the two-step inquiry formulated by the EEOC concerning whether an individual is qualified under the ADA.[82] The majority then characterized the Board's and Johnson's contentions.[83] Specifically, the Board contended that Johnson's lack of legal authorization to teach in Idaho rendered her unqualified pursuant to

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75. *Id.* at *10.

76. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561 (9th Cir. 2011). Johnson did not appeal any other aspect of the district court's decision. *Id.* at 564.

77. *Id.* at 564 n.2.

78. *Id.* at 564 n.3.

79. *Id.* at 565.

80. *Id.* at 564 n.1.

81. *Id.* at 564.

82. *Id.* at 565. For a district court decision in the Ninth Circuit discussing the EEOC's two-step test concerning whether an individual with a disability is qualified under the ADA adopted by the Ninth Circuit in *Bates* and *Johnson*, see Ward v. Vilsak, No. Civ-S-10-0376-KJM-KJN-PS, 2012 WL 996569, **1-2 (E.D. Cal. Mar. 23, 2012). In addition to the Ninth Circuit, every other federal court of appeals that has considered the question, albeit not discussing the specific issue of whether an employer has a duty to reasonably accommodate an individual with a disability who cannot satisfy a job prerequisite, has adopted the EEOC's two-step approach on the qualified individual issue. *See* Colon-Fontanez v. Municipality of San Juan, 660 F.3d 17, 33 (1st Cir. 2011); Budde v. Kane Cnty. Forest Pres., 597 F.3d 860, 862 (7th Cir. 2010); EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007); Tate v. Farmland Indus., Inc., 268 F.3d 989, 993 (10th Cir. 2001); Reed v. Heil Co., 206 F.3d 1055, 1062 (11th Cir. 2000).

83. *Johnson*, 666 F.3d at 565.

the first step of the two-step qualification inquiry.[84] In response, Johnson contended that the Court was required to consider reasonable accommodations in determining whether she satisfied the job prerequisites for the teaching position that she sought and had previously held.[85] Johnson further argued that because she could have obtained legal authorization to teach had the Board granted her request for accommodation, she had satisfied the first step of the qualification inquiry.[86]

The majority sided with the Board (and the district court) on the qualification inquiry, initially focusing on the above-discussed EEOC regulations:

> [W]e note that the first step of the qualification inquiry, unlike the second step, contains no reference to reasonable accommodation. If the EEOC had intended to require employers to provide reasonable accommodation to ensure that disabled individuals can satisfy the job prerequisites, in addition to the essential job functions, it presumably could have said so in the regulation. That the EEOC declined to include any reference to reasonable accommodation in the first step suggests that such omission was deliberate.[87]

The majority next buttressed its analysis and conclusion by referencing the EEOC's interpretative guidance concerning the two-step inquiry and employer's duty to reasonably accommodate an individual with a disability:

> Our reading is supported by the EEOC's interpretive guidance on Title I ("Guidance"). In discussing the qualification inquiry, the Guidance explains that "[t]he first step is to determine if the individual satisfies the prerequisites for the position, such as

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84. *Id.*

85. *Id.*

86. *Id.* Johnson had held an Idaho teaching certificate, issued by the SBE and valid for the subjects that she taught, from September 1, 2002 to September 1, 2007; however, as discussed above, it lapsed when Johnson, due to a major depressive episode, failed to complete the necessary course work to renew her certificate. *Id.* at 563; *see also supra* note 60 and accompanying text. But, as described in the majority opinion,

> School districts in Idaho could apply for provisional authorization to hire teachers who lacked the appropriate certification by submitting a letter of request signed by the superintendent and chair of the board of trustees explaining the need for provisional authorization, "outlining the 'good faith effort' the district made in attempting to hire someone with appropriate certification," and specifying the teacher's qualifications. Upon ISBE approval, the teacher would be allowed to teach for a nonrenewable one-year term.

Johnson, 666 F.3d at 563; *see also* IDAHO STATE BD. OF EDUC., SUMMARY OF ALTERNATIVE AUTHORIZATION/ROUTES TO CERTIFICATION (2009), *available at* <http://www.sde.idaho.gov/site/teacher_certification/docs/alt_routes_docs/Summary%20of%20Alternative%20Authorizations%20and%20Routes%20to%20Certification%20in%20Idaho.pdf>.

87. *Johnson*, 666 F.3d at 565 (citation omitted).

> possessing the appropriate educational background, employment experience, skills, licenses, etc." Hence, "the first step in determining whether an accountant who is a paraplegic is qualified for a certified public accountant (CPA) position is to examine the individual's credentials to determine whether the individual is a licensed CPA." Absent from this discussion is any mention of a requirement that the employer consider whether the individual *could* become a licensed CPA with reasonable accommodation.
>
> According to another section of the Guidance, "the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria." The Guidance further provides that "[a]n individual with a disability is 'otherwise qualified' . . . if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions." Such statements make clear that unless a disabled individual independently satisfies the job prerequisites, she is not "otherwise qualified," and the employer is not obligated to furnish any reasonable accommodation that would enable her to perform the essential job functions.[88]

The majority concluded this portion of its analysis with an example from the EEOC interpretative guidance indicating that a law firm that requires all lawyers joining the firm to graduate from an accredited law school and pass the bar exam would not owe a duty of reasonable accommodation to an individual who had not met those selection criteria.[89] Specifically, the Court noted that "[a]gain, the Guidance explicitly disclaims any requirement of providing reasonable accommodation to disabled individuals who fail to meet the job prerequisites on their own."[90]

The majority went on to respond to and reject two arguments made on Johnson's behalf – one by Johnson herself and one by amicus curiae EEOC. Johnson, although conceding (according to the majority) that an individual who cannot satisfy job prerequisites is generally not qualified under the first-step of the EEOC two-step inquiry adopted by the Ninth Circuit in *Bates*, argued that "an exception exists 'where the employer exercises significant control over an individual's ability to obtain job-related qualifications.'"[91] The

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88. *Id.* at 565-66 (citations omitted).

89. *Id.* at 566.

90. *Id.*

91. *Id.* at 566 n.6 (quoting Opening Brief of Plaintiff/Appellant Trish Johnson, at 26, *Johnson*, 666 F.3d 561 (July 21, 2010), *available at* 2010 WL 5162538). More precisely, Johnson conceded only that

> if an employer has no control over job-related qualifications such as degrees or

majority disagreed, relying on the EEOC enforcement guidance and the Seventh Circuit's decision in *Williams* – both to the effect that an employer is not required under the ADA to provide an employee with training so that he or she can become qualified.[92]

The EEOC, relying on a section of its interpretative guidance providing that "selection criteria . . . related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria *with the provision of a reasonable accommodation*," argued that the reasonable accommodation issue must be considered under the first step (and second step) of the qualification inquiry.[93] The majority agreed that, "in the context of a challenge to an employer's '*facially discriminatory* qualification standard,'" that "it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge."[94] The majority, however, rejected the EEOC's argument, noting that Johnson had not challenged the board's legal authorization requirement as a discriminatory job prerequisite, but instead had based her discrimination claim on the "analytically distinct" claim that the board had failed to reasonably accommodate her disability.[95] The majority concluded that, because Johnson had neither alleged nor shown that the certification standard was discriminatory in effect, "the guidance section pertaining to discriminatory qualification standards is inapposite."[96]

Based on this analysis, the majority "reject[ed] Johnson's

> professional certifications, both the *Guidance* and the plain language of the ADA indicate that an individual who lacks those qualifications will not be "qualified." That is because an employer in those circumstances cannot furnish the accommodation that would make the individual "qualified."

Opening Brief of Plaintiff/Appellant Trish Johnson, at 25, *Johnson*, 666 F.3d 561 (July 21, 2010), *available at* 2010 WL 5162538.

92. *Johnson*, 666 F.3d at 566 n.6 (citing EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 20 (2002)) ("There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job."); Williams v. United Ins. Co. of Am., 253 F.3d 280, 282 (7th Cir.2001) (holding that an employer is not required to provide a disabled individual "training that will equip her with the qualifications for the job . . . that at present she lacks")).

93. *Id.* at 566 (quoting 29 C.F.R. pt. 1630, app. § 1630.10).

94. *Id.* at 566-67.

95. *Id.* at 567.

96. *Id.* at 566-67 (citations omitted).

reliance on cases such as *Bates* and *Rohr* . . . both of which involved challenges to discriminatory qualification standards"[97] and concluded as follows:

> [A]n individual who fails to satisfy the job prerequisites cannot be considered "qualified" within the meaning of the ADA unless she shows that the prerequisite is itself discriminatory in effect. Otherwise, the default rule remains that "the obligation to make reasonable accommodation is owed only to an individual with a disability who . . . satisfies all the skill, experience, education and other job-related selection criteria." Because Johnson does not allege that the Board's legal authorization requirement was itself discriminatory, her failure to satisfy such requirement rendered her unqualified, and the Board was not required to accommodate her disability.[98]

Because of its conclusion on the qualification issue, the majority did not consider the board's argument that Johnson's requested accommodation, i.e. that the board apply to the SBE for a provisional certificate on her behalf, was unreasonable under the ADA.[99]

The concurring and dissenting judge, Circuit Judge Paez, agreed with the majority that Johnson was not entitled to prevail on her disability discrimination claims, but for different reasons. Judge Paez agreed with the majority's decision affirming the grant of summary judgment in favor of the board, but reached his decision on the ground that the accommodation requested by Johnson – provisional authorization allowing the board to hire an uncertificated teacher – was not within the board's authority to grant.[100] Disagreeing with the district court's dicta on the reasonable accommodation issue, Judge Paez found and concluded that, under SBE policy, "provisional authorization to hire an uncertified teacher is an accommodation of last resort to local school districts, not an accommodation to a teacher who does not possess the required certification."[101] Judge Paez further noted that the authorization process did "not provide a school district with the authority to waive the certification requirement by itself at the request of an uncertified teacher" and that "only the [SBE] may authorize provisional authorization."[102] As such, Judge Paez believed that "[a]lthough provisional authorization was potentially available, the District was not required to utilize the procedure to rehire

97. *Id.* at 567 n.8.
98. *Id.* at 567.
99. *Id.* at 567 n.9.
100. *Id.* at 567 (Paez, J., concurring in part and dissenting in part).
101. *Id.* at 568.
102. *Id.* at 568-69.

Johnson."[103] Judge Paez concluded concerning the reasonable accommodation issue that, although it "might be a different case if the District had created the certification requirement or if it had independent authority and discretion to waive the certification requirement so that it could rehire Johnson," Idaho's teacher certification scheme vested those responsibilities in SBE.[104] Under those circumstances, Judge Paez believed that Johnson had "no basis to complain that the District discriminated against her in violation of the IHRA and the Rehabilitation Act when it declined to seek provisional authorization from the state."[105]

Judge Paez also disagreed with the majority on the "otherwise qualified" issue.[106] Judge Paez initially identified the deferential standard which courts must apply to an agency's interpretation of its own regulations, pointing out that the Supreme Court had "held that where a particular test 'is a creature of the [agency]'s own regulations, [the agency's] interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation'"[107] and had further made clear that "such deference is due even where, as here, the agency's position is contained in an appellate brief, so long as the agency is not attempting to defend its own past actions."[108]

Judge Paez next noted that "the EEOC, as amicus curiae, argues that an employer has a duty to provide reasonable accommodation to a prospective employee if that accommodation would allow the person to become qualified for the position."[109] Judge Paez went on to identify and reject the majority's arguments refusing to adopt the position taken by the EEOC in the case, concluding concerning the "otherwise qualified" issue as follows:

> In sum, the EEOC's position expressed in its Amicus Brief is not plainly erroneous, irrational, or inconsistent with either the ADA or the EEOC's regulations and interpretive guidance. Although the rule the majority proposes in Part III of the opinion is plausible, it is contrary to the reasonable view of the EEOC, and we ought to defer to the agency's reasonable position rather than attempt to give our own interpretation to the EEOC's regulation and the

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103. *Id.* at 569.
104. *Id.*
105. *Id.*
106. *Id.* at 567-68, 569-71.
107. *Id.* at 569 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
108. *Id.* at 569-70 (citing *Auer*, 519 U.S. at 462).
109. *Id.* at 570.

> governing statute. Because I see no reason to reject the EEOC's position that employers have a duty to provide reasonable accommodation to disabled individuals who could satisfy job prerequisites with an accommodation, I would defer to that position.[110]

However, because Judge Paez believed that "the District did not have the authority to grant Johnson a provisional waiver to the required state certification," he concurred in the majority's opinion affirming the decision of the district court.[111]

IV. CRITIQUE

A. Plain Language Analysis

The ADA is not a model of clarity – particularly concerning the circumstances under which an individual will be deemed to be otherwise qualified for the position that he or she holds or seeks and, therefore, covered by the ADA's anti-discrimination provisions, including its reasonable accommodation and job selection criteria requirements.[112] As discussed previously, the express language of the

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110. *Id.* at 571.

111. *Id.* Both during the Ninth Circuit proceedings and at the district court, Johnson argued – and the evidentiary record supported her argument – that "the School District successfully requested . . . provisional certifications as a routine matter." Opening Brief, *supra* note 91, at 6. Thus, as pointed out by Johnson, "the School District approved two other requests for provisional certification in the very same meeting where it denied that accommodation to Johnson," *id.* at 34-35, and "the School District made at least twenty such requests between 2006 and 2009, including six *additional* requests in the same 2007-08 academic year, and nine requests the year earlier," *id.* at 35. Or, as Johnson argued to the Ninth Circuit, "[a]ll that Johnson sought is for the School District to petition for a one-year provisional teaching certificate–something it had done for at least twenty other teachers over a three-year period – and to allow her to continue in her position if the provisional certificate were gra[n]ted." Reply Brief of Plaintiff/Appellant Trish Johnson, at 6, *Johnson*, 666 F.3d 561 (Oct. 6, 2010), *available at* 2010 WL 5162541. However, neither the majority or concurrence and dissent at the Ninth Circuit, nor the district court mentioned these facts, analyzed their legal significance, or heeded Johnson's argument.

112. In determining the meaning of congressional enactments like the ADA, courts (and commentators) are governed and guided, respectively, by several well-settled principles of statutory construction. Thus, in enforcing an act of Congress, courts must apply the plain language of the statute, W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98-99 (1991) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United Stats, 242 U.S. 470, 485 (1917) ("'[W]here, as here, the statute's language is plain, "the sole function of the court is to enforce it according to its terms."'")), should not resort to legislative history to ascertain congressional intent. United States v. Gonzalez, 520 U.S. 1, 6 (1997); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992), and must reject an agency's construction of the statute if it is contrary to clear legislative intent. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 93 (2007); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 & n.9 (1984). "In ascertaining the plain meaning of [a] statute, the Court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." Sullivan v. Everhart, 499 U.S. 83, 89 (1990) (quoting K-Mart Corp. v.

ADA (1) defines "qualified individual" with a disability to mean an individual with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,"[113] (2) requires an employer to "mak[e] reasonable accommodations to . . . an otherwise qualified individual with a disability" unless to do so would cause it an undue hardship,[114] and (3) prohibits an employer from "using qualification standards . . . or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless such standards or criteria are job-related and compelled by business necessity.[115]

The plain language of § 12111(8) clearly requires an employer to provide a "qualified individual" with a disability a reasonable accommodation, if an accommodation will allow the individual to perform the essential functions of a job. But what does the plain language of § 12111(8) and the other, above-quoted ADA provisions require of employers and employees concerning job prerequisites – a term which, notably, does not appear in the ADA's statutory language?

In *Bates*, the Ninth Circuit properly held that the plain language of § 12111(8)'s definitional provision, because it refers only to an "individual" with a disability (and not to an "otherwise qualified individual with a disability" as in § 12112(b)(5)), "does not require that a person meet each of an employer's established 'qualification standards,'. . . to show that he is 'qualified.'"[116] This result was further compelled by the plain language of § 12112(b)(6) – the anti-discrimination provision under which the *Bates* case was litigated – which again spoke only of prohibiting employer use of job qualification standards or selection criteria that discriminated against or tended to discriminate against "individuals with . . . or classes of individuals with disabilities."[117] Thus, the Ninth Circuit remanded the

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Cartier, Inc., 486 U.S. 281, 291 (1988)). If, however, the language of a statute is ambiguous, i.e. reasonably subject to more than one interpretation, Gonzalez v. Oregon, 546 U.S. 243, 258 (2006), the court may look to the legislative history underlying the congressional enactment, Oklahoma v. New Mexico, 501 U.S. 221, 236 n.5 (1991), Green v. Boch Laundry Machine Co., 490 U.S. 504, 511 (1989), and must enforce an agency's interpretation which is based on a permissible construction of the statute. Astrue v. Capato, 132 S. Ct. 2021, 2026 (2012); *Chevron*, 467 U.S. at 843.

113. 42 U.S.C. § 12111(8) (Supp. II 2008).

114. *Id.* § 12112(b)(5).

115. *Id.* § 12112(b)(6).

116. Bates v. United Parcel Serv., Inc., 511 F.3d 974, 990 (9th Cir. 2007).

117. 42 U.S.C § 12112(b)(6); *Bates*, 511 F.3d at 989; *see also supra* notes 44, 54 and

case for evaluation of, among other things, whether a reasonable accommodation under § 12113(a) was available to the *Bates* plaintiffs.[118] In contrast, in *Johnson*, plaintiff Johnson litigated the case as a failure to make a reasonable accommodation case under § 12112(b)(5), which requires an individual to be "otherwise qualified" to receive a reasonable accommodation.[119] As a result, the Ninth Circuit distinguished *Bates* on the grounds that *Bates* was a qualification standards/job selection criteria case under § 12112(b)(6) and held that Johnson's failure to satisfy a job prerequisite, i.e. hold a current Idaho teaching certificate, made her unqualified for the position and, therefore, not entitled to a reasonable accommodation.[120]

From a plain language perspective, should the difference in the specific ADA anti-discrimination provision relied upon by a plaintiff lead to diametrically-opposite results concerning the employer's duty to reasonably accommodate an employee or applicant? On the one hand, probably not – particularly given that § 12111(8)'s definition of a "qualified individual with a disability" is the starting point in the analysis under both a section 12112(b)(6) qualification standards/job selection criteria case and a § 12112(b)(5) reasonable accommodation case and further given that there appears to be no meaningful difference between the term "job selection criteria" under § 12112(b)(6) (as litigated in the *Bates* case) and the term "job prerequisite" as derived from EEOC regulations interpreting § 12111(8) (as litigated in the *Johnson* case). Indeed, the terms appear – and, as discussed below, have been used interchangeably by at least one court[121] – to mean the same thing.

On the other hand, the fact that the terms at issue – "individual with a disability" and "otherwise qualified individual with a disability" – contain differing language and appear in separately-enumerated anti-discrimination provisions of the ADA suggest that

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accompanying text.

118. 511 F.3d at 994.

119. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561, 567 (9th Cir. 2011); *see* 42 U.S.C. § 12112(b)(5); *supra* note 95 and accompanying text; *see also supra* note 22 and accompanying text.

120. *Johnson*, 666 F.3d at 567.

121. *See Bates*, 511 F.3d at 990 n.6 (court of appeals, in supporting its conclusion that the plain language of and legislative history underlying the ADA do not require that an employee meet job prerequisites in order to be qualified under § 12111(8) and § 1630.2(m), relied on language of and legislative history underlying job selection criteria provision in § 12112(b)(6)); *see also infra* note 140 and accompanying text.

Congress intended, at the very least, that the terms have different meanings and, as such, impose different legal requirements.[122] Also, although the term "individual with a disability" is clear and unambiguous in that it speaks only to an individual suffering from a medical condition under the ADA and contains no language about the individual's qualifications for a job, the term "*otherwise* qualified individual with a disability" is ambiguous in that it is susceptible to more than one reasonable interpretation. In this regard, the term could reasonably mean an individual with a disability who can meet all job prerequisites (and perform the essential functions of the position), except for those prerequisites (or essential functions) which his or her disability prevents him or her from satisfying or performing, but which he or she could satisfy with a reasonable accommodation (as argued by Johnson and the EEOC in *Johnson*).[123] Alternatively, the term could reasonably mean an individual who satisfies all job prerequisites without the need for a reasonable accommodation (as argued by the School District in *Johnson*).[124] The fact that neither the district court nor the Ninth Circuit in *Johnson* attempted to parse the ADA's relevant language concerning "qualified individual" and, instead, focused on the meaning of rules promulgated by the EEOC[125] and the fact that both parties to the *Johnson* appeal, as well as amicus curiae EEOC, filed briefs arguing that the plain language of the ADA (and the EEOC regulations) supported their respective positions further suggests the ambiguity in the statute.[126]

In sum, evaluating the ADA's relevant provisions as a whole, and although there may be good, text-related reasons to require employers to make reasonable accommodations in both job selection

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122. *Johnson*, 666 F.3d at 567 (noting "analytical[] . . . distinct[ion]" between reasonable accommodation claim and disparate treatment and disparate impact claims under the ADA); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (Congress's use of "certain language in one part of the statute and different language in another" can indicate that "different meanings were intended").

123. *See* Opening Brief, *supra* note 91, at 22; Brief for the United States and Equal Opportunity Commission as Amicus Curiae Supporting Plaintiff-Appellant and Arguing for Reversal, at 17, *Johnson*, 666 F.3d 561 (July 28, 2010), *available at* 2010 WL 5162539.

124. *See* Answering Brief of Defendants/Appellees, at 8, 11, *Johnson*, 666 F.3d 561 (Sept. 3, 2010), *available at* 2010 WL 5162540.

125. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, No. CV-09-61-N-BLW, 2010 WL 530070 at *8 (D. Idaho Feb. 9, 2010), *aff'd*, 666 F.3d 561 (9th Cir. 2011).

126. *See* Opening Brief, *supra* note 91, at 10-11, 18, 23, 26; and Brief for the United States and EEOC, *supra* note 123, at 11, 16; Answering Brief, *supra* note 124, at 11; *see also* Marcoux v. Parker Hannifin/Nichols Portland Div., 881 A.2d 1138, 1142 (Me. 2005) (where opposing parties argued that their respective positions were each supported by the plain language of the statute, court found ambiguity in statutory language); Clark County v. S. Nev. Health Dist., 289 P.3d 212, 215-16 (Nev. 2012) (same).

criteria cases under § 12112(b)(6) and job prerequisite cases under § 12112(b)(5), the inclusion of the term "otherwise qualified" in § 12112(b)(5) creates sufficient ambiguity in the statutory language to preclude a plain language determination that an employer's duty to provide a reasonable accommodation in a job prerequisites case. In other words, the language of the ADA alone does not resolve the question raised in *Johnson*, i.e. whether an employer is required under the ADA to provide a reasonable accommodation to an applicant or employee with a disability in order to allow that individual to satisfy job prerequisites for a position or only to perform the essential functions of a position. Thus, we must look further.

B. Legislative History and Statutory Precursor

Both the ADA's plain language and its legislative history, as well as judicial interpretations of the ADA's statutory predecessor, section 504 of the Rehabilitation Act, clearly indicate that Congress intended that employers have a duty to reasonably accommodate employees or applicants concerning performing essential job functions and satisfying qualification standards/job selection criteria. Less clear, however, is what that legislative history means concerning employer provision of reasonable accommodation concerning employee satisfaction of job prerequisites.

The House and Senate reports accompanying the ADA make clear that "[t]he underlying premise of [Title I's employment provisions] is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job."[127] Specifically, concerning the qualification standards/job selection criteria provisions of § 12112(b)(6), the House and Senate reports refer to the public law sections corresponding to § 12112(b)(6) and the reasonable accommodation provisions of § 12112(b)(5) and provide that "[i]n order to assure a match between job criteria and an applicant's actual ability to do the job, the bill contains . . . the requirement that any selection criteria that screen out or tend to

127. H.R. REP. NO. 101-485, pt. 3, at 31-32 (1990). The relevant language in the Senate report is essentially identical to the above-quoted language in the House report. *See* S. REP. NO. 101-116, at 37-38 (1989). The Supreme Court has made clear that, if congressional intent cannot be gleaned from the plain language of a statute, House and Senate committee reports are the next best source. Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969))).

screen out people with disabilities be job-related and consistent with business necessity [§ 102(b)(6)]; and . . . *the requirement to provide reasonable accommodation to assist persons with disabilities to meet legitimate job criteria [§ 102(b)(5)].*"[128] The House report further provides as follows:

> If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, and not marginal, aspect of the job. The criterion must be carefully tailored to measure the actual ability of a person to perform an essential function of the job. If the criterion meets this test, it is not discriminatory on its face and is not prohibited by the ADA. *If the legitimate criterion can be satisfied by the applicant with a reasonable accommodation, then the reasonable accommodation must be provided under Section 102(b)(5).*[129]

Referring again to the reasonable accommodation provisions in § 102(b)(5), the term "otherwise qualified" and to "job-related selection criteria/qualification standards" under § 102(b)(6), the House report continues:

> . . . the legislation requires that reasonable accommodation be made for "an otherwise qualified individual who is an applicant or employee . . . " The term "otherwise qualified" is used in this particular provision in order to clearly describe a person with a disability who meets all of an employer's job-related selection criteria except those criteria that he or she cannot meet because of a disability, but which could be met with a reasonable accommodation. . . . This individual, who is "otherwise qualified" for the job, must then be offered the reasonable accommodation that will then make the individual a "qualified individual with a disability" under this title.
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> For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not yet met these selection criteria. That individual is not yet eligible for a reasonable accommodation because he or she is not otherwise qualified for the position.[130]

Similarly, the Senate report states regarding those three ADA terms as follows:

> Section 102(b)(5) of the legislation requires that reasonable

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128. *See* H.R. REP. NO. 101-485, pt. 3, at 31-32 (emphasis added); S. REP. NO. 101-116, at 37-38 (emphasis added).

129. H.R. REP. NO. 101-485, pt. 3, at 31-32 (emphasis added).

130. H. R. REP. NO. 101-485, at 64-65. Again, the relevant text in the Senate report is nearly identical. *See* S. REP. NO. 101-116, at 33-34; *see also* discussion *supra* note 127 and accompanying text.

> accommodation be made for "a qualified individual who is an applicant or employee ***" The term "qualified" as used in this section does not refer to the definition of "qualified individual with a disability" set forth in section 101(7) because such an interpretation would be circular and meaningless. Rather, as in section 504 [of the Rehabilitation Act] regulations, the term "qualified" in section 102(b)(5) means "otherwise qualified" (See CFR 84.12(a)), i.e., a person with a disability who meets all of an employer's job-related selection criteria except such criteria he or she cannot meet because of a disability.[131]

The House report, referencing qualification standards/job selection criteria under the section 102(b)(6) and section 504 case law and regulations, further provides that

> [i]f an employer uses a facially neutral qualification standard, employment test or other selection criterion that has a discriminatory effect on persons with disabilities, this practice would be discriminatory unless the employer can demonstrate that it is job related and required by business necessity.[32]
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> The requirement that job selection procedures be job-related and consistent with business necessity underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the job, but that even if they do provide such a measure, a disabled applicant is offered a reasonable accommodation to meet the criteria that relate to the essential functions of the job at issue.
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> [32] See, Prewitt v. U.S. Postal Service, 662 F.2d 292, 306 (5th Cir., 1981), 45 CFR 84.13; 28 CFR 42.512; 29 CFR 32.14; 42 Fed.Reg. 22688, ¶ 17 (1977).[132]

In *Prewitt v. U.S. Postal Service*,[133] plaintiff, an individual with a physical handicap brought a case under section 501 of the Rehabilitation Act against a federal government agency, claiming "that, despite his handicap, he [was] physically able to perform the job for which he applied, but that the postal service's physical requirements, neutral on their face, had disparate impact upon a person with his particular handicap and that they excluded him from employment that in fact he was physically able to perform."[134] The Fifth Circuit, discussing the requirements of both section 501 and the ADA's statutory predecessor, section 504 of the Rehabilitation Act, first noted that handicapped persons face four distinct types of discriminatory barriers when seeking employment: (1) intentional

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131. S. REP. NO. 101-116, at 31.
132. H. Rep. No. 101-485, pt. 3, at 42.
133. 662 F.2d 292 (5th Cir.1981).
134. *Id.* at 304.

discrimination for reasons of social bias; (2) neutral standards with disparate impact; (3) surmountable impairment barriers; and (4) insurmountable impairment barriers.[135] The court of appeals next noted that "the Supreme Court held that the Rehabilitation Act does not require redress of 'insurmountable barrier' handicap discrimination [in] that the statutory language prohibiting discrimination against an 'otherwise qualified handicapped individual' means qualified 'in spite' of his handicap, not qualified in all respects except for being handicapped."[136] However, turning to what the court characterized as Prewitt's "surmountable barrier" claim, the court found and concluded that Prewitt had raised genuine issues of material fact on his challenge to the postal service's job requirements.[137] Specifically, the court of appeals held that, in order for a plaintiff to prove a prima facie case, he must show "that he is qualified for the position under all but the challenged criteria."[138] The court further held that Prewitt had raised genuine issues of material fact concerning his reasonable accommodation claim as well.[139]

Clearly, the ADA's legislative history, including its reference to section 504 of the Rehabilitation Act and case law interpreting it, make clear (as did the ADA's plain language) that an employer has a duty to reasonably accommodate an employee or applicant who needs assistance in performing the essential functions of a job and who can satisfy all job-related selection criteria, except for the criteria he or she cannot satisfy because of his or her disability. But does that requirement also lead to the conclusion that Congress intended to require an employer to reasonably accommodate an employee or applicant who satisfies all job prerequisites, except for a job prerequisite that the individual cannot meet because of a disability?

Certainly, Congress's general exhortation that "persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job" suggests that Congress intended employers to reasonably accommodate employees or applicants who can do the job, when the accommodation would plausibly remedy a

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135. *Id.* at 305 n.19 (citing Mark E. Martin, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 883-84 (1980) and Amy Jo Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 958-66 (1978)).

136. *Id.* at 307 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979)).

137. 662 F.2d at 309.

138. *Id.* at 306.

139. *Id.* at 309-10 & n.23.

disability-caused inability pertaining to any important aspect of job qualifications or performance – whether it be essential functions, qualification standards/job selection criteria or job prerequisites. Just as courts have blurred any distinction between "qualification standards/job selection criteria" and "job prerequisites,"[140] courts have also treated "job prerequisites" as if they were "essential functions" of a job.[141] Moreover, a strong argument can be made that, given the similarity between the terms "qualification standards/job selection criteria" or "legitimate (job) criterion" and "job prerequisites," the terms should carry the same meaning and impose the same reasonable accommodation requirement under the ADA.[142] Indeed, the term "legitimate (job) criteria," when contrasted with qualification standards or job selection criteria that screen out or tend to screen out otherwise qualified individuals, seems particularly synonymous with job prerequisites. However, Congress used only the terms "qualification standards/job selection criteria," "legitimate criterion," "otherwise qualified," and "essential function" in the ADA and the House and Senate reports accompanying the statute. In contrast, the term "job prerequisites," although relating to the ADA's "otherwise qualified" requirement, is an EEOC construct and came from the agency only after the enactment of the ADA. Thus,

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140. *See* Bates v. United Parcel Service, Inc., 511 F.3d 974, 990 n.6 (9th Cir. 2007), discussed *supra* note 121 and accompanying text.

141. *See* Coleman v. Pa. State Police, No. 11-1457, 2013 WL 3776928, at *14 (W.D. Pa. July 17, 2013) (both quoting and characterizing the Ninth Circuit's decision in *Johnson v. Board of Trustees of Boundary County School District No. 101*, 666 F.3d 561 (9th Cir, 2011), district court stated that "'Johnson's lack of legal authorization to teach in Idaho rendered her unqualified pursuant to the first step of the two-step qualification inquiry and the employer is not obligated to furnish any reasonable accommodation that would enable her to perform the essential job functions'"); Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, No. CV-09-61-N-BLW, 2010 WL 530070, at *9 (D. Idaho Feb. 9, 2010) (according to district court, "when Johnson's teaching certificate expired she could no longer perform the 'essential functions' of the position because she was precluded by State law from doing so") (citing Levinger v. Mercy Med. Ctr., Nampa, 75 P.3d 1202, 1208 (2003) ("When Levinger's medical privileges and medical license were suspended, he was no longer capable of performing the essential functions of his job.")); *see also* McDonald v. Menino, No. 96-10825-RGS, 1997 WL 106955, at *3 (D. Mass. Jan. 3, 1997) (residency requirement, which looks very much like a "job selection criteria" or "job prerequisite," treated as an "essential function" of public sector job); *but cf.* Valle v. City of Chicago, 982 F.Supp. 560, 566 (N.D. Ill 1997)(noting the difference between "threshold qualification tests" and essential functions and stating that "[t]hreshold requirements . . . once they are satisfied . . . no longer need to be performed by the employee").

142. Although the issue here involves the meaning of similar language in the ADA and EEOC rules and guidances, Judge O'Scannlain, who authored the majority opinion in *Johnson*, has stated in analogous circumstances that "'[w]e generally adhere to the maxim of statutory construction that similar terms appearing in different sections of a statute should receive the same interpretation.'" Carvalho v. Equifax Info. Servs., LLC, 615 F.3d 1217, 1230 (9th Cir. 2010) (quoting United States v. Nordbrock, 38 F.3d 440, 444 (9th Cir. 1994)).

although a strong argument can be made that the nearly-identical terms "qualification standards/job selection criteria" and "job prerequisites" should receive the same interpretation vis-à-vis the reasonable accommodation issue, it cannot be said – indeed, it would strain credulity and logic to say – that Congress, which never used the term "job prerequisites" in either the ADA or committee reports, intended to attach legal requirements, let alone a particular legal requirement, to the term.

Lastly, the law firm example used by Congress, although at first glance militating against an employer having a duty to reasonably accommodate an employee or applicant with a disability who cannot satisfy a job prerequisite, does not illustrate the precise issue addressed by this article (and by the courts in *Johnson*). In this regard, the example describes circumstances where the lawyer's disability – visual impairment – did not cause the lawyer's inability to satisfy the firm's job prerequisite of having all of its attorneys graduate from accredited law schools and pass the bar examination. Rather, the lawyer's inability to satisfy the firm's job prerequisites presumably had nothing to do with her disability and had everything to do with an insufficient undergraduate grade point average, low LSAT score, and below passing score on the bar exam. As such, the law firm example is more akin to an "insurmountable barrier" disability described in *Prewitt* and *Davis*, which causes an individual with a disability to not be otherwise qualified and for which a reasonable accommodation is not required. Specifically, the example roughly illustrates an "insurmountable barrier" case in that it describes an individual who cannot satisfy the job prerequisite and happens to be disabled, rather than the kind of "surmountable barrier" disability case described in *Johnson*, where the individual could have satisfied the job prerequisite "in spite of" her disability if the employer had provided a reasonable accommodation.[143]

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143. The law firm example is akin to, but not precisely the same as, an insurmountable barrier case. In this regard, one district court has described an insurmountable barrier case as occurring "where the handicap itself prevents the individual from fulfilling the essential requirements of the position." Nelson v. Thornburgh, 567 F. Supp. 369, 378 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984). As alluded to above, there is no indication in the law firm example that the lawyer's visual impairment had anything to do with his inability to meet the firm's job prerequisites. However, the Seventh Circuit, citing the above-discussed *Williams v. United Insurance Co. of America*, 253 F.3d 280 (7th Cir.2001) case, has concluded that a disabled employee's inability to satisfy a job prerequisite need not necessarily have been caused by a disability to take the employee outside ADA coverage, stating that "the ADA does not shelter disabled individuals from adverse employment actions if the individual, *for reasons unrelated to his disability* . . . is *not qualified* for the job or is *unable to perform* the job's essential functions or

For these reasons, the legislative history underlying the ADA (like its plain meaning) provides some degree of support for the proposition that employers have a duty to reasonably accommodate an employee or applicant who can meet all job prerequisites other than the one(s) he or she cannot meet because of a disability, but does not definitively resolve the question.

C. EEOC Authority

Because the ADA's plain language and legislative history are less than conclusive on the job prerequisite/reasonable accommodation issue, we must turn next to the EEOC's several pronouncements concerning the matter.[144]

1. Pre- (and Post-) *Johnson* Rules and Guidance

Well prior to the Ninth Circuit's decision in *Johnson* and continuing to this day, the EEOC promulgated both rules and administrative guidances concerning the job prerequisites and reasonable accommodation issue. As discussed above, the EEOC added the job prerequisites inquiry to the essential function analysis under § 12111(8) by promulgating § 1630.2(m), which defines "qualified individual with a disability" as someone who "satisfies the requisite skills, experience, education and other job-related requirements of the employment position such individual holds or desires and [who], with or without reasonable accommodation, can perform the essential functions of such position."[145] The EEOC went on to explain in its interpretative guidance concerning § 1630.2(m) that the first step in this administratively-coined analysis

> is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. For example, the first step in determining whether an accountant who is paraplegic is qualified for a certified public accountant (CPA)

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fulfill the requirements of the position as prescribed by the employer." Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 862 (7th Cir. 2005) (citing *Williams*, 253 F.3d at 282).

144. *See* Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 185 (1989) (Marshall, J., dissenting) ("Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history. Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretations of the provision articulated by the agencies responsible for its enforcement, so long as these agency interpretations are 'based on a permissible construction of the statute.'" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984))).

145. *See supra* note 25 and accompanying text.

> position is to examine the individual's credentials to determine whether the individual is a licensed CPA.[146]

And, concerning an employer's obligation to reasonably accommodate an individual with a disability who could satisfy job prerequisites with such an accommodation, the EEOC further stated in its interpretative guidance:

> The obligation to make reasonable accommodation is a form of non-discrimination. It applies to all employment decisions and to the job application process. . . .
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> . . .
>
> The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. . . .
>
> The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of § 1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified," in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.[147]

But, the EEOC continued in its enforcement guidance as follows:

> There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job. The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.[148]

And, addressing the related issue of job selection criteria and reasonable accommodation, the EEOC tracked the House and Senate reports by stating in its interpretative guidance that

> [t]he purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. . . .
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> . . .
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> . . . [S]election criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a

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146. 29 C. F. R. pt. 1630, app. § 1630.2(m) (2013).

147. 29 C. F. R. pt. 1630, app. § 1630.9.

148. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.002, REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 20 (2002).

> reasonable accommodation. Experience under a similar provision implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, most often resolved by reasonable accommodation. It is therefore anticipated that challenges to selection criteria brought under this part will generally be resolved in a like manner.[149]

Much like the ADA's plain language, the EEOC regulation creating the two-step process concerning the ADA's otherwise qualified standard is ambiguous in that it is reasonably subject to more than one interpretation. Indeed, the majority in *Johnson* drew inferences and presumed that the EEOC's omission of a specific reasonable accommodation requirement concerning an individual's ability to satisfy job prerequisites militated in favor of an interpretation that the duty-to-provide-a-reasonable-accommodation issue would only arise concerning an individual with a disability's ability to perform the essential functions of a position;[150] however, Judge Paez, concurring and dissenting, believed that the majority's inferences and presumptions, while reasonable "in a vacuum," were not conclusive and were rebutted by the EEOC's explanation of its position in its amicus brief.[151]

Similarly, the EEOC's guidances, like the ADA's legislative history, generally exhort employers to accommodate individuals with disabilities. At various junctures, the guidances state that "[t]he determination of whether an individual with a disability is qualified . . . should be based on the capabilities of the individual . . . at the time of the employment decision,"[152] "[t]he reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated,"[153] and "[t]he purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job."[154] Moreover, the EEOC's interpretative guidance, like the ADA's legislative history, blurs distinctions in terms. Thus, in the above-quoted two-sentence paragraph discussing reasonable accommodations, the EEOC states that the term "otherwise

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149. 29 C.F.R. pt. 1630, app. § 1630.10.

150. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561, 565 (9th Cir. 2011).

151. *Id.* at 570 (Paez, J., concurring in part and dissenting in part).

152. 29 C.F.R. pt. 1630, app. § 1630.2(m).

153. 29 C.F.R. pt. 1630, app. § 1630.9; *see supra* note 147 and accompanying text.

154. 29 C.F.R. pt. 1630, app. § 1630.10.

qualified" is used to make clear that an employer only has a duty to reasonably accommodate an individual with a disability under 1630.2(m)'s *job prerequisites* provision if the individual can satisfy, among other things, the employer's "*job-related selection criteria*," but that "[a]n individual with a disability [will be] . . . 'otherwise qualified' . . . if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to perform the job's *essential functions*."[155] And, the EEOC's use of the House and Senate report's law firm example, as well as the example of a paraplegic accountant who will only be qualified for an accountant position if he or she possesses a CPA license (again) describe cases where the employee or applicant is not otherwise qualified for the position that he or she holds or seeks and, as a result, is not entitled to a reasonable accommodation from the employer. Specifically, the examples constitute "insurmountable barrier" cases (or cases akin thereto) where the employer has no duty to reasonably accommodate individuals with disabilities because the reasons for the employees' or applicants' inability to satisfy job prerequisites are either the severity of the disabling condition or unrelated to the individuals' disabilities such that an accommodation would not enable them to satisfy job prerequisites. These circumstances are in marked contrast to "surmountable barrier" cases where, as in *Johnson*, reasonable accommodations would, as discussed below, allow the individuals to satisfy job prerequisites "in spite of" their disability. Likewise, the EEOC does not specify whether its bald statements that "[t]here is no obligation for the employer to assist the individual to become qualified" and that "the employer does not have to provide training so that the employee acquires necessary skills to take a job" applies only to an "insurmountable barrier"/"insurmountable barrier"-like case or to a "surmountable barrier" case as well. Thus, the EEOC's examples are again inconclusive on the job prerequisites/reasonable accommodation issue.

Lastly, the EEOC's guidances – again, like the ADA's legislative history – by discussing the reasonable accommodation requirement in the context of job selection criteria and essential functions of a job, send out mixed or arguably negative signals concerning whether employers owe a duty to reasonably accommodate individuals whose disabilities prevent them from satisfying job prerequisites.

For all of these reasons, the EEOC rules and guidances – like the

155. *See supra* note 147 and accompanying text (emphasis added).

ADA's plain language and legislative history – provide less-than-clear authority concerning the job prerequisite/reasonable accommodation issue resolved against the plaintiff in *Johnson* both at trial court proceedings and on appeal.

2. The EEOC's Position in its Amicus Brief in *Johnson*

In contrast to the lack of clarity concerning the job prerequisites/reasonable accommodation issue, the EEOC's amicus curiae brief on Johnson's appeal to the Ninth Circuit removed all doubt about the EEOC's position (or at least the position of its attorneys) on the issue.

In its brief, the EEOC, equating qualification standards/job selection criteria described under §§ 12112(b)(6) and 12113(a) with job prerequisites under § 1630.2(m), made clear that it believes that an individual with a disability is qualified under the ADA – and would, therefore, be entitled to a reasonable accommodation from an employer – where the accommodation would enable the individual to satisfy job prerequisites or perform an essential function of the job which the individual holds or seeks.[156] The EEOC's brief was replete with unequivocal statements concerning its position on the job prerequisites/reasonable accommodation issue:

> The district court erred in failing to ask the controlling question: whether plaintiff would have been a "qualified individual" under the ADA if she had received the one-year waiver of the certification requirement from the [SBE]. Its failure to do so was in turn based upon its erroneous view that the reasonable accommodation requirement in Title I of the ADA does not apply to job qualification standards. . . .
>
> Title I's plain language establishes that an employer must reasonably accommodate an employee or applicant with a disability, where such an accommodation is available to enable that individual to (1) perform an essential function of the job in question, 42 U.S.C. 12112(a), 12111(8); or (2) satisfy the job's qualification standards or selection criteria, 42 U.S.C. 12113(a).[157]
>
> [and]
>
> The court read the EEOC's Intepretive Guidance to mean that an employer's obligation of reasonable accommodation does not apply to job prerequisites, such as a teaching license. Thus, according to the district court's rationale, an individual whose disability prevents

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156. Brief for the United States and Equal Employment Opportunity Commission, *supra* note 123, at 10-11, 14-17, 18 (not explicitly mentioning 42 U.S.C. § 12112(b)(6) (Supp. II 2008) but discussing language found there as well as in § 12113(a)).

157. *Id.* at 10-11; *see also id.* at 16.

> him or her form obtaining a State-mandated license is *never* entitled to a reasonable accommodation because the individual is not "qualified." This reading of the ADA, and of the EEOC's Interpretative Guidance, was erroneous.[158]
>
> [and]
>
> The district court's decision, however, was not faithful to the language of the statute. By erroneously concluding that the duty to reasonably accommodate is inapplicable to job qualification standards, the court failed to conduct the inquiry mandated by the statute; *i.e.*, whether plaintiff would have been "qualified" for the job if she received the waiver she requested.[159]

Thus, the EEOC, in its amicus brief in *Johnson*, but not in its rules and guidances, has definitively taken the position that an employer's duty of reasonable accommodation extends to both assisting an individual in performing essential job functions *and* in satisfying job prerequisites. As pointed out by concurring and dissenting Judge Paez in *Johnson*, the EEOC's position, because it was not inconsistent with the ADA and its own regulations or clearly erroneous, should have been followed by the Ninth Circuit. However, as discussed previously, that was not to be.[160]

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158. *Id.* at 14 (citation omitted).

159. *Id.* at 16-17.

160. As alluded to previously, qualified individuals with disabilities possess alternatives to remedy disability discrimination under the ADA. Thus, as discussed in *McDonald v. Menino*, No. 96-10825-RGS, 1997 WL 106955 (D. Mass. Jan. 3, 1997) and *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir.1981), an ADA plaintiff may pursue a disparate impact claim under the ADA. *See supra* notes 28-35, 133-39 and accompanying text. Based on § 12112(b)(6)'s prohibition on the use of "qualification standards . . . or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard . . . or other selection criteria . . . is shown to be job-related . . . and . . . consistent with business necessity," the Supreme Court has confirmed that disparate impact claims are cognizable under the ADA. Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003). Under this theory, if a discriminatory qualification standard or selection criterion is not job-related and consistent with business necessity, it will not be enforceable under the ADA. *See, e.g.*, Cripe v. City of San Jose, 261 F.3d 877, 890-93, 895 (9th Cir. 2001) (municipal policy restricting disabled police officers to undesirable assignments); Gaus v. Norfolk S. Ry. Co., No. 09-1698, 2011 WL 4527359, at **30-31 (W.D. Pa. Sept. 28, 2011) (railway's medical guidelines barring employees using certain medications from working). As such, an individual with a disability who is able to satisfy all job prerequisites (and perform all essential functions) of a position other than the discriminatory prerequisite/criterion/ standard will be qualified for the position and would not need to seek a reasonable accommodation to satisfy the discriminatory standard. Bates v. United Parcel Serv., 511 F.3d 974, 990 & n.6 (9th Cir. 2007), discussed *supra* note 54 and accompanying text.

Unlike the theory espoused in this article, a discriminatory impact theory allows an ADA plaintiff to challenge the legitimacy of the job prerequisite itself. For this reason and others, commentators have suggested that the disparate impact theory has been underutilized, but holds promise as an alternative to reasonable accommodation-based claims, under the ADA. Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006). However, a review of the post-*Raytheon* case law indicates that lower courts, while recognizing the availability of disparate impact claims under the ADA,

V. THE PROPOSED STANDARD AND ITS RATIONALE AND CONSEQUENCES

A. The Standard Itself

Based on a proper understanding of the ADA's otherwise qualified and reasonable accommodation provisions, the standard for determining whether an individual with a disability is a qualified individual such that an employer has a duty to reasonably accommodate the individual if he or she cannot satisfy a job prerequisite is essentially the standard articulated by the EEOC in its amicus brief on the *Johnson* appeal. Thus, the standard should be as follows:

> An individual with a disability is a qualified individual – and the employer must provide a reasonable accommodation to such individual – (1) where the individual is unable to meet a job prerequisite because of his or her disability or, in other words, where the individual can meet all job prerequisites of the position that he or she holds or seeks, except for those job prerequisites the employee cannot satisfy because of that disability, but which he or she can satisfy with a reasonable accommodation and (2) where the individual can perform the essential function of the position with or without a reasonable accommodation.[161]

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have generally not been receptive to such claims as a matter of proof – particularly where evidence of discriminatory impact on individuals with disabilities is lacking, Kintz v. United Parcel Serv., Inc., 766 F. Supp. 2d 1245, 1253-54 (M. D. Ala. 2011); Adams v. Penn., No. 1:06-CV-2154, 2009 WL 2707601, at *10 (M.D. Pa. Aug. 25, 2009), or the business necessity defense has been raised by the employer. Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316-18 (11th Cir. 2009). That said, a compilation of the success or failure rate of ADA disparate impact cases and the reasons for the results is beyond the scope of this article.

161. An issue may arise concerning whether this standard should apply irrespective of whether the job prerequisite is solely mandated by the employer or mandated by both the employer and state or federal law. Certainly, there is no question that the ADA permits an employer to utilize federal or state statutory or regulatory standards as job prerequisites or qualification standards for a position. *See* Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999). Thus, although the job prerequisites in *Williams v. United Insurance Co. of America*, 253 F.3d 280 (7th Cir.2001) were solely employer-imposed, the job prerequisites and/or qualifications standards in *McDonald*, *Bates*, and *Johnson* stemmed from municipal, federal, and state regulatory schemes, respectively. Indeed, the Supreme Court in *Albertson's*, in holding that the employer could rely on Department of Transportation regulations in determining the employee qualification issue, pointed to (but did not rely upon) an EEOC regulation which provides a defense when the employer's hiring or firing decision is "required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by" the ADA. 527 U.S. at 570 n.16 (citing 29 C.F.R. § 1630.15(e) (1998)). Certainly, there may be a few instances where, because the job prerequisite or qualification standard is a state- or federally-imposed requirement admitting to no waiver or exception, the question of whether an individual with a disability is qualified for a position will rise or fall on the requirements of the state or federal statute, *see, e.g.*, Brockmeier v. Greater Dayton Regional Transit Auth., No. 3:12-CV-327, 2013 WL 3337403, *3 (S.D. Ohio July 2, 2013), *rejected by* No.

B. The Rationale for the Proposed Standard

1. Positive Effects of the Proposed Standard

As discussed above, Congress, both in the findings and purposes provisions concerning the ADA generally and its specific provisions concerning qualified individuals and reasonable accommodation, has made clear that the ADA should be read and enforced to enable individuals with disabilities to work in positions that they hold or seek unless they are actually unable to do the job.[162] In this regard, Congress did not draw any fine distinction between job prerequisites and essential functions of a job and certainly did not draw the even finer distinction between job prerequisites and qualification standards/job selection criteria drawn by the Ninth Circuit in the *Johnson* case. Indeed, there is good reason why any distinctions between these various terms have largely (and appropriately) been blurred by most courts.[163] For an individual with a disability who

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3:12-CV-327, 2013 WL 4647139 (S.D. Ohio Aug. 29, 2013), as long as such requirements are "job-related . . . and . . . consistent with business necessity." Gaspar v. DS Waters of Am., No. 11 C 7465, 2013 WL 2355994, at **5-6 (N.D. Ill. May 22, 2013) (citing 42 U.S.C. § 12113(a) (Supp. II 2008)). However, in the vast majority of cases, i.e. cases where the job prerequisite or qualification standard is (a) created by the employer and, therefore, waivable or (b) waivable even though created by state or federal law, the issue should be addressed under the reasonable accommodation provisions of the ADA. *See infra* note 194 and accompanying text.

162. *See supra* notes 20, 24-27 and accompanying text.

163. *See supra* notes 121, 141 and accompanying text. Thus, in *McDonald*, the district court analyzed a facially-neutral job requirement – residency – as a discriminatory qualification standard/job selection criteria under 42 U.S.C. § 12112(b)(6) (Supp. II 2008) and held that the employer had an obligation to reasonably accommodate two individuals with disabilities. *See supra* notes 28-35 and accompanying text. Neither the district court nor the majority and concurrence and dissent in *Johnson v. Board of Trustees of Boundary County School District No. 101*, 666 F.3d 561 (9th Cir. 2011) cited or discussed *McDonald*.

Initially, the district court in *Johnson* characterized another facially-neutral job prerequisite – professional licensing – as a qualification standard. *See supra* text accompanying note 70. However, ignoring the distinctions made in *Bates*, the district court ultimately characterized professional licensing as an essential function of Johnson's teaching position, thereby improperly conflating a qualification standard or a job prerequisite with an essential function, but holding that the school district had no obligation to reasonably accommodate Johnson. *Id.* A causal factor in that conflation was the district court's decision to distinguish *Bates*, based on the district court's view that a qualification standard imposed by the state is legally different from a qualification standard imposed by an employer. *Id.* However, the source of the job prerequisites – whether it be government- or employer-imposed – should not give rise to a legal distinction under the ADA where it is waivable or may be altered by accommodation.

Unlike the court in *McDonald*, the majority in *Johnson* treated another facially-neutral job prerequisite – professional licensing – as a job prerequisite under 42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2 (m) (2013) (and not a qualification standard/job selection criteria provision under 42 U.S.C. § 12112(b)(6)) and refused to require reasonable accommodation, see *supra* notes 87-98 and accompanying text, while the concurrence and dissent believed, like the court in *McDonald*, that § 12112(b)(6) could properly apply to a facially neutral job standard that screens out individuals with disabilities – particularly when the standard could be waived, i.e.

would be able to perform the job he or she seeks with a reasonable accommodation, it matters little or not at all that a disability affects his or her ability to satisfy a licensing requirement – which may technically be classified as a job prerequisite – rather than teach a class or drive a vehicle – which would be classified as essential functions of a job. In either circumstance, the individual merely seeks assistance from the employer in overcoming a surmountable barrier caused by his or her disability. Likewise, for an employer (and other than the cost of the accommodation), it should be equally inconsequential that the reasonable accommodation it must afford to that same individual with a disability will enable the individual to satisfy licensing requirements or perform the day-to-day duties set forth in a job description. In either circumstance, the employer would derive the benefit of the individual's labor with no loss in aggregate productivity and would satisfy the stated purpose of Congress. And, society would benefit from treating the individual with a disability as qualified – and affording the individual a reasonable accommodation – since, in either circumstance, discrimination in the workplace against qualified individuals with disabilities will be obviated and non-productivity relating to those same individuals will be thwarted.[164]

Thus, recognizing that individuals with disabilities are qualified when they are able to satisfy job prerequisites (such as the licensing requirement in *Johnson*) with a reasonable accommodation – and requiring employers to make reasonable accommodations under those circumstances – would not only benefit such individuals, but would also be consistent with the purposes of the ADA.

2. Remedial Effects of the Proposed Standard

Several scholars and commentators have recognized the judicial tendency to act as a "gatekeeper" in ADA cases by resolving cases on summary judgment in favor of employers on the question of whether plaintiffs are disabled within the meaning of the ADA and thereby avoiding the question of whether an employer has a duty to

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addressed by a reasonable accommodation. *Johnson*, 666 F.3d at 571 (Paez, J., concurring in part and dissenting in part).

164. Johnson herself is a good example. Although Johnson completed all of the course work necessary to obtain certification within six months of her termination by the school district, she could not find a teaching position. Reply Brief of Plaintiff/Appellant Trish Johnson, *supra* note 111, at 6 n.2. As a result, Johnson deferred obtaining renewal of her teaching certificate because she could not afford the $ 150 recertification fee. *Id.*

reasonably accommodate an employee or applicant.[165] The district court and Ninth Circuit in *Johnson*, although accepting for purposes of the proceedings before them that Johnson suffered from a disability cognizable under the ADA, similarly truncated the disability discrimination analysis – and avoided the reasonable accommodation issue (except by way of dicta from the district court and a concurring (and dissenting) opinion from Judge Paez) – by finding and concluding that Johnson was not qualified under the ADA.

However, as alluded to above, recognizing a duty in an employer to reasonably accommodate an individual with a disability when the accommodation will allow an employee or applicant to perform essential job functions *and* satisfy job prerequisites will remedy the judicial proclivity to avoid reasonable accommodation analysis when the spirit, if not quite clearly, the letter, of the ADA strongly militates in favor of a robust application of the Act's reasonable accommodation provisions.[166] Moreover, as discussed more fully below, recognition of an employer's duty of reasonable accommodation under these circumstances would not unduly burden employers and not improperly shift the balance of power in favor of employees or applicants under the ADA.[167]

For these reasons, judicial recognition that an individual with a disability is qualified – and that an employer owes such individual a

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165. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101, 103, 110-26 (1999); John E. Rumel, *Federal Disability Discrimination Law and the Toxic Workplace: A Critique of ADA and Section 504 Case Law Addressing Impairments Caused or Exacerbated by the Work Environment*, 51 SANTA CLARA L. REV. 515, 536-42 (2011) (citing Comm'n on Mental & Physical Disability Law, Am. Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404-05 (1998)); Michael Ashley Stein, *Foreward: Disability and Identity*, 44 WM. & MARY L. REV. 907, 908 (2003); *see also* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L. J. 861, 864 n.13, 945 n.353 (2004) (citing Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LABOR L. 19 (2000)). *See generally* Burgdorf, *supra* note 19 (chronicling and decrying the numerous judicial decisions narrowly construing the ADA's definition of disability).

166. As in cases where courts have summarily determined that an individual is not disabled within the meaning of the ADA, a "robust" application of the ADA's reasonable accommodation provisions in job prerequisite cases would mean nothing more (or less) than giving full play to this important component of the ADA. *See* Rumel, *supra* note 165, at 542. For a discussion of the features of a truly robust reasonable accommodation provision, i.e. one that would apply a "mixed civil rights/social welfare approach" and go beyond applying the existing provisions of the ADA by mandating accommodations outside the workplace and government subsidization of those accommodations, see Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 556-58 (2008).

167. *See infra* notes 169-80 and accompanying text.

duty of reasonable accommodation – when a reasonable accommodation will enable the individual to satisfy job prerequisites – will constitute one more step toward properly curbing the judicial tendency to give less-than-full effect to each of the ADA's provisions.[168]

3. The Proposed Standard Would Not Unduly Burden Employers and Would Strike the Appropriate Balance of Power Between Individuals with Disabilities and Employers Under the ADA

As discussed above, the proposed standard concerning the job prerequisite/reasonable accommodation issue would expand the class of individuals with disabilities who will be entitled to job protection under the ADA – to the benefit of those individuals, society, and, perhaps less obviously, employers. But what of its potential burden on employers?

A number of scholars have demonstrated that, at least prior to the enactment of the ADAAA in 2008, employers typically prevailed in suits brought under the ADA, winning approximately 84 percent to 94 percent of cases that were not settled prior to motion practice or, less likely, trial.[169] The 2008 amendments to the ADA, which, among other things, expanded the definition of disability under the ADA, should increase the win rates of plaintiffs to some degree; however, several scholars remain skeptical about plaintiffs' prospects even under the enhanced protections of the ADAAA[170] – and for good reason.

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168. *See* Rumel, *supra* note 165, at 532-39 (arguing that, because workplace-caused or -exacerbated impairments may substantially limit major life activities other than working, they constitute disabilities under, and should be subject to the reasonable accommodation provisions of, the ADA and section 504 of the Rehabilitation Act).

169. *See* Colker, *supra* note 165, at 107-08; Louis Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 365-366 (2000); *see also* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308-09 (2008) (citing Colker and Rulli).

170. *See, e.g.*, Stacy A. Hickox, *The Underwhelming Impact of the Americans with Disabilities Act Amendment Act*, 40 U. BALT. L. REV. 419, 420 (2011) (expressing concerning that other requirements of the amended Act, including difficulties in proving substantial limitations on major life activities and addressing temporary or intermittent disabilities and the need to compare the effect of an impairment on an individual to its effect on the general population and other plaintiffs and to utilize expert testimony in proving ADA cases, will continue to stymie plaintiffs); *see also* Sharona Hoffmann, *Employing E-Health: The Impact of Electronic Health Records on the Workplace*, 19 KAN. J. L. & PUB. POL'Y, 409, 423 (2010) (notwithstanding the 2008 amendments, "plaintiffs will still find it challenging to prove that adverse employment decisions are linked to their disability status and were motivated by employers' intent to discriminate").

Under the ADA and the 2008 amendments, plaintiffs have always faced and continue to face significant barriers to recovery. Indeed, those barriers are even more fundamental than the not insignificant barriers discussed by scholars concerning the ADAAA. To prevail under the Act, a plaintiff must prove he or she suffers from an impairment that constitutes a disability under the ADA.[171] In order to constitute a disability, the impairment must substantially limit (not merely incidentally limit) a major life activity (not merely a minor aspect of life).[172] Even if a plaintiff can prove he or she is disabled within the meaning of the ADA, the plaintiff must also prove that he or she can satisfy job prerequisites and essential job functions, with or without a reasonable accommodation.[173] If a plaintiff is unable to do so, an employer is not required to afford the plaintiff a reasonable accommodation.[174] Also, even if the plaintiff is entitled to an accommodation from an employer, the accommodation need only be reasonable and need not be the accommodation requested by plaintiff.[175] And, even if a plaintiff requests an otherwise reasonable accommodation, the employer need not provide the accommodation if do so would cause it an undue hardship.[176] Given these barriers, and given the empirical evidence concerning employer win rates discussed above, it is not surprising that at least one magistrate judge, in issuing an enhanced attorney's fee award to a prevailing plaintiff in an ADA case, stated that "ADA cases are notoriously difficult to win."[177]

In addition, even if adoption of the standard proposed in this article will expand the circumstance where an employer must reasonably accommodate an employee or applicant, the existing empirical evidence uniformly demonstrates that the cost of such accommodations is minimal-to-non-existent.[178] Indeed, one scholar,

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171. *See supra* note 21 and accompanying text.

172. *See supra* note 21.

173. *See supra* notes 24-25 and accompanying text.

174. *See generally supra* notes 21-27 and accompanying text.

175. *See supra* note 22 and accompanying text; *see also* Walter v. United Airlines, Inc., No. 99-2622, 2000 WL 1587489, at *5 (4th Cir. Oct. 25, 2000) ("[T]he ADA does not require an employer to provide the specific accommodation requested by the disabled employee, or even to provide the best accommodation, so long as the accommodation provided to the disabled employee is reasonable.").

176. *See supra* note 22.

177. *See* Baker v. Windsor Republic Doors, 414 F. App'x 764, 770 (6th Cir. 2011) (citations omitted); *see also* Rulli, *supra* note 169, at 368 ("[W]hile plaintiffs find all ADA cases difficult to win, employment ADA cases are by far the most difficult to win.").

178. *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1277-1278 (2003); *see also* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I - Workplace Accommodations*, 46

compiling and analyzing a number of studies, determined that the provision of reasonable accommodation by employers often involved no financial outlay at all and seldom cost more than $150.[179]

In sum, adoption of a legal standard that would recognize an individual with a disability as otherwise qualified under the ADA if he or she could satisfy job prerequisites with a reasonable accommodation – and requiring employers to make such accommodation – would not unduly burden employers. Rather, it would more properly balance a statutory scheme that, even when properly interpreted, poses substantial barriers to recovery, and, in many ways on many issues, has been improperly interpreted by courts in favor of employers.[180]

4. The Proposed Standard Applied to the Cases

The parameters and limitations of the proposed standard, i.e. that an individual with a disability is otherwise qualified – and an employer will have a duty to reasonably accommodate that individual – when his or her disability causes the individual to be unable to satisfy a job prerequisite, but provision of a reasonable accommodation will allow him or her to do so, can be better understood by applying the standard to the cases previously discussed in this article.

In *McDonald*, because the proposed legal standard treats job prerequisites and essential functions identically, whether the residency requirement at issue is treated as an essential function (as the court did in the case) or as a job prerequisite (which is the more accurate characterization of the requirement), the result reached by the court would not change. As a threshold matter, the employees in the case would be qualified individuals with disabilities. Next, the City of Boston would have a duty to reasonably accommodate the employees. And both because the employees could satisfy job

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DEPAUL L. REV. 877, 902 (1997); Rumel, *supra* note 165, at 542 & n.104; Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674 (2000).

179. Stein, *supra* note 178, at 1674.

180. Sometimes improper judicial interpretation of the ADA has occurred despite the fact that the interpretation has had essentially no support in the text of ADA, its legislative history, or Supreme Court precedent. *See* Rumel, *supra* note 165, at 532-33 (discussing lack of support for line of cases holding that, when an impairment is caused or exacerbated by the work environment and substantially limits major life activities other than working, courts must still treat case as a "working" claim and apply employer-favoring "class-based" or "foreclosure" analysis). Here, in contrast, the district court's and Ninth Circuit's decisions in *Johnson* can be more properly attributed to lack of clarity on the job prerequisites/reasonable accommodation issue in the ADA's statutory and regulatory scheme and in its legislative history.

prerequisites and perform the essential functions of their municipal jobs if the city provided them with a reasonable accommodation and because the city had applied the residency requirement in a discriminatory fashion in that it had not enforced and/or waived the residency requirement for other municipal employees, the city would almost certainly have been required to waive the residency requirement for the two employees or other similarly-situated individuals. Thus, *McDonald* illustrates why there should not be any legally-significant difference between job prerequisites and essential job functions vis-à-vis the duty of reasonable accommodation. It further illustrates why a facially neutral job prerequisite or qualification standard/job selection criteria may still give rise to a duty on behalf of an employer to reasonably accommodate applicants or employees with disabilities.

In *Williams*, application of the proposed standard would not change the result in the case – and specifically, the employer would not be required to train the employee for the sales manager position she had sought – for at least two reasons. First, *Williams* was not a surmountable barrier case. In this regard, unlike *Johnson*, but very much like the law firm and paraplegic examples discussed in the several ADA authorities, there is no indication in *Williams* that the plaintiff's inability to perform the sales manager job that she sought was caused by her disability or, stated another way, that Williams could perform the job that she sought despite her disability if only she received an accommodation in the form of job retraining. Indeed, the facts in *Williams* indicate that the plaintiff, because of her disability stemming from a series of leg injuries, prevented her from working at the door-to-door salesperson position from which she had been fired, but had nothing to do with her inability to perform the sales manager position that she sought. As such, because an accommodation would not have remedied a disability-caused inability to work in the salesperson position, Williams was not an otherwise qualified individual with a disability under either the proposed standard or the ADA generally.

Second, job training, although an accommodation, will typically not be a reasonable accommodation under the ADA.[181] Thus, even in a surmountable barrier case, i.e. even where a disability causes an employee to be unable to perform in a new position, and even where the job training might enable the person to satisfy job prerequisites or

181. *See supra* note 39.

perform essential functions of the job, it will seldom be reasonable – and, indeed, may constitute an undue hardship on an employer – to require the employer to train or retrain an individual with a disability.[182] As alluded to in *Williams* (and in the EEOC's enforcement guidance), one possible exception to this categorical rule of unreasonableness would occur where the employer offers training to other, non-disabled employees, but refuses to do so for individuals with disabilities where the training would enable those latter individuals to serve in the position for which the training was designed to qualify applicants.[183]

Little need be said about *Bates*. The result in *Bates*, where the court of appeals held that, based on both the plain language of the ADA and on its legislative history, an individual with a disability is not required to meet an employer's qualification standards/job selection criteria in order to be qualified under the ADA, would likewise not change under the proposed standard. In *Bates*, the hearing-impaired employees were able to meet all job prerequisites or qualification standards for the package-car driver position (seniority, minimum age, and possession of a valid driver's license) and therefore did not need a reasonable accommodation from the UPS on those "first-step" issues and only might have needed a reasonable accommodation on the "second step" essential function issue concerning safe driving. An employer's duty to reasonably accommodate an individual with a disability under those later circumstances was resolved years ago by the plain language of the ADA and the proposed standard merely incorporates that requirement.

Finally, and obviously, application of the proposed standard would change the majority's (and district court's) determinations in *Johnson* that (1) Johnson, because she did not satisfy the job prerequisite of holding a current, valid Idaho teaching certificate, was not a qualified individual with a disability under the ADA and (2) as

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182. *Id.*; *see also* Nelson v. Thornburgh, 567 F. Supp. 369, 379 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984) ("[A]n individual facing a surmountable employment barrier is not 'otherwise qualified' if accommodation would require a substantial modification in the requirements of the position, or would result in an undue administrative or financial burden upon the federally assisted program sought to be charged pursuant to section 504." (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410, 412 (1979))); Schmidt v. Bell, No. 82-1758, 1983 WL 631, at *7 (E.D. Pa. Sept. 9, 1983) (same); Weber, *supra* note 1, at 1124 (arguing that reasonable accommodation and undue hardship are the opposite sides of the same coin, i.e. that the existence of undue hardship will make a requested accommodation unreasonable).

183. *See supra* note 39 and accompanying text.

such, the school district did not have a duty to reasonably accommodate her. Those changes, however, would only change the result in *Johnson* if, like the district court and unlike concurring and dissenting Judge Paez, a majority of the court of appeals also believed that the school district's failure to apply for provisional certification from the SBE violated the school district's duty to reasonably accommodate Johnson under the ADA.

According to the EEOC's interpretative guidance, a reasonable accommodation under the ADA is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[184] As indicated by the district court in *Johnson*, and although not yet directly addressed by the Supreme Court,[185] most courts of appeals agree that the ADA requires that "[a]s long as a reasonable accommodation available to the employer could have plausibly enabled a . . . [disabled] employee to adequately perform his job, an employer is liable for failing to attempt the accommodation."[186]

The district court in *Johnson* essentially got the reasonable accommodation issue right – albeit in dicta. Thus, the district court correctly pointed out that, in order for the school district to receive a provisional certification from the SBE which would have permitted Johnson to teach for the year while finishing her continuing education course work, the school district only needed to certify the good faith efforts it had made in attempting to replace Johnson with a certificated teacher, and not that there were no certificated teachers available in the school district.[187] The district court also correctly noted that, under and because of the plausibility standard, the possibility that the SBE might deny the school district's application

184. 29 C.F.R. pt. 1630, app. (2013); *see also* Porter, *supra* note 1, at 544 n.90 (discussing the breadth and lack of limitations in this standard).

185. The Supreme Court has issued only one opinion in an ADA reasonable accommodation case – *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). However, in *Barnett*, the Court did not discuss the likelihood of success that a requested accommodation must have in order for it to constitute a reasonable accommodation under the ADA.

186. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, No. CV-09-61-N-BLW, 2010 WL 530070, at *9 (citing Humphreys v. Mem'l Hosp. Ass'n, 239 F.3d 1228, 1136 (9th Cir. 2001) and quoting Kimbro v. Atl. Richfield Co., 889 F.2d 869, 879 (9th Cir. 1989)). In addition to the Ninth Circuit, several other courts of appeals have adopted the plausibility standard. *See, e.g.*, McMillan v. New York, 711 F.3d 120, 127 (2d Cir. 2013); Cehrs v. Ne. Ohio Alzheimer's Res. Ctr., 155 F.3d 775, 781 (6th Cir. 1998); Criado v. v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998); Woodman v. Runyon, 132 F.3d 1330, 1343 (10th Cir. 1997) (Rehabilitation Act case).

187. *See supra* note 71 and accompanying text; *see also* IDAHO STATE BD. OF EDUC., *supra* note 86.

was largely irrelevant.[188]

In contrast, Judge Paez got the reasonable accommodation issue wrong in his concurrence and dissent in *Johnson* – for several reasons. First, Judge Paez, in stating that "the district was not required to utilize the [provisional certification] procedure to rehire Johnson,"[189] made no reference to the plausibility standard and, therefore, misses the point recognized by the district court: if it was plausible that the SBE would have granted the school district's request for a provisional certificate for Johnson and thereby permit her to teach, then the school district was required under the reasonable accommodation provisions of the ADA to "change . . . the way things are customarily done" and make the request. And the record before the district court and the Ninth Circuit indicated both that it was plausible – indeed, almost certain – that the SBE would grant the school district a provisional certificate authorizing Johnson to teach and further that, by requesting authorization for Johnson, the school district did not have to change the way things were customarily done. In this regard, the record demonstrated that, both during the time that the school district employed Johnson and after she was fired, the school district applied for and received provisional certificates for numerous teachers who did not hold regular teaching certificates.[190] Specifically, Johnson submitted evidence, not rebutted by the school district, that it had requested approximately twenty provisional certificates from the SBE – a number of which were granted – during the last few years of Johnson's employment and immediately thereafter.[191] However, none of the judges in the case, including Judge Paez, discussed, let alone analyzed, this evidence.[192]

Second, Judge Paez believed that, because only the SBE, and not the school district, had the authority to grant the provisional

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188. *Johnson*, 2010 WL 530070, at *9; *see supra* notes 71-74 and accompanying text.

189. *See supra* note 103.

190. *See supra* note 111.

191. *Id.*

192. To his credit, Judge Paez, although not pointing to the record showing that the school district had frequently requested that the SBE grant provisional certification to a number of other – presumably, non-disabled – teachers, did point out, consistent with *McDonald v. Menino*, No. 96-10825-RGS, 1997 WL 106955 (D. Mass. Jan. 3, 1997) (and with dicta in *Williams v. United Insurance Co. of America*, 253 F.3d 280 (7th Cir.2001)), that facially neutral qualification standards or job prerequisites that screen out an individual with disabilities (and not necessarily a class of individuals with disabilities) may be actionable under the ADA and give rise to a duty of reasonable accommodation on the part of the employer. Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101, 666 F.3d 561, 571 (9th Cir. 2011) (Paez, J., concurring in part and dissenting in part).

certification, that fact militated against requiring the school district to request provisional authorization from the SBE.[193] However, nothing in the reasonable accommodation provisions of the ADA itself, the EEOC rules, the cases interpreting them, or the spirit of those authorities suggests that an employer's obligation to provide a reasonable accommodation to an individual with a disability hinges on whether the end product of the accommodation granted must come from the employer and not a third party.[194] Thus, in *Johnson*, the reasonable accommodation owed by the school district to Johnson was the *request* for provisional certification from the SBE, even though the end product of that request – the provisional certificate itself – would have been issued by the SBE.[195] Certainly,

193. *See supra* note 102 and accompanying text.

194. As discussed previously, the standard proposed in this article does not depend on whether the job prerequisite or qualification standard which is the subject of the reasonable accommodation is solely employer-imposed or imposed by the employer due to a state or federal law requirement. *See supra* note 161. This is not to say, however, that the origin of the job prerequisite or qualification standard is irrelevant to the reasonable accommodation inquiry. As a general matter, because waiver or modification of employer-imposed job prerequisites often will not be costly or adversely consequential for an employer, employer objections to such measures on reasonable accommodation or undue hardship grounds often will not be meritorious. *See supra* notes 178-79 and accompanying text. Conversely, although the author was unable to locate any cases in the disability discrimination context, employer waiver or modification of governmentally imposed requirements – particularly when they give rise to fines, penalties, or other adverse consequences from governmental agencies such as the Internal Revenue Service or Department of Transportation – will typically not constitute a reasonable accommodation or will cause an undue hardship on the employer in the religious discrimination context. *See, e.g.*, United States v. Bd. of Educ., 911 F.2d 882, 891 (3d Cir. 1990); Bhatia v. Chevron U.S.A. Inc., 734 F.2d 1382, 1384 (9th Cir. 1984); EEOC v. Oak-Rite, Mfg. Corp., No. IP99-1962-C-H/G, 2001 WL 1168156, at *14 (S.D. Ind. Aug. 27, 2001); Weber v. Leaseway Dedicated Logistics, Inc., 5 F. Supp. 2d 1219, 1223 (D. Kan. 1998). Whatever the source of the job prerequisite or qualification standard, the employer's duty or ability to waive or modify the requirement can be sufficiently addressed under the reasonable accommodation and undue hardship provisions of the ADA.

195. Judge Paez also believed that an SBE grant of provisional authorization to a school district to allow a teacher who does not currently hold certification to teach is an *exception* to the educator certification requirement under IDAHO CODE ANN. § 33-1201 (2013). *Johnson*, 666 F.3d at 568 (Paez, J., concurring in part and dissenting in part). However, properly understood, the SBE's decision to grant provisional authorization in those circumstances is a decision to grant a provisional certificate to the teacher, not merely provisional authorization to the school district. The SBE recognizes as much on its website by discussing provisional authorization under a reference to IDAPA 08.02.02.016 which provides, under the heading, *Idaho Educator Credential*, "[t]he State Board of Education authorizes the State Department of Education to issue certificates and endorsements to those individuals meeting the specific requirements for each area provided herein. (Section 33-1201, Idaho Code)." IDAHO STATE BD. OF EDUC., *supra* note 86. Likewise, the district court judge in *Johnson* properly stated throughout his opinion that Johnson asked the school district to obtain a *provisional certificate* on her behalf. *See supra* notes 59-70 and accompanying text. Although the distinction was semantical for purpose of the issue before the courts in *Johnson*, it may be crucial under other circumstances – such as where an educator's right to compensation or other employment benefits may hinge on whether he or she holds a certificate.

there may be some cases where a requested accommodation would be unreasonable because the employer has no ability to facilitate or trigger the actions of a third party;[196] however, where, as in *Johnson*, the employer must initiate the process under circumstances where the accommodation may plausibly be granted by a third party, then the employer's duty of reasonable accommodation under the ADA would include making the request.[197]

Third, Judge Paez relied on the Supreme Court's decision in *Albertson's, Inc. v. Kirkingbury*[198] in determining that that the school district did not discriminate against Johnson when it refused to seek provisional certification for her from the SBE.[199] There, the Supreme Court held that the Albertson's grocery chain was not required by the ADA to hire a truck driver for a position affecting interstate commerce, despite the fact that the driver had obtained a waiver under a temporary and experimental waiver program run by the Federal Highway Administration for research purposes, when the program did not change the applicable safety regulations.[200] However, unlike the employer in *Albertson's*, who eschewed an alternative certification program for visual acuity testing as a "flawed experiment,"[201] the school district embraced the provisional certification program as substantively "on par" with the ordinary certification regime.[202] Although the school district could have rejected the SBE's policy decision that provisionally-certified

196. *See, e.g.*, Hall v. Easton Area Sch. Dist., No. 10-7603, 2014 WL 1797415 at **4-6 & n.3 (E.D. Pa. May 6, 2014) (distinguishing *Johnson* on grounds that teacher had a valid emergency permit when accomodation requested, but concluding as a matter of law that school district was not obligated to reasonably accommodate teacher by requesting renewal of emergency permit where state law and state department of education guidelines required school district to attempt to fill teacher's position with a fully-certified applicant).

197. The requirement that a school district or its officials, rather than an individual educator, make the request for provisional certification to the state licensing agency is not unusual in public education. *See* Dancause v. Mount Morris Cent. Sch. Dist., No. 13-CV-6019, 2013 WL 2946063, at *3 (W.D.N.Y. June 14, 2013) ("Under New York law, a teacher may be exempted from the certification requirement if the Superintendent of a school district certifies that no certified teachers are available to teach the subject. If no certified teachers are available, than [sic] an uncertified teacher may teach the subject.... It is uncontroverted that the Superintendent did not certify to the State Board of Education that no certified teachers were available to teach."); *see also* Mellin v. Flood Brook Union Sch. Dist., 790 A.2d 408, 425-26 (Vt. 2001) (superintendent, rather than teacher, must request waiver from state Department of Education).

198. 527 U.S. 555 (1999).

199. *Johnson*, 666 F.3d at 569 (Paez, J., concurring in part and dissenting in part).

200. *Albertson's*, 527 U.S. at 558, 577-78.

201. *Id.* at 561.

202. *See Johnson*, 666 F.3d at 568-69 (Paez, J., concurring in part and dissenting in part); *see also Albertson's*, 527 U.S. at 571.

teachers were acceptable for classroom employment, it instead utilized that program to obtain certification for at least twenty teachers between 2006 and 2009.[203] Thus, as the *Albertson's* court explained, an employer in the school district's position was therefore "required to accept a waiver once obtained, and probably to provide an applicant some opportunity to obtain a waiver whenever that was reasonably possible."[204] Since Johnson was qualified for her position in every way other than the lapse of her teaching certificate, the school district was obligated to provide her an opportunity to obtain the same provisional teaching certification it had authorized for numerous other teachers. Because *Albertson's* was distinguishable from *Johnson*, Judge Paez improperly replied on it in addressing the reasonable accommodation issue in *Johnson*.

In sum, the proposed standard would have changed the result in *Johnson* on the "otherwise qualified" issue and the proper application of well-established principles of reasonable accommodation would have allowed Johnson to prevail on her non-time-barred disability discrimination claims as a whole.[205]

VI. PROPOSED NEXT STEPS

Because the Ninth Circuit's decision in *Johnson* is of relatively recent vintage, its holding concerning the job prerequisites/reasonable accommodation issue has not (yet) been applied in any significant way by district or appellate courts in or outside of the Ninth Circuit.[206]

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203. *See supra* note 111.

204. *Albertson's*, 527 U.S. at 571; *see also* Tingum v. Atl. Richfield Co., 34 P.3d 855, 858 n.3 (Wash. App. 2001) (distinguishing *Albertson's*, and possibly requiring employer to hire trucker, where Washington's federally approved waiver program, was neither temporary nor experimental, and changed the governing regulatory standards).

205. As discussed previously, Johnson argued before the Ninth Circuit that, as an exception to the general rule not requiring an employer to assist an unqualified individual with a disability, an employer should be required to reasonably accommodate an individual with a disability "where the employer exercises significant control over an individual's ability to obtain job-related qualifications." *See supra* note 91 and accompanying text. In other words, Johnson argued that the degree of an employer's control should factor in the determination of whether a duty of reasonable accommodation even arises in the first instance. However, consistent with this article's attempt to shift the analysis, i.e. to give more play to the ADA's reasonable accommodation provisions (and less play to the qualified individual standard on the job prerequisites issue), the degree of an employer's control over the ability of an individual to satisfy job prerequisites should factor, not in determining whether a duty of reasonable accommodation exists for an individual who cannot satisfy job prerequisites, but rather, in determining whether a requested accommodation is reasonable or not under the circumstances.

206. For a recent district court opinion citing *Johnson*, but not specifically addressing or applying its holding on the job prerequisites/reasonable accommodation issue, see Herron v. Peri & Sons Farms, Inc. No. 3:13-cv-00075-HDM, 2014 WL 1917934, at **5 and 7 (D. Nev. May

As such, the issue concerning whether an individual with a disability is otherwise qualified and whether an employer owes that individual a reasonable accommodation is likely a long way from attracting the attention of the Supreme Court. However, the issue will almost certainly arise in other federal and state courts[207] – particularly in those jurisdictions that have adopted the EEOC's two-step inquiry in determining whether an individual with a disability is qualified under the ADA.[208]

Under these circumstances, several options present themselves. The first approach would be to essentially do nothing – that is, allow cases raising the job prerequisite/reasonable accommodation issue to continue to percolate through the lower courts with the EEOC weighing in by either filing suit on behalf of an aggrieved plaintiff or, as in *Johnson*, seeking leave to file and stating its position in an amicus brief in a case filed by a private plaintiff. This approach, however, would be inefficient in that it would leave resolution of the issue to piecemeal determinations by district courts and courts of appeals and might be ineffective if those courts, as did the *Johnson* courts, reject the EEOC's position in favor of a contrary argument asserted by an employer.

The second approach would be to seek a legislative fix, i.e. have Congress amend the ADA and ADAAA to make clear that an individual with a disability is otherwise qualified – and an employer has a duty to reasonably accommodate such individual – under the ADA where provision of a reasonable accommodation would enable the individual to satisfy job prerequisites which the individual is unable to satisfy because of his or her disability. This approach would be consistent with the approach taken by disability rights advocates in 2008 after the Supreme Court interpreted the ADA narrowly to limit the class of plaintiffs who fell within the definition of disability under the Act.[209] However, the Supreme Court has not yet spoken on the job

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13, 2014) (holding that employee was not qualified for maintenance mechanic position where he did not possess employer-mandated training certificates, but not addressing reasonable accommodation issue, where employee did not request accommodation regarding lack of certifcation); *see also* cases discussed *supra* at notes 82, 141 and 196.

207. State courts have concurrent jurisdiction over claims brought pursuant to the ADA or section 504 of the Rehabilitation Act. Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997) (ADA claims); B.D. ex rel. S.D. v. Dazzo, No. 11-15347, 2012 WL 2711457, *6 (E.D. Mich. July 9, 2012) (ADA and section 504 claims); Mercer v. Strange, 899 A.2d 683, 689 n.7 (Conn. App. 2004) (same); Elek v. Huntington Nat'l Bank, 573 N.E.2d 1056, 1059-60 (Ohio 1991) (section 504 claims).

208. *See supra* note 82.

209. *See supra* note 17 and accompanying text.

prerequisites/reasonable accommodation issue. Moreover, the issue, although important, does not affect as many individuals – and, therefore, is not of the same magnitude – as the disability coverage issue. And, because of the two above-stated reasons and because of a change in the composition of Congress since 2008, Congress would not likely be inclined to legislate on the subject, let alone pass ADA plaintiff-favoring legislation. For all of these reasons, this approach would almost certainly not be fruitful.

The third approach would be for the EEOC to expressly incorporate its litigation position in *Johnson* into its revised rules and guidances. At least as to the regulations, this approach would require public comment and therefore invite public scrutiny and opposition.[210] If successful, however, this approach would constitute a singular policy statement by the EEOC concerning the job pre-requisite/reasonable accommodation issue and, therefore, constitute a more forceful position than the litigation position taken by the EEOC in *Johnson*. In essence, it would convert *Auer* deference into *Chevron* deference[211] and enhance the likelihood that courts would defer to the EEOC's position on the issue.[212]

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210. Pursuant to the Administrative Procedure Act, the EEOC would need to afford notice-and-comment rights to the public and interested parties concerning promulgation or revision of its substantive regulations, see 5 U.S.C. § 553(b) and (c) (2012), but would not be required to do so concerning adoption or revision of its interpretative guidances, *id.* § 553(b)(1)(A).

211. *See* Ann Graham, *Searching for Chevron in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 241-42 (2008) ("[C]ourts apply [*Auer v. Robbins*, 519 U.S. 452 (1997)] deference when a case involves interpreting an [ambiguous] agency regulation, and [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] deference when the case involves interpretation of an ambiguous statute" and citing Gonzalez v. Oregon, 546 U.S. 243, 256 (2006)).

212. As discussed previously, both *Auer* deference and *Chevron* deference require that the source of law interpreted be ambiguous. *See supra* notes 112, 144, 210 and accompanying text. As also discussed above, the ADA's statutory provisions and the EEOC's regulations on the job prerequisites/reasonable accommodation issue are ambiguous such that some level of judicial deference to the EEOC's interpretation of either the ADA or the regulations interpreting and/or enforcing it is appropriate. *See supra* notes 122-26, 150-51 and accompanying text. The degree of deference owed to agency interpretations under *Auer* and *Chevron* is similar, although not identical: under *Auer*, a court must defer to an agency's interpretation of its own regulations as long as the interpretation is not plainly erroneous or inconsistent with regulation, see *supra* note 92 and accompanying text, while under *Chevron*, a court must defer to agency's interpretation of a statute as long as the interpretation constitutes a permissible construction of the statute, see *supra* note 96. Thus, although the EEOC's revision of its regulations to adopt the position taken by it on Johnson's appeal to the Ninth Circuit and the position proposed by the author in this article would constitute a more efficient and uniform approach to stating the EEOC's position on the job prerequisite/reasonable accommodation issue, it would not, as a matter of administrative law relating to judicial deference, significantly change the applicable legal standard. However, scholarly and Supreme Court sentiment to eliminate *Auer* deference due to separation of powers concerns has recently been gaining traction. *See* John F. Manning,

For these reasons, the EEOC should take the steps necessary to revise its regulations and guidances concerning the job prerequisites and reasonable accommodation issues to clarify that employers owe individuals with a disability a duty of reasonable accommodation in both job prerequisite and essential function cases.

VII. CONCLUSION

Congress took major strides in 2008 toward furthering the original purposes of the ADA and restoring a proper balance between the rights of employees and applicants and the obligations and rights of employers by enacting the ADAAA. However, those purposes remain unfulfilled and those rights and obligation remain imbalanced due to less-than-clear legislative enactments by Congress and regulations promulgated and guidances issued by the EEOC on the job prerequisites/reasonable accommodation issue and due to judicial decisions, like the Ninth Circuit's decision in *Johnson,* that do not pay appropriate deference to the EEOC's stated position concerning an issue and continue to read the ADA and its regulations in a narrow fashion in favor of employers.

As such, the EEOC should forthwith promulgate regulations and issue guidances restating the position that it took on the job prerequisite/reasonable accommodation issue during the court of appeals proceeding in *Johnson* and adopting the standard proposed by this article on the issue. Likewise, courts should adopt and apply that standard. That way, additional appropriate measures will be taken toward removing inappropriate qualifications and barriers to the rights of otherwise qualified individuals with disabilities under the ADA.

Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules, 96 COLUM. L. REV. 612 (1996) and *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring), both cited in *Christopher v. SmithKline Beacham Corp.*, 132 S. Ct. 2156, 2168 (2012). *See also* Aneil Kovvval, Note, *Seminole Rock and the Separation of Powers*, 36 HARV. J. L. PUB. POL'Y, 849, 850 & n.12 (2013). Therefore, revision of EEOC's regulations to reflect the proposed legal standard concerning the job prerequisite/reasonable accommodation issue would be on stronger legal footing.