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ARTICLE: DENIAL OF JURY TRIALS FOR EMPLOYEES WITH DISABILITIES: THE HIGH BAR OF PROVING DISCRIMINATORY INTENT

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Author: Stacy ***Hickox**** *& Maya* ***Stevelinck****

* Associate Professor, Michigan State University, School of Human Resources & Labor Relations

** Undergraduate Student, Michigan State University, School of Human Resources & Labor Relations

Highlight

Employees with ***disabilities*** face stigma and stereotypes associated with their impairment. [1]Revelation of a ***disability*** to obtain an accommodation can lead to negative consequences including harassment, retaliation, or even discharge, as documented by a survey of employees who requested accommodations at a university. [2]This paper explores how difficult it is for employees facing such negative consequences to prove discriminatory intent under the Americans with ***Disabilities*** Act (hereinafter "ADA"). [3]An extensive review of court decisions reveals that the ADA's protection against discrimination rarely provides relief to employees who suffer those negative consequences because the courts defer to employers' reasons for adverse actions taken against people with ***disabilities***, and discount circumstantial proof of intentional stigmatization and stereotyping. [4]

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[1] *See* Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 207, 215-20 (2016).

[2] F. Munir et al., *Dealing with Self-Management of Chronic Illness at Work: Predictors for Self-Disclosure,* 60 SOC. SCI. & MED. 1397, 1398 (2005).

[3] *See* Kaminer, *supra* note 1, at 253.

[4] *See id.* at 252 ("Mentally ill employees also do not consistently fare well under the "adverse action" or third prong of the prima facie case.").

Text

[*1]

INTRODUCTION

Employment discrimination based on immutable characteristics has been deemed unfair, both because it is morally wrong [5]and because those immutable traits lack a relationship with the person's value as an **[*2]** employee. [6]These principles apply to people with ***disabilities*** as much as other groups of people protected by Title VII of the Civil Rights Act. [7]Workplace biases continue to be structural, relational, and situational, and may often be based on cognitive or unconscious biases. [8]Such biases can be addressed by redesigning employers' systems of decision-making, work assignment, and conflict resolution, to influence subjective decisions that could be affected by those biases. [9]

The passage of the ADA recognized that people with ***disabilities*** face those biases that continue to prevent their entry or retention in the workforce, while they often need to reveal their ***disability*** to obtain an accommodation they need to be productive. [10]Therefore, it is important to understand how difficult it is for a person with a ***disability*** who is adversely affected by those biases to prove a claim of disparate treatment or retaliation. [11]

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[5] Deborah Hellman, *Discrimination: When Is It Morally Wrong and Why*, 4 DARTMOUTH L. J. 3, 5 (2006).

[6] *See, e.g.*, Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 26 (1991) (describing various irrational assumptions underlying discrimination); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 UNIV. PA. L. REV. 149, 169-70 (1992) (discussing irrationality and false beliefs).

[7] Kaminer, *supra* note 1, at 208-09.

[8] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, *101 COLUM. L. REV. 458, 460 (2001)*.

[9] *Id.* at 463, 489.

[10] *See* Mirella Sarah De Lorenzo, *Employee Mental Illness: Moving Towards a Dominant Discourse in Management and HRM*, 9 INT'L J. OF BUS. & MGMT. 133, 134 (2014).

[11] *See* Nicole Buonocore Porter, *Disabling ADA Retaliation Claims*, *19 NEV. L. J. 823, 846 (2019)*.

Accountability is an important part of any system designed to address identified and uncorrected problems. [12]Unfortunately, for an employee whose ***disability*** becomes known or who must reveal her ***disability*** to be accommodated, her employer is rarely held accountable for its negative reaction to that revelation because it is so difficult to prove that employer's discriminatory intent. [13]This lack of accountability contributes directly to employees' reluctance to request accommodations provided under the ADA which could make them better performers, reduce the burdens associated with their ***disability***, and ultimately support their continued employment. [14]

This paper begins with a discussion of the biases which can influence employers' decisions about people with ***disabilities***. [15]Discrimination **[*3]** results in a loss of opportunities for success in the workplace among people subjected to it. [16]For employers, discrimination can increase employee turnover [17]and forfeits the positive results of a more diverse workforce. [18]To address these biases, the ADA proposes to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with ***disabilities***. [19]

More than sixty-one million adult Americans, or at least one in four, suffer from some type of ***disability***. [20]This prevalence is significantly higher for Blacks and Hispanics over age forty-five and among those in the lowest

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[12] Sturm, *supra* note 8, at 483.

[13] *See* Porter, *supra* note 11, at 847-48 (citing an example of a CEO's statement, "life would be easier [without] this distraction," and a court holding this was insufficient to establish causation or pretext).

[14] *See* De Lorenzo, *supra* note 10, at 133, 137.

[15] *See* Kaminer, *supra* note 1, at 207, 215-20.

[16] *See* De Lorenzo, *supra* note 10, at 134; Kaminer, *supra* note 1, at 215; Munir, *supra* note 2, at 1398; Carolyn S. Dewa et al., *Nature and Amplitude of Mental Illness in the Workplace,* 5 HEALTHCARE PAPERS 12, 18 (2004).

[17] *See, e.g.*, Robert J. Flanagan, *Discrimination Theory, Labor Turnover, and Racial Unemployment Differentials*, 13 J. HUM. RES. 187, 205 (1978) (showing discrimination increases turnover).

[18] *See, e.g.*, Craig Westergard, *Haply a Minority's Voice May Do Some Good: Diversity at the Supreme Court*, 29 J. JUD. ADMIN. 174, 184 (2020) (stating that diverse teams are more effective and more effective teams lead to greater economic efficiency and ultimately social equality).

[19] *About the ADA National Network*, ADA NAT'L NETWORK, https://adata.org/about-ada-national-network (last visited Oct. 24, 2021).

[20] Catherine A. Okoro, et al., *Prevalence of **Disabilities** and Health Care Access by **Disability** Status and Type Among Adults - United States,* 2016, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 17, 2018), https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm?s_cid=mm6732a3_w.

poverty level. [21]Among young adults, cognitive ***disability*** (10.6%) has been the most prevalent type, [22]while in 2019 a total of 51.5 million Americans, or 20.6% of adults aged eighteen or older, were estimated to have some mental illness, with many also suffering from co-occurring substance abuse. [23]Along with a variety of physical impairments, some visible and some not, these ***disabilities*** often lead to inequities and unfairness in hiring practices and their work environments. [24]Research on the stigmatization of people with ***disabilities*** and an original survey of employees at a large university who requested **[*4]** accommodations because of their ***disabilities***, demonstrate the vitality and impact of biases on their employment opportunities. [25]

These significant barriers to employment faced by people with ***disabilities*** lead to employment rates that lag significantly behind rates for people without ***disabilities***, at rates of 36.7% for the former versus 76.6% for the latter, both as of December 2021. [26]One should not assume that people with ***disabilities*** cannot or do not choose to work given that one survey among unemployed people with ***disabilities*** showed that 25.8% were seeking work, [27]and 36% of those jobseekers had experienced an employer who incorrectly assumed that they could not do their job because of their ***disability***. [28]Given this experience, it is important to understand biases against hiring or

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[21] *Id.*

[22] *Id.*

[23] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH (SAMHSA) 3 (2020), *https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf*.

[24] *See* U.S. DEP'T OF LAB., OFF. OF ***DISABILITY*** EMP. POL'Y, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH ***DISABILITIES***: TECHNICAL REPORT 3, 5 (2008), *https://www.dol.gov/odep/research/SurveyEmployerPerspectivesEmploymentPeopleDisabilities.pdf* (finding that only 8.7 percent of companies reported hiring people with ***disabilities*** during the twelve months preceding November 2008, and that employers cited "nature of the work" as a concern for hiring people with ***disabilities***).

[25] *See* KESSLER FOUND., THE KESSLER FOUNDATION 2015 NATIONAL EMPLOYMENT AND ***DISABILITY*** SURVEY: REPORT OF MAIN FINDINGS 20-22, 25 (2015), *www.kesslerfoundation.org/sites/default/files/filepicker/5/KFSurvey15_Results-secured.pdf* (showing a survey conducted by the University of New Hampshire).

[26] *See nTIDE December 2021 Jobs Report: Employment Remains above Historic Levels for People with* ***Disabilities***, KESSLER FOUND. (Jan. 7, 2022), *https://kesslerfoundation.org/press-release/ntide-december-2021-jobs-report-employment-remains-above-historic-levels-people?utm_source=direct-homepage&utm_medium=banner&utm_campaign=ntide-december-2021-jobs-report-employment-remains-above-historic-levels-people*.

[27] *See* KESSLER FOUND., *supra* note 25, at 15-16.

retaining a person with a ***disability***, [29]and to review how the courts have addressed these biases in litigation under the ADA. [30]

The second part of this paper explores the reluctance of courts to consider employers' biases against people with ***disabilities*** in reviewing claims of discrimination. [31]People often reveal their ***disability*** to obtain an accommodation that is both guaranteed under the ADA and essential to their inclusion and continuation as contributing members of the labor force. [32]While the Americans with ***Disabilities*** Act Amendments Act (hereinafter "ADAAA") of 2008 expanded the scope of the ADA's coverage of people with impairments, [33]the ADA retained its requirement that people with ***disabilities*** provide explicit information about their **[*5]** ***disability*** to access the ADA's right to reasonable accommodations. [34]The failure of courts to hold employers accountable for the disparate treatment and retaliation arising from such a request for accommodation may result from belief that the ADA's accommodation process is a form of "special treatment," benefitting individuals with ***disabilities*** "at the expense of the nondisabled workforce." [35]

ADA disparate treatment and retaliation claims often arise after a plaintiff has requested an accommodation for her ***disability***, perhaps because employers first learn of a hidden ***disability*** at this time and because employers react negatively to any request for an accommodation. [36]Protection against retaliation claims aims to uphold the right to accommodations under the ADA. [37]As one court explained, "the right to request an accommodation in good faith is no less a guarantee under the ADA than the right to file a complaint with the [Equal Employment

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28 *Id.* at 19-20.

29 *Infra* Part I.

30 *Infra* Part I.B.

31 *Infra* Part II.

32 *See* Stacy ***Hickox*** & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 571-80 (2020) (explaining that an employee's failure to provide clarifying medical information can end the employer's duty to interact and that the ADA decisions have placed a heavy burden of an employee seeking accommodation to reveal both the existence of a ***disability*** and the limitations that flow from that ***disability***).

33 *See* Michelle A. Travis, *Disqualifying Universality Under the Americans with* ***Disabilities*** *Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1696, 1699, 1707 (2015).

34 *See* ***Hickox*** & Case, *supra* note 32, at 560-67

35 *See* Travis, *supra* note 33, at 1690-91.

36 *See* Porter, *supra* note 11, at 851-52.

37 *See* *id.* at 828 (describing requesting an accommodation as a "protected activity").

Opportunity Commission]." [38]However, a 2019 study of retaliation claims under the ADAAA showed that of 294 cases, only 25% survived a motion for summary judgment filed by the employer. [39]This study suggests that ADA plaintiffs alleging retaliation may not be able to rely on a retaliation claim to protect their right to request the accommodations they need. [40]

The second part of this paper includes an in-depth analysis of the U.S. courts' approach to discrimination claims under the ADA, based on a legal analysis of 143 federal court decisions in which employees were required to prove that their ***disability*** was the but-for cause of their disparate treatment or retaliation. [41]To survive a motion for summary judgment in a claim of disparate treatment or retaliation, that employee must produce evidence of a prima facie claim of discrimination and evidence that the employer's reason for taking an adverse action against them was a pretext for discrimination. [42]

Our review examines courts' reliance on statements linking the treatment of the employee to their ***disability*** or protected activity, such as requesting an accommodation, as well as the influence of the temporal proximity between the revelation of the employee's ***disability*** and the **[*6]** adverse action in avoiding dismissal of a claim on summary judgment. [43]Our review also demonstrates the significant influence of courts' deference to employers' reasons for taking an adverse action, even shortly after their ***disability*** was revealed and after the employer made derogatory statements about an employee's ***disability*** or request for accommodation. [44]

The paper concludes with recommendations to better address the potential for biases against people with ***disabilities*** to result in disparate treatment or retaliation. [45]Courts should reevaluate the evidence necessary for an employee with a ***disability*** to defeat a motion for summary judgment, taking into account the continuing influence of one's revelation of a ***disability*** on an employer who has been asked to accommodate her. [46]At a minimum, when an adverse action occurs shortly after the revelation of a ***disability***, and statements by the employer

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38 *Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 191 (3d Cir. 2003)*.

39 *See* Porter, *supra* note 11, at 836.

40 *See id.* at 852.

41 *See infra* Part II.

42 *See Yarberry v. Gregg Appliances, Inc., 625 F. App'x 730, 737 (6th Cir. 2015)*.

43 *See infra* Part II.B.

44 *See infra* Part II.E.1.

45 *See infra* Part III.

46 *See infra* Part III.

indicate some causation, then a jury should decide whether the employee with a ***disability*** has proven the requisite discriminatory or retaliatory intent. [47]

I. EVIDENCE OF BIAS AND ITS EFFECTS

Studies and surveys have long documented discrimination faced by applicants and employees with ***disabilities*** in the U.S. [48]Discrimination starts with the hiring process: a 2008 survey of 3,797 employers in the U.S. showed that only 19.1% knowingly employed employees with ***disabilities***, and only 8.7% reported hiring a person with a ***disability*** within the past twelve months. [49]In describing challenges in hiring people with ***disabilities***, employers cited "discomfort or unfamiliarity" (32.2%), [50]"attitudes of co-workers" (29.1%), [51]and "attitudes of supervisors" (20.3%). [52]In addition, 30.8% of the employers cited the concern that "supervisors are not comfortable with managing" people with ***disabilities***, with a higher percentage among employers that do not **[*7]** actively recruit people with ***disabilities***. [53]These reasons were consistently cited more often by employers who did not identify as actively recruiting people with ***disabilities***. [54]Similarly, employers identified negative attitudes of customers as common challenges to retaining employees with ***disabilities***. [55]It is noteworthy that none of these reasons concern the qualifications of the person with a ***disability***. [56]

Even if hired, people with ***disabilities*** face additional barriers to success. [57]For example, people with psychiatric ***disabilities*** can experience worse discrimination in the workplace than in any other setting. [58]One

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47 *See infra* Part III.

48 *See* Michelle Maroto & David Pettinicchino, *Twenty-Five Years After the ADA: Situating* ***Disability*** *in America's System of Stratification*, 35 ***DISABILITY*** STUD. Q., no. 3, at 1, 3, 6 (2015).

49 *See* U.S. DEP'T OF LAB., *supra* note 24, at 2-3.

50 *See id.* at 13, 15.

51 *See id.*

52 *See id.* at 13.

53 *See id.* at 16.

54 *See id.* at 15.

55 *See id.* at 20.

56 *See id. (*showing the challenges consisting of attitude and cost concerns).

57 *See* Susan Stefan, *Hollow Promises: Employment Discrimination Against People with Mental* ***Disabilities***, 3 AM. PSYCH. ASS'N 4 (2001).

survey of people with psychiatric ***disabilities*** revealed that 15.7% of the survey's participants experienced problems with a superior who had a negative attitude related to their ***disability***, and only 41.3% were able to overcome this barrier; [59]15.5% experienced negative attitudes from co-workers, and 54.5% of them were able to overcome that barrier. [60]These attitudes were identified as more common barriers than "needing special features or accommodations on the job (11.4%, overcome by 57.4% of them). [61]

The stigma associated with mental illness is "both greater and more pervasive than the stigma associated with physical illness." [62]For example, one survey of 200 human resource professionals found that a physically impaired job applicant was more likely to be hired than an applicant taking medication for a mental illness. [63]Employers can have "preconceived notions" that certain health conditions "signal underlying qualities about workers" with those conditions. [64]For example, the stereotype that an applicant with a mental impairment is incompetent and **[*8]** has difficulty functioning as a capable adult [65]can lead to their rejection by employers.

Both subtle and overt discrimination has been experienced by individuals with these forms of ***disabilities***, which makes their interview and work-life experiences even more difficult. [66]Some actual hurdles that individuals with ***disabilities*** have faced include being blamed for acts they did not commit, and beliefs that these individuals are weak, or that they are just trying to receive special attention or advantages based on their impairment. [67]The

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[58] *Id.*

[59] *See* KESSLER FOUND., *supra* note 25, at 5, 20-21.

[60] *See* *id.* at 20-21.

[61] *See* *id.* at 21.

[62] Kaminer, *supra* note 1, at 216.

[63] *See* Denise A. Koser et al., *Comparison of a Physical and a Mental* ***Disability*** *in Employee Selection: An Experimental Examination of Direct and Moderated Effects*, 1 N. AM. J. OF PSYCH. 213, 213, 216, 218 (1999); *see also* Elaine Brohan et al., *Systematic Review of Beliefs, Behaviors and Influencing Factors Associated with Disclosure of a Mental Health Problem in the Workplace*, 12 BMC PSYCHIATRY (2012) (applicants with mental health problems consistently rated as less employable than candidates with no ***disability*** or physical ***disability***).

[64] *See* Jennifer Bennett Shinall, *Anticipating Accommodation*, *105 IOWA L. REV. 621, 662 (2020)*.

[65] *See* Kaminer, *supra* note 1, at 220.

[66] *See* Ariella Meltzer et al., *Barriers to Finding and Maintaining Open Employment for People with Intellectual* ***Disability*** *in Australia*, 54 SOC. POL'Y ADMIN. 88, 94-97 (2020).

[67] *See* Pirjo Hakkarainen et al., *Concealment of Type 1 Diabetes at Work in Finland: A Mixed-Method Study*, 8 BMJ OPEN, Jan. 2018, at 1, 4-5 (2018) (main reason for nondisclosure was fear of discrimination).

impact can be circular, because a failure to reveal a hidden ***disability*** can result in a manager's misunderstanding about the reasons for an employee's negative work outcomes, such as absenteeism due to depression. [68]

A. Sources and Impact of Bias

The negative treatment of people with ***disabilities*** by employers arising from stigma and stereotypes associated with ***disabilities*** is supported by fear and misunderstanding. [69]Such stereotypes include the use of "imperfect proxies" and "overbroad generalizations." [70]Employers fear that people with ***disabilities*** will be unable to carry out their duties and negatively affect the company's performance. [71]One study found that only 33% of businesses would choose to hire a person with a ***disability*** even if they were qualified, due in large part to the belief that employees with ***disabilities*** are "less capable members of the workforce." [72]Relying on similar assumptions, one court dismissed the claim of an applicant for an EMT position who was an amputee based on the employer's unproven **[*9]** assumption that she could not perform the lifting duties of the position. [73]Additionally, employers often assume that people with ***disabilities*** will create emotional disturbances in the workplace or have poor social skills. [74]

Employers tend to focus on fears that people with ***disabilities*** will display unpredictable behaviors that could possibly put themselves or others around them in danger. [75]They also are concerned that "working is not

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[68] *See* De Lorenzo, *supra* note 10, at 134.

[69] *See* Cynthia L. Harden et al., *Reaction to Epilepsy in the Workplace*, 45 EPILEPSIA 1134, 1135 (2004) (explaining how employers misunderstand how to treat those with ***disabilities*** like epilepsy and put unnecessary restrictions on their ability to use machinery).

[70] *See* Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, *92 IND. L. J. 1059, 1099 (2017)*.

[71] *See* Darlene D. Unger, *Employers' Attitudes Toward Persons with* ***Disabilities*** *in the Workforce: Myths or Realities?*, 17 FOCUS ON AUTISM & OTHER DEVELOPMENTAL ***DISABILITIES*** 2, 4 (2002) (explaining how some studies show that employers are concerned with the productivity level of those with ***disabilities*** which leads to a negative effect on a company's overall performance levels).

[72] *See* Marjorie L. Baldwin & Steven C. Marcus, *Perceived and Measured Stigma Among Workers with Serious Mental Illness*, 57 PSYCH. SERVS. 388, 388 (2006).

[73] *See* *Gillen v. Fallon Ambulance Serv. Inc., 283 F.3d 11, 32 (1st Cir. 2002)*.

[74] *See* Unger, *supra* note 71, at 4; *see also* Carri Hand & Joyce Tryssenaar, *Small Business Employers' Views on Hiring Individuals with Mental Illness*, 29 PSYCH. REHAB. J. 166, 169-70 (2006).

[75] Harden, et. al., *supra* note 69, at 1135, 1138-39.

healthy for people with a mental health problem" or the individual will be unable or disinclined to treat their illness themselves (e.g. taking medication) during the workday. [76]Managers and supervisors are worried that these individuals with invisible ***disabilities*** will be unfit in their workplace, but instead of making the reasonable adjustments, they choose to mistreat them even if that is not their original intention. [77]

Reliance on stigma and stereotypes about people with ***disabilities*** also arises from a lack of education behind the nature of ***disabilities*** and a lack of exposure to others with ***disabilities***. [78]Supervisors and managers have admitted that they do not know how to react and are fearful of the unknown. [79]Their unfamiliarity with the nature of hidden ***disabilities*** in particular makes them extremely uncomfortable and because of this they tend to act uninterested, and do not provide or discuss the level of support that these employees may need. [80]Several employers in one study noted the lack of understanding towards the nature of diabetes among employees, and explained, "linked to this lack of understanding of diabetes was a tendency for managers to be disinterested and therefore not likely to ascertain the level of support that might be needed." [81]Other employer concerns include a lack of knowledge as to how to **[*10]** accommodate employees with ***disabilities*** and the potential for future litigation. [82]

Employers may view some health conditions as more ambiguous than others, based on symptomatic differences, [83]leading to their reluctance to hire individuals with some particular conditions. [84]For example, one study showed a greater willingness to accommodate a pregnant worker compared to a worker with a need for joint

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[76] Elaine Brohan & Graham Thornicroft, *Stigma and Discrimination of Mental Health Problems: Workplace Implications*, 60 OCCUPATIONAL MED. 414, 414 (2010).

[77] *See id.*

[78] *See* Annmarie Ruston et al., *Diabetes in the Workplace - Diabetic's Perceptions and Experiences of Managing their Disease at Work: A Qualitative Study*, BMC PUB. HEALTH 1, 6 (2013).

[79] *See id.* at 8.

[80] *See id.* at 5 ("They know I'm diabetic, but that's it, they never asked anything about it or what to do.").

[81] *Id.*

[82] H. Stephan Kaye et al., *Why Don't Employers Hire and Retain Workers with* ***Disabilities***, 21 J. OF OCCUPATIONAL REHAB. 526, 527-30 (2011).

[83] Shinall, *supra* note 64, at 662.

[84] *Id.* at 662, 665.

surgery, a more ambiguous condition. [85]Such ambiguity may be perpetuated by the inability of an employer to ask questions about an applicant's need for accommodation prior to making a tentative job offer. [86]

The third cause of stigma burdening employees with ***disabilities*** may result from a perception that they are receiving "special-treatment." [87]For example, requiring an employee to show that he or she is a person with a ***disability*** to receive accommodation marks them "as separate and different from all workers, who become normalized in the process." [88]This negative treatment may result from employers' perceptions that accommodating employees is "expensive and burdensome," [89]even though the cost of turnover as well as decreased productivity and loyalty of the employee who is not accommodated may be greater than the cost of the accommodation itself. [90]This perception results in an employer's reluctance to hire or promote people with ***disabilities*** who "need or are likely to need accommodations." [91]Ironically, employers seem to be less willing to accommodate if legally required to do so. [92]Stigma may also arise from coworkers who resent the accommodations afforded to an employee with a ***disability***, either because they are overburdened by that accommodation or they resent being denied a similar accommodation. [93]

[*11] This stigmatization is well-documented and its causes are understood. [94]But it is also important to understand its significant impact on people with ***disabilities*** who are seeking to succeed in a workplace. [95]It is both the actual stigmatization and the fear of the same which create barriers to their success. [96]

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85 *See id.* at 663-64.

86 *See id.* at 664-65.

87 Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 87 (2016).

88 *Id.* at 124.

89 *Id.* at 87.

90 *See id.* at 126.

91 *Id.* at 97.

92 *See id.*

93 Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 234 (2016).

94 *See id.* at 260-63.

95 *See generally id.* at 254 (exploring the stigmas that individuals with ***disabilities*** experience in the workplace and the harm experienced by individuals with ***disabilities*** because of special treatment stigma).

*B. Repercussions from Revelation of **Disability***

Because of the biases outlined above, many applicants and employees are concerned about disclosure of a hidden ***disability*** based on fears about that revelation's impact on their career . [97]Among people with ***disabilities*** surveyed in 2015, 72.7% of those currently or previously employed were willing to discuss their ***disability*** with others at work, but this percentage lowered to 67.5% for those with cognitive ***disabilities***. [98]Conversely, this means that one quarter to one third of people with ***disabilities*** do not feel comfortable disclosing their ***disability*** in their workplace, even if they need to do so to be accommodated. [99]

The anticipation or fear of negative reaction to the disclosure of a ***disability*** influences behavior, even if that fear is unfounded. [100]For example, employees with depression hesitate to disclose their ***disability*** at work "because of the potential of being ridiculed or viewed as less competent." [101]Anticipating such a reaction from a supervisor may cause the individual with a ***disability*** to suffer from stress/fear, or even change their behavior accordingly. [102]Consequently, anticipated fear limits people with ***disabilities'*** opportunity and ability to find proper and satisfying work. [103]Being too afraid to put themselves out there to find a **[*12]** place of employment, even though they are fully capable and qualified, negatively affects their lifetime career path. [104]These fears cause anxiety and low self-esteem, adding to the negative self-perceptions of their ***disability*** even

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96 *See* Katharina Vornholt et al., ***Disability*** *and Employment - Overview and Highlights*, 27 EUR. J. OF WORK & ORG. PSYCH. 40, 49 (2018) (explaining that many individuals in many countries around the world fail to disclose their ***disability*** because of the fear of stigmatization).

97 *See* De Lorenzo, *supra* note 10, at 134-35, 138; Kaminer, *supra* note 1, at 215; Dewa, *supra* note 16, at 214; Munir, *supra* note 2, at 1398.

98 *See* KESSLER FOUND., *supra* note 25, at 24.

99 *See id.*

100 *See* *id. at 25*.

101 Angela J. Martin & Rebecca Giallo, *Confirmatory Factor Analysis of a Questionnaire Measure of Managerial Stigma Towards Employee Depression*, 32 STRESS AND HEALTH: J. INT'L SOC'Y FOR THE INVESTIGATION OF STRESS 621, 628 (2016).

102 Margaret H. Vickers, *Dark Secrets and Impression Management: Workplace Masks of People with Multiple Sclerosis (MS),* 29 EMP. RESP. & RTS. J. 175, 178 (2017).

103 *Id.* at 176.

104 *Id. at 188-89*.

more. [105]Consequently, many individuals pretend to not even have the illness, so that others around them are unaware and cannot think of them as any less of a person. [106]

Despite this potential for stigmatization, people with ***disabilities*** may be required to disclose their ***disability*** to their employer for several reasons. [107]First, prior to being hired, an applicant may be required to complete a full medical examination. [108]Although the ADA stipulates that this examination should not be used to discriminate against applicants with ***disabilities*** and the information should be kept confidential, [109]the burden falls on the applicant to prove such discrimination, including proof that her ***disability*** does not render her unqualified for the position. [110]For example, the claim of a hearing-impaired applicant for a transfer with Walmart was dismissed because he was unable to show that he was qualified to perform the communication aspects of the position he sought. [111]In reaching this decision, the court accepted the employer's chosen communication method as the only way that the plaintiff could fulfill the communications requirement of the position. [112]

Accommodation can be essential for entry or retention in the workforce. [113]An employee will also be required to reveal her ***disability*** to justify a request for a reasonable accommodation. [114]One study found that a hidden ***disability*** is often disclosed in connection with a request for accommodation; a need to be understood or to explain circumstances may **[*13]** also drive disclosure. [115]A 2019 study reported that among 1,247 Americans,

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105 *Id.* at 178.

106 *Id.*

107 Americans with ***Disabilities*** Act of 1990, 42 U.S.C. § 12112(d)(3)-(4) (permitting employers to require all employees to receive a medical examination, or submit to a medical examination for job related purposes consistent with business necessity).

108 *Id.* § 12112(d) (prohibiting an employer from conducting a medical examination of a job applicant unless, among other requirements, the employer has already made the applicant a job offer conditioned on a medical examination).

109 *See, e.g.*, Buchanan v. City of San Antonio, 85 F.3d 196, 198-99 (5th Cir. 1996).

110 *See infra* Part II-B.

111 *See* Barnhart v. Wal-Mart Stores, Inc., 206 F. App'x 890, 892 (11th Cir. 2006); *see also* Roberts v. City of Chicago, 817 F.3d 561, 566 (7th Cir. 2006) (plaintiffs failed to prove that they were not hired because of ***disability*** rather than delays associate with obtaining medical clearance).

112 *See* Barnhart, 206 F. App'x at 892.

113 Matthew J. Hill et al., *Employer Accommodation and Labor Supply of Disabled Workers*, 41 LAB. ECON. 291, 292 (2016).

114 ***Hickox*** & Case, *supra* note 32, at 538-39.

14.7% were experiencing a work-limiting health problem, and 22.3% were accommodation-sensitive, meaning that a workplace accommodation could potentially enable them to work (79% of whom were currently working). [116]

Past studies estimate that between one quarter and one third of workers with ***disabilities*** are accommodated by their employers. [117]One study found that being non-white, agreeable, introverted, neurotic, or having certain ***disabilities*** (back problems, emotion-related ***disabilities***) was significantly related to being less likely to be accommodated, whereas higher education or job tenure of six to twelve years had a positive correlation with receiving accommodation. [118]One study concluded that "policies targeting the disclosure environment for disabled workers may be more effective in increasing accommodation rates than policies that target the employer side of the accommodation equation alone." [119]

Despite the prevalence of need for accommodation, as few as one quarter of accommodation-sensitive individuals ask their employers for an accommodation. [120]One study showed that among employees who needed accommodations, 47.1% did not receive the accommodation they needed. [121]Yet approval of an accommodation led to a much higher likelihood that they would be working both in the short and long term. [122]

In addition to requests for accommodation, a current employee may be required to complete a fitness for duty examination to establish one's ability to continue performing work duties. [123]Even though that employee is protected against discrimination based on the results of that examination, [124]the resulting medical information

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115 Marsh Langer Ellison et al., *Patterns and Correlates of Workplace Disclosure Among Professionals and Managers with Psychiatric Conditions*, 18 J. OF VOCATIONAL REHAB. 3, 12 (2003).

116 Nicole Maestas et al., *Unmet Need for Workplace Accommodation,* 38 J. OF POL'Y ANALYSIS & MGMT. 1004, 1013, 1018, 1023 (2019).

117 Hill et al., *supra* note 113, at 291.

118 *Id. at 296* tbl. 4, 297, 298 tbl. 6.

119 *Id.* at 301.

120 Maestas et al., *supra* note 116, at 1024.

121 *Id.* at 1020.

122 *See id.* at 1021.

123 *See, e.g.*, *Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999)* (ADA does not require a police department to delay a fitness for duty examination until perceived threat becomes real).

can be used by an employer to establish that the employee is not otherwise qualified for her **[*14]** position. [125]For example, an employee who was sent for an evaluation was discharged just ten days after a report stating that the employee had a "thought disorder and deeply ingrained personality issues" was provided to his employer. [126]

This need to reveal one's ***disability*** as part of the hiring, accommodation, or retention process raises serious concerns about the potential for stigmatization and stereotyping based on that information revealed. [127]If a supervisor or coworker acts based on these biases, the person with a ***disability*** can be subjected to disparate treatment and/or retaliation. [128]

C. Study Results

Personal accounts of the biases and conflicts described above were revealed in the author's survey and interviews of employees of a large mid-western university. [129]The survey was conducted during the Summer of 2019 among university employees registered with the university's Resource Center for Persons with ***Disabilities*** (hereinafter "RCPD"), which certifies employees' eligibility for accommodations. [130]The survey asked employees about their experiences in revealing a ***disability*** to obtain accommodations. [131]The most common

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[124] *See, e.g.*, *Krocka v. City of Chicago, 203 F.3d 507, 511 (7th Cir. 2000)* (adverse employment action against a police department because they placed the plaintiff, a chronically depressed officer, into program for officers with disciplinary problems).

[125] *Id. at 515* (the results of a medical evaluation may be used by an employer to determine whether an employee is able to continue working).

[126] Krowiak v. BWXT Nuclear Operations Grp., Inc., No. 1:18 CV 629, *2018 U.S. Dist. LEXIS 184027, at 7-8 (N.D. Ohio Oct. 25, 2018)*; *see also Andrekovich v. Borough of Punxsutawney, No. 17-1041, 2018 U.S. Dist. LEXIS 184557, at 13-14 (W.D. Pa. Oct. 29, 2018)* (police department required an employee to remain on administrative leave to undergo additional counseling and evaluation despite the evaluating doctor's recommendation that the employee should retorn to work.).

[127] *See generally* ABA Comm'n on ***Disability*** Rts., *Implicit Biases & People with* ***Disabilities***, ABA IMPLICIT BIAS GUIDE, *https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/* (last visited Oct. 22, 2021) (references numerous studies to demonstrate employers prefer to hire people without ***disabilities***).

[128] *See generally id.* (implicit and explicit biases related to ***disabilities*** can lead to discriminatory employment practices).

[129] Stacy ***Hickox***, RCPD Survey Data (July 19, 2021) (on file with author); *see also infra* Appendix B (listing the questions asked of participants).

[130] *About RCPD*, MICH. STATE UNIV., *https://www.rcpd.msu.edu/about-rcpd* (last visited Dec. 27, 2021).

[131] ***Hickox***, *supra* note 129; *infra* Appendix B.

accommodations requested by these employees included paid or unpaid time off for medical needs (28.9%), modification of the physical environment (35.6%), provision of **[*15]** tools or assistive technology to help complete tasks (24.4%), or a flexible work schedule (20%). [132]

In the forty-six responses to the general question regarding their accommodation process, 15.2% disagreed and 8.7% strongly disagreed that they were "satisfied with the results of the accommodation request process," while 28.3% strongly agreed and 28.3% agreed with that statement. [133]When asked to characterize the accommodation process, 17.4% responded "difficult" and 30.4% responded "somewhat difficult," whereas 21.7% responded "somewhat easy" and 10.7% responded "easy." [134]Overall, more than 56% agreed or strongly agreed that they were satisfied with the results of the accommodation request process. [135]

In contrast to this expression of general satisfaction, when asked specifically about their relationship with their supervisor, 11.1% strongly agreed and 20% agreed with the statement that "my relationship with my supervisor was negatively affected by the accommodation process," whereas 22.2% disagreed and 28.9% strongly disagreed with that statement. [136]Interestingly, a much lower percentage of employees reported a worsened relationship if they first went to their supervisor with an accommodation request, compared to employees who first sought certification of their ***disability*** by the university. [137]In one explanation of whether the employee needed and/or received assistance to complete the accommodation request, one respondent noted that "the special accommodation shouldn't have been necessary, but because of harassment by my unit supervisor, and a lack of cooperation by HR and Parking Services, I was forced to independently pursue a formal accommodation from RCPD, which I received, but ultimately, was not honored." [138]

The survey demonstrated that a large percentage of employees were hesitant to reveal their ***disability*** in the workplace. In response to the statement "I can be honest with my supervisor about my ***disability*** and how it affects me," 56.5% of the respondents agreed or strongly agreed, whereas 17.4% disagreed and 17.4% strongly disagreed. [139]39.1% of respondents agreed or strongly agreed with the statement "I feel in control **[*16]** of

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[132] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 3.

[133] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 9.

[134] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 8.

[135] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 8.

[136] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 10.

[137] *Compare infra* Appendix B at Question 10, *with infra* Appendix B at Question 4 .

[138] ***Hickox***, *supra* note 129 at Question 6.1.

[139] ***Hickox***, *supra* note 129; *infra* Appendix B at Question 14.

the accommodation process and how it affects me," whereas 17.4% disagreed and 19.6% strongly disagreed with that statement. [140]

Employees also revealed practices which did not protect the privacy of their health information, which could contribution to more widespread stigmatization by coworkers and supervisors. [141]Regarding the health information connected to an employee's request for accommodation, 51.1% of employees agreed or strongly agreed with the statement that "only the necessary information to provide my accommodation was given to my supervisor," whereas 20% disagreed or strongly disagreed with that statement. [142]

Employees revealed perceptions of stigmatization as well. [143]When asked for reaction to the statement that "stereotypes/stigma related to my ***disability*** have negatively influenced how peers and supervisors treat me," 26.1% strongly agreed and 26.1% agreed, whereas only 10.7% disagreed and 13% strongly disagreed. [144]More broadly, in reaction to the statement "disclosing my ***disability*** has helped achieve my goals at work," 15.6% of respondents strongly disagreed and 24.4% disagreed, whereas 20% agreed and 11.1% strongly agreed. [145]

Survey respondents were asked to participate in a follow up interview to gain more insight into their experiences in requesting accommodations. [146]While some of the six interviewed employees did not reveal any negative repercussions from revealing their ***disability*** to obtain an accommodation, some related a much more negative experience. [147]One employee described significant negative treatment from a supervisor after requesting to work remotely as an accommodation, and another employee was accused of lying after requesting accommodations to reduce allergic reactions. [148]A third employee received a negative performance evaluation because her ***disability*** affected her ability to work a regular schedule, even though she had asked for a

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140 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 15.

141 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 13.

142 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 13.

143 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 11.

144 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 11.

145 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 12.

146 ***Hickox***, *supra* note 129; *infra* Appendix B at Question 17.

147 *See* Keenan Case, Mich. State Univ., Presentation at the Mid-Michigan Symposium for Undergraduate Research Experiences (July 24, 2019) (on file with author).

148 *See id.*

revised schedule as an accommodation. [149]Several employees also **[*17]** reported being excluded from meetings about their accommodation requests between their supervisor and a representative from RCPD. [150]

These survey and interview responses demonstrate that while a majority of the employees were satisfied with the overall accommodation process, a significant minority of the employees perceived that their relationship with their supervisor was negatively impacted by the process. [151]A majority of employees also believed that stereotypes and/or stigma related to their ***disability*** had negatively influenced their treatment at work, and close to a majority disagreed that revealing their ***disability*** had helped them achieve their goals at work. [152]These results suggest that supervisors and coworkers are still reacting negatively when learning about an employee's ***disability***, even after that person has been hired for the position. [153]

II. PROVING CAUSATION IN THE COURTS

The stigmatization revealed, both in this study and in previous research, should be addressed and remedied by non-discrimination laws. Overall, these laws are intended to broaden employment opportunities for members of a protected class "seeking economic opportunity and social freedom," and attempt to reduce "the gap between an individual's true capacities and identity and the capacities attributed to her" by her membership in a protected class, such as ***disability***. [154]In other words, prohibitions against disparate treatment and retaliation should interrupt employers' reliance on biases and stereotypes, and "reward[] workers for the true value of their labor." [155]

Nondiscrimination laws, including the ADA, aim to reduce the "injury to individual potential" caused by employers' reliance on stigma and stereotypes. [156]Allowance of disparate treatment claims focuses on the notion that membership in a protected class is "unrelated to job productivity," so as to correct "market failures" caused by

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149 *See id.*

150 *See id.*

151 ***Hickox***, *supra* note 129, at Question 10; *infra* Appendix B at Question 10.

152 ***Hickox***, *supra* note 129, at Question 12; *infra* Appendix B at Question 12.

153 *See supra* notes 132-46.

154 Dinner, *supra* note 70, at 1065.

155 *Id.* at 1102.

156 *Id.* at 1069.

employers' inefficient "propensity to discriminate." [157]It can also be said that non- **[*18]** discrimination laws prohibit decisions by employers that are simply "wrong" and undermine "social equality." [158]

Despite these lofty purposes and noble goals, discrimination and retaliation continue to limit the opportunities of people with ***disabilities*** in the workplace. [159]Employers often resist providing accommodations and take adverse action against those who ask for them. [160]Resistance to the mandates of the ADA in particular may arise from the view that accommodation claims under the ADA impose costs beyond those posed by other nondiscrimination laws' "demand for an efficient marketplace." [161]This view may explain why people with ***disabilities*** find it so difficult to convince courts that an employer has intentionally discriminated against them in violation of the ADA. [162]

The stigma and stereotyping described earlier not only affects employers' reactions to requests for accommodation, but can also influence the decisions of judges who review the claims of employees who have suffered adverse actions. [163]These biases can lead to a court's acceptance of an employer's reason to discharge an employee with a ***disability***. [164]Claims of disparate treatment by people with ***disabilities*** may also be undermined by courts' tendencies to focus on conscious, expressed intent to discriminate, [165]as evidenced

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157 *Id.* at 1087-88.

158 *Id.* at 1104.

159 Kaminer, *supra* note 1 at 208.

160 *See* Porter, *supra* note 11, at 852.

161 Dinner, *supra* note 70, at 1103.

162 *See generally id.* (concluding that requests for accommodation are more contestable than simple discrimination claims because accommodating a ***disability*** involves expending finite social resources).

163 Susan Stefan, *Delusions of Rights: Americans with Psychiatric* ***Disabilities****, Employment Discrimination and the Americans with* ***Disabilities*** *Act*, 52 ALA. L. REV. 271, 272-73 (2000).

164 *See, e.g.*, Wilson v. Chrysler Corp., 172 F.3d 500, 513 (7th Cir. 1999) (Easterbrook, J., concurring) ("Paranoid schizophrenia often entails the sort of violent outbursts ... that an employer need not accommodate."); Ann Hubbard, *The ADA, the Workplace, and the Myth of the "Dangerous Mentally Ill"*, 34 U.C. DAVIS L. REV. 849, 921-22 (2001) (criticizing court's evidence-free assumption about the plaintiff's "inability to control her behavior.").

165 *See generally*, Mark C. Weber, *Accidentally on Purpose: Intent in* ***Disability*** *Discrimination Law*, 56 BOS. COLL. L. REV. 1417, 1417 (2015) (the requirement for intent is wrongfully inferred and enforced by courts).

by blatant ableist statements by supervisors. This approach disadvantages people with ***disabilities*** who often face discrimination based on risk assessment influenced by unconscious or unspoken stereotypes or biases. [166]

Regardless of the motivations of judges, employees and applicants making claims under the ADA often face dismissal at either the trial or **[*19]** appellate level. [167]Some experts have called the ADA's track record on improving employment opportunities for individuals with ***disabilities*** "dismal." [168]Even after the 2009 amendments (the ADAAA), summary judgment was granted to the employer in 20.7% of cases involving physical illness and 40% of cases involving mental illness, [169]decreasing from pre-ADAAA employer win rates of 78.3% in cases involving a physical ***disability*** and 60% in cases involving a mental ***disability***. [170]This increase in win rates for people with ***disabilities*** likely resulted from the expanded definition of who is a person with a ***disability***, rather than some expansion of the opportunity to establish disparate treatment based on that ***disability***. [171]

After the passage of the ADAAA, more people with ***disabilities*** face dismissal of their claims based on the employer's opinion that they lack the qualifications to perform the job they seek or hold, often because the employer is unwilling to accommodate them. [172]Under the ADAAA, discrimination claims which reached the issue of whether the person with a ***disability*** was qualified were decided in favor of the employer in 69.7% of trial court cases, compared to 47.9% of the cases prior to the ADAAA amendments. [173]These decisions on motions for

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166 *See* Hubbard, *supra* note 164, at 921.

167 *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 566 (2001); Ruth Colker, *The Americans with* ***Disabilities*** *Act: A Windfall for Defendants*, 34 HARV. C.R.C.L. L. REV. 99, 100 (1999) (defendants prevailed in more than ninety-three percent of the ADA cases decided on the merits at the trial court level, and in eighty-four percent of the cases that were subsequently appealed); McCarthy Weisberg Cummings, P.C., *Disabled Workers Still Face Discrimination in the Workplace*, DISABLED WORLD (Aug. 26, 2010), www.disabled-world.com/***disability***/discrimination/workplace-discrimination.php; *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL ***DISABILITY*** L. REP. 403, 404 (1998).

168 PETER BLANCK ET AL., IS IT TIME TO DECLARE THE ADA A FAILED LAW?, THE DECLINE OF EMPLOYMENT OF PEOPLE WITH ***DISABILITIES***: A POLICY PUZZLE 301 (David C. Stapleton & Richard Burkhauser eds., W.E. Upjohn INST. 2003), https://research.upjohn.org/cgi/viewcontent.cgi?article=1175&context=up_press.

169 Kaminer, *supra* note 1, at 224.

170 *Id.*

171 *Id.*

172 Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031-32 (2013).

summary judgment prevent plaintiffs from even getting to the issue of whether the employer acted with an intent to discriminate based on his or her ***disability***. [174]

These low win rates for plaintiffs facing motions for summary judgment result from the expansive definition of essential functions of jobs so as to exclude people with ***disabilities*** based on qualification **[*20]** standards such as a lack of skills or characteristics. [175]This approach "imbeds ***disability*** and impairment-based stereotypes and assumptions into the definition of work and the workplace itself, making them even more difficult to recognize and disrupt." [176]Moreover, the essential qualifications for a job sought by a person with a ***disability***, often including when and where those duties are accomplished, most often depends on an employer's own judgment. [177]This approach allows ***disability***-based stereotypes to influence the "definition of the workplace itself." [178]Arguably this approach undermines the entire purpose of the ADA to open up the labor market for people with ***disabilities***. [179]

This paper's review of ADA decisions goes beyond earlier studies by examining the heavy burden of avoiding summary judgment even after the plaintiff has established that she is a person with a ***disability*** who is otherwise qualified for the position. [180]The heavy burden of establishing an employer's discriminatory intent is revealed by our review of 143 court decisions involving claims by employees with ***disabilities*** who alleged disparate treatment and/or retaliation connected to their ***disability***. [181]These decisions were chosen because the claim was specifically decided (at least in part) based on the court's determination as to whether the alleged disparate treatment or retaliation was because of an employee's ***disability*** or protected activity, typically following a request for accommodation or some other incident that revealed the employee's ***disability*** to her employer. These decisions were gathered from a broad search of Nexis UNI and Bloomberg BNA, including both reported and unreported decisions. Decisions were excluded if the outcome was determined by a plaintiff's failure to prove that she was disabled as defined by the ADA, or that she lacked qualifications for the job even if provided with reasonable

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173 *Id.* at 2055.

174 *See id.* at 2071.

175 Travis, *supra* note 33, at 1702-03, 1712, 1721.

176 *Id.* at 1706-07.

177 *Id.* at 1710, 1715.

178 *Id.* at 1720.

179 *Id.* at 1757.

180 *See infra* Part II.E.3.

181 *See infra* Appendix A.

accommodations. Many of these decisions also included claims of harassment and failure to provide a reasonable accommodation, but this analysis focuses on the outcome of the disparate treatment and/or retaliation claims.

Of the 143 decisions reviewed, ninety-five (66.4%) were decided in favor of the employer and forty-eight (33.6%) in favor of the plaintiff **[*21]** employee with a ***disability***. [182]Of these 143 decisions, eighteen were decided on a motion to dismiss, 120 were decided on a motion for summary judgment, and five were decided on post-trial motions. [183]Of those 120 decisions decided on a motion for summary judgment, eighty-six (71.7%) were decided in favor of the employer and in the eighteen cases decided on motions to dismiss, 33.3% were decided in favor of the employer. [184]The relatively more favorable outcome for employers filing motions for summary judgment is unsurprising given the lower threshold for a plaintiff to survive a motion to dismiss. [185]

These decisions were analyzed to determine the impact, if any, of the plaintiff's characteristics. Gender of the plaintiff did not appear to be a significant factor, in that the win rate for male plaintiffs was 32.0% and the win rate for female plaintiffs was 35.3%. [186]The type of ***disability*** experienced by the plaintiff seems to be a somewhat more influential factor in the outcome of the decision. Table 1 displays the different outcomes according to the type of ***disability***.

TABLE 1. Influence of ***Disability*** Type [187]

Disability Type	Number of claims	Outcome in favor of employer
Mental Illness/Psychiatric ***Disability***	32	24 (75%)

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182 *See infra* Appendix A.

183 *See infra* Appendix A.

184 *See infra* Appendix A.

185 *Compare* Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) (stating that the Court must accept the factual allegations as true and construe them broadly in the light most favorable to the plaintiff when reviewing a motion to dismiss), *with* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.'"). *See generally* FED. R. CIV. P. 12(b)(6) (establishing that a court may dismiss a case for "failure to state a claim upon which relief can be granted.").

186 *See infra* Appendix A.

187 *See infra* Appendix A.

Mental Illness & Cognitive Impairment	1	0
Mental Illness & Physical Impairment	3	3 (100%)
Cognitive Impairment	3	2 (66.6%)
Physical Impairment	99	64 (64.6%)
Physical & Cognitive	3	1 (33.3%)

[*22] It was surprising, given the research on stigmatization of people with mental illness in particular, [188]that the negative outcomes were not significantly higher for plaintiffs suffering from mental illness compared to the ***disabilities*** experienced by other plaintiffs.

A. Proof of Causation

The high likelihood that an employee's claim of ***disability*** discrimination will be dismissed even before it reaches a jury demonstrates the weight of the burden to establish that their employer acted with discriminatory and/or retaliatory intent. [189]These dismissals occur even where the plaintiff has established that she has a ***disability*** and is otherwise qualified for the position in question. [190]In the absence of direct evidence of discriminatory intent, such as a statement that "we fired Joe because of his ***disability***," a plaintiff must rely on "circumstances which tend to prove that an illegal motivation was more likely than the reason offered by the [employer]," [191]under the ADA's "but-for" causation standard. Our review demonstrates that courts often engage in their own interpretation of these factual circumstances on a motion for summary judgment, blocking an opportunity for the plaintiff to convince a jury that the employer acted on the biases and stereotypes documented above. [192]

In general, a motion for summary judgment in a claim of employment discrimination should only be granted if an employer "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a

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188 *See supra* Part I.

189 Alexandra Zabinski, *Surviving the "Pretext" Stage of McDonnell Douglas: Should Employment Discrimination and Retaliation Plaintiffs Prove "Motivating Factors" or But-For Causation?*, 40 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 280, 281, 283 (2019).

190 *See supra* Part II.

191 *See Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994)*; Rafferty v. Giant Eagle Mkts, Inc., No. 2:17-CV617, *2018 U.S. Dist. LEXIS 186643, at 14 (S.D. Ohio Oct. 31, 2018)*.

192 *See supra* Part I.

matter of law." [193]Thus, reasonable inferences should be drawn in favor of the plaintiff with a ***disability***, and genuine disputes of fact should be resolved by a jury. [194]In employment discrimination claims, this means that where the outcome depends upon witnesses' credibility or other disputes as to the sufficiency of the **[*23]** evidence of discriminatory intent, a jury rather than a judge should decide the outcome. [195]This deference to juries in making credibility determinations provides employees with the opportunity to present all of the evidence supporting a claim of disparate treatment and avoids the influence of an individual judge's biases on the interpretation of that evidence. [196]

The ADA prohibits intentional discrimination "on the basis of ***disability***." [197]Some have argued that this standard of proof adopted in 2009 under the ADAAA amendments should be easier to meet, [198]compared to the original ADA's prohibition of discrimination "because of" a ***disability***. [199]In contrast to the ADAAA, Title VII's language was amended in 1991 to allow for disparate treatment claims where the plaintiff's "race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." [200]The Supreme Court subsequently has interpreted this language as preventing

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193 *Tolan v. Cotton, 572 U.S. 650, 656-57 (2014)*.

194 *See id. at 660*.

195 *See Valderaz v. Lubbock Cnty. Hosp. Dist., 611 F. App'x 816, 827 (5th Cir. 2015)* (Dennis, J., dissenting).

196 Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, *57 N.Y. L. SCH. L. REV. 749, 763 (2013)* ("A liberal application of reasonable inference-drawing would alleviate, or altogether eliminate, many of the barriers federal courts have placed in the path of employment discrimination plaintiffs."); Trina Jones, *Anti-Discrimination Law in Peril?*, *75 MO. L. REV. 423, 433 (2010)*; Selmi, *supra* note 167, at 562.

197 *42 U.S.C. § 12112(a)*.

198 *See, e.g., Grant v. Oceans Healthcare, LLC, No. 17-00642, 2019 U.S. Dist. LEXIS 211504, at 32 (M.D. La. Dec. 9, 2019)* (requiring that adverse action be taken "in whole or in part because of" the plaintiff's ***disability***); *Whalen v. City of Syracuse, No. 11-0794, 2014 U.S. Dist. LEXIS 95835, at 23 (N.D.N.Y. July 15, 2014)* (explaining that plaintiff must demonstrate that her ***disability*** was "in the very least, "a motivating factor'... if not a "but-for' cause."); *Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1062-63 (D. Ore. 2013)* (providing that no Congressional intent to require dismissal of claims under the more onerous but-for standard); *see also* H.R. Rep. No. 110-730, pt. 1, at 16 (2008) (explaining the legislative history of ADA and suggesting that "indirect evidence" and "mixed motive" cases should be permitted under the ADA discrimination causes of action).

199 *See* H.R. Rep. No. 110-730, pt. 1, at 16.

200 *42 U.S.C. § 2000e-2(m)*.

dismissal of disparate treatment claims where an employee's protected class was "a motivating factor for an adverse employment decision." [201]

The "on the basis of" language, found both in the ADAAA and the Age Discrimination in Employment Act (hereinafter "ADEA"), incorporates a "but-for" standard to prove discriminatory intent, **[*24]** according to the Supreme Court's interpretation of the ADEA. [202]The but-for standard allows dismissal of a claim of disparate treatment based on an employer's evidence that "it would have made the same decision" even if it had taken the employee's protected class into account. [203]Consequently, the ADAAA only protects employees who can prove that an employer's discriminatory or retaliatory animus was outcome-determinative. [204]

The "but-for" standard of proof under the ADAAA has been adopted by the Courts of Appeal for the Second Circuit, [205]the Fourth Circuit, [206]the Sixth Circuit, [207]and the Ninth Circuit. [208]These courts reason that, unlike Title VII, the "on the basis of" language in the ADAAA does not allow a plaintiff to avoid dismissal by showing that discrimination was a motivating factor in the decision. [209]The Court of Appeals for the Fourth Circuit explained that it failed to see any "meaningful textual difference" between "on the basis of" in the ADAAA, and the term "because of," found in the ADA and the original Title VII, which has been interpreted to require satisfaction of the "but-for" standard. [210]The Fourth Circuit later granted summary judgment in favor of an

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201 *Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003)*.

202 *See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013)*; *Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)*.

203 *See 29 U.S.C. § 623(a)*; *Univ. of Tex., 570 U.S. at 360*; *Gross, 557 U.S. at 173-74*.

204 Zabinski, *supra* note 189, at 303; *see, e.g.*, *McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076 (11th Cir. 1996)* (imposing liability on employer only where a person's ***disability*** "makes the difference in the employer's decision"), *cert. denied*, ***520 U.S. 1228 (1997)***.

205 *Natofsky v. City of New York, 921 F.3d 337, 348 (2d Cir. 2019)*, *cert. denied*, ***140 S. Ct. 2688 (2020)***.

206 *See Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 235-36 (4th Cir. 2016)* (applying "but-for" causation standard based on ADA language prohibiting discrimination "on the basis of" ***disability***); Zabinski, *supra* note 189, at 286.

207 *See* EEOC v. W. Meade Place, LLP, 841 F. A'ppx 962, 969 (6th Cir. 2021); *Hunt v. Monro Muffler Brake, Inc., 769 Fed. Appx. 253, 256 (6th Cir. 2019)*; *Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012)* (applying "but-for" test).

208 *See Murray v. Mayo Clinic, 934 F.3d 1101, 1107 (9th Cir. 2019)*, *cert. denied*, ***140 S. Ct. 2720 (2020)***.

209 *Id. But see Flaherty v. Entergy Nuclear Operations, Inc., 946 F.3d 41, 53 (1st Cir. 2019)* (stating in dictum that the plaintiff must demonstrate that the employer took the adverse employment action "in whole or in part because of [her] ***disability***.").

employer where "an employer acts with a mixed motive - both a discriminatory and non-discriminatory reason" because the but-for standard "requires ***disability*** to be more than *a* motivating factor: it must be *the only* motivating factor." [211]This "but-for" standard has been relied upon subsequently to **[*25]** dismiss claims of disparate treatment [212]and retaliation under the ADAAA. [213]

Some see this adherence to the "but-for" standard as an expression of courts' concern about the potential breadth of the ADA. [214]Regardless of any court's motivation, adherence to the "but-for" standard for proving discriminatory intent makes it more difficult for plaintiffs with ***disabilities*** to establish disparate treatment caused by unconscious or subtle discrimination. [215]Until the ADAAA is amended to lower this more difficult standard of proof, it becomes even more important to understand the courts' application of this standard where an employee faces an adverse action after the revelation of her ***disability***.

B. Prima Facie Evidence of Discriminatory Intent

To prove that an employer acted with the intent to discriminate under the "but-for" standard, a plaintiff with a ***disability*** must first prove that the employer had some knowledge of her ***disability***. [216]But the more difficult burden is to prove that the ***disability*** or their protected activity led to the employer's decision to reject or discharge that person. [217]This review of court decisions where the employer's intent was in dispute establishes just how difficult it is for plaintiffs to meet that burden in the face of courts' widespread use of motions for summary judgment to dispose of claims where the factual issue of intent should determine the outcome of the claim. [218]If a

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210 *Gentry, 816 F.3d at 235-36*.

211 *Davis v. W. Carolina Univ. 695 F. App'x. 686, 688 (4th Cir. 2017)*.

212 Donaldson v. Clover Sch. Dist., No. 0:15-1768-*MBS-KDW, 2017 U.S. Dist. LEXIS 155431, at 33 (D.S.C. July 24, 2017)*.

213 Wilson v. Montgomery Cty. Coll. Bd. of Trs., No. 17-cv-2784-*PWG, 2021 U.S. Dist. LEXIS 54740, at 23 (D. Md. Mar. 23, 2021)* (explaining that employer had "ample non-retaliatory reason" to discharge plaintiff).

214 Selmi, *supra* note 167, at 556.

215 *Id.* at 571.

216 *Tennial v. UPS, 840 F.3d 292, 306 (6th Cir. 2016)*; *Nilles v. Givaudan Flavors Corp., 521 F. App'x 364, 368 (6th Cir. 2013)*.

217 *See Tennial, 840 F.3d at 306*.

218 *See Holcomb v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008)*.

plaintiff is unable to establish a prima facie claim of disparate treatment, the case may even be dismissed on a motion to dismiss. [219]

An employee will fail to meet this initial burden of proof if the decision makers implementing an adverse action did not know about the employee's ***disability*** or protected activity. [220]Courts have explained that **[*26]** even an employer's knowledge of the symptoms of a plaintiff's ***disability*** does not establish the employer's knowledge of the ***disability*** to support ADA claims. [221]As the Sixth Circuit has recognized, "unless the [employer] knew or believed that the plaintiff was disabled, or knew that the symptoms were caused by a ***disability*** as defined by law, it would be impossible for the [employer] to have made its decision *because of* the ***disability***." [222]Under this approach, one court dismissed the claim of an employee with rheumatoid arthritis because an "employer must be aware of symptoms raising an inference of ***disability*** and not every complaint of pain or statement relaying the medications an employee is taking necessarily creates such an inference." [223]This means that if an employee has requested an accommodation but has not revealed or been asked about "the specifics of [her] ***disabilities*** or restrictions" then she has failed to establish a prima facie claim of disparate treatment. [224]

Thus, even if the employee exhibits symptoms of her impairment at work, the failure of an employer's deciding official to categorize those symptoms as a ***disability*** will establish an employer's lack of notice of the employee's

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219 *See* Moore v. Time Warner GRC 9, 18 F. Supp. 2d 257, 262 (W.D.N.Y. 1998).

220 Kaminer, *supra* note 1, at 251; Reutzel v. Answer Pro, LLC, No 17-944, 2019 U.S. Dist. LEXIS 130511, at 14 (W.D. Pa. Aug. 5, 2019); Porto v. Chevron NA Exploration & Prod. Co., No. H-17-1419, 2018 U.S. Dist. LEXIS 123757, at 31 (S.D. Tex. July 24, 2018); *see also* Whaley v. Bonded Logic Inc., No. CV-19-02442-PHX-DJH, 2020 U.S. Dist. LEXIS 171801, at 8 (D. Az. Sept. 18, 2020) (using the employer's decision to discharge made before employer learned of ***disability*** as evidence in favor of granting employer's motion); Williams v. AT&T Mobility Servs. LLC, 847 F.3d 384, 395 (6th Cir. 2017) (requiring that employer "knew or had reason to know" of her ***disability***); EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1049 (10th Cir. 2011); Ainsworth v. Indep. Sch. Dist. No. 3, 232 F. App'x 765, 771 (10th Cir. 2007) (providing that an employer must know of a ***disability*** before it can be held liable under ADA).

221 Nilles, 521 F. App'x at 369; *see also* Cozzi v. Great Neck Union Free Sch. Dist., No. 05-CV-1389 (ENV), 2009 U.S. Dist. LEXIS 74305, at 42 (E.D.N.Y. Aug. 21, 2009) (noting that employer's knowledge of plaintiff's symptoms does not establish knowledge that plaintiff was disabled); Moore, 18 F. Supp. 2d at 262 (noting that knowledge of plaintiff's diabetes or hypertension is "not equivalent to knowing that his condition "disabled' him within the meaning of the ADA.").

222 Yarberry v. Gregg Appliances, Inc. 625 Fed. Appx. 729, 737 (6th Cir. 2015); *see also* Brown v. BKW Drywall Supply, Inc., 305 F. Supp. 2d 814, 829 (S.D. Ohio 2004) ("Knowing that an employee has health problems, however, is not the same as knowing that the employee suffers from a ***disability***.").

223 EEOC v. Detroit Cmty. Health Connection, No. 13-12801, 2014 U.S. Dist. LEXIS 165904, at 25 (E.D. Mich. Nov. 26, 2014).

224 Arthur v. Am. Showa, Inc., 625 F. App'x 704, 708 (6th Cir. 2015).

disability. [225]This lack of knowledge defense has supported the dismissal of a claim by an employee with a psychiatric ***disability*** who had requested that his supervisor provide an accommodation and even **[*27]** filed an EEO complaint, based on the court's finding that the "concurring official" and "deciding official" taking the adverse action lacked knowledge of his ***disability***. [226]Similarly, a previous supervisor's knowledge of a plaintiff's ***disability*** was insufficient evidence of the current deciding supervisor's knowledge of her ***disability***, even though that decision maker took over the same position as the person with knowledge of the ***disability***. [227]

An employer's awareness of an employee's ***disability*** typically arises from communication with that employee, [228]often in connection with a request for accommodation. Ironically, if an employee or applicant chooses to forego accommodation because of a fear of discrimination, she may have a difficult time proving that her employer acted with an intent to discriminate. [229]In some cases, an employee has failed to establish causation even when the disparate treatment is linked to such a request for accommodation. [230]For example, even when an employee's request for accommodation also referenced his ***disability***, one court found no evidence of causation because the employer's communications with the plaintiff never indicated that his "medical condition itself was ever discussed or at issue." [231]

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[225] *See* ***Crandall v. Paralyzed Veterans of Am., 146 F.3d 894, 898 (D.C. Cir. 1998)*** (no "adequate, prior alert to the defendant of the plaintiff's disabled status" where plaintiff displayed extremely "rude behavior" but did not reveal to his employer that he suffered from bipolar disorder); *Taylor v. Principal Fin. Grp., Inc., 93 F.3d 155, 159 (5th Cir. 1996)* (explaining that there was an insufficient notice of ***disability*** to employer where employee with worsening job performance told his employer that he was bipolar but said he was all right, never offered more information).

[226] Lober v. Brennan, No. CV-18-2640-*PHX-DMF, 2020 U.S. Dist. LEXIS 68694, at 15-16 (D. Az. Apr. 20, 2020)*; *see also* Bates v. Anthem Ins. Cos., No. 1:18-cv-502, *2020 U.S. Dist. LEXIS 142522, at 16-18 (S.D. Ohio Aug. 10, 2020)* (knowledge that employee requires leave and temporary adjustment of schedule does not support inference that plaintiff's supervisor knew she was disabled); *Arthur, 625 F. App'x at 708* (noting that the decision maker was aware of restrictions but unaware of specifics or why restrictions were imposed); *Moloney v. Home Depot U.S.A., Inc., No. 11-10924, 2013 U.S. Dist. LEXIS 16526, at 2 (E.D. Mich. Feb. 7, 2013)* (noting that it is knowledge of person who made the decision to terminate that is relevant).

[227] *Morgan v. J. C. Penney Co., No. 13-10023, 2014 U.S. Dist. LEXIS 43069, at 7-9 (E.D. Mich. Mar. 31, 2014)*, *recon. den'd 2014 U.S. Dist. LEXIS 62907 (E.D. Mich. May 7, 2014)*.

[228] *Yarberry v. Gregg Appliances, Inc. 625 Fed. Appx. 729, 737 (6th Cir. 2015)*.

[229] JENNY YANG & JANE LIU, ECON. POL'Y INST., STRENGTHENING ACCOUNTABILITY FOR DISCRIMINATION 9 (2021), *https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/*.

[230] Israelitt v. Enter. Servs. LLC, No. SAG-18-1454, *2021 U.S. Dist. LEXIS 38821, at 19 (D. Md. Mar. 2, 2021)*.

[231] *Id. at 20*.

The reasoning of these courts ignores the inherent link between a request for accommodation and the ***disability*** necessitating that accommodation. These decisions fail to recognize that supervisors, managers, and other decision makers may know enough about an employee's ***disability*** through informal communications with other employer representatives or even based on unsupported assumptions, which led to an adverse action. Moreover, the "ignorance" of those **[*28]** representatives regarding the scope of the ADA's coverage should not allow them to escape the obligation to at least produce some legitimate reason for an adverse action against that employee. [232]

Even under these exacting standards to prove an employer's notice of ***disability***, some courts refuse to dismiss a claim based on an employer's constructive notice of an employee's ***disability***. Such notice may be established "if an employee's symptoms are "severe enough to alert" it, giving it either knowledge or "some generalized notion" of the ***disability***. [233]For example, where the employee was hospitalized and unable to communicate more details with his employer, the Sixth Circuit deemed that an employer had sufficient notice of the employee's mental illness where his discharge was finalized after his supervisor learned of his involuntary commitment to a mental hospital, combined with the sudden onset of his extreme symptoms. [234]Similarly, a plaintiff avoided dismissal of his ***disability*** discrimination claim based on his supervisor's knowledge that he had used Family & Medical Leave Act (hereinafter "FMLA") leave in the past, creating a question of fact regarding that supervisor's knowledge of his ***disability***. [235]This more enlightened approach recognizes that discrimination can occur based on an employee's ***disability*** even if the employer's representative has not engaged in a legal analysis of whether the employee's impairment qualifies under the ADA's definition of ***disability***. [236]This approach also allows a jury, rather than a judge, to decide whether an employer was on notice of an employee's ***disability***.

Even if an employee can establish that her employer had knowledge of her ***disability***, a prima facie claim to survive a motion for summary judgment will require evidence of a link between that ***disability*** and an adverse action, which is often established by the temporal proximity between the employee's revelation of a ***disability*** and the adverse action taken against them. [237]Like a disparate treatment claim, a retaliation claim will require some employer

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232 *Hedberg v. Ind. Bell Tel. Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995)*.

233 *Nilles v. Givaudan Flavors Corp., 521 F. App'x 364, 369 (6th Cir. 2013)*; *see also* *Hedberg, 47 F.3d at 934* (some symptoms may be "so obviously manifestations of an underlying ***disability*** that it would be reasonable to infer that an employer actually knew of the ***disability***.").

234 *Yarberry v. Gregg Appliances, Inc. 625 Fed. Appx. 729, 738 (6th Cir. 2015)*.

235 Buzulencia v. Ohio Bell Tel. Co., No. 4:11CV2293, *2014 U.S. Dist. LEXIS 102551, at 3 (N.D. Ohio July 28, 2014)*.

236 *See generally id. at 26* (the employer's representative had no knowledge of the plaintiff's prior use of FMLA leave, nor his history of suffering from migraines).

237 *See id. at 32*.

awareness of an employee's engagement in **[*29]** some protected activity, such as requesting an accommodation. [238]To establish a prima facie case of ADA retaliation, the plaintiff must prove that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action against her either subsequent to or contemporaneous with the protected activity; and (3) there was a "causal connection between the protected activity and the adverse employment action." [239]

In general, temporal proximity between the adverse action experienced by the employee and disclosure of a ***disability*** can raise an inference of unlawful discrimination or retaliation. [240]Thus, it is important to understand the latitude afforded to employers who wish to remove a person with a ***disability*** from employment by waiting for some time to pass before taking an adverse action. [241]

C. Role of Temporal Proximity in Disparate Treatment Claims

The temporal proximity between a revelation of an employee's ***disability*** or engagement in protected activity can support a prima facie claim of disparate treatment, yet the impact of such temporal proximity carries some significant limitations. [242]First, the timing must be close enough to suggest some causation. [243]In addition, while temporal proximity may establish a prima facie case of disparate treatment, close timing alone will be insufficient to avoid dismissal of a claim if an employer provides some legitimate justification for its adverse action and the plaintiff cannot show that reason to be pretextual. [244]

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238 *42 U.S.C. § 12203(a)*.

239 *Oehmke v. Medtronic, Inc., 844 F.3d 748, 758 (8th Cir. 2016)*; *LaRochelle v. Wilmac Corp., 210 F. Supp. 3d 658, 698 (E.D. Pa. 2016)* (causal connection); *Coleman v. Md. Ct. of Appeals, 626 F.3d 187, 190 (4th Cir. 2010)* (causal link); *Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 106 (1st Cir. 2007)* (causal connection); *Anderson v. Coors Brewing Co., 181 F.3d 1171, 1178 (10th Cir. 1999)*.

240 *Williamson v. Bon Secours Rich. Health Sys., 34 F. Supp. 3d 607, 615 (E.D. Va. 2014)*.

241 *See Cormier v. City of Meriden, 420 F. Supp. 2d 11, 22 (D. Conn. 2006)* (the district court describes a "few months" period which allows for the inference of temporal proximity).

242 *See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997)*.

243 *Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 274 (2001)*; *see also* Kane v. City of Ithaca, No. 3:18-CV-0074, *2019 U.S. Dist. LEXIS 188376, at 32 (N.D.N.Y. Oct. 30, 2019)* (discharged three days after revelation of ***disability*** raises inference of discrimination); *Kelly v. N. Shore-Long Island Jewish Health Sys., 166 F. Supp. 3d 274, 286-87 (E.D.N.Y. 2016)* (plaintiff placed on administrative leave two hours after revelation of ***disability*** raises inference of discrimination); *Baron v. Advanced Asset & Prop. Mgmt. Sols., LLC, 15 F. Supp. 3d 274, 283 (E.D.N.Y. 2014)* (disclosure of ***disability*** five-six weeks before termination could be factor in determining that employer discriminated against plaintiff).

244 *Morgan v. Wells Fargo Bank, N.A., 585 F. App'x 152, 153 (4th Cir. 2014)*.

[*30] In our review of 143 court decisions concerning disparate treatment claims by plaintiffs with ***disabilities***, sixty-eight involved adverse actions which occurred within a relatively close time frame after the plaintiff revealed her ***disability*** or engaged in protected conduct related to her ***disability***, typically a request for accommodation. [245]The outcomes of those cases are displayed in the following table:

TABLE 2. Influence of Temporal Proximity [246]

	Close Timing Only	Close Timing & Relevant Statements	Rejection of Reason & Timing	Timing, Statements & Rejection of Employer Reason	Close Timing & Acceptance of Employer Reason	Statements & Close Timing but Employer Reason Accepted
For Employee (48)	5	8	11	12	0	0
For Employer (96)	1	0	0	0	28	3
Success Rate for Plaintiffs	5/6	8/8	11/11	12/12	0/28	0/3

This table shows that plaintiff employees were most often successful, in 12/48 (25%) of the cases decided in their favor, by establishing close timing between the adverse action and the revelation or protected activity combined with negative, relevant statements and an ability to otherwise discredit the employer's reason for taking the adverse action. [247]Rejection of an employer's reason for the adverse action combined with close timing led to success for an additional eleven (22.9%) of the successful plaintiffs, and combined with negative statements led to success for an additional six (12.5%) of the plaintiffs. [248]Close timing combined with negative statements led to the

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245 *See infra* Appendix A.

246 *See infra* Appendix A.

247 *Supra* Table 2.

success of an additional eight (16.7%) of the successful plaintiffs, whereas close timing alone only supported the continuation of five (10.4%) out of forty-eight successful claims. [249]

[*31] Close proximity between the revelation of a ***disability*** or engagement in a protected activity, such as requesting an accommodation, and the employer's adverse action can establish causation. [250]To effectively prove discriminatory intent, the Supreme Court has suggested that temporal proximity must be "very close." [251]In trying to define the precise meaning of "very close," a collection of ADA decisions illustrates that plaintiffs' adverse actions occurring up to two months after a requested accommodation or the revelation of a ***disability*** allowed them to establish a prima facie claim of disparate treatment or retaliation. [252]Temporal proximity has established a *prima facie* case of retaliation based on a separation of as much as three months between the engagement in protected activity and the adverse action. [253]If an employer does not learn **[*32]** about a

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[248] *Supra* Table 2 .

[249] *Supra* Table 2 .

[250] *See, e.g.*, Stryker v. HSBC Sec. (USA), No. 16-cv-9424, *2020 U.S. Dist. LEXIS 158630, at 40-43 (S.D.N.Y. Aug. 31, 2020)* (causation not shown because a year gap existed between the leave taken and her ***disability*** and had a history of performance and attendance issues).

[251] *Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 274 (2001)*; *see also* Kane v. City of Ithaca, No. 3:18-CV-0074, *2019 U.S. Dist. LEXIS 188376, at 32 (N.D.N.Y. Oct. 30, 2019)* (noting that discharge three days after revelation of ***disability*** raises inference of discrimination); *Kelly v. N. Shore-Long Island Jewish Health Sys., 166 F. Supp. 3d 274, 286-87 (E.D.N.Y. 2016)* (noting that a plaintiff placed on administrative leave two hours after revelation of ***disability*** raises inference of discrimination); *Baron v. Advanced Asset & Prop. Mgmt. Sols., LLC, 15 F. Supp. 3d 274, 283 (E.D.N.Y. 2014)* (noting that disclosure of ***disability*** five-six weeks before termination could be factor in determining that employer discriminated against plaintiff).

[252] *Consedine v. Willimansett E. SNF, 213 F. Supp. 3d 253, 262 (D. Mass. 2016)*; *see also* Horwath v. DHD Windows & Doors, LLC, No. 3:18-cv-1422, *2020 U.S. Dist. LEXIS 106371, at 75 (D. Conn. June 17, 2020)* (plaintiff placed on PIP shortly after revealing impairment); *Mancini v. Accredo Health Grp., Inc., 411 F. Supp. 3d 243, 251 (D. Conn. 2019)* (finding that discharge less than two weeks after medical emergency establishes prima facie case of ***disability*** discrimination); Pogorzelski v. Cmty. Care Physicians, PC, No. 6:16-cv-498, *2018 U.S. Dist. LEXIS 54217, at 4 (N.D.N.Y. Mar. 30, 2018)* (discharge twelve days after disclosure of ***disability*** suffice as evidence of discriminatory intent); *Powell v. Merrick Acad. Charter Sch., No. 16-CV-5315, 2018 U.S. Dist. LEXIS 32810, at 19 (E.D.N.Y. Feb. 28, 2018)* (denying a motion to dismiss with one month between disclosure and discharge); *Budzban v. Dupage Cnty. Reg'l Office of Educ., No. 12C900, 2013 U.S. Dist. LEXIS 5094, at 15-17 (N.D. Ill. Jan. 14, 2013)* (showing a plausible connection to survive motion to dismiss where termination shortly followed Plaintiff's request for accommodations); *Primmer v. CBS Studios, Inc., 667 F. Supp. 2d 248, 253-54, 260 (S.D.N.Y. 2009)* (providing that less than two months between health event and discharge was a sufficiently short amount of time to give rise to inference of unlawful discrimination). *But see* *Clark Cnty., 532 U.S. at 274* ("20 months later suggests, by itself, no causality at all."); *Zelasko v. N.Y.C. Dept. of Educ., No. 20-CV-5316, 2021 U.S. Dist. LEXIS 119127, at 5-6 (E.D. N.Y. June 25, 2021)* (finding no causation based on adverse action 7 months after health event).

person's ***disability*** until an accommodation is requested, this approach leaves an employee who has faced disparate treatment or retaliation with a very short window of time in which an adverse action is sufficiently causally related to the person's ***disability***. [254]

Under the Supreme Court's description of this requisite timing as "very close," [255] lower courts vary in the amount of time which allows for an inference of disparate treatment or retaliation. [256] In some cases, close temporal proximity has been established by a gap of six to seventeen days, between the request for accommodation and the adverse treatment by an employer. [257] In other cases, temporal proximity has been recognized despite a gap of as long as three months between protected activity and an adverse action. [258] In stark contrast, other courts have deemed that a period of two or three months between a request for accommodation and an adverse action may be too long to establish retaliation. [259] Such a variation must lead

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[253] Goree v. UPS, 17-5139, *2017 U.S. App. LEXIS 22596, at 4-5 (6th Cir. Nov. 8, 2017)* (finding three weeks between the protected activity and the adverse action); *see also Sanchez-Rodriguez v. AT&T Mobility P.R., Inc., 673 F.3d 1, 15 (1st Cir. 2012)* (finding that a three month gap between filing EEOC complaint and employer discipline was "close enough to suggest causation"); *Colon-Fontanez v. Mun. of San Juan, 660 F.3d 17, 37 (1st Cir. 2011)* (finding that the employer's knowledge of the protected activity close in time to the employer's adverse action can show causation); *Treglia v. Town of Manlius, 313 F.3d 713, 720-21 (2d Cir. 2002)* (holding that adverse action one month after protected activity supports prima facie claim of retaliation).

[254] *See Sanchez-Rodriguez, 673 F.3d at 15*; *Tregalia, 313 F.3d at 720-21*.

[255] *Clark Cty. Sch. Dist. , 532 U.S. at 273*; *Adams v. Persona, Inc., 124 F. Supp. 3d 973, 982-83 (D.S.D. 2015)*; Porter, *supra* note 11, at 846.

[256] *Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525 (6th Cir. 2008)*; *see also* Magee v. Trader Joe's Co., No. 3:18-cv-01956-*AC, 2021 U.S. Dist. LEXIS 76777, at 3 (D. Ore. Apr. 20, 2021)* (adverse action occurred within one month of employee being placed on unpaid leave for ***disability***); D'Alessio v. Charter Commc'n, LLC, No. 18-cv-2738, *2020 U.S. Dist. LEXIS 173332, at 20 (E.D.N.Y. Sept. 21, 2020)* (time period of more than one year insufficient to support causation).

[257] *Bridgewater v. Mich. Gaming Control Bd., 282 F. Supp. 3d 985, 1001 (E.D. Mich. 2017)*; *Consedine, 213 F. Supp. 3d at 262*; *Cloe v. City of Indianapolis, 712 F.3d 1171, 1181 (7th Cir. 2013)*; *Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999)* . *See also Israelitt, 2021 U.S. Dist. LEXIS 38821, at 25-28* (no summary judgment for employer where request for accommodation was followed a few weeks after by adverse treatment).

[258] *Hixon v. TVA Bd. of Dir., 504 F. Supp. 851, 874 (E.D. Tenn. 2020)*; *see also Dye v. Office of Racing Comm'n., 702 F.3d 286, 306 (6th Cir. 2012)* (causation based on adverse action taken two to three months after plaintiff engaged in protected activity under ADA); *Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004)* (establishing prima facie retaliation under Title VII by a three-month period between protected activity and discharge).

[259] *See* Payne v. Cornell Univ., No. 18-cv-1442, *2021 U.S. Dist. LEXIS 864, at 57-8 (N.D.N.Y. Jan. 5, 2021)* (finding no causation where adverse employment actions took place approximately six months after she engaged in the protected

to confusion among both employees seeking to establish discriminatory or retaliatory intent, and among employers who seek to avoid liability based on an adverse action taken against an employee with a ***disability***.

As illustrated by these examples, courts have explained that "a specified time period cannot be mechanically applied," [260] and that there **[*33]** is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship. [261] Longer lapses of time may not establish causation, unless the plaintiff can show that some reason for a delay in the retaliatory action, [262] or ongoing hostility such as a "pattern of antagonism" occurring during the intervening period. [263]

These decisions demonstrate the point that temporal proximity does not establish a prima facie claim for all adverse actions taken after engagement in protected activity. [264] If "some time" elapses between when the employer learns of a protected activity and the subsequent adverse action, "the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality." [265]

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activities); *Perez v. Transformer Mfrs., Inc., 35 F. Supp. 3d 941, 954 (N.D. Ill. 2014)* (finding no evidence of causal connection between filing of plaintiff's discrimination charge and his termination).

260 *Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1003 (9th Cir. 2009)*.

261 *Magnotti v. Crossroad Healthcare Mgmt., LLC, 126 F. Supp. 3d 301, 313 (E.D.N.Y. 2015)*; *Espinal v. Goord, 558 F.3d 119, 129 (2d Cir. 2009)*; *see also* Ivankovskaya v. Metro. Transp. Auth. Bus Co., No. 15-cv-5727, *2017 U.S. Dist. LEXIS 122598, at 16 (E.D.N.Y. Aug. 3, 2017)* (finding that a passage of 2 months between request for accommodation and retaliatory act does not defeat finding of causation); *Abrams v. Dept. of Pub. Safety, 764 F.3d 244, 254-55 (2d Cir. 2014)* (noting that a temporal proximity of events may give rise to inference of retaliation); *Infantolino v. Joint Indus. Bd. of Elec. Indus., 582 F. Supp. 2d 351, 359 (E.D.N.Y. Oct. 1, 2008)* (finding that plaintiff established prima facie retaliation claim despite two month lapse between protected activity and adverse action.).

262 *Hurd v. N. Y. Health & Hosps. Corp., No. 04-CV-998, 2007 U.S. Dist. LEXIS 15635, at 5 (S.D.N.Y. Mar. 5, 2007)*, *aff'd sub nom*. *Hurd v. N. Y. C. Health & Hosps. Corp., No. 07-CV-1250, 2008 U.S. App. LEXIS 24727 (2d Cir. Dec. 8, 2008)*.

263 *Curcio v. Roosevelt Union Free Sch. Dist., No. 10-CV-5612 (SJF), 2012 U.S. Dist. LEXIS 120144, at 44 (E.D.N.Y. Aug. 22, 2012)*; *see also Schmitt v. City of N.Y., No. 15-CV-05992, 2018 U.S. Dist. LEXIS 187382, at 29 (E.D.N.Y. Nov. 1, 2018)* (showing a pattern of antagonism helped establish causation despite less temporal proximity); *Quinby v. WestLB AG, No. 04-CV 7406, 2007 U.S. Dist. LEXIS 28657, at 14 (S.D.N.Y. Apr. 19, 2007)*.

264 *Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997)*.

265 *Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525 (6th Cir. 2008)*; *see also Piligian v. Icahn Sch. of Med. at Mt. Sinai, 490 F. Supp. 3d 707, 720 (S.D.N.Y. 2020)* (showing a temporal proximity of a few days combined with emails showing lack of intent to accommodate justified denial of summary judgment for employer); McCoy v. MV Residential Prop. Mgmt., 2:14-*CV-2642, 2016 U.S. Dist. LEXIS 47733, at 7 (S.D. Ohio Apr. 8, 2016)* (showing a gap in time between plaintiff's complaints and his transfer, no other indicia of retaliatory conduct); *Cormier v. City of Meriden, 420 F. Supp. 2d 11, 21-22 (D. Conn. 2006)* (explaining that temporal proximity of a few months is sufficient for prima facie case of retaliation).

Even if an adverse action is taken within a short time after the revelation of a ***disability*** or engagement in protected activity, summary judgment still may be granted for an employer whose timing is consistent with its justification for the adverse action. [266]For example, a discharge which occurred just days after a plaintiff with a ***disability*** returned from **[*34]** leave was justified by patient complaints about her behavior. [267]Courts often grant summary judgment for an employer that imposes an adverse action in close temporal proximity when progressive discipline or an investigation into the reasons for an adverse job actions began before the plaintiff's ***disability*** was revealed or an accommodation requested. [268]This approach makes it difficult for an employee with a ***disability*** who may be having performance or attendance issues because of her ***disability*** to establish a prima facie claim of discrimination based on temporal proximity, if the employer begins any type of progressive discipline or even just a critique of her performance before that employee reveals her ***disability*** or requests an accommodation. [269]

If the employer delays a decision regarding an accommodation after that revelation occurs, then the person with a ***disability*** who is subsequently subjected to an adverse action will have a difficult time proving that the employer acted with discriminatory intent. [270]Moreover, these decisions ignore the continuing potential influence of a request for accommodation on future adverse actions against an employee who continues to challenge an employer's denial of an accommodation, or who receives an accommodation that draws resentment from supervisors, managers, and/or coworkers. [271]

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266 *Watson v. Fairfax Cty., 297 F. Supp. 3d 591, 604 (E.D. Va. 2018)*.

267 *Mancini v. Accredo Health Grp., Inc., 411 F. Supp. 3d 243, 251 (D. Conn. 2019)*; *see also Toussaint v. N.Y. Dialysis Services, Inc., 706 F. App'x 44, 45 (2d Cir. 2017)* (affirming summary judgment for employer even though employer erroneously credited a colleague's version of events).

268 *Powell v. Merrick Acad. Charter Sch., No. 16-CV-5315, 2018 U.S. Dist. LEXIS 32810, at 21 (E.D.N.Y. Feb. 28, 2018)* (explaining plaintiff was subject to disciplinary action and her position was "demonstrably at risk" before disclosure of ***disability***); *see also Telesford v. N.Y.C. Dept. of Educ., No. 16-CV-819, 2021 U.S. Dist. LEXIS 26242, at 9-10 (E.D.N.Y. Jan. 6, 2021)* (showing plaintiff faced gradual adverse job actions long before ***disability*** arose); Gray v. Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs., No. 5:16-CV-973, *2020 U.S. Dist. LEXIS 36231, at 22-23 (N.D.N.Y. Mar. 3, 2020)* (explaining that administrators started investigation into Plaintiff's alleged inappropriate and unprofessional conduct before she submitted notice of her medical leave); *McDonnell v. Schindler Elevator Corp., No. 12-CV-4614 (VEC), 2014 U.S. Dist. LEXIS 96824, at 38-42 (S.D.N.Y. July 16, 2014)*, *aff'd* 618 F. App'x. 697 (2d Cir. 2015) (noting that poor performance evaluations were received before ***disability*** revealed).

269 *See Powell, 2018 U.S. Dist. LEXIS 32810 at 10*.

270 *See* Porter, *supra* note 11, at 854 n.270.

271 *See id. at 852*.

This approach allows an employer to delay a decision to discharge or otherwise punish an employee who has requested an accommodation, which necessarily requires the disclosure of an employee's ***disability***, and consequently avoid a claim of retaliation. [272]Plaintiffs' reliance on close temporal proximity between the revelation of a ***disability*** and an adverse **[*35]** action has led to the observation that "[a] savvy, well-counseled employer knows that it cannot take an adverse employment action immediately after a harassment or discrimination complaint." [273]

This reasoning also ignores the ongoing influence of a revelation of a ***disability*** or a request for accommodation that may continue to influence an employer's treatment of an employee with a ***disability*** long after the initial revelation or request. [274]Because of the interactive process associated with requests for accommodation, the employer may continue to consider that employee's ***disability*** for a period of time that is insufficiently "close" in time to satisfy courts' requirement of proof of a prima facie claim of disparate treatment or retaliation. [275]

These decisions demonstrate that an employee with a ***disability*** may have a difficult time establishing a prima facie claim of disparate treatment or retaliation even if that adverse event occurred in a relatively short amount of time after she revealed her ***disability*** to her employer. [276]Instead, many courts will be quick to dismiss that claim even without evidence of a legitimate reason for the adverse action.

D. Deference to Employers' Reason for Adverse Action

Once a plaintiff presents a prima facie claim of discrimination under the ADA, the employer has the "relatively light" burden to "articulate a legitimate, nondiscriminatory reason" for an adverse action taken against a person with a ***disability***. [277]In imposing this light burden, courts have demonstrated extreme deference to employers' judgments regarding what job duties are essential and whether the employee with a ***disability*** can fulfill those duties. [278]This deference is exemplified by the dismissal of the claim of an employee with a ***disability*** based on his employer's view that his ***disability*** prevented him from "performing his job at a level that met his employer's

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272 *See id. at 841* (delaying grant of accommodation was not considered an adverse employment action).

273 *Id. at 854*.

274 *See id. at 843*.

275 *See id.*

276 *See id. at 825-26* (explaining requirements for establishing a prima facie claim and the reasons many courts dismiss Plaintiffs' claims).

277 Weirich v. Horst Realty Co., LLC, No. 07-cv-871, *2009 U.S. Dist. LEXIS 24526, at 7 (E.D. Pa. Mar. 26, 2009)*; *Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994)*.

278 Travis, *supra* note 33, at 1701.

legitimate expectations." [279]In conferring this **[*36]** deference to employers, courts often decline to act as "a super-personnel office" by questioning an employer's "business judgment" to take an adverse action against an employee, even if that employee has established a prima facie case of disparate treatment or retaliation. [280]

The significant influence of this deference to employers' reasons for taking an adverse action against an employee with a ***disability*** is illustrated by our review of 143 court decisions. [281]Decisions were categorized as "Acceptance of Employer Reason" if the court relied on the employer's proffered reason for taking an adverse action in granting a motion for summary judgment or motion to dismiss in favor of the employer. [282]Conversely, "Rejection of Reason" refers to a court's questioning of whether the reason provided by the employer for taking an adverse action was a pretext for discrimination or retaliation. [283]"Close Timing" refers to a court's determination that the adverse action followed closely in time after an employee's revelation of their ***disability*** or engagement in protected activity, such as requesting an accommodation. [284]"Statements" refers to statements by a decision maker for the employer that directly relate to the employee's ***disability*** or protected activity; this does not include statements that were deemed to be unrelated, made by someone other than a decision maker, or otherwise as "stray" statements that were insufficient to show an employer's intent. [285]

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TABLE 3. Influence of Employer's Reason [286]

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279 Matthews v. Gee, No. 3:17cv271-*HEH, 2017 U.S. Dist. LEXIS 102549, at 14 (E.D. Va. June 30, 2017)*; *see also* Melani v. Chipotle Serv., LLC, No. 3:17-cv-01177-*AC, 2019 U.S. Dist. LEXIS 227041, at 39-47 (D. Ore. Sept. 4, 2019)* (legitimatizing discharge ten days after revelation of ***disability*** by assertion that plaintiff was discharged for unacceptable work performance); Brown v. Duke Energy Corp., No. 1:13cv869, *2019 U.S. Dist. LEXIS 54923, at 39 (S.D. Ohio Mar. 31, 2019)* (noting no causation where employer identified performance issues before ***disability*** arose).

280 *Hunt v. Moro Muffler Brake, Inc., 769 F. App'x 253, 257 (6th Cir. 2019)*; *Tingle v. Arbors at Hilliard, 692 F.3d 523, 530-31 (6th Cir. 2012)*; *Klimek v USW Local 397, 618 F. App'x 77, 80 (3d Cir. 2015)*; *Harp v. SEPTA, No. 04-2205, 2006 U.S. Dist. LEXIS 35344, at 12 (E.D. Pa. June 1, 2006)*.

281 *See infra* Appendix A.

282 *See infra* Table 3.

283 *See infra* Table 3.

284 *See infra* Table 3.

285 *See infra* Table 3.

286 *See infra* Appendix A.

Outcome	For Employee (N=48)	For Employer (N=95)	Success Rate for Plaintiffs
Acceptance of Employer Reason Only	0	40	0/40
Close Timing & Acceptance of Employer Reason	0	28	0/28
Acceptance of Employer Reason & Statements	0	4	0/4
Statements & Close Timing but Employer Reason Accepted	0	3	0/3
Rejection of Employer Reason Only	3	0	3/3
Rejection of Employer Reason & Statements	6	0	6/6
Rejection of Reason & Timing	11	0	11/11
Timing, Statements & Rejection of Employer Reason	12	0	12/12

Of the ninety-five out of 143 decisions in which the employer succeeded in its motion to dismiss or motion for summary judgment, courts most often (75/95 cases) relied on their acceptance of the employer's reason for taking an adverse action against the plaintiff. [287]This acceptance occurred even in 28 of those cases where the adverse action took place close in time to the revelation of the plaintiff's ***disability*** or engagement in protected activity, such as asking for an accommodation. [288]Employers also had success in four of those seventy-five cases where the court accepted its reason for the adverse action even if the plaintiff submitted evidence of negative statements related to their ***disability*** or protected activity, and in three of those cases even where the **[*38]** plaintiff established both close timing and negative statements. [289]This analysis demonstrates the influence of the deference given to an employer's reason for taking an adverse action against an employee with a ***disability***.

Courts often defer to employers regarding their standard of performance for a particular position or employee, and the court will not readily question an employer's business judgment as to whether an employee met those

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287 *See supra* Table 3.

288 *See supra* Table 3.

289 *See supra* Table 3.

standards. [290]Moreover, courts defer to employers' judgment that job duties must be completed in a particular way, which may not be possible given the limitations of the employee's impairment. [291]The legitimacy of the employer's reason for taking an adverse action is supported by evidence that the plaintiff's deficiencies were noted or even the reason for discipline before her ***disability*** was revealed. [292]It is the rare case in which a court will deny summary judgment for an employer which has presented evidence of a plaintiff's performance issues, and this typically only occurs where the plaintiff has presented substantial evidence that those issues are untrue combined with harsher treatment compared to similarly situated coworkers. [293]

Some courts defer to employers by allowing them to define a job so as to render the person with a ***disability*** unqualified. [294]For example, by classifying in-person attendance as an essential part of a job, an employer can eliminate telework or a flexible schedule as a reasonable accommodation. [295]This deference to employers results in the dismissal of claims without allowing a jury to determine which aspects of a job are essential. [296]Employers also benefit when courts misclassify personal and professional qualifications to include the absence of a ***disability***, which relieves them of the burden of showing that the exclusionary qualification **[*39]** serves a business necessity. [297]This deference and misclassification "embeds the same ***disability***-based stereotypes that the ADA was intended to disrupt" leading to the disqualification of many people with ***disabilities*** who could otherwise be accommodated. [298]

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290 Jacobson v. Capital One Fin. Corp., No. 16cv6169, *2018 U.S. Dist. LEXIS 211312, at 16 (S.D.N.Y. Dec. 12, 2018)*; *see also White v. Pacifica Found., 973 F. Supp. 2d 363, 382 (S.D.N.Y. 2013)* (noting that plaintiff did not deny poor performance and could not show that reasons for termination, including economic recession, were pretextual); *see* ***Silva v. Peninsula Hotel, 509 F. Supp. 2d 364, 385 (S.D.N.Y. 2007)*** (noting that plaintiff did not dispute that he committed various infractions of employer policies).

291 *See* Travis, *supra* note 33, at 1715.

292 *Wein v. N.Y. City Dep't of Educ., No. 18 Civ. 11141, 2020 U.S. Dist. LEXIS 150136, at 38 (S.D.N.Y. Aug. 19, 2020)*; *see also* Gray v. Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs., No. 5:16-CV-973, *2020 U.S. Dist. LEXIS 36231, at 22-23 (N.D.N.Y. Mar. 3, 2020)* (finding that the investigation into conduct began before request for medical leave).

293 Corona v. Clarins U.S.A., Inc., No. 17-cv-4438, *2019 U.S. Dist. LEXIS 155862, at 21-22 (S.D.N.Y. Sept. 12, 2019)*.

294 Travis, *supra* note 33, at 1701.

295 *Id.* at 1715-17.

296 *Id.* at 1718-19.

297 *Id.* at 1721-23.

298 *Id.* at 1720.

An employer's legitimate reason for taking an adverse action has been interpreted so broadly as to even defer to an employer's judgment that the absence of a ***disability*** is an essential job qualification. [299]Such deference undermines the assumption made in other discrimination claims that one's protected status, such as sex or race, is "irrelevant to job performance unless the employer proves otherwise." [300]In other words, courts regularly defer to an employer's opinion about qualifications or whether the person poses a direct threat even if that employer's assessment is influenced by stigma or stereotypes related to the person's ***disability***. [301]

In rare circumstances, a court will allow a claim to proceed past a motion for summary judgment where the employer's reason for the adverse action is especially suspect. [302]For example, an employer's failure to adhere to its own disciplinary process or failure to document past performance issues can undermine the legitimacy of that discipline. [303]Similarly, a motion for summary judgment was denied for an employer who alleged that the adverse action was taken because of "job abandonment" combined with past attendance issues, but the employer had tolerated the plaintiff's attendance pattern for years before her request for an accommodation. [304]

In addition to allegations of poor performance or misconduct, employers often rely on the direct threat defense to justify the taking of an adverse action against a person with a ***disability***, based on the employer's opinion that the person with a ***disability*** poses some threat to themselves or others in the workplace. [305]While the ADA characterizes direct threats as "defenses to an allegation of discrimination," circuit courts vary on **[*40]** which party carries the burden of proving that a person with a ***disability*** poses a direct threat. [306]In theory, this defense requires that the employer prove that the employee with a ***disability*** in fact poses a "direct threat." [307]In reality,

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299 *Id.* at 1712.

300 *Id.* at 1713.

301 *Id.* at 1729.

302 *See* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997).

303 Corona v. Clarins U.S.A., Inc., No. 17-cv-4438, 2019 U.S. Dist. LEXIS 155862, at 22-23 (S.D.N.Y. Sept. 12, 2019); *see also* Lareau v. Nw. Med. Ctr., No. 2:17-cv-81, 2019 U.S. Dist. LEXIS 174256, at 6-7 (D. Vt. Oct. 8, 2019) (finding that the employer failed to follow its usual, documented practice of providing employee with written notice before imposing disciplinary action).

304 Torres v. Hilton Int'l of P.R., Inc., No. 10-1190, 2012 U.S. Dist. LEXIS 91436, at 15-16 (D.P.R. July 2, 2012).

305 29 C.F.R. § 1630.15(b)(2) (2011).

306 Id. at 163.

raising the direct threat defense forces employees to produce detailed medical evidence to show the absence of a threat, to survive a motion for summary judgment. [308]This approach obviates the burden on the employer to show that the safety standard serves a business necessity. [309]

In an early decision addressing whether an employee with a ***disability*** poses a direct threat in the workplace, the Supreme Court stated that a "belief that a significant risk existed, even if maintained in good faith, would not relieve" a discriminator from liability for excluding someone as a "direct threat." [310]Similarly, the EEOC has offered the guidance that:

"the determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." [311]

Instead of following the guidance of the Supreme Court and the EEOC, lower courts have treated the question of whether an employee poses a direct threat as a question of law which can be decided on a motion for summary judgment rather than by a jury. [312]Many courts often afford employers significant deference in establishing the direct threat defense, including basing a finding of direct threat not on medical opinion, but rather based on the evidence of the employee's behavior. [313]

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307 *EEOC v. Beverage Distribs. Co., LLC, 780 F.3d 1018, 1021-22 (10th Cir. 2015)*; *Osborne v. Baxter Healthcare Corp., 798 F.3d 1260, 1268 (10th Cir. 2015)*; *see, e.g.*, U.S. EEOC, QUESTIONS & ANSWERS ABOUT DIABETES IN THE WORKPLACE AND THE AMERICANS WITH ***DISABILITIES*** ACT 6, 7 (2013), *https://www.eeoc.gov/laws/guidance/diabetes-workplace-and-ada*.

308 Travis, *supra* note 33, at 1727.

309 *Id.* at 1728.

310 *Bragdon v. Abbott, 524 U.S. 624, 649 (1998)*; *see also Stragapede v. City of Evanston, No. 12C08879, 2016 U.S. Dist. LEXIS 7370, at 12 (N.D. Ill. Jan. 22, 2016)* (finding that the employer's burden to show that employee posed direct threat to workplace safety that could not be eliminated by reasonable accommodation).

311 *29 C.F.R. § 1630.2(r) (2011)*.

312 *Michael v. City of Troy Police Dep't, 808 F.3d 304, 307, 309 (6th Cir. 2015)*.

313 *See* Jeffrey A. Van Detta, *"For the Love of God! Open This Door!": Individual Rights Versus Public Safety Under the "Direct Threat" Standard of The Americans with* ***Disabilities*** *Act After Three Decades of Litigation*, 6 BELMONT L. REV. 147, 190 (2019).

[*41] Under this deference to employers, courts grant a motion for summary judgment in the employer's favor rather than allowing a fact finder to independently assess whether the employee poses a direct threat; instead, a claim is dismissed if the employer's assessment of the threat was "objectively reasonable" in the employer's opinion. [314]For example, the Tenth Circuit dismissed the claim of an employee with post-traumatic stress disorder who was discharged after reacting to physical contact originating with a coworker, based only on the employer's individualized assessment of what the employer claimed to be the "best available objective evidence" that he posed a direct threat, without requiring support from an "independent medical examination." [315]In contrast, only a small number of courts have required that a direct threat defense be based on "objective reasonableness of [the employer's] actions," [316]as established by the views of health care professionals, [317]and scientific objectivity. [318]

This common deference to an employer's opinion about whether a person with a ***disability*** poses a direct threat is particularly problematic for people with a mental illness or other stigmatized impairment. [319]Stereotypes and stigmatization of mentally ill individuals as dangerous allows for intentional employment discrimination against them based on employers' concerns about violence in the workplace generally as well as their potential negligent hiring liability. [320]Instead of relying on stigma and stereotypes, an employer's conclusion that an employee with a ***disability*** poses a direct threat in the workplace should rely on medical **[*42]** evidence, but neither courts nor juries have the medical or scientific competency to determine whether a person with a ***disability*** poses a direct threat.

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314 *EEOC v. Beverage Distribs. Co., LLC, 780 F.3d 1018, 1021 (10th Cir. 2015)*.

315 *Jarvis v. Potter, 500 F.3d 1113, 1117 (10th Cir. 2007)*.

316 *Nail v. BNSF Ry. Co., 917 F.3d 335, 342 (5th Cir. 2019)* (citing *Bragdon v. Abbott, 524 U.S. 624, 650 (1998))*.

317 *Id. (*citing ***Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 86 (2002))***; *Justice v. Crown Cork & Seal Co., 527 F.3d 1080, 1091-92 (10th Cir. 2008)*; *see also Lowe v. Ala. Power Co., 244 F.3d 1305, 1309 (11th Cir. 2001)*.

318 *See* Burns v. Dal-Italia, LLC, No. CIV-13-528-*KEW, 2016 U.S. Dist. LEXIS 7564, at 14 (E.D. Okla. Jan. 22, 2016)* (summary judgment denied because of questions of fact as to whether employer relied on reasonable medical judgment in determining that plaintiff posed direct threat).

319 Travis, *supra* note 33, at 1729.

320 Kaminer, *supra* note 1, at 219-21; Edward Diksa & E. Sally Rogers, *Employer Concerns about Hiring Persons with Psychiatric* ***Disability****: Results of the Employer Attitude Questionnaire*, 40 J. OF AM. REHAB. COUNSELING ASS'N 31, 31 (1996); *see also* OTTO F. WAHL, TELLING IS RISKY BUSINESS: MENTAL HEALTH CONSUMERS CONFRONT STIGMA 82 (1999) (stating that "the change of attitude of interviewers and prospective employers when psychiatric status was disclosed, as well as the negative outcomes, helped to convince consumers that their psychiatric history rather than their current competence was the basis of job denials."); Jean Campbell, *Unintended Consequences in Public Policy: Persons with Psychiatric* ***Disabilities*** *and the Americans with* ***Disabilities*** *Act*, 22 POL'Y STUD. J. (1994).

[321]Deference to an employer's determination of whether a person poses a direct threat seems to be the preferred solution to this lack of knowledge. [322]

Courts' deference to employers includes allowing employers to legitimize adverse actions against employees with ***disabilities*** based on their "good faith belief" that the employee posed a threat, engaged in misconduct, or performed poorly. [323]For a plaintiff with a ***disability***, evidence that her employer's decision was "wrong or mistaken," [324]or that the decision was not "wise, shrewd, prudent or competent" will be insufficient to establish pretext so as to avoid dismissal on a motion for summary judgment. [325]As one court explained, "questionable decision-making does not equate to pretext." [326]

Under this approach, courts have allowed the dismissal of a claim of discrimination brought by a person with a ***disability*** based on the employer's reasonable belief that the employee or applicant posed a direct threat. [327]Thus, if an employer can characterize "speculation regarding future risk of injury as a direct threat to self, then it becomes a valid reason for disqualification." [328]Even beyond cases involving a direct threat defense, courts defer to an employer's beliefs regarding an employee's alleged misconduct. [329]For example, a court dismissed the retaliation claim of a plaintiff accused of working while he was on leave, based on that employer's

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321 Van Detta, *supra* note 313, at 154.

322 ***Id. at 165-66***.

323 *Merrill v. McCarthy, 184 F. Supp. 3d 221, 244 (E.D.N.C. 2016)*; *Little v. Ill. Dep't of Revenue, 369 F.3d 1007, 1012 (7th Cir. 2004)*; *see also Trent v. Constellation Energy Grp., Inc., No. CCB-08-1271, 2009 U.S. Dist. LEXIS 58260, at 18-19 (D. Md. July 8, 2009)* (stating that "employers are free to rely on allegations of misconduct in making [disciplinary] decisions, so long as their reliance is reasonable and in good faith."). *But see McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855, 862 (8th Cir. 2009)* (possible pretext where "the record in support of the employer's conclusion is ... so sparse, or the employer's conclusion so implausible.").

324 *Harp v. SEPTA, No. 04-2205, 2006 U.S. Dist. LEXIS 35344, at 12 (E.D. Pa. June 1, 2006)*.

325 *Peterson v. Sec'y U.S. Dep't of Veterans Affs., No. 20-3244, 2021 U.S. App. LEXIS 15517, at 8 (3d Cir. May 25, 2021)*.

326 *Rumanek v. Indep. Sch. Mgmt., 619 F. App'x 71, 80 (3d Cir. 2015)* (affirming jury verdict in favor of employer).

327 *EEOC v. Beverage Distributors Co., 780 F.3d 1018, 1021-22 (10th Cir. 2015)*; *Jarvis v. Potter, 500 F.3d 1113, 1121-22 (10th Cir. 2007)*.

328 Van Detta, *supra* note 313, at 158.

329 *Schwendeman v. Marietta City Schs., No. 20-3251, 2020 U.S. App. LEXIS 39230, at 5-6, 9 (6th Cir. Dec. 14, 2020)*.

"honest belief" that the plaintiff was evasive in **[*43]** responding to the employer's allegations. [330]No proof of actual misuse of leave was required to avoid dismissal of the claim. [331]

This honest belief defense, for both assertion of a direct threat and other employer-generated reasons for taking an adverse action, allows employers to escape liability for disparate treatment or retaliation if they can articulate some reason for taking an adverse action against an employee with a ***disability***, even if that reason is not true. [332]Courts have consistently held that the falsity of an employer's explanation for an adverse action is not enough to prove discriminatory intent; [333]instead, the employee must show the employer did not truly believe that the employee engaged in the alleged misconduct or poor performance. [334]Consequently, an employee who has suffered an adverse action after revealing her ***disability*** or requesting an accommodation will be unable to survive a motion for summary judgment even if the employer's reason for taking that action is not based in reality, so long as the employer professes its belief in that reason. [335]

Courts' reliance on employers' perceptions of whether an employee fails to meet performance standards or poses a direct threat undermines the ability of a person with a ***disability*** to establish that the decision was made with discriminatory intent. [336]For example, if an employee reveals a ***disability*** to obtain an accommodation, but the employer perceives that the employee or applicant cannot perform their duties, has engaged in misconduct, or poses a direct threat, then that employer can reject or discharge that employee *because of* their ***disability***. [337]Given this deference, employees with ***disabilities*** are forced to produce evidence of pretext to survive a motion for summary judgment. [338]

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330 *Id. at 10-11*.

331 *Id. at 12-13*.

332 *Id. at 14*.

333 Stefanidis v. Jos. A. Bank Clothiers, Inc., No. 3:14-CV-971, *2016 U.S. Dist. LEXIS 26133, at 17-18 (D. Conn. Mar. 2, 2016)*; *see also Kolesnikow v. Hudson Valley Hosp. Ctr., 622 F. Supp. 2d 98, 111 (S.D.N.Y. 2009)* (stating that termination is justified if employer made a good-faith business determination, regardless of whether employer reached a correct conclusion in attributing fault to plaintiff); *Roge v. NYP Holdings Inc., 257 F.3d 164, 169 (2d Cir. 2001)* (lawful for employer to base termination on good faith belief that employee recently engaged in fraud relating to employment, whether or not fraud actually occurred).

334 *Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1003 (8th Cir. 2012)*.

335 Van Detta, *supra* note 313, at 158.

336 Natasha T. Martin, *Pretext in Peril*, *75 MO. L. REV. 313, 356 (2010)*.

337 *Id.* at 321-23.

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E. Discounting Evidence of Pretext Leads to Dismissal

Even if an employee with a ***disability*** can establish a prima face claim of disparate treatment or retaliation based on her revelation of a ***disability*** and/or a request for accommodation, the claim will still be dismissed unless that employee invalidates the employer's legitimate reason for an adverse action by showing that the reason proffered by the employer was a pretext for unlawful discrimination. [339]If a plaintiff provides sufficient evidence to raise a credible question of pretext, the claim should be referred to a jury rather than being dismissed on a motion for summary judgment. [340]To survive a motion for summary judgment, however, a plaintiff must demonstrate that a jury could reasonably doubt or reject her employer's legitimate reason and infer that her ***disability*** or protected activity was the "but-for" cause of the adverse action. [341]

Pretext can be established by facts that could convince a jury to "(1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." [342]In determining whether the employer's reason was the true explanation for the adverse action, [343]the court evaluates the plaintiff's evidence supporting a future jury's rejection of the employer's explanation for the adverse action. This evaluation includes significant deference afforded to that employer's judgment, as described above. [344]Moreover, this requirement on the employer to legitimize its action is light, and the plaintiff bears the "ultimate burden of proving that she has been the victim of intentional discrimination." [345]Under this standard, courts often dismiss a claim on a motion for summary

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338 *Id.* at 323.

339 *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-18 (1993)* ("inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced"); *Ferrari v. Ford Motor Co., 826 F.3d 885, 892 (6th Cir. 2016)*.

340 *Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147-48 (2000)*.

341 *Upshaw v. Ford Motor Co., 576 F.3d 576, 586 (6th Cir. 2009)*; *see also* Hersko v. Wilson, No. 3:15-cv-215, *2018 U.S. Dist. LEXIS 119573, at 43-44 (S.D. Ohio July 18, 2018)* (dismissing claim without reason to disbelieve that adverse action was taken based on record of absenteeism).

342 *Wright v. Providence Care Ctr., LLC, 822 F. App'x 85, 91 (3d Cir. 2020)*; *West v. Northampton Clinic Co., 783 F. App'x 118, 122 (3d Cir. 2019)*; *Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 668 (3d Cir. 1999)*; *see also* Zabinski, *supra* note 189, at 285; Martin, *supra* note 336, at 326.

343 *Reeves, 530 U.S. at 148-49*; *Grose v. Lew, No. 15-5357, 2016 U.S. App. LEXIS 24454, at 17 (6th Cir. Sept. 21, 2016)*.

344 *See supra* notes 216-41 and accompanying text.

judgment without allowing a **[*45]** jury to determine whether the plaintiff has introduced sufficient facts to support their finding that the employer acted with discriminatory intent. [346]

Beyond the employer's lack of honest belief in the reason discussed above, [347] a plaintiff can attempt to show that the employer's reasons "did not actually motivate the employer's action," or that the reason was "insufficient to motivate the employer's action." [348] Circumstantial evidence of pretext can include "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered legitimate reasons, so as to permit a jury to infer the employer's discriminatory intent. [349] Plaintiffs typically rely on a relationship between the adverse action and (1) negative statements by their employer and/or (2) the timing of the revelation of their ***disability*** or their protected activity. [350] Employees with ***disabilities*** may also establish pretext by showing that similarly situated, able-bodied employees were treated more favorably, [351] but this method is difficult because of the unique circumstances surrounding most claims by employees with ***disabilities***. Without such evidence from the plaintiff, courts will dismiss a claim of disparate treatment or retaliation on a summary judgment motion. [352]

1. Negative Statements as Evidence of Pretext

Negative statements about a plaintiff's ***disability*** or protected activity can sometimes establish pretext, much like racial or sex-related comments can establish pretext under Title VII of the Civil Rights Act. [353] For example, a

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345 *Smith v. Strayer Univ. Corp., 79 F. Supp. 3d 591, 599 (E.D. Va. 2015)*.

346 *See, e.g.*, *Id. at 602* (dismissing harassment and hostile work environment claim for failure to produce sufficient evidence of subjective and objective discrimination).

347 *See supra* notes 339-52 and accompanying text .

348 *Sands v. Brennan, No. 18-2186, 2019 U.S. App. LEXIS 7530, at 4-5 (6th Cir. Mar. 13, 2019)*; *Chen v. Dow Chem. Co., 580 F.3d 394, 394 (6th Cir. 2009)*.

349 *Palencar v. N.Y. Power Auth., 834 F. App'x 647, 651 (2d Cir. 2020)* (retaliation); *Kwan v. Andalex Grp. LLC, 737 F.3d 834, 846 (2d Cir. 2013)* (disparate treatment); *Castellani v. Bucks Co. Mun., 351 F. App'x 774, 777 (3d Cir. 2009)*.

350 *See, e.g.*, *Kwan, 737 F.3d at 847* (temporal proximity); *Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 (1st Cir. 2002)* (statements about ***disability***).

351 *See* Martin, *supra* note 336, at 323, 333, 345.

352 *See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 148 (2000)*.

353 *See, e.g.*, Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, *91 N.Y.U. L. REV. 1, 15 (2016)*.

supervisor's comments about a plaintiff's absences, indicating his dislike of people with ***disabilities*** combined with references to a plaintiff's need for physical therapy, helped to defeat an employer's motion for summary judgment regarding the plaintiff's subsequent **[*46]** discharge. [354]As one court noted, however, admissions of an employer's discriminatory or retaliatory motive are rare, "for obvious reasons." [355]After almost thirty years of ADA coverage, employers likely avoid such open expressions of discriminatory intent. Therefore, given the awareness of potential discrimination claims among managers and supervisors, proof of such blatant statements may be unobtainable even if a supervisor holds such discriminatory attitudes. [356]

Even though such discriminatory statements are unusual, our review of ADA claims reveals that without specific negative statements by the employer's decision maker, the plaintiff will likely fail to defeat a motion for summary judgment. [357]However, evidence of such statements is not a guarantee to reach a jury.

TABLE 4. Influence of Negative Statements [358]

	Close Timing & Relevant Statements	Acceptance of Employer Reason & Statements	Statements & Close Timing but Employer Reason Accepted	Rejection of t Employer Reason & Statements	Timing, Statements & Rejection of Employer's Reason
For Employee (48)	8	0	0	6	12
For Employer (96)	0	4	3	0	0
Success Rate for	8/8	0/4	0/3	6/6	12/12

354 Murphy v. N.Y. State Pub. Emp. Fed'n, No. 1:17-cv-628, *2019 U.S. Dist. LEXIS 152908, at 37-40 (N.D.N.Y. Sept. 9, 2019)*.

355 *Cloe v. City of Indianapolis, 712 F.3d 1171, 1180 (7th Cir. 2013)*.

356 *See* Martin, *supra* note 336, at 315, 317, 320.

357 *See infra* Table 4.

358 *See infra* Appendix A.

Plaintiffs

The limited impact of negative statements is demonstrated in our review of 143 court decisions. [359]None of those decisions relied on negative statements about the plaintiff's ***disability*** or protected activity alone. [360]Instead, negative statements related to the plaintiff's ***disability*** **[*47]** and/or protected activity supported a denial of summary judgment where the plaintiff was able to produce other evidence of pretext, such as the temporal proximity of the adverse action or some reason for the court to reject the legitimacy of the employer's reason for the adverse action. [361]

Employers had success in four cases where the court accepted their reason for the adverse action, even if the plaintiff submitted evidence of negative statements related to their ***disability*** or protected activity, and in three of those cases the plaintiff even established both close timing and negative statements. [362]

The lack of influence of negative statements stems in part from the restrictive view of their relevance. In our review of decisions, eight out of 96 decisions for employers were dismissed in part because an employer's negative statements were deemed unrelated to the plaintiff's ***disability*** or protected activity; three were dismissed in part because statements were not made by a decision maker for the employer; two were dismissed where the statements were deemed unrelated and by a non-decision maker; and seven out of ninety-six decisions for employers were based in part on the court's determination that the negative statements were unrelated to the adverse action taken.

As seen in our review, a negative statement about the plaintiff is only sufficient to avoid summary judgment when four factors related to the context demonstrate the employer's discriminatory intent: when the negative statement was made by a decision maker or some other supervisor or manager, in connection to the disparate treatment being challenged, and the content and context of the comment support an inference of the employer's discriminatory intent. [363]Thus, courts only consider statements with an obvious connection to a plaintiff's ***disability*** or request for accommodation. [364]

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359 *See infra* Appendix A.

360 *See infra* Appendix A.

361 *See infra* Appendix A.

362 *See supra* Table 4.

363 *Henry v. Wyeth Pharms., Inc., 616 F.3d 134, 149 (2d Cir. 2010)*.

Consequently, negative statements will only support a denial of summary judgment where "[a] jury can infer a causal connection between the alleged adverse employment action and the protected activity based on certain remarks made by Defendants." [365]For example, two plaintiffs avoided dismissal when they had been referenced as "handicapped," **[*48]** "hospital people," "retarded," and "stupid." [366]Similarly, one court sent a claim to a jury based on ***disability***-related comments about an employee who had used leave because of his ***disability***, even though the statements were made six months before the employee's discharge, where the supervisor told him that he was there to get rid of "the old, the sick, the people taking a lot of time out from work." [367]

Given these limitations, in rare cases the negative, ***disability***-related statements by a decision maker may help to prevent the dismissal of a claim on a motion for summary judgment. [368]In one case, comments made at a meeting where the plaintiff was informed of the adverse action to be taken, combined with the temporal proximity of that meeting to her return to work after leave for her ***disability***, sufficed to defeat that employer's motion for summary judgment. [369]In a second decision, comments about the plaintiff's ***disability*** and negative comments on her performance evaluation for taking FMLA leave (even though they were made fourteen months before her termination), combined with treating the plaintiff more harshly than similarly situated coworkers, was sufficient to avoid dismissal of a claim for retaliation. [370]These examples illustrate the limited circumstances in which ***disability***-related negative statements can prevent dismissal of a claim.

In contrast, more general derogatory statements about an employee with a ***disability*** may be insufficient to establish pretext. [371]For example, statements that the plaintiff "is always trying to do something. She's nothing but a troublemaker," have been deemed to be unrelated to a ***disability*** involving asthma and allergies for which she

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364 *See generally* Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25 (1st Cir. 2002) (discussing the need for direct evidence of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision.").

365 Schmitt v. City of New York, No. 15-CV-05992, 2018 U.S. Dist. LEXIS 187382, at 26 (E.D.N.Y. Nov. 1, 2018).

366 EEOC v. Big Lots Stores, Inc., No. 2:17-CV-73, 2018 U.S. Dist. LEXIS 167382, at 11-14 (N.D.W. Va. Sept. 27, 2018).

367 Darosa v. Admiral Packaging, Inc., No. 16-485 WES, 2019 U.S. Dist. LEXIS 74874, at 16-17 (D.R.I. May 2, 2019).

368 *See* Primmer v. CBS Studios, Inc., 667 F. Supp. 2d 248, 261 (S.D.N.Y. 2009); Merendo v. Ohio Gastroenterology Grp., Inc., No. 2:17-cv-817, 2019 U.S. Dist. LEXIS 31507, at 59-60 (S.D. Ohio Feb. 27, 2019).

369 *See* Primmer, 667 F. Supp. 2d at 261.

370 *See* Merendo, 2019 U.S. Dist. LEXIS 31507, at 59-60.

371 Evans v. Capital Blue Cross, No. 1:19-CV-497, 2021 U.S. Dist. LEXIS 40267 at 27-28 (M.D. Pa. Mar. 4, 2021). *See generally* Martin, *supra* note 336, at 348-49 (discussing the "stray remarks" doctrine).

had sought accommodations. [372]Similarly, remarks that relate to the plaintiff's **[*49]** behavior rather than her ***disability***, such as "weird" and "creepy," may be insufficient to support a finding of discriminatory intent. [373]

The influence of negative statements is limited in avoiding dismissal of disparate treatment claims, even where the statements are clearly ***disability***-related. [374]Derogatory comments concerning a plaintiff's ***disability*** or protected activity typically may only establish pretext if those comments have some temporal or causal connection to the allegedly discriminatory adverse action. [375]If the timing of ***disability***-related remarks predates the adverse action so as to be considered "stray remarks," those statements will not necessarily prevent dismissal of a claim. [376]For example, one court found that "a three-month lapse between alleged discriminatory statements and an adverse employment action is too long a gap to find the remark probative of discrimination." [377]

Even ***disability***-related statements may be insufficient to avoid summary judgment for the employer if the employer offers other reasons for the adverse action. [378]For example, the Third Circuit recently affirmed the dismissal of a claim of discrimination brought by a nurse who missed work due to her cancer, who alleged that she was not chosen for several positions because of her ***disability***. [379]Even though her supervisor had referenced her

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372 Evans v. Capital Blue Cross, No. 1:19-CV-497, *2021 U.S. Dist. LEXIS 40267 at 27-28 (M.D. Pa. Mar. 4, 2021)*.

373 Auble v. Babcock & Wilcox Tech. Servs. Y-12, LLC, No. 3:13-CV-422-*TAV-HBG, 2015 U.S. Dist. LEXIS 140868, at 2 (E.D. Tenn. Oct. 15, 2015)*.

374 *See infra* notes 378-80.

375 *See Laurin v. Providence Hosp., 150 F.3d 52, 58 (1st Cir. 1998)*; *see also Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25 (1st Cir. 2002)* (noting that direct evidence of discrimination excludes "mere background noise" and "stray remarks"); Duryea v. MetroCast Cablevision of N.H., LLC, No. 15-cv-164-*LM, 2017 U.S. Dist. LEXIS 60841, at 32-33 (D.N.H. Apr. 21, 2017)* (holding that pretext was not established by comments by supervisors who did not decide to discharge plaintiff).

376 *See* Langella v. Mahopac Cent. Sch. Dist., No. 18-cv-10023, *2020 U.S. Dist. LEXIS 95588, at 29 (S.D.N.Y. May 31, 2020)* (***disability***-related remarks made a year before adverse action in a different context); *Luka v. Bard College, 263 F. Supp. 3d 478, 487 (S.D.N.Y. 2017)* (showing ***disability***-related remarks were made three years before adverse action being challenged); Moore v. Verizon, No. 13-cv-6467, *2016 U.S. Dist. LEXIS 16201, at 9 (S.D.N.Y. Feb. 5, 2016)* (showing that remarks made one year prior to termination were not related to decision to terminate).

377 *Sethi v. Narod, 12 F. Supp. 3d 505, 540 (E.D.N.Y. 2014)*; *see also Callistro v. Cabo, No. 11-CV-2897, 2013 U.S. Dist. LEXIS 11176, at 20-21 (S.D.N.Y. Jan. 25, 2013)* (holding that the remarks were too attenuated where one remark was made at least one month before discussion of adverse action and the other remark was made at beginning of her employment).

378 *See Yingst v. Coatesville Hosp. Co., LLC, No. 20-2960, 2021 U.S. App. LEXIS 20822, at 3-4, 9-11 (3d Cir. July 14, 2021)*.

379 *See id.* at 3-4.

recent use of leave in explaining her rejection for those positions, summary judgment was granted based in part on the employer's [*50] perception that the plaintiff did not perform well during the interview for one of those positions. [380]

In addition to some temporal connection, negative, ***disability***-related comments typically will not defeat a motion for summary judgment if those comments were not made by a decision maker in connection with the adverse action taken. [381] In a perfect example of a plaintiff's difficulty in surviving a motion for summary judgment, a court recognized that a supervisor's reference to management's concern about the plaintiff's use of leave because of his ***disability***, shortly before his discharge, was sufficient to support a prima facie claim of disparate treatment when it was evident that this same "management" made the decision to discharge the plaintiff. [382] However, that same court went on to conclude that those statements were insufficient evidence of pretext, even though they were directly related to the plaintiff's use of ***disability*** leave, because the plaintiff was not discharged until after she returned from leave. [383]

Evidence of discriminatory intent on the part of a supervisor, connected with the plaintiff's disclosure of her ***disability***, can establish an employer's discriminatory intent so as to avoid summary judgment under a "cat's paw" theory of liability. [384] Under this theory, discriminatory intent may be established under Title VII where a decision maker, regarding the adverse action taken, was influenced by a biased subordinate, [385] particularly

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380 *See id.* at 9-11.

381 *See* Laurin v. Providence Hosp., 150 F.3d 52, 58 (1st Cir. 1998); *see, e.g.*, Preston v. Bristol Hosp., 645 F. App'x17, 22 (2d Cir. 2016) (comments not related to discharge by person who was not a decision maker); *see also* Harvin v. Manhattan & Bronx Surface Transit Operating Auth., No. 14-CV-5125, 2018 U.S. Dist. LEXIS 56759, at 30 (E.D.N.Y. Mar. 30, 2018) (***disability***-related comments were not made by a decision maker).

382 Clark v. Jewish Childcare Ass'n, 96 F. Supp. 3d 237, 253-54 (S.D.N.Y. 2015) (finding that the remark directly related to use of leave for ***disability*** was made shortly before discharge).

383 *See* id. at 257.

384 *See* Natofsky v. City of New York, 921 F.3d 337, 350 (2d Cir. 2019); *see also* Staub v. Proctor Hosp., 562 U.S. 411, 415 n.1 (2011) (demonstrating an action brought under USERRA); Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 272 (2d Cir. 2016) (exemplifying an action brought under Title VII); Holcomb v. Iona Coll., 521 F.3d 130, 143 (2d Cir. 2008) (showing another action brought under Title VII).

385 *See* Bourara v. N.Y. Hotel Trades Council & Hotel Ass'n of N.Y.C., No. 17cv7895, 2020 U.S. Dist. LEXIS 159371, at 27-28 (S.D.N.Y. Sept. 1, 2020); *see also* Murphy v. N.Y.S. Pub. Employ. Fed., No. 1:17-cv-628, 2019 U.S. Dist. LEXIS 152908, at 12 (N.D.N.Y. Sept. 9, 2019) (holding that a jury could find that the person who made ***disability***-related statements played an "important role" in adverse action decision).

where that decision maker failed to undertake **[*51]** any independent investigation regarding the legitimacy of the reason for the adverse action taken. [386]

Under this approach, a plaintiff with a ***disability*** survived a motion for summary judgment by an employer, the discriminatory intent of which was established by the discriminatory attitude of the supervisor who was aware of the plaintiff's ***disability*** and influenced the decision maker for the employer. [387]This theory can be important for employees with ***disabilities*** who have disclosed their ***disability*** to a supervisor, who then passes that information along to another supervisor or manager who decides to take some adverse action against that employee, but alleges that he or she did not have knowledge of that employee's ***disability***. [388]In nineteen of the ninety-six decisions in favor of employers in our review, the employer alleged that the decision maker lacked knowledge of the plaintiff's ***disability*** or protected activity until after making the decision to take an adverse action. [389]

Surprisingly, plaintiffs were unable to avoid dismissal of their claims in many cases even where ***disability***-related statements suggested an employer's discriminatory intent. Consequently, plaintiffs with ***disabilities*** will struggle to survive a motion for summary judgment which alleges a lack of connection between their ***disability*** and the adverse action they have experienced. [390]In determining the weight to afford to ***disability***-related statements on a motion for summary judgment, courts reviewing claims of disparate treatment and retaliation should consider **[*52]** the approach of courts reviewing hostile work environment claims by employees with ***disabilities***.

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386 *See* Geras v. Hempstead Union Free Sch. Dist., 149 F. Supp. 3d 300, 328-29 (E.D.N.Y. 2015) (holding that a person harboring racial bias had a "singular influence" or "dominated" the ultimate decision maker); *see also* Back v. Hastings Union Free Sch. Dist., 365 F.3d 107, 126 (2d Cir. 2004) (vacating grant of summary judgment in gender discrimination claim where deciding board was influenced by evaluation of employee's performance by others with bias without making independent inquiry); Zagaja v. Vill. Freeport, No. 10cv-3660, 2013 U.S. Dist. LEXIS 79668, at 42-7 (E.D.N.Y. June 3, 2013) (denying dismissal of a retaliation claim where person with retaliatory motive had meaningful role in adverse action decision); Casseus v. Verizon, Inc., 722 F. Supp. 2d 326, 351-52 n.20 (E.D.N.Y. 2010) (denying dismissal of discrimination claim based on evidence of deference to biased person); Mugavero v. Arms Acres, Inc., No. 03 civ. 05724, 2009 U.S. Dist. LEXIS 30431, at 63 (S.D.N.Y. Mar. 31, 2009) (finding summary judgment improper where person with retaliatory motive "played a meaningful role in the decision to terminate Plaintiff's employment."). *But see* McLean v. Metro. Jewish Geriatric Ctr., No. 11-CV-3065, 2013 U.S. Dist. LEXIS 152377, at 9 n.8 (E.D.N.Y. Oct. 23, 2013) (holding that a supervisor with final authority based adverse employment action exclusively on "independent evaluation."); Baron v. N.Y.C. Dep't of Educ., No. 06-CV-2816, 2009 U.S. Dist. LEXIS 57515, at 22-23 (E.D.N.Y. July 7, 2009) (finding that the employer's decision was based on evaluation of performance by several individuals beyond person who expressed ageist views).

387 *See* Bourara, 2020 U.S. Dist. LEXIS 159371, at 28.

388 *See* id. at 19-21.

389 *See infra* Appendix A.

390 *See* Bourara, 2020 U.S. Dist. LEXIS 159371, at 29.

Some harassment-related statements prevent dismissal even if they do not refer directly to a person's ***disability***. [391]For example, a supervisor's ***disability***-related statements to an employee established the requisite causation in a hostile environment claim by telling the employee to go home, take medication and see a psychiatrist. [392]In some hostile work environment claims, causation can be established even though the harassers may lack specific information about the target's medical condition. [393]For example, a target of harassment survived a motion for summary judgment where the target told his harassers about his symptoms and that he suffered from "medical issues" and "ailments." [394]Similarly, causation was established by a harasser's use of "***disability***-specific and derogatory terms" showing that the harassment was motivated by the target's ***disability***. [395]This court also noted that more neutral insults could be deemed connected to the target's ***disability*** if that harassment began after the target revealed his ***disability*** to the harasser. [396]

If an employer's supervisor or manager exhibits a discriminatory or retaliatory attitude through their negative statements, courts should at a minimum allow a jury to determine the significance of those statements in determining whether the employer acted with intent consistent with those statements. Placing limitations on the relevance of such statements so as to remove claims from a jury's consideration places inappropriate barriers to disparate treatment and retaliation claims by employees with ***disabilities***. [397]

2. Temporal Proximity as Proof of Pretext

For an employer whose supervisors and managers are savvy enough to avoid making negative, discriminatory statements, plaintiffs often rely on the timing of the adverse action they suffered after revealing their **[*53]** ***disability*** or requesting an accommodation. [398]For example, one court refused to grant a motion for

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[391] *See* Mlinarchik v. Brennan, No. 3:16-cv-257, *2018 U.S. Dist. LEXIS 174037, at 9-10 (W.D. Pa. Oct. 10, 2018)*.

[392] *Id.*

[393] *See, e.g.*, *Schmitt v. City of New York, No. 15-CV-05992, 2018 U.S. Dist. LEXIS 187382, at 17-18 (E.D.N.Y. Nov. 1, 2018)*.

[394] *Id.*

[395] *Mashni v. Bd. of Educ. of City of Chicago, No. 15C10951, 2017 U.S. Dist. LEXIS 141706, at 29 (N.D. Ill. Sept. 1, 2017)*.

[396] *Id. at 30*.

[397] *See id.*

[398] *See* Nash v. HomeGoods, Inc., No. 16-cv-1043, *2019 U.S. Dist. LEXIS 55151, at 27-29 (E.D.N.Y. Mar. 29, 2019)* (employer began adverse treatment for disputed reasons shortly after revelation of ***disability***); McNulty v. City of Warren, No. 1:16-CV-843, *2019 U.S. Dist. LEXIS 36591, at 46 (N.D.N.Y. Mar. 7, 2019)* (pretext established by person with ***disability*** who was subjected to heightened scrutiny shortly after returning from leave); *Vale v. Great Neck Water Pollution Control Dist., 80 F. Supp.*

summary judgment filed against an employee with epilepsy where the school employing him as a custodian imposed unjustified, disproportionate discipline three months after his revelation of his ***disability***. [399]This decision, which also relied on the court's skepticism of the plaintiff's performance as justification for the adverse action, [400]exemplifies the principle that to demonstrate pretext, "plaintiffs may rely on evidence comprising [their] prima facie case, including temporal proximity, together with other evidence such as inconsistent employer explanations, to defeat summary judgment at that stage." [401]

This principle means that temporal proximity may only be sufficient to establish pretext for discrimination or retaliation if the employer fails to provide a sufficient legitimate reason for the adverse action. [402]Conversely, if an employer offers any reason for the adverse action, temporal proximity alone is "insufficient to demonstrate a pretext." [403]For **[*54]** example, one court's opinion included no discussion of pretext when an employer's performance-based justification for discharge just thirteen days after learning of an employee's ***disability*** was accepted by the court. [404]Similarly, a second court failed to discuss the significance of temporal proximity as

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3d 426, 437 (E.D.N.Y. 2015) (employer began taking adverse action shortly after plaintiff's injury even though termination did not occur for more than two years).

399 Karatzas v. Herricks Union Free Sch. Dist., No. 15-cv-2888, *2017 U.S. Dist. LEXIS 112397, at 61-3 (E.D.N.Y. July 18, 2017)*.

400 *Id. at 66-7*.

401 *Kwan v. Andalex Grp. LLC, 737 F.3d 834, 847 (2d Cir. 2013)*.

402 *Baron v. Advanced Asset & Prop. Mgm't Sols., 15 F. Supp. 3d 274, 283 (E.D.N.Y. 2014)*.

403 *Parks v. UPS Supply Chain Sols., Inc., 607 F. App'x 508, 517 (6th Cir. 2015)*; *see also Powell v. Merrick Acad. Charter Sch., No. 16-CV-5315, 2018 U.S. Dist. LEXIS 32810, at 20-21 (E.D.N.Y. Feb. 28, 2018)* (temporal proximity of less than one month insufficient to survive motion for summary judgment where pleadings established other legitimate reason for adverse action); *Mancini v. Accredo Health Grp., Inc., 411 F. Supp. 3d 243, 253-54 (D. Conn. 2019)* (claim dismissed on summary judgment despite temporal proximity and factual issues regarding truth of employer's reasons for adverse action); *Kieffer v. CPR Restoration & Cleaning Serv., LLC, 733 F. App'x 632, 638-39 (3d Cir. 2018)*; *Francis v. Namdor, Inc., No. 15CV745, 2017 U.S. Dist. LEXIS 134251, at 8-9 (E.D.N.Y Aug. 22, 2017)* (temporal proximity does not prevent dismissal where employer provides a legitimate, non-discriminatory reason for adverse action); *Trent v. Town of Brookhaven, 966 F. Supp. 2d 196, 206 (E.D.N.Y. 2013)* (granting summary judgment where "Plaintiff's only evidence disputing Defendant's evidence of a legitimate, non-discriminatory reason is the temporal proximity of particular events and speculation."); *El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010)* ("temporal proximity is insufficient to satisfy [a plaintiff's] burden to bring forward some evidence of pretext."); *Iverson v. Verizon Communications, No. 08 Civ. 8873, 2009 U.S. Dist. LEXIS 96117, at 20 (S.D.N.Y. Oct. 13, 2009)* ("Merely claiming temporal proximity between the disclosure of ***disability*** and termination, however, is not enough to show that [employer's] reasons for termination were a pretext for discrimination."); *Holcomb v. Iona Coll., 521 F.3d 130, 141 (2d Cir. 2008)* (given employer's evidence that it acted for non-discriminatory reasons, "[plaintiff] may no longer rely on the presumption of discrimination raised by the prima facie case.").

evidence of pretext when, based on the court's acceptance of a doctor's tardiness as justification for dismissal, an employer was permitted to discharge an employee with a ***disability*** within days of his request for accommodations. [405]

The Sixth Circuit affirmed dismissal of this second disparate treatment claim because "temporal proximity cannot be the sole basis for finding pretext" once the employer has offered other legitimate reasons for the adverse action. [406]While the court noted that the temporal proximity was sufficient for a prima facie claim of retaliation, the court dismissed the claim absent additional evidence of pretext in light of the employer's other substantiated reasons for the discharge, which were documented by warnings. [407]

These decisions demonstrate that a plaintiff who reveals her ***disability*** or requests an accommodation for that ***disability*** can only rely on a very short time frame to establish a prima facie claim of disparate treatment based on temporal proximity. [408]Even if that timing is sufficiently close to establish a prima facie claim, it may be insufficient to establish the employer's pretext to discriminate if the employer offers some other legitimate reason for its adverse action. [409]This approach essentially nullifies the temporal connection between an employee's revelation of their ***disability*** or request for accommodation and the adverse action they suffer shortly thereafter. [410]

[*55] As with claims of disparate treatment, in claims of retaliation, temporal proximity typically fails to defeat a motion for summary judgment where the employer has offered some legitimate reason for its adverse action. [411]For example, temporal proximity between a plaintiff's protected activity and an adverse action was insufficient to

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404 Mishak v. Serazin, No. 1:17CV1543, *2018 U.S. Dist. LEXIS 185625, at 16-17, 48-50 (N.D. Ohio Oct. 30. 2018)*.

405 *Keogh v. Concenta Corp., No. 16-CV-11460, 2017 U.S. Dist. LEXIS 170535, at 8-11 (E.D. Mi. Oct. 16, 2017)*, *aff'd 752 F. App'x 316 (6th Cir. 2018)*.

406 *Keogh, 752 F. App'x at 324-25*.

407 *Id.*; *see also Sukari v. Akebono Brake Corp., No. 18-10987, 2019 U.S. Dist. LEXIS 127177, at 14-15 (E.D. Mich. July 31, 2019)* (summary judgment in favor of employer justifying discharge based on plaintiff's attendance issues and belief in plaintiff's misuse of vacation days, despite temporal proximity).

408 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 16-17*; *Keogh, 752 F. App'x at 324-25*; *Sukari, 2019 U.S. Dist. LEXIS 127177, at 14-15*.

409 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 16-17*; *Keogh, 752 F. App'x at 324-25*; *Sukari, 2019 U.S. Dist. LEXIS 127177, at 14-15* .

410 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 16-17*; *Keogh, 752 F. App'x at 324-25*; *Sukari, 2019 U.S. Dist. LEXIS 127177, at 14-15* .

prove retaliation where the employer already had plans to implement an adverse action prior to the plaintiff's protected activity. [412]

Although often insufficient by itself, temporal proximity generally may be combined with other evidence of pretext to survive a motion for summary judgment regarding a claim of retaliation. [413] In a very narrow range of decisions, plaintiffs with ***disabilities*** were able to rely on temporal proximity as evidence of pretext to defeat a motion for summary judgment. [414] The Sixth Circuit provided a path for plaintiffs to survive a motion for summary judgment by refusing to dismiss the claim of a plaintiff discharged shortly after he engaged in protected activity under Title VII, and where the employer only offered "inconsistent explanations for her termination." [415] For example, a police officer plaintiff was able to survive a motion for summary judgment where he alleged that the retaliatory adverse actions occurred within four months of his request for an accommodation and two weeks after he complained about a hostile work environment, where his supervisor had also made derogatory **[*56]** comments about his medical condition during that time. [416] This approach applied under Title VII should be expanded to protect employees with ***disabilities*** who have suffered an adverse action shortly after revealing a ***disability*** or engaging in a protected activity, such as requesting an accommodation.

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411 *El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010)* (plaintiff must produce "evidence other than temporal proximity in support of [a] charge that the proffered reason for [their] discharge was pretextual.").

412 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 70-71*; *see also* Langella v. Mahopac Cent. Sch. Dist., No. 18-cv-10023, *2020 U.S. Dist. LEXIS 95588, at 32 (S.D.N.Y. May 31, 2020)* (showing that investigation began before protected activity); *Wang v. Palmisano, 157 F. Supp. 3d 306, 327 (S.D.N.Y. 2016)* (FLSA retaliation claim dismissed despite close temporal proximity where employer's conduct began before employee's protected activity); Varughese v. Mount Sinai Med. Ctr., No. 12-Civ.-8812, *2015 U.S. Dist. LEXIS 43758, at 174 (S.D.N.Y. Mar. 27, 2015)* (Title VII retaliation claim dismissed where adverse actions were part of employer's "course of conduct that began well before any protected activity took place.").

413 *Kwan v. Andalex Grp., LLC, 737 F.3d 834, 847 (2d Cir. 2013)* (retaliation under Title VII); *see also Raniola v. Bratton, 243 F.3d 610, 625 (2d Cir. 2001)* (detailing that retaliatory intent may be shown by sufficient proof to rebut employer's reason for discharge); *James v. N.Y. Racing Ass'n, 233 F.3d 149, 156-57 (2d Cir. 2000)* (evidence of falsity of employer's reason for adverse action "may or may not be sufficient" to sustain claim of retaliation).

414 *Kwan, 737 F.3d at 847*; *Lewis v. Univ. of Pa., No. 16-5874, 2018 U.S. Dist. LEXIS 13423, at 23 (E.D. Pa. Jan. 29, 2018)* *aff'd in relevant part*, *779 F. App'x 920 (3d Cir. 2019)*; House v. Wal-Mart Stores Tex., LLC, No. EP-16-CV-408-*PRM, 2017 U.S. Dist. LEXIS 128979, at 20-21 (W.D. Tex. Aug. 14, 2017)*.

415 *Kwan, 737 F.3d at 847*.

416 *Lewis, 2018 U.S. Dist. LEXIS 13423, at 23*. *But see House, 2017 U.S. Dist. LEXIS 128979, at 20-21* (four months between accommodation request and discharge undermines claim of retaliation).

These decisions demonstrate a fairly simple solution for employers seeking to avoid a claim of disparate treatment or retaliation after an employee has revealed a ***disability*** and/or requested an accommodation: wait one or two months, avoid any negative ***disability***-related statements, and then proceed with any adverse action based merely on the employer's belief that some justification exists. [417]With such a relatively minor delay, the employee with a ***disability*** would need to produce additional evidence of the employer's discriminatory or retaliatory intent to survive a motion for summary judgment. [418]

3. Limited Influence of Other Evidence of Pretext

Beyond reliance on ***disability***-related statements or temporal proximity, a plaintiff alleging disparate treatment or retaliation under the ADA may be able to survive a motion for summary judgment by challenging the legitimacy of the employer's reason for taking an adverse action. [419]In rare circumstances, summary judgment may be avoided by directly questioning the employer's honest belief in its reason for the adverse action. [420]In our review, such a challenge led to a trial for three plaintiffs out of forty-eight who successfully challenged a motion for summary judgment or motion to dismiss. [421]For example, a plaintiff who had requested accommodations less than three months before his **[*57]** discharge was able to survive a motion for summary judgment where the performance issues relied upon by the employer to justify his discharge occurred seven months before his discharge. [422]This timing suggested to the court that the performance issues were not significant enough to support the discharge decision. [423]

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417 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 16-17*; *Keogh v. Concerta Corp., No. 16-CV-11460, 2017 U.S. Dist. LEXIS 170535, at 324-25 (E.D. Mi. Oct. 16, 2017)*, *aff'd 752 F. App'x 316 (6th Cir. 2018)*; *Sukari v. Akebono Brake Corp., No. 18-10987, 2019 U.S. Dist. LEXIS 127177, at 14-15 (E.D. Mich. July 31, 2019)*; *Langella, 2020 U.S. Dist. LEXIS 95588, at 20-21*; *Wang, 157 F. Supp. 3d at 327*; *Varughese, 2015 U.S. Dist. LEXIS 43758, at 112-13*.

418 *Mishak, 2018 U.S. Dist. LEXIS 185625, at 16-17*; *Keogh, 2017 U.S. Dist. LEXIS 170535, at 324-25*; *Sukari, 2019 U.S. Dist. LEXIS 127177, at 14-15 (E.D. Mich. July 31, 2019)*; *Langella, 2020 U.S. Dist. LEXIS 95588, at 20-21*; *Wang, 157 F. Supp. 3d at 327*; *Varughese, 2015 U.S. Dist. LEXIS 43758, at 112-13* .

419 *See* Singh v. Vanderbilt Univ. Med. Ctr., No 3:17-cv-00400, *2020 U.S. Dist. LEXIS 7713, at 31-32 (M.D. Tenn. Jan. 16, 2020)*; *Taylor v. Seamen's Soc'y for Child., No. 112 Civ. 3713, 2013 U.S. Dist. LEXIS 176914, at 41 (S.D.N.Y. Dec. 17, 2013)*.

420 *Singh, 2020 U.S. Dist. LEXIS 7713, at 31-32*.

421 *See infra* Appendix A.

422 *Singh, 2020 U.S. Dist. LEXIS 7713, at 31-32*.

423 *Id.*

Beyond asserting that the reason for adverse action simply is not true, plaintiffs can rely on a comparison between their adverse action and the adverse actions taken by the same employer against other employees. [424]Generally, a plaintiff alleging discrimination must establish that those comparable employees were in a situation sufficiently similar to the plaintiff's to support an inference that the difference of treatment may be attributable to discrimination. [425]Under the "but-for" standard, that plaintiff can defeat a motion for summary judgment by proving that "the employer treated other, similarly situated persons not of his protected class more favorably." [426]The plaintiff bears the burden of demonstrating that a putative comparator is similarly situated "in all material respects." [427]

To be similarly situated to another employee, a plaintiff will only be able to establish pretext based on more favorable treatment of co-workers who were (1) "subject to the same performance evaluation and discipline standards" and (2) "engaged in comparable conduct." [428]It should be noted that in general, the existence of employees who are similarly situated is ordinarily a question of fact; but "if there are many distinguishing factors between plaintiff and the comparators, the court may conclude as a matter of law that they are not similarly situated." [429] **[*58]** For example, summary judgment was granted where the comparators put forth by the plaintiff alleging discrimination under Title VII had worked for the employer for more years than the plaintiff had. [430]

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424 *Taylor, 2013 U.S. Dist. LEXIS 176914, at 41*.

425 *Id.*

426 *Frost v. City of Philadelphia, 839 F. App'x 752, 757 (3d Cir. 2021)*.

427 *See* Bennett v. Verizon Wireless, No. 04-CV-*6314 CJS, 2008 U.S. Dist. LEXIS 5373, 4 (W.D.N.Y. Jan. 24, 2008)* (dismissing claim on post-trial motion for reconsideration); *see also Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000)* (showing Title VII claim of race discrimination). *But see White v. Home Depot Inc., No. 04-CV-401, 2008 U.S. Dist. LEXIS 4294, at 10-11 (E.D.N.Y. Jan. 17, 2008)* (showing Title VII claim not dismissed based on more favorable treatment of similarly situated coworkers seeking promotion).

428 *Graham, 230 F.3d at 40*.

429 *Watson v. Geithner, No. 09-CV-6624, 2013 U.S. Dist. LEXIS 139673, at 28 (S.D.N.Y. Sept. 27, 2013)*; s *ee also* ***Sosa v. N.Y.C. Dep't of Educ., 368 F. Supp. 3d 489, 514-15 (E.D.N.Y. 2019)*** (granting motion to dismiss where plaintiff failed to allege factual details relevant to allegation that other similarly situated employees were treated more favorably); *Abel v. N.Y.C. Hum. Res. Admin., No. 10-CV-0295, 2011 U.S. Dist. LEXIS 23780, at 17-18 (S.D.N.Y. Mar. 2, 2011)* (dismissing ADA claims where plaintiff failed to identify any nondisabled comparators); *Fox v. State Univ. of N.Y., 686 F. Supp. 2d 225, 230 (E.D.N.Y. 2010)* (dismissing ***disability*** discrimination claim where plaintiff failed to name any similarly situated nondisabled comparators who were treated differently).

430 *Tillman v. Luray's Travel, 137 F. Supp. 3d 315, 332 n.12 (E.D.N.Y. 2015)*.

Likewise, one court dismissed the claim of an employee challenging his dismissal as pretextual when other employees were not discharged for similar absences because the plaintiff failed to present evidence of the reasons for the proposed comparators' unauthorized absences, their opportunity to offer a proper explanation or excuse for their absences, whether they were disciplined in some other way, and whether their supervisor was the same. [431]These decisions demonstrate the heavy burden on an employee to establish that a coworker engaged in the same behavior or performed in the same way and yet was treated differently. [432]This demonstration of similarity becomes nearly impossible for an employee with a ***disability*** that affects their performance or behavior, given the small likelihood that another employee working for the same supervisor also has a similar ***disability*** affecting their performance. [433]

In rare cases, a plaintiff with a ***disability*** may establish questions of fact based on more favorable treatment of other similarly situated employees. [434]For example, a doctor with a ***disability*** was able to defeat her employer's motion for summary judgment based on the employer's reasons for her discharge, including tardiness, refusal to cover for other doctors, and "behavioral issues," in large part because those reasons were either untrue or her behavior was less severe than similar conduct by other doctors. [435]Similarly, the employer's failure to discharge other similarly situated employees for comparable performance issues helped to defeat a motion for summary judgment against a plaintiff who claimed both disparate treatment and retaliation after his discharge, which occurred the day after informing his employer that he needed surgery. [436]

Like disparate treatment of similarly situated employees, an employer's failure to adhere to its own policies or procedures can, in rare **[*59]** instances, help to defeat a motion for summary judgment. [437]For example, a Wal-Mart employee survived a motion for summary judgment based on evidence that she was discharged because of absences attributed to her ***disability***. [438]Even though Wal-Mart had discharged other employees without ***disabilities*** under the same policy, it had failed to provide the plaintiff, known to have a ***disability*** because of earlier

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431 *Novick v. Vill. of Wappingers Falls, 376 F. Supp. 3d 318, 344 (S.D.N.Y. 2019)*.

432 *See id. at 341*.

433 *See generally id. at 343* (explaining cases where employees had difficulty demonstrating another employee having a similar ***disability***).

434 *See Farha v. Cogent Healthcare of Mich., P.C., 164 F. Supp. 3d 974, 990 (E.D. Mich. Feb. 29, 2016)*.

435 *Id.*

436 *Sherman v. Cty. of Suffolk, 71 F. Supp. 3d 332, 351-53 (E.D.N.Y. 2014)*.

437 Feringa v. Andrews, No. 3:19-CV-656, *2021 U.S. Dist. LEXIS 96425, at 27-29 (N.D.N.Y. May 20, 2021)*.

438 *Id. at 22-23*.

requests for accommodation, with an opportunity to explain her absences as it had for those other employees. [439]That court ultimately denied summary judgment because a jury could conclude that the employee was not provided with her routine attendance review meeting because her employer knew that her ***disability*** caused her absences and that authorization of those absences could be a reasonable accommodation for her. [440]

Proof of more favorable treatment of similarly situated employees or an employer's failure to follow its own procedures may be a path for avoiding summary judgment for other types of discrimination. [441]However, for a person with a ***disability***, this proof of pretext requires a comparison between that employee's unique circumstances, as influenced by her ***disability***, and other able-bodied employees who likely have not requested an accommodation or otherwise faced the barriers to job performance faced by employees with ***disabilities***. [442]This difficulty may explain why, in our review of claims by employees with ***disabilities***, most of them avoided summary judgment only if they were able to provide evidence of negative, ***disability***-related statements made in close temporal proximity or otherwise in connection with the adverse action they were challenging.

[*60]

CONCLUSION

Research and our own survey establish that people who reveal their ***disability*** to their employer face bias, stigmatization, and stereotypes that will influence that employer's decisions about them after they reveal a ***disability*** or request an accommodation. [443]Both disparate treatment and retaliation are all possible outcomes of the revelation of a ***disability*** during one's employment. [444]The ADA was adopted to guard against those types of reactions. [445]But as was true twenty years ago regarding employment discrimination more generally, "the

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439 *Id. at 23*; *see also Smith v. N. Shore-Long Island Jewish Health Sys., 286 F. Supp. 3d 501, 522 (E.D.N.Y. 2018)* (denying motion for summary judgment where employer denied leave connected to ***disability*** for administrative reasons that were "either a post hoc fabrication or otherwise did not actually motivate the employment action.").

440 *Feringa, 2021 U.S. Dist. LEXIS 96425, at 28-29*; *see also Conn v. Am. Nat'l Red Cross, 149 F. Supp. 3d 136, 145-46 (D.D.C. 2016)* (denying motion for summary judgment where plaintiff establishes that other employees engaged in similar behavior and were not disciplined as harshly).

441 *See Farha v. Cogent Healthcare of Mich., P.C., 164 F. Supp. 3d 974, 990 (E.D. Mich. Feb. 29, 2016)*; *Feringa, 2021 U.S. Dist. LEXIS 96425, at 27-29*.

442 *See Conn, 149 F. Supp. 3d at 145-46*.

443 ***Hickox*** & Case, *supra* note 32, at 550.

444 *See* Sturm, *supra* note 8, at 466-67.

445 *See* *supra* Part II.

features of accountability, reflection, and effectiveness that link process to outcomes have sometimes dropped out of judicial analysis" when addressing second generation biases. [446]As our overview of decisions applying the ADA to disparate treatment and retaliation shows, plaintiffs will lose in second generation cases without "clear evidence of intentional bias." [447]

One way to avoid these biases would be to expand the protections against revealing a ***disability*** in a post-offer medical examination, or otherwise prohibiting inquiries about employees' ***disabilities***. However, employers will be even more reluctant to provide accommodations for applicants and employees who fail to justify their need for accommodation without revealing the details of their medical diagnosis. As long as revelation of one's ***disability*** remains part of the accommodation process, an employee may never feel comfortable in revealing their need for an accommodation, and "the anti-discrimination goals of ADA will not be realized." [448]

If an employee is required to reveal their ***disability*** to realize the ADA's promise of reasonable accommodation, [449]then employers must be required to address the influence of biases among their own decision makers. To do so, employers should adopt practices to reduce the subjectivity in their decision-making, including establishment of "fair systems and mechanisms of accountability." [450]To address second generation discrimination, employers' processes should address the structural problems underlying second generation bias. To adopt **[*61]** processes that address "problems of both productivity and inclusion," [451]employers should ensure that qualifications for a position and the scope of a direct threat analysis are not so broad as to exclude people with ***disabilities*** from their workforce. [452]Moreover, adverse actions proposed after an employee reveals a ***disability*** or requests an accommodation should be examined carefully to ensure that biases have not influenced that proposition.

If employers are unwilling or unable to adopt practices to address the influence of biases against people with ***disabilities***, then courts must enhance their enforcement of the ADA's protections to reduce the influence of those biases. First, courts should reconsider their application of the honest belief defense under the ADA. [453]This defense allows employers to manufacture justifications for an adverse action taken against an employee with a

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446 *See generally* Sturm, *supra note 8, at 542*.

447 *Id. at 554*.

448 *See* Porter, *supra* note 11, at 852.

449 *Id. at 851-52*.

450 Sturm, *supra* note 8, at 489.

451 *See* ***id. at 489-90***.

452 *See generally* ***id. at 489-520*** (discussing examples from studies on the workplace) .

453 *See generally* *supra* Part II.D (discussing the honest belief defense).

disability simply by claiming that the employer believed, even mistakenly, that the employee was unable to perform their job duties or posed a direct threat because of their ***disability***. [454]This defense allows employers to rely on their biases and stereotypes about people with ***disabilities*** to justify an adverse action without even facing a jury's review. [455]Instead, untruthful or inaccurate justifications for an adverse action against an employee with a ***disability*** should not prevent that plaintiff from presenting all of her evidence of bias to a jury to determine the factual issue of whether her employer acted with discriminatory intent.

Second, in both disparate treatment and retaliation claims, courts should allow a jury to decide whether negative ***disability***-related statements made by an employer's representatives establish that employer's discriminatory or retaliatory intent, even if the employer does not acknowledge that the employee has a ***disability*** as defined by the ADA. [456]Moreover, a jury should decide whether statements made by any employer's representative reflects the influence of ***disability***-related biases on an adverse action decision, even if that particular statement was not made by the employer's official "decision maker." [457]Such statements could reflect a culture where negative stereotypes indirectly influence **[*62]** decisions. In addition, a jury could decide the relevance of such negative statements even if made some time prior to the final decision to take an adverse action against a person with a ***disability***, because a person's ***disability*** and their need for accommodation is a continuous state of being. [458]

Third, a jury should decide whether discriminatory or retaliatory intent influenced an adverse action taken even after a significant period of time has passed since the person's initial revelation of a ***disability*** or request for accommodation. [459]Unlike other categories of employees protected against discrimination, employees with ***disabilities*** who seek accommodations should be afforded with a continuing assumption that an adverse action is tied to their request for an accommodation. This assumption is appropriate because accommodation is a continuous event rather than a singular event like revealing one's religion or engaging in some other type of protected activity, such as filing an EEOC charge. [460]

Employees with ***disabilities*** who cannot prove that ***disability***-related statements were made should not be required to prove that their employer treated a similarly situated employee differently to survive a motion for summary

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454 *See, e.g.*, Kolesnikow v. Hudson Valley Hosp. Ctr., 622 F. Supp. 2d 98, 111 (S.D.N.Y. 2009).

455 *See* id. at 106-07.

456 *See supra* Part II.E.1.

457 *See supra* Part II.E.1.

458 *See supra* Part II.E.1.

459 *See supra* Part II.C., II.E.2.

460 *See supra* Part II.C.

judgment. [461]Typically, an employee with a ***disability*** faces unique challenges or limitations in performing work duties, which is why the ADA provides for reasonable accommodation. [462]To require that an employee compare herself to a co-worker with similar limitations, who likely does not exist, essentially nullifies this method of proving pretext. [463]

Lastly, courts need to ensure that employers adopt a system of accountability to ensure that bias does not negatively influence decisions about and treatment of people with ***disabilities***. Professor Susan Sturm points out that such accountability needs to "(a) provide for regular assessment of the adequacy of processes and outcomes, (b) redefine compliance to reward effective problem solving, and (c) sanction stasis in the face of identified and uncorrected problems or extreme, first generation violations." [464]If employers are unwilling or unable to self-police to address the impact of biases against people with ***disabilities***, then courts should "encourage employers to design systems that will bring **[*63]** problems to the surface, to develop and continually reassess measures of effectiveness, to reflect on patterns that cut across individual cases, or to undertake more structural approaches" to provide stronger protections against disparate treatment, harassment and retaliation. [465]Employers' processes should be required to include "robust criteria and measures of effectiveness in relation to the problems of bias." [466]

Lack of employment opportunities is a serious issue for people with ***disabilities***, especially those ***disabilities*** which carry a heavy, negative stigma. [467]Even if that ***disability*** is hidden, applicants and employees may need to reveal that ***disability*** to obtain the accommodations they need to be productive, to which they are entitled under the ADA. [468]That revelation can lead to disparate treatment, harassment, and retaliation by employers whose decision makers hold biases related to those ***disabilities***. [469]

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461 *See supra* Part II.E.3.

462 *See* ***Hickox*** & Case, *supra* note 32, at 567.

463 *See supra* Part II.E.3.

464 *Sturm, supra note 8, at 555*.

465 *Id. at 539*.

466 *Id. at 559*.

467 *See supra* Part I.A.

468 *See supra* Part I.B.

469 *See supra* Part I.B.

To address that anticipated mistreatment, both employers and courts should adopt protections for people with ***disabilities*** that include the ability to challenge decisions and treatment which arise from those biases. This means that an applicant or employee should have an opportunity to establish discriminatory intent even if the decision maker or harasser does not use inflammatory language or time their decision in extremely close proximity to the revelation of a ***disability***. [470]With additional protections in place, people with ***disabilities*** will have more opportunities to gain meaningful employment, which will in turn help to address biases in that organization. [471]Only then will the ADA have a chance to achieve its intended purpose of supporting the entry and retention of people with ***disabilities*** in the workforce. [472]

[*64]

APPENDIX A

List of Court Cases Analyzed

Adams v. Persona, Inc., 124 F. Supp. 3d 973 (D.S.D. 2015)

Ainsworth v. Indep. Sch. Dist. No. 3, 232 F. App'x 765 (10th Cir. 2007)

Anderson v. Coors Brewing Co., 181 F.3d 1171 (10th Cir. 1999)

Andrekovich v. Borough of Punxsutawney, No. 17-1041, 2018 U.S. Dist. LEXIS 184557 (W.D. Pa. Oct. 29, 2018)

Arthur v. Am. Showa, Inc., 625 F. App'x 704 (6th Cir. 2015)

Auble v. Babcock & Wilcox Tech. Servs. Y-12, LLC, No. 3:13-CV-422-*TAV-HBG, 2015 U.S. Dist. LEXIS 140868 (E.D. Tenn. Oct. 15, 2015)*

Bates v. Anthem Ins. Cos., No. 1:18-cv-502, *2020 U.S. Dist. LEXIS 142522 (S.D. Ohio Aug. 10, 2020)*

Baron v. Advanced Asset & Prop. Mgmt. Sols., LLC, 15 F. Supp. 3d 274 (E.D.N.Y. 2014)

Berger v. Auto. Media, LLC, No. 18-11180, 2020 U.S. Dist. LEXIS 103050 (E.D. Mich. June 12, 2020)

Bogart v. Univ. of *Ky., 766 F. App'x 291 (6th Cir. 2019)*

Bourara v. N.Y. Hotel Trades Council, No. 17cv7895 (*DF), 2020 U.S. Dist. LEXIS 159371 (S.D.N.Y. Sept. 1, 2020)*

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[470] *See supra* Part II.A; *see also supra* Part II.C.

[471] *See generally supra* Part II.

[472] *See supra* Part II.

Brady v. Bd. of Educ., 222 F. Supp. 3d 459 (D. Md. 2016)

Bridgewater v. Mich. Gaming Control Bd., No. 17-2360, 2018 U.S. App. LEXIS 26966 (6th Cir. Sept. 19, 2018)

Brown v. BKW Drywall Supply, Inc., 305 F. Supp. 2d 814 (S.D. Ohio 2004)

Brown v. Duke Energy Corp., No. 1:13cv869, *2019 U.S. Dist. LEXIS 54923 (S.D. Ohio Mar. 31, 2019)*

Budzban v. Dupage Cnty. Reg'l Off. of Educ., No. 12 C 900, 2013 U.S. Dist. LEXIS 5094 (N.D. Ill. Jan. 14, 2013)

Buzulencia v. Ohio Bell Tel. Co., No. 4:11CV2293, *2014 U.S. Dist. LEXIS 102551 (N.D. Ohio July 28, 2014)*

Caez-Fermaint v. State Ins. Fund Corp., 286 F. Supp. 3d 302 (D.P.R. 2017)

Cambria v. Ass'n of Flight Attendants, No. 03-cv-5605, *2005 U.S. Dist. LEXIS 13101 (E.D. Pa. June 30, 2005)*

Cody v. Prairie Ethanol, LLC, 763 F.3d 992 (8th Cir. 2014)

Colon-Fontanez v. Mun. of San Juan, 660 F.3d 17 (1st Cir. 2011)

Conn v. Am. Nat'l Red Cross, 149 F. Supp. 3d 136 (D.D.C. 2016)

Consedine v. Willimansett E. SNF, 213 F. Supp. 3d 253 (D. Mass. 2016)

Cormier v. City of Meriden, 420 F. Supp. 2d 11 (D. Conn. 2006)

[*65] Corona v. Clarins U.S.A., Inc., No. 17-cv-4438 (*JGK), 2019 U.S. Dist. LEXIS 155862 (S.D.N.Y. Sept. 12, 2019)*

Coulson v. Goodyear Tire & Rubber Co., 31 F. App'x 851 (6th Cir. 2002)

Cozzi v. Great Neck Union Free Sch. Dist., No. 05-cv-1389-*ENV-WDW, 2009 U.S. Dist. LEXIS 74305 (E.D.N.Y. Aug. 21, 2009)*

Cloe v. City of Indianapolis, 712 F.3d 1171 (7th Cir. 2013)

Crandall v. Paralyzed Veterans of Am., 146 F.3d 894 (D.C. Cir. 1998)

Custer v. Penn State Geisinger Health Sys., No. 00-cv-1860, *2004 U.S. Dist. LEXIS 28953 (M.D. Pa. Dec. 27, 2004)*

Davis v. W. Carolina Univ., 695 F. App'x 686 (4th Cir. 2017)

Donaldson v. Clover Sch. Dist., No. 0:15-1768-*MBS-KDW, 2017 U.S. Dist. LEXIS 155431 (D.S.C. 2017)*

Duarte v. St. Barnabas Hosp., 265 F. Supp. 3d 325 (S.D.N.Y. 2017), 341 F. Supp. 3d 306 (S.D.N.Y. 2018)

Duryea v. MetroCast Cablevision of N.H., LLC, No. 15-cv-164-*LM, 2017 U.S. Dist. LEXIS 60841 (N.H. Apr. 21, 2017)*

EEOC v. C.R. Eng., Inc., 644 F.3d 1028 (10th Cir. 2011)

EEOC v. Detroit Cmty. Health Connection, No. 13-12801, 2014 U.S. Dist. LEXIS 165904 (E.D. Mich. Nov. 26, 2014)

Edwards v. Sec'y, United States DOI, No. 3:15 *CV 2073, 2017 U.S. Dist. LEXIS 120123 (N.D. Ohio July 31, 2017)*, *aff'd 2018 U.S. App. LEXIS 19997 (6th Cir. July 18, 2018)*

Fabian v. St. Mary's Med. Ctr., No. 16-4741, 2018 U.S. Dist. LEXIS 147634 (E.D. Pa. Aug. 29, 2018)

Farha v. Cogent Healthcare of Mich., P.C., 164 F. Supp. 3d 974 (E.D. Mich. 2016)

Feringa v. Andrews, No. 3:19-CV-656, *2021 U.S. Dist. LEXIS 96425 (N.D.N.Y. May 20, 2021)*

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APPENDIX B

Survey Questions

Below are the questions asked in the survey conducted by the authors. The results of this survey remain unpublished; however, they are analyzed and summarized in this article. The results are on file with both the author and the Hofstra Labor & Employment Law Journal.

Q1: Are you an employee, student, or both?

Q2: How would you classify your ***disability*** (check all that apply)?

Q3: Do you receive any accommodations in your workplace?

Q4: Who did you first contact to receive an accommodation (selected choice)?

Q5: Who else did you meet to discuss your needs for accommodation(s) during the process (selected choice)?

Q6: Did you need and/or receive assistance to complete the accommodation request (selected choice)?

Q7: Did any of the following factors add to the time from when you requested an accommodation to the time you received the accommodation(s) (Check all that apply)?

Q8: How would you characterize the process of requesting accommodations?

Easy

Somewhat easy

No Strong Opinion

Somewhat Difficult

Difficult

Q9: I was satisfied with the results of the accommodation request process.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

[*71]

Strongly Disagree

Q10: My relationship with my supervisor was negatively affected by the accommodation process.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q11: Stereotypes/stigma related to my ***disability*** have negatively influenced how peers and supervisors treat me.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q12: Disclosing my ***disability*** has helped my ***disability*** has helped achieve my goals in work.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q13: Only the necessary information to provide my accommodation was given to my direct supervisor.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q14: I can be honest with my supervisor about my ***disability*** and how it affects me.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

[*72] Q15: I feel in control of the accommodation process and how it affects me.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q16: I had access to information about receiving accommodations early on in my employment.

Strongly Agree

Agree

Neither Agree nor disagree

Disagree

Strongly Disagree

Q17: Would you be interested in participating in a follow up 20-30-minute interview?

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