To Trigger or Not to Trigger: The Catch-22 of the Americans with Disabilities Act's Interactive Process

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I. INTRODUCTION

"As for other Americans, life for people with disabilities involves striving, working, taking risks, failing, teaming, and overcoming obstacles."[1] The ability to work is an essential part of the American experience.[2] To guarantee persons with disabilities a place in the American workforce,[3] Congress enacted the Americans with Disabilities Act (ADA).[4]

Yet, despite the ADA, mentally disabled individuals continue to endure discrimination in employment.[5] Studies show "that mental disabilities are

1. NAT'L COUNCIL ON DISABILITY, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS (1986), https://ncd.gov/publications/1986/February1986#5 [https://perma.cc/JVD6-3YA6].

2. *See id.* ("We have all had the experience of seeking something that eludes us, of trying to reach a goal that seems to dance just out of reach. Most of us have also had the rewarding experience of surmounting obstacles to achieve a goal or accomplish a task, succeeding even though someone else or even we ourselves doubted we could do it.").

3. Employers have a duty to offer reasonable accommodations for persons with disabilities so that they can take part in the American economy. *See* S. REP. NO. 101-116, at 10 (1988).

4. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).

5. For example, in 2012, the "national unemployment rate for individuals receiving public mental health services [was] approximately 80 percent." *Mental Illness: NAMI Report Deplores 80 Percent Unemployment Rate; State Rates and Ranks Listed—Model Legislation Proposed*, NAMI (Jan. 1, 2014), https://www.nami.org/Press-Media/Press-Releases/2014/Mental-Illness-NAMI-Report-Deplores-80-Percent-Une [https://perma.cc/8EL7-M6AJ]. In California, that statistic was a staggering 90%. *Id.* These statistics are distressing because "[w]ork is tied to a person's sense of identity, dignity and worth in our society. Even

the most negatively perceived of all disabilities."[6] The "single biggest issue" facing mentally disabled persons may be the ability to find and maintain employment.[7]

The ADA has failed to create a clear way for employers to accommodate the needs of persons with mental disabilities. Mental disabilities, as opposed to physical disabilities, are not always obvious.[8] Uncertainty about whether an individual has a mental disability creates a potential catch-22 of liability for employers. If an employer fails to provide reasonable accommodations for a person with disabilities, an employer can be held liable under the ADA.[9] But if an employer initiates the process of providing an accommodation to an employee, the employer could also face liability under the ADA for "regarding" that employee as "disabled."[10] As the number of mental diagnoses steadily

during the recession, the national unemployment rate paled next to what people in the public mental health system routinely experience. We must do better." *Id.* The Bureau of Labor Statistics' recent report on disability and employment statistics has neglected to differentiate between physical and mental disabilities. However, in total, a whopping 81% of persons with disabilities were unemployed in 2019. *See* BUREAU OF LABOR STATISTICS, USDL-20-0339, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2019 (2020), https://www.bls.gov/news.release/disabl.htm [https://perma.cc/U7S8-R2TV].

6. Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More:" Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 63 (2000). Perception is critical because in many ways "perception functions as a source of knowledge," which dictates social interaction. Olli Lagerspetz, *Studying Perception*, 83 PHILOSOPHY 193, 197 (2008).

7. Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HARV. C.R.-C.L. L. REV. 73, 75 (2017) (quoting JUDITH BARNARD ET AL., NAT'L AUTISTIC SOC'Y, IGNORED OR INELIGIBLE? THE REALITY FOR ADULTS WITH AUTISM SPECTRUM DISORDERS 18 (2001)); *see also* Michael Edward Olsen, Jr., Note, *Disabled but Unqualified: The Essential Functions Requirement as a Proxy for the Ideal Worker Norm*, 66 HASTINGS L.J. 1485, 1488 (2015). More than thirty years after passage of the ADA, only 19.3% of persons with disabilities are employed. BUREAU OF LAB. STAT., USDL-19-1735, THE EMPLOYMENT SITUATION—SEPTEMBER 2019 tbl.A-6 (2019), https://www.bls.gov/news.release/archives/empsit_10042019.pdf [https://perma.cc/97E9-NYV8]. This statistic is troubling because it may reflect a much deeper meaning: overall life satisfaction. In other words, employment status is often used as a key indicator of life satisfaction. *See generally* Nabil Khattab & Steve Fenton, *What Makes Young Adults Happy? Employment and Non-Work as Determinants of Life Satisfaction*, 43 SOCIOLOGY 11 (2009) (studying the relationship between employment status and life satisfaction for 1100 individuals).

8. *See infra* Section III.A.

9. *See infra* Section II.C.1.

10. *See infra* Section II.C.2.

increases,[11] so too does potential liability for employers.[12] The net result: the ADA will fail to protect persons with mental disabilities.[13]

Employers need better tools than the ADA currently affords to help mentally disabled employees. The current approach to employer liability under the ADA presumes that employers intentionally discriminate or choose not to offer reasonable accommodations. Further, the approach disregards common sense notions that employers have the incentive to ensure their *entire* workforce is successful—not just nondisabled employees.[14] Clarifying that employee disclosure of a disability would explicitly trigger the employer's duty to initiate the interactive process would encourage employers' efforts to be proactive, benefitting both employers and mentally disabled employees.[15] Without changes to the ADA, persons with mental disabilities will continue to miss out on the full benefits of employment.[16]

Currently, Title I of the ADA imposes an affirmative duty on employers to engage in an "interactive process" with an employee to determine a reasonable accommodation for the employee's disability.[17] This duty is "triggered" when employers know or have a reason to know that an employee has a mental disability under the ADA and therefore needs a reasonable accommodation.[18] An employee does not need to explicitly initiate the

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11. *See infra* Section III.A.1.

12. *See infra* Section III.A.3.

13. *See infra* Section III.A.

14. Savvy employers aim to please their entire workforce because happy employees increase their productivity, which leads to more profits. *See* Shawn Achor, *The Happiness Dividend*, HARV. BUS. REV. (June 23, 2011), https://hbr.org/2011/06/the-happiness-dividend [https://perma.cc/K59W-N72M] ("A decade of research proves that happiness raises nearly every business and education outcome: raising sales by 37%, productivity by 31%, and accuracy on tasks by 19% . . . ."); Andrew Chamberlain, *6 Studies Showing Satisfied Employees Drive Business Results*, GLASSDOOR (Dec. 5, 2017), https://www.glassdoor.com/research/satisfied-employees-drive-business-results/ [https://perma.cc/7843-5XRY] ("A powerful lesson has emerged: Employees who are more satisfied—who feel like their job is rewarding, see an upward career path, and have great managers—clearly drive better financial performance for companies."); Samuel Edwards, *Examining the Relationship Between Workplace Satisfaction and Productivity*, INC. (Oct. 29, 2015), https://www.inc.com/samuel-edwards/examining-the-relationship-between-workplace-satisfaction-and-productivity.html [https://perma.cc/Q65R-HCRN] ("[A]n increase in job satisfaction is directly related to a 6.6 percent increase in productivity per hour.").

15. *See infra* Section IV.B.1.

16. *See infra* Section III.B.

17. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000) ("Therefore, we join explicitly with the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA . . . ."), *vacated*, 535 U.S. 391 (2002)); *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999) (holding employer's duty is triggered "[o]nce the employer knows of the disability and the employee's desire for accommodations . . . .").

18. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1171–72 (10th Cir. 1999) (holding employer's duty to engage in interactive process is triggered when employee "convey[s]

process by disclosing a disability or requesting an accommodation.[19] Failure to initiate an interactive process can make an employer liable for failure to accommodate.[20] At the same time, an employer can also be held liable for discriminating against an employee if the employer "regards" an employee as having a mental disability.[21]

This leaves employers whipsawed: employers currently may face liability for failure to trigger the interactive process, or, if they do initiate an interactive process, potential liability for regarding an employee as disabled.[22] This catch-22 needs to be addressed so that employers can provide their employees with effective accommodations.[23] This might be accomplished through agency guidance; however, although the U.S. Equal Employment Opportunity Commission (EEOC) has the power to enforce the ADA,[24] courts treat its guidelines as merely "persuasive" and not binding.[25] Additionally, although

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to the employer a desire to remain with the company despite his or her disability"); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) ("But properly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say 'I want a reasonable accommodation,' particularly when the employee has a mental illness."); *see also Small Employers and Reasonable Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/facts/accommodation.html [https://perma.cc/K6ZE-CV8N] (last updated Dec. 20, 2017) (explaining that when requesting accommodation, "[a]n individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation'").

19. *See, e.g.*, *Bultemeyer*, 100 F.3d at 1285; *Small Employers and Reasonable Accommodation*, *supra* note 18.

20. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2012); *see, e.g.*, *Barnett*, 535 U.S. at 396 ("[T]he ADA says that 'discrimination' includes an employer's '*not making reasonable accommodations* . . . .'").

21. 42 U.S.C. § 12102(1)(C) (2012); *see, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 630 (1998).

22. *See infra* Section II.C.

23. *See generally* JOSEPH HELLER, CATCH-22 (50th anniversary ed. 1989); *see also Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 [https://perma.cc/WRP8-N8SR] (defining catch-22 as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule").

24. 42 U.S.C. § 2000e-4 (2012); *see also About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/ [https://perma.cc/H2VX-NRUF]; *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/disability.cfm [https://perma.cc/4XMW-63DB] (listing ADA as an EEOC-enforced law).

25. The EEOC routinely administers administrative guidelines to aid in federal employment law enforcement, such as the ADA; however, the courts do not consistently defer to the agency's guidelines. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (declining to defer to EEOC's interpretation of ADA as adopted by agency's guidelines), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325,

courts have played an instrumental role in interpreting the interactive process's trigger, circuits inconsistently apply the ADA.[26] An effective solution, therefore, will require Congress to amend the ADA once again and reconcile this circuit split.[27]

This Comment proposes solutions to help ensure persons with mental disabilities are supported in the workplace and will proceed in the following manner. Part II examines the historical background of the ADA and the employer's role and duties under the ADA.[28] This Part also briefly describes the elements of a "failure to accommodate" claim and a "regarded as" claim.[29] Part III explores the current trend of ADA mental disability claims and explains how the current ADA limits employers to "reactive"—rather than proactive—solutions.[30] This reactive approach only confuses employers and inhibits the assimilation of persons with mental disabilities into the workplace.[31] Finally, Part IV recommends how Congress can amend the ADA to require employees to disclose their disabilities to their employers before an employer can be held liable for failing to accommodate an individual's disability.[32] Requiring an employee to disclose a mental disability to an employer gives the employer a clear signal to engage in an interactive process with the employee to find an effective accommodation.[33] Additionally, Congress should prohibit plaintiffs from pleading in the alternative with respect to failure to accommodate and regarded as discrimination claims.[34] These relatively small changes to the ADA will make it easier for employers and employees to work together, which will help to integrate qualified persons with mental disabilities into the workplace.

II. A SHORT INTRODUCTION TO THE ADA

In 1990, Congress passed the ADA, finding that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number

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122 Stat. 3554; *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (explaining *Chevron* deference as "[t]he power of an administrative agency to administer a congressionally created . . . program, [which] necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

26. *See infra* notes 76–89 and accompanying text.
27. *See infra* Part IV.
28. *See infra* Sections II.A., II.B.
29. *See infra* Section II.C.
30. *See infra* Part III.
31. *See infra* Sections III.B, III.C.
32. *See infra* Part IV.
33. *See infra* Section IV.B.1.
34. *See infra* Section IV.B.2.

is increasing as the population as a whole is growing older."[35] Initially, courts narrowly construed the ADA's scope of protection and held that several mental illnesses, such as bipolar disorder, were not covered by the ADA.[36] As a result, Congress amended the ADA in 2008, expressly admonishing courts for interpreting the Act narrowly.[37]

Congress intended the 1990 ADA enactment and 2008 ADA amendments to promote equal opportunity for individuals with disabilities.[38] This Part examines the historical progression of the ADA,[39] the employer's role under the ADA,[40] and the elements establishing failure to accommodate and regarded as discrimination claims.[41]

A. A Brief History of the ADA

Under the first version of the ADA, enacted in 1990, persons with mental disabilities were commonly denied protected status under the ADA.[42] After nearly two decades of backlash, Congress introduced amendments

35. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(1) (2008) (amended 2009).

36. *See, e.g.*, Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 766–67 (10th Cir. 2006) (holding cerebral palsy outside scope of ADA); Blanks v. Sw. Bell Commc'ns, Inc., 310 F.3d 398, 399 (5th Cir. 2002) (holding HIV infection outside scope of ADA); Sorensen v. Univ. of Utah Hosp., 194 F.3d 1084, 1085 (10th Cir. 1999) (holding multiple sclerosis outside scope of ADA); Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350, 357–58 (N.D.N.Y. 2000) (holding bipolar disorder outside scope of ADA); Hirsch v. Nat'l Mall & Serv., Inc., 989 F. Supp. 977, 980–82 (N.D. Ill. 1997) (holding cancer outside scope of ADA). *See generally* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (finding 94% of employers won ADA claims at trial court level).

37. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), (4), 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. § 12101 (2012)) ("[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage. . . . [T]he holdings of the Supreme Court . . . have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect . . . ."). The amended ADA thus reinstated "a broad scope of protection to be available under the ADA." *Id.* § 2(b)(1).

38. 42 U.S.C. § 12101.

39. *See infra* Section II.A.

40. *See infra* Section II.B.

41. *See infra* Section II.C.

42. *See* Allison Duncan, *Defining Disability in the ADA:* Sutton v. United Airlines, Inc., 60 LA. L. REV. 967, 968 (2000); *see also infra* Section II.A.1.

that grossly broadened the ADA's scope.[43] Without a clear trigger to the interactive process, however, this expanded category of ADA-protected individuals is unable to fully realize their statutorily protected rights to reasonable accommodations.[44] This is why employers should be given an opportunity to engage in the interactive process with a straightforward trigger for the interactive process.[45]

1. ADA Enactment in 1990

When first enacted in 1990,[46] the ADA prohibited employers from discriminating against a qualified individual with a disability[47] and was "the first statute to prohibit discrimination based on disability in the private sector."[48] The ADA supplied persons with disabilities with a cause of action for traditional forms of discrimination, as well as for an employer's failure to make reasonable accommodations.[49] Congress required employers to make reasonable accommodations so that persons with disabilities could "be part of the economic mainstream of our society."[50]

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43. *See infra* Section II.A.2.

44. *See infra* Section III.C.

45. *See infra* Section IV.B.1.

46. Americans with Disabilities Act, 42 U.S.C. § 12101 (2012). Prior to the ADA's enactment, disabled individuals were protected under the Rehabilitation Act. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (2012)). Additionally, many states had already enacted similar laws. *See* Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 628 (2004) [hereinafter Long, *State Anti-Discrimination Law as a Model*] ("By 1990, the number of states that explicitly included a reasonable accommodation requirement in their statutes had grown to twenty-seven."). However, "even though many states prohibited discrimination against individuals with disabilities prior to the enactment of the ADA in 1990, state laws were far from uniform and frequently provided less protection than that ultimately provided by the ADA." Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477–78 (2006) [hereinafter Long, *Divergent Interpretations*] (footnotes omitted).

47. 42 U.S.C. § 12112(a) (2012).

48. Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 219 (2016) (citing RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 19 (2005)). The reason the legislation focused on the term "disability" was because "handicap" had a negative connotation in American culture. *See* Malinda Orlin, *The Americans with Disabilities Act: Implications for Social Services*, 40 SOC. WORK 233, 234 (1995).

49. 42 U.S.C. § 12112(b)(5)(A) (2012).

50. S. REP. NO. 101-116, at 10 (1988). The Senate Report notes: "Individuals with disabilities experience staggering levels of unemployment and poverty," and "a large majority of those not working say that they want to work." *Id.* at 9. Yet still, once they entered the workplace, one of the "major categories of job discrimination faced by people with disabilities include[s] . . . failure to provide or make available reasonable accommodations." *Id.*

Yet, courts were leery of a statute that imposed such broad and affirmative obligations on employers. Consequently, courts narrowly construed the definition of "disability."[51] Courts worried that it would be too difficult for them to determine what a reasonable accommodation is for each unique type of job, employer, and industry.[52]

A number of reasons helped pave the way for this judicial backlash. Congress had not faced much opposition when it enacted the legislation in 1990.[53] Most states had already enacted state antidiscrimination laws regarding disability,[54] several Congressmen had personal connections to disabled individuals,[55] and Congress enacted the ADA at a time when the legislative branch "was largely receptive to the demands of civil rights groups."[56] Because Congress faced little opposition to the ADA, Congress did not have to engage the public about the scope of its protections and the kinds of costs and tradeoffs that it—like all legislation—would entail.[57]

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51. *See* Porter, *supra* note 48, at 220 ("In other words, if the plaintiff never proceeds past the coverage question, the court never has to answer the more difficult question of whether the plaintiff should succeed on the merits, which often involves an issue of whether the employer is obligated to provide a reasonable accommodation to the employee." (citing Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 542 (2013))).

52. *See id.* at 219–20 ("[C]ourts' reluctance to make employers broadly restructure a job or the physical workspace and the difficulty in determining what accommodations are reasonable has [likely] contributed to courts narrowly construing the definition of disability." (citing Porter, *supra* note 51, at 542)).

53. *See* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 522 n.3 (2008).

54. *See* Long, *State Anti-Discrimination Law as a Model*, *supra* note 46, at 627 ("[B]y the time of the ADA's enactment in 1990, forty-eight states and the District of Columbia had statutes prohibiting disability-based discrimination in the private sector.").

55. *See* Selmi, *supra* note 53, at 538–39.

56. *Id.* at 539. For a comparison between the Civil Rights Act of 1964 and the ADA, see generally Robert D. Dinerstein, *The Americans with Disabilities Act of 1990: Progeny of the Civil Rights Act of 1964*, HUM. RTS., Summer 2004, at 10.

57. *See* Selmi, *supra* note 53, at 541–42. The ADA passed into legislation relatively easily:

> Of all the civil rights statutes that were passed towards the end of the decade, the ADA was perhaps the least controversial. The Family and Medical Leave Act was vetoed twice by President Bush; the Civil Rights Act of 1990 was likewise vetoed, and the Civil Rights Act of 1991 was headed for a veto until the Clarence Thomas hearings intervened. As a consequence, all of these statutes received more congressional attention, and more legislative massaging, than the ADA.

Consequently, Congress did not have to persuade the American public or various interest groups about the need to protect persons with diverse disabilities from discrimination or to extend to them the novel right of reasonable accommodation.[58]

This judicial backlash[59] effectively limited the number of mental disabilities protected under the ADA.[60] A number of appellate courts denied plaintiffs' claims based on mental disabilities, concluding that mental disabilities, such as post-traumatic stress disorder and depression, were not substantially limiting enough to be protected under the ADA.[61] In 2002, the Supreme Court again limited the scope of plaintiffs with ADA-protected disabilities when the Court interpreted the ADA's "substantially limited" language as "severely restrict[ed]" in regards to the ability to perform major life functions.[62]

Id. (footnotes omitted). "[L]ack of controversy, however, can just as easily lead to problems during the implementation phase of the statute—problems that might have been addressed through more careful congressional deliberation." *Id.* at 539.

58. *Id.* at 543 ("Given the apparent limited support for an expansive definition, it is worth noting that the public advocacy that did occur in support of the statute all focused on traditional disabilities."). In other words, there was "no apparent public support for an expansive definition of disability." *Id.* at 542.

59. The critical backbone of the judicial backlash began in 1999 with the *Sutton* trilogy. *See* Porter, *supra* note 48, at 220. *See generally* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475–76 (1999), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554; Murphy v. United Parcel Serv., 527 U.S. 516, 518–19 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 558 (1999).

60. *See, e.g.*, Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350, 350–51, 354, 358 (N.D.N.Y. 2000) (granting summary judgment for employer-defendant against plaintiff diagnosed with bipolar disorder because, although bipolar disorder "can constitute an impairment," impairment does not necessarily constitute ADA-protected disability). Perhaps this result was because, at the time, "much of the larger disagreement over the Americans with Disabilities Act [could] be characterized as a clash of perspectives about the meaning of disability." Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 213 (2000). "[U]nderlying assumptions about disability frame[d] the . . . debate over the ADA." *Id.*

61. *See, e.g.*, Rohan v. Networks Presentations L.L.C., 375 F.3d 266, 276 (4th Cir. 2004). The *Rohan* court observed the plaintiff experienced about thirty sporadic episodes, which rendered the plaintiff "almost completely incapable of interacting with others during her episodes." *Id.* However, the court stated that, "[i]ntermittent manifestations of an illness are insufficient to establish a substantial limitation on a major life activity." *Id.*; *see also* Ogborn v. United Food & Commercial Workers Union, Local No. 881, 305 F.3d 763, 767–78 (7th Cir. 2002) (holding employee not disabled under ADA for suffering from depression because plaintiff had not shown how depression substantially limited work performance); Swanson v. Univ. of Cincinnati, 268 F.3d 307, 316 (6th Cir. 2001) (finding depressed surgical resident "impaired . . . by his depression but not substantially limited").

62. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554; *see also* Hensel, *supra* note 7, at 80.

In sum, under the 1990 ADA, plaintiffs met the definition of an "individual with a disability" only if they had a physical or mental impairment that substantially limited a major life activity, had a record of such impairment, or was regarded as having such an impairment.[63] This narrow reading of disability undermined the ADA's purpose because courts easily determined that plaintiffs did not meet the elements of a prima facie case of discrimination, and thus courts commonly dismissed ADA claims at summary judgment.[64]

As a result, "[o]nly those with the most severe disorders, who correspondingly were the least likely to be employed, were able to establish" that they had disabilities.[65] Plaintiffs with social difficulties common to many mental disabilities, such as the reduced ability to interact with others, were typically considered not disabled.[66] Courts dismissed plaintiffs with mental disabilities that were not substantially limiting enough to be qualified under the ADA.[67] For example, at summary judgment, courts habitually dismissed plaintiffs who had been diagnosed with bipolar disorder, severe anxiety, and depression.[68] Statistically, only 7% of ADA plaintiffs survived summary

63. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 330 (1990) (codified as amended at 42 U.S.C. § 12102(2) (1990) (amended 2002)).

64. *See, e.g.*, Porter, *supra* note 48, at 219 ("[P]rior to the ADAAA, the courts narrowly interpreted the definition of disability, which resulted in a very restricted class of those who were entitled to protection of the ADA."). For examples of courts dismissing ADA claims at summary judgment, see *infra* note 68.

65. Hensel, *supra* note 7, at 80.

66. *See id.* at 81–82; *see also* Comber v. Prologue, Inc., No. CIV.JFM–99–2637, 2000 WL 1481300, at *2, *6 (D. Md. Sept. 28, 2000) (holding plaintiff with autism not disabled).

67. Hensel, *supra* note 7, at 82. "Ironically, many of the same courts that rejected interacting with others as a major life activity concluded that 'getting along with others' was an essential function of nearly every job." *Id.* "Courts also found the ability to handle stressful situations without upsetting others to be a critical and universal job function." *Id.*; *see* Calef v. Gillette Co., 322 F.3d 75, 86 (1st Cir. 2003) (holding employee diagnosed with attention deficit hyperactivity disorder (ADHD), prone to outbursts during stressful situations, unqualified under ADA)).

68. *See, e.g.*, Horwitz v. L & J.G. Stickley, Inc., 122 F. Supp. 2d 350, 353–54, 358 (N.D.N.Y. 2000); *see also* McCarron v. British Telecom, No. 00-CV-6123, 2002 WL 1832843, at *9–10 (E.D. Penn. Aug. 7, 2002) (declining to consider bipolar disorder as disability under ADA and instead relying on whether morbid obesity was disability); Doebele v. Sprint Corp., 157 F. Supp. 2d 1191, 1200, 1212 (D. Kan. 2001) (holding plaintiff diagnosed with bipolar disorder and ADHD deemed not disabled under ADA), *aff'd in part, rev'd in part*, 342 F.3d 1117 (10th Cir. 2003); Lottinger v. Shell Oil Co., 143 F. Supp. 2d 743, 747, 780 (S.D. Tex. 2001) (holding plaintiff diagnosed with depression deemed not disabled under ADA); Scherer v. GE Capital Corp., 59 F. Supp. 2d 1132, 1134, 1136 (D. Kan. 1999) (holding plaintiff diagnosed with severe anxiety deemed not disabled under ADA).

judgment.[69] Thus, the 1990 ADA was widely considered to be a failure in protecting individuals with disabilities in the workplace.[70]

2. 2008 Amendments

Dissatisfied with the courts' narrow interpretation of disability,[71] Congress passed the ADA Amendments Act (ADAAA) in 2008.[72] The ADAAA expanded the scope of disability, including the scope of "mental" disability.[73] Congress emphasized that a court's "determination of disability 'should not demand extensive analysis,' and 'shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of [the] Act.'"[74] This change made it much easier for plaintiffs to survive summary judgment.[75]

The ADAAA overturned several Supreme Court precedents: First, the amendments explicitly direct courts to consider whether an impairment substantially limits a major life activity "without regard to the ameliorative effects of mitigating measures."[76] This overturned the Court's ruling in *Sutton v. United Airlines, Inc.*, which had held that whether a person had a disability had to be assessed with regard to any ameliorative measures that an individual used.[77]

Second, the amendments expanded the definition of disability in three ways. This expansion effectively overturned the Court's ruling in *Toyota Motor Manufacturing v. Williams*, which had limited disabilities to only impairments that were so severe that they prevented individuals from doing activities that were "of central importance to most people's daily lives."[78]

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69. Hensel, *supra* note 7, at 81 (citing Colker, *supra* note 36, at 99–100).

70. For a list of scholarly explanations describing the originally enacted ADA's failure to protect persons with disabilities and the subsequent judicial backlash, see Olsen, *supra* note 7, at 1493–96.

71. *See* Porter, *supra* note 48, at 222.

72. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012).

73. Porter, *supra* note 48, at 223.

74. Hensel, *supra* note 7, at 83 (footnotes omitted) (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(b)(5), 4(a)(4)(A), 122 Stat. 3553, 3553–55 (codified as amended at 42 U.S.C. § 12101 (2012)); *see also* Olsen, *supra* note 7, at 1491 ("Some legal scholars have described these amendments as 'instructional,' in the sense that the ADAAA directs courts to 'interpret the same statutory language in a different way.'" (quoting Kate Webber, *Correcting the Supreme Court—Will It Listen? Using the Models of Judicial Decision-Making To Predict the Future of the ADA Amendments Act*, 21 S. CAL. INTERDISC. L.J. 305, 325 (2014))).

75. *See* Porter, *supra* note 48, at 217; Porter, *supra* note 51, at 536–37; Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 19–46 (2014).

76. 42 U.S.C. § 12102(4)(E)(i); *see also* Porter, *supra* note 48, at 223–24.

77. 527 U.S. 471, 475, 482 (1999), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554.

78. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554.

Congress abandoned the Court's narrow reading of disabilities covered under the ADA, opting instead for a broad interpretation of disability that affected a nonexhaustive list of "major life activities."[79] Major life activities include, but are not limited to, caring for oneself, learning, concentrating, thinking, communicating, and working.[80]

Additionally, an impairment may still be considered a disability when it is in remission.[81] As a result, "episodic" impairments are protected under the ADA.[82] Temporary impairments also qualify for protection under the ADA, so long as the impairment substantially limits a major life activity.[83] For example, in *Summers v. Altarum Institute, Corp.*, the Fourth Circuit noted that the ADAAA did not impose a durational requirement for "actual" disabilities.[84]

79. 42 U.S.C. §§ 12101(b), 12102(2); *see also* Porter, *supra* note 48, at 223.

80. 42 U.S.C. § 12102(2)(A). Prior to the 2008 amendment, "some courts had previously refused to recognize" the activities on this list as major life activities. Hensel, *supra* note 7, at 83; *see, e.g.*, Humbles v. Principi, 141 F. App'x 709, 712 (10th Cir. 2005) ("[I]nteractions with others and concentration have not been deemed major life activities by this circuit."); Boerst v. Gen. Mills Operations, Inc., 25 F. App'x 403, 406 (6th Cir. 2002) (holding "concentrating" not major life activity); Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEX. TECH. L. REV. 321, 325 (2002).

81. 42 U.S.C. § 12102(4)(D) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

82. *See, e.g.*, Howard v. Pa. Dep't of Pub. Welfare, No. 11-1938, 2013 WL 102662, at *11 (E.D. Pa. Jan. 9, 2013) (holding fibromyalgia, though episodic and only appearing in wet or rainy weather, protected under ADA). Fibromyalgia is believed to be both a mental and physical impairment. *See Fibromyalgia: Symptoms & Causes*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/fibromyalgia/symptoms-causes/syc-20354780 [https://perma.cc/4R96-37QS] ("Researchers believe that fibromyalgia amplifies painful sensations by affecting the way your brain processes pain signals.").

83. *See, e.g.*, Summers v. Altarum Inst., Corp., 740 F.3d 325, 333 (4th Cir. 2014).

84. *Id.* at 332. The ADAAA only "imposes a six-month requirement with respect to 'regarded-as' disabilities." *Id.*

Finally, the ADAAA broadened the regarded as prong.[85] Subsequently, courts have heeded Congress's mandate to broaden the definition of disability; as a result, far more plaintiffs are surviving summary judgment.[86]

While Congress has expanded who the ADA protects, it has not significantly expanded protections for individuals with disabilities, particularly individuals with mental disabilities. This larger group of protected persons cannot maximize ADA benefits because employers are afraid to initiate an interactive process to provide an employee with reasonable accommodations because doing so can expose them to liability for regarding that individual as disabled.[87]

B. The Employer's Role Under the ADA

The employer's role is focused on preventative law and guided by statutory restrictions, whereas the employee's course of legal action is centered around reactive law,[88] with two potential causes of action that directly contradict one another.[89] This Section examines the employer's statutorily constrained role and explains why employees are currently unable to enjoy the ADA's broad protections until after the employee files a lawsuit.

To begin, employers cannot inquire about an employee's disability.[90] Nor can they require any medical examinations before extending an employment offer.[91] Additionally, they cannot request employee medical

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85. 42 U.S.C. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."). Under the ADAAA, "an ADA plaintiff no longer faces the difficult task of proving that a defendant's misperception of his or her condition was *so* severe as to amount to a belief that the condition substantially limited a major life activity. Instead, the new amendments place the focus on the employer's motivation." Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 224 (2008).

86. *See* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031–32 (2013). For a discussion of how the broader reading of disability applied to Title II of the ADA, as well, see Ryan Ballard & Chris Henry, *Mediation and Mental Health Claims Under the ADA*, 44 CAP. U. L. REV. 31, 52–54 (2016).

87. *See infra* Part III.

88. For a comparison of proactive and reactive law, see *infra* Section III.C.3.

89. *See infra* Section II.C.

90. *See* Hensel, *supra* note 7, at 86 ("Individuals with disabilities may not be forced to disclose their [disability] status in any respect.").

91. *Id.* at 86 ("These broad prohibitions extend to every step of the hiring process, including written job applications, employment interviews, and—increasingly significant

records to show a substantially limiting disability,[92] nor may employers rely solely upon a physician's opinion as to whether an employee has a mental disability and is in need of reasonable accommodations.[93] Furthermore, an employee's failure to make direct requests for specific accommodations does not relieve an employer of the duty to provide reasonable accommodations.[94] These prohibitions against disclosure act as barriers to ADA-protected employees because employers are less likely to initiate the interactive process when they can be held liable for regarded as discrimination.[95]

In order for ADA-protected employees to enjoy the full benefits of the ADA and receive reasonable accommodations, an employer should have notice of the employee's disability so that it can enter into the interactive process without worrying about regarded as liability.[96] As described below, coaxing employee disclosure through new legislation will give employers an opportunity to engage in the interactive process without worrying about regarded as liability.[97]

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in the digital age—any background investigation conducted by the employer directly or indirectly.").

92. Both the Seventh and Ninth Circuits have held that the ADA's statutory language, the EEOC's implementing regulations, and case law do not require employees to supply the employer with any medical testimony to prove an employee's substantial limitations. Frank C. Morris, Jr., *Selected Developments Under the Americans with Disabilities Act*, SY002 ALI-CLE 751 (2016) (citing EEOC v. AutoZone Inc., 630 F.3d 635 (7th Cir. 2010); Head v. Glacier Nw. Inc., 413 F.3d 1053 (9th Cir. 2005)).

93. *See, e.g.*, Lafata v. Dearborn Heights Sch. Dist. No. 7, No. 13-cv-10755, 2013 WL 6500068, at *9–10 (S.D. Mich. Dec. 11, 2013) ("[Doctor's] deposition testimony reflects that his examination of Plaintiff was neither lengthy nor comprehensive. The School District has a duty to review [the doctor's] report to assure itself that his examination and analysis were thorough and/or reasonable.").

94. *See, e.g.*, Heath v. Brennan, No. 2:13-cv-00386-JDL, 2015 WL 2340781, at *7–8, *10 (D. Me. May 14, 2015) (holding employee's history of disabilities and prior EEOC complaints and settlement agreements still gave employer reason to know it should engage in interactive process to ascertain reasonable accommodations for employee—even though prior settlement agreements had not been breached).

95. *See infra* Section II.C.2.

96. *See infra* Section II.C.2.

97. *See infra* Section IV.B.

C. The Plaintiff's Two Current Causes of Action that Create the Catch-22

The employer's dilemma here is couched between two causes of action: (1) failure to accommodate[98] and (2) regarded as discrimination.[99]

1. Failure to Accommodate

Under the ADA, plaintiffs may file a suit for a failure to accommodate using two distinct methods.[100] First, plaintiffs may show that (1) they are a qualified individual with a disability that substantially limits a major life activity; (2) the employer knew or had reason to know the employee needed a reasonable accommodation; and (3) the employer failed to offer a reasonable accommodation to the employee.[101] Once the employee establishes these elements, the burden shifts to the employer to show that an accommodation would place an "undue hardship" on the employer.[102]

Second, and more pertinently here, plaintiffs may show that (1) the employer knew *or had reason to know* that the qualified individual had a disability, (2) the employer knew *or had reason to know* that the employee needed a reasonable accommodation, and (3) the employer *failed to initiate the interactive process*.[103] In other words, liability for failing to provide a reasonable accommodation does not require discriminatory animus; it only requires proof that the employer did not sufficiently engage in the interactive process

98. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5) (2012).

99. *Id.* § 12102(1)(C).

100. *Id.* § 12112(b)(5); *see also* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 407 (2002) (Stevens, J., concurring) ("The Court of Appeals also correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether petitioner violated the statute by failing to engage in an interactive process concerning respondent's three proposed accommodations.").

101. 42 U.S.C. § 12112(b)(5). Reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . . and other similar accommodations for individuals with disabilities." *Id.* § 12111(9)(B).

102. *Id*. § 12112(b)(5)(A). This Comment does not examine undue hardship in detail because this burden shift happens at trial, and this Comment is focused on keeping employers compliant without a trial. For another look at burden shifting in the employment law context, see generally Joss Teal, Comment, *A Survivor's Tale:* McDonnell Douglas *in a Post*-Nassar *World*, 55 SAN DIEGO L. REV. 937 (2018).

103. *See, e.g.*, *Barnett*, 535 U.S. at 407 (Stevens, J., concurring); *see also* Gray v. U.S. Steel Corp., No. 2:09-cv-327-APR, 2013 WL 6682951, at *20 (N.D. Ind. Dec. 17, 2013) ("In failure to accommodate cases, in addition to showing that he is a qualified disabled individual, the plaintiff must show that the employer was aware of his disability and failed to accommodate it.").

to provide the employee with a reasonable accommodation.[104] Thus, having reason to know under the second prong triggers an employer's duty to initiate an interactive process. This reason to know standard directly conflicts with the second cause of action described below.

2. Regarded As Discrimination

Plaintiffs may also file regarded as claims under the ADAAA.[105] There are two ways that a plaintiff may show regarded as discrimination here: (1) an employer mistakenly believes that an employee has a mental impairment that substantially limits one or more major life activities, or (2) an employer mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.[106] In either case, the employer must have "entertain[ed] misperceptions about the individual."[107]

This second option creates tension with the reason to know standard discussed above because employers face liability for failing to trigger the interactive process without explicitly knowing of an employee's disability. Yet, an employer may also face liability for assuming that an employee is disabled. Additionally, just to cover their bases, plaintiffs are increasingly filing

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104. *See* THOMSON REUTERS, EXECUTIVE LEGAL SUMMARY NO. 349, REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2019) ("An employer can breach this duty to accommodate without being motivated by any discriminatory animus.").

105. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(3)(A) (2012). Congress added the regarded as prong to hamper discrimination based on "archaic attitudes" and "erroneous but nevertheless prevalent perceptions about the handicapped." Sch. Bd. of Nassau Cty v. Arline, 480 U.S. 273, 279 (1987).

106. 42 U.S.C. § 12102(1)(A), (C) (2012); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554.

107. *Sutton*, 527 U.S. at 489. That is, the worker need only show that the employer believed that the worker had a mental or physical impairment, not that such impairment affected him or her to any specific degree; under the "regarded as" prong, the employer's perception about the worker is the court's pivotal inquiry. Sowell v. Kelly Servs., Inc., 139 F. Supp. 3d 684, 700 (E.D. Pa. 2015); Douglas A. Haas, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 699 (2013) ("While an employer is not required to provide reasonable accommodations to individuals who are only 'regarded as' disabled under the ADA, the post-ADAAA regulations add that 'regarded as' disability discrimination may arise from adverse employment actions taken based on the symptoms of actual or perceived impairments, or on medication used to treat such impairments." (footnotes omitted) (citing 29 C.F.R. § 1630.2(l)(1) (2019))). Both of these causes of action under the ADA are part of what is known as "reactive" law because they can only guarantee rights through litigation, i.e. *after* an employer has already infringed upon a right. *See infra* Section III.C.3.

both causes of action against the employer.[108] Congress can alleviate this tension by making some minor adjustments to the ADA.[109]

III. THE CURRENT ADA'S AMBIGUOUS TRIGGER ENSNARES EMPLOYERS IN INEVITABLE LEGAL LIABILITY

The problem sketched above[110] is dire. The current ADA provisions lead to absurd results—this cannot be what Congress intended when enacting the ADA.[111] If an employer cannot inquire about an employee's limitations, require a medical exam, or ask for medical records, an employer is left with nothing but its impressions that an employee may have a disability. But relying on such "impressions" resembles nothing more than relying on stereotypes about disabilities—that is, resembles nothing more than "regarding" a worker as disabled.

This framework is disadvantageous to both the employer and the employee: employers face liability, and employees are not offered a reasonable accommodation.[112] Thus, Congress should require employee disclosure of a disability as an element in failure to accommodate claims to encourage disclosure and get employees what they actually need—reasonable accommodations—not legal fees.[113]

Additionally, Congress should bar some forms of alternative pleading in ADA suits. Congress implemented the regarded as prong of the ADAAA to debunk the "myths, fears[,] and stereotypes associated with disabilities,"[114]

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108. Employees continue to file both failures to accommodate and regarded as claims in the same suit. *See, e.g.*, Southall v. USF Holland, Inc., No. 3:15-cv-1266, 2018 WL 6413651, *7–8 (M.D. Tenn. Dec. 5, 2018) (alleging both that (1) plaintiff qualified as disabled under ADA for failure to accommodate, and (2) defendant-employer discriminated against plaintiff-employee by regarding plaintiff as disabled).

109. *See infra* Part IV.

110. *See supra* Section II.C.

111. Congress did not intend to terrify employers with legal liability to the point that they fear offering employees reasonable accommodations; instead, Congress sought to integrate persons with disabilities into the workplace with employers' help—with reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5) (2012). Although thus far Congress has relied on the courts to interpret ambiguities, the judicial interpretation approach has led to circuit splits. *See infra* notes 76–89 and accompanying text. The increasing numbers of ADA plaintiffs demonstrate that Congress should settle these circuit splits and clarify the interactive process's trigger so that qualified individuals get reasonable accommodations—not court fees. *See infra* Sections III.A, III.B.

112. For a discussion of unachieved ADA policy goals, see *infra* Section III.B.

113. *See infra* Section IV.B.1.

114. Sutton v. United Air Lines, Inc., 527 U.S. 471, 490 (1999), (quoting 29 C.F.R. app. § 1630.2(l) (2019)), *superseded by statute*, ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3554.

and to broaden the coverage of the ADA.[115] However, allowing for alternative pleading when employees are pursuing a failure to accommodate claim does not help discredit such notions; alternative pleading only gives plaintiffs another option for recovery.[116] By statutorily restricting this alternative pleading approach, Congress can help make sure that employees are getting the help they need without filing a lawsuit.[117]

This Part explores three key reasons why Congress should amend the ADA. First, current trends show that employers are increasingly more likely to face liability under the ADA.[118] With the upsurge in mental disability diagnoses, employers are increasingly more likely to encounter a candidate with a mental disability or an employee whose disability is not easily apparent and who may not request a reasonable accommodation.[119] Unfortunately, circuits do not uniformly interpret employer liability under the ADA,[120] which means employers still remain without much guidance—even with judicial interpretations of the ADA.

Second, today's predicament establishes that the ADA's policy goals remain unachieved.[121] If employers are unable to take the necessary steps to help employees with mental disabilities, then disabled employees are not able to enjoy the same employment opportunities as their nondisabled coworkers.[122] This lack of workplace opportunity means that the ADA is still not adequately protecting disabled employees.[123]

Finally, this Part explores proactive methods of guaranteeing these statutory rights to ADA-protected individuals.[124] Other solutions proposed, such as

115. *See* Haas, *supra* note 107, at 697–98 ("Finally, the ADAAA rejected federal courts' requirement that plaintiffs alleging 'regarded as' disability prove that defendants perceived their real or imagined disabilities to be 'substantially limiting.' Instead, to satisfy this prong, the Act only required plaintiffs to prove that they suffered disability discrimination 'because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.' The ADAAA also provided that employers need not extend a reasonable accommodation to individuals who merely satisfy the 'regarded as' definition of disability." (footnotes omitted)).

116. For a discussion of reactive and proactive law, see *infra* Section III.C.3.

117. *See infra* Section III.C.3.

118. *See infra* Sections III.A.1, III.A.3.

119. *See infra* Sections III.A.1, III.A.3.

120. *See infra* Section III.A.2.

121. *See infra* Section III.B.

122. *See infra* Section III.B.

123. *See infra* Section III.B.

124. *See infra* Section III.C.

factors tests and mediation, are simply reactive solutions to this problem.[125] Additionally, although the EEOC plays an instrumental role in enforcing the ADA, this role is also a reactive response.[126] Employers need a proactive approach and better congressional guidance to help ensure that their disabled employees have the best support possible.[127]

For these reasons, Congress should delineate a clearer approach to the interactive process by requiring employee disclosure as an element in failure to accommodate claims.[128] This disclosure would thus explicitly trigger the interactive process.[129] Additionally, Congress should prohibit dual pleading of regarded as and failure to accommodate claims.[130]

A. Contemporary Trends Show that Employers Increasingly Face Legal Liability Under the ADA

Some scholars argue that the 2008 amendment eliminated any catch-22 in the ADA.[131] However, the catch-22 has merely shifted, instead entrapping employers rather than plaintiffs.[132] As a result of the 2008 amendments to the ADA, far more plaintiffs' ADA cases are surviving summary judgment.[133] Although recent legal amendments have encouraged employers to hire disabled employees,[134] these amendments "unquestionably" make the reasonable accommodation request process more challenging because employees with mental disabilities often have "unique needs."[135] Without encouraging employee disclosure by requiring it as an element of a failure to accommodate claim,[136] employers will continue to miss opportunities

125. *See infra* Section III.C.1.
126. *See infra* Section III.C.2.
127. *See infra* Section III.C.3.
128. *See infra* Section IV.B.1.
129. *See infra* Section IV.B.1.
130. *See infra* Section IV.B.2.
131. *See, e.g.*, Ballard & Henry, *supra* note 86, at 51.
132. *See supra* Section II.C.
133. *See* Befort, *supra* note 86, at 2050 (finding significantly lower rates of courts granting summary judgment to employers for disability finding after passage of ADA Amendments Act).
134. *See* Hensel, *supra* note 7, at 75–76. The 2016 amendment to the Rehabilitation Act "require[s] some federal contractors to attempt to achieve a workforce comprised of at least 7% of employees with disabilities." *Id.*; *see also* Olsen, *supra* note 7, at 1488 n.11 (citing Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,681, 58,682 (Sept. 24, 2013) (codified as amended at 41 C.F.R. pt. 60-741 (2019)). These recent legal amendments have helped created equal opportunities for both mentally disabled employees—to gain employment in the workplace—and employers—"to tap into the talents and abilities of a sizable population of workers." Hensel, *supra* note 7, at 76.
135. Hensel, *supra* note 7, at 76.
136. *See infra* Section IV.B.1.

to reasonably accommodate their ADA-protected employees and best leverage their diverse workforces.[137]

This Section examines how employers are increasingly more likely to hire persons with mental disabilities,[138] how courts inconsistently interpret the ADA's trigger to the interactive process,[139] and how the number of ADA plaintiffs is only growing.[140] Thus, as the ADA currently stands, employers will undoubtedly find themselves in a dilemma—unable to offer reasonable accommodations to their mentally disabled employees for fear of regarded as liability.

1. As Mental Disability Diagnoses Continue to Increase, the Number of Employees with Mental Disabilities Will Also Increase in the Workplace

The number of mental diagnoses has increased dramatically since the first enactment of the ADA in 1990.[141] A recent U.S. Census Bureau report estimates that one in five Americans has a disability.[142] Since the 1980s, mental health diagnoses have more than doubled, and for children, mental health diagnoses have increased more than 3000%.[143] With the medical community's growing recognition that mental health is equally as important as physical health, Americans will continue to see an increase in mental disability diagnoses.[144]

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137. *See infra* Section III.B.
138. *See infra* Section III.A.1.
139. *See infra* Section III.A.2.
140. *See infra* Section III.A.3.
141. *See, e.g.*, Hensel, *supra* note 7, at 74.
142. *Nearly 1 in 5 People Have a Disability in the U.S.*, *Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html [https://perma.cc/FPQ8-K3F4].
143. *See* Lauren Fierro, Note and Comment, *Reasonably Accommodating Employees with Mental Health Conditions by Putting Them Back to Work*, 46 SW. L. REV. 423, 429 (2017). Autism diagnoses, for example, have increased more than 78% since 2007. Hensel, *supra* note 7, at 74. Recent studies estimate that one out of every sixty-eight children suffers from autism. *Id.* Over the next decade, studies suggest "a 230 percent increase in the number of [young people] with autism transitioning to adulthood." Michelle Diament, *As More with Autism Near Adulthood, Clues to Success Emerge*, DISABILITY SCOOP (May 14, 2015), https://www.disabilityscoop.com/2015/05/14/as-autism-adulthood-clues/20299/ [https://perma.cc/58LU-26GT].
144. The medical community's growing recognition is reflected in the 2015 changes to the Medical College Admission Test (MCAT). *See* Barry Hong, *The Teaching of Psychology and the New MCAT*, AM. PSYCHOL. ASS'N (Aug. 2012), https://www.apa.org/ed/precollege/ptn/

Although many physically disabled plaintiffs' claims may be dismissed because the individual is an unqualified individual in a blue-collar company,[145] workplace trends show a growing shift toward white-collar employment.[146] In other words, more persons with mental disabilities are entering offices, which may be better equipped to make reasonable accommodations without undue hardship to the company. However, what was once deemed inappropriate office behavior, and a terminable offense, may actually be protected under the ADA.[147] Unfortunately, this means that employers are less likely to take proactive approaches to managing workplace performance or offer reasonable accommodations because an employer may be held liable for regarding an employee as mentally disabled.[148]

2012/08/mcat.aspx [https://perma.cc/LJ9G-9W4X]. The MCAT had not been changed since 1991. *Id.* However, the MCAT now tests on psychology and behavior:

> The importance of the inclusion of psychology and behavioral science on the MCAT cannot be minimized. Students who aspire to a career in medicine will be alerted to the fact that psychosocial/cultural issues matter and are as important as the biological and physical sciences because knowledge of the scientific aspects of psychology will need to be attained by pre[-]med students. Thus, the new MCAT may strengthen the level of scientific psychology instruction in many colleges and universities. Indirectly, the MCAT will help raise the awareness that psychological science is an embedded, essential aspect of health care.

Id. For a suggestion that adding the new portion on mental health to the MCAT was just "part of a decade-long effort by medical educators to restore a bit of good old-fashioned healing and bedside patient skills into a profession that has come to be dominated by technology and laboratory testing," see Elisabeth Rosenthal, *Pre-Med's New Priorities: Heart and Soul and Social Science*, N.Y. TIMES (Apr. 13, 2012), https://www.nytimes.com/2012/04/15/education/edlife/pre-meds-new-priorities-heart-and-soul-and-social-science.html [https://perma.cc/48AW-Q5KH].

145. Employees may lose protection under the ADA because they must also be qualified to perform essential job functions. In a blue-collar setting, attendance is often an essential job function, whereas white-collar settings invite alternative work schedules, such as work-from-home programs. For an example of losing ADA coverage because regular attendance was an essential job function at a nursing center, see Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1235 (9th Cir. 2012).

146. Prior to the coronavirus pandemic, the United States had seen the lowest unemployment rates in fifty years. U.S. DEP'T LABOR, NEWS RELEASE: UNEMPLOYMENT INSURANCE WEEKLY CLAIMS (2018), https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20181534.pdf [https://perma.cc/C4H7-5G7C] (lowest unemployment insurance claims filed since 1969); *see also Economic News Release: Job Openings and Labor Turnover Summary*, U.S. DEP'T LAB., https://www.bls.gov/news.release/jolts.nr0.htm [https://perma.cc/QG4T-MG3J] (last updated Feb. 11, 2020) (reporting more job openings than job seekers). However, "globalization and automation" have reduced blue-collar work. Sean Gregory, *The Jobs That Weren't Saved*, TIME (May 18, 2017), http://time.com/4783921/the-jobs-that-werent-saved/ [https://perma.cc/52MK-QK3L]; *see also* Jacob Bogage, *Coronavirus Unemployment Guide: What to Do If You Get Laid Off or Furloughed*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/business/2020/04/03/unemployed-coronavirus-faq/?arc404=true [https://perma.cc/8V86-TUEK] (discussing how the coronavirus has decreased blue-collar jobs).

147. *See supra* Section III.B.

148. *See supra* Section II.C.

Compared to physical disabilities, mental disabilities offer a unique challenge because no two mental disabilities affect individuals in the same way, which "makes it difficult to offer categorical statements" regarding any mental disability.[149] For example, some persons with mental disabilities may actually have above average intelligence, which is advantageous for employers,[150] but have "obsessive behaviors" and "delays in communication and language usage."[151] Thus, these varied symptoms and skillsets are challenging for employers to navigate and determine whether the employer's duty to engage in the interactive process has been triggered, especially for employers with limited resources.[152]

The threat of regarded as discrimination thwarts reasonable accommodations and thus undermines workplace productivity, spurs employee turnover, and diminishes bottom lines. A recent study, for example, found that 31% of surveyed executives believed mental health issues "were the leading cause of lost productivity and increased absenteeism at work."[153] Other research shows that employees diagnosed with major depressive disorders miss, on average, about twenty-seven days of work annually, and employees diagnosed with bipolar disorder miss about sixty-five days.[154] These absences

149. Hensel, *supra* note 7, at 76.

150. *See id.* ("[T]here is little doubt that increasing numbers of individuals with [autism] will enter the labor pool over the next decade. This shift presents tremendous opportunities both for people with autism to integrate into the workforce and for employers to tap into the talents and abilities of a sizable population of workers."). For an example of successful companies leveraging diversity in the workplace, see Mary F. Salomon & Joan M. Schork, *Turn Diversity to Your Advantage*, 46 RES. TECH. MGMT., July–Aug. 2003, at 37, 37.

151. Hensel, *supra* note 7, at 77 (citing Rebecca A. Johnson, *"Pure" Science and "Impure" Influences: The DSM at a Scientific and Social Crossroads*, 15 DEPAUL J. HEALTH CARE L. 147, 194 (2013)).

152. *See* John J. Quinn, *Personal Ethics and Business Ethics: The Ethical Attitudes of Owner/Managers of Small Business*, 16 J. BUS. ETHICS 119, 126 (1997).

153. Ballard & Henry, *supra* note 86, at 31; *see also* WORLD HEALTH ORG., MENTAL HEALTH AND WORK: IMPACT, ISSUES, AND GOOD PRACTICES 1 (2000), https://www.who.int/mental_health/media/en/712.pdf [https://perma.cc/TRT8-SCJE] ("The impact of mental health problems in the workplace has serious consequences not only for the individual but also for the productivity of the enterprise. Employee performance, rates of illness, absenteeism, accidents and staff turnover are all affected by employees' mental health status.").

154. Ballard & Henry, *supra* note 86, at 31 (citing Ronald C. Kessler et al., *Prevalence and Effects of Mood Disorders on Work Performance in a Nationally Representative Sample of U.S. Workers*, 163 AM. J. PSYCHIATRY 1561, 1564 (2006)).

may cost employers up to $100 billion annually in lost productivity alone.[155]

Without improving the odds of engaging in the interactive process by requiring employee disclosure in failure to accommodate claims,[156] employers will be less able to discover reasonable accommodations for their employees with mental disabilities.[157] Additionally, removing regarded as liability as an alternative cause of action[158] will encourage employers to continue engaging in the interactive process until the appropriate reasonable accommodations are discovered—and perhaps throughout the employee's career.

2. The Current Legal Landscape Demonstrates that Even Courts Are Unsure Whether Employers Have the Best Tools to Support Persons with Mental Disabilities

Currently, employers do not have much legal guidance on the interactive process.[159] Congress has yet to clarify standards on the interactive process with any statutes. Examining case law, only one Supreme Court case has even mentioned the interactive process.[160] This lack of legal guidance has led circuits to inconsistently interpret what triggers the interactive process.[161] As a result, a number of courts have incorrectly applied ADA case law to current disability claims.[162] Thus, nonlegally trained employers are left to construe an ambiguous law, and often face liability as a result.[163]

The Supreme Court has only once commented on the interactive process.[164] In *United States Airways, Inc. v. Barnett*, the Supreme Court affirmed the Ninth Circuit's approach to determining whether an employer had violated the ADA by analyzing whether the employer had failed to engage in the interactive process.[165] Thus, although *Barnett* was heard in the early 2000s,

155. Fierro, *supra* note 143, at 429–30 (quoting *Mental Health Conditions*, NAT'L ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions [https://perma.cc/3WDK-6XJA]).

156. *See infra* Section IV.B.1.

157. *See infra* Section III.B.

158. *See infra* Section IV.B.2.

159. *See* Olsen, *supra* note 7, at 1496.

160. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 407 (2002) (Stevens, J., concurring).

161. *See* Olsen, *supra* note 7, at 1496.

162. *See id.*; *see also* Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1963 (2014) ("It is well known that the U.S. Supreme Court waits before resolving federal circuit splits to let federal circuit courts of appeal take the first crack at the legal and policy questions.").

163. *See supra* Section II.C.

164. *Barnett*, 535 U.S. at 407 (Stevens, J., concurring).

165. *Id.* at 406–07 (majority opinion).

as the only case to broach the subject of the interactive process, a number of courts continue to rely on the Ninth Circuit's approach.[166]

Most notably, the Ninth Circuit included a "reason to know" standard before the 2008 amendments, when it stated: "In circumstances in which an employee is unable to make such a request, if the company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process."[167] In construing the ADA, the Ninth Circuit considered both a Senate report and the EEOC's guidelines to examine the steps of the interactive process.[168] In sum, the Ninth Circuit held that employers who failed to engage in the interactive process should be held liable for a failure to accommodate, and that the question of whether the employer engaged in a good faith interaction may often be a factual question for the jury.[169] This employer liability for failure to trigger the interactive process is a critical device contributing to the employer's dilemma.

After *Barnett*, the interactive process trigger remains unclear. If anything, the *Barnett* Court merely "created uncertainty" for employers "by rejecting a categorical approach" that delineated specific employment policies that would suffice under the ADA.[170] Furthermore, because the *Barnett* decision "created a more plaintiff-friendly approach . . . for addressing other types of employment policies," an employer is far less likely to approach employees who have not explicitly asked for an accommodation.[171] This fear of liability hinders employers from engaging in the interactive process, and ADA-protected employees are thus not enjoying the full benefits of equal employment opportunities under the ADA.[172]

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166. *See, e.g.*, Kowitz v. Trinity Health, 839 F.3d 742, 748 (8th Cir. 2016) ("Because there remains a genuine issue of material fact as to whether Kowitz made a request for an accommodation sufficient to trigger Trinity's duty to engage in the interactive process of identifying a reasonable accommodation, the judgment of the district court is reversed and remanded for further proceedings.").

167. Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000), *vacated*, 535 U.S. 391 (2002). In contrast, for a typical ADA decision tree, which lacked any reason to know standard for employers before the 2008 amendment, see Gerald V. O'Brien & Christina Ellegood, *The Americans with Disabilities Act: A Decision Tree for Social Services Administrators*, 50 SOC. WORK 271, 273 tbl.1 (2005).

168. *Barnett*, 228 F.3d at 1114.

169. *Id.* at 1116.

170. Michelle Letourneau, *Providing Plaintiffs with Tools: The Significance of* EEOC v. United Airlines, Inc., 90 NOTRE DAME L. REV. 1373, 1403 (2015).

171. *Id.*

172. *See infra* Section III.B.

Perhaps what is most admirable—and most concerning—about the Ninth Circuit's *Barnett* analysis is the court's policy exploration.[173] Initially, the court got it right when it stated that "[w]ithout the interactive process, many employers will be unable to identify effective reasonable accommodations."[174] The court reasoned that without the threat of liability under failure to accommodate claims for not engaging in the interactive process, "employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations."[175]

The Ninth Circuit's policy reasoning, however, may now be outdated. Although this promulgation was perhaps quite accurate back in the early 2000s, the analysis does not hold up today because it neglects the 2008 amendments' expanded scope of regarded as employer liability.[176] Today, employers are disincentivized from engaging in the interactive process when they may face liability for regarding an employee as mentally disabled.[177]

Thus, due to congressional silence and sparse, outdated Supreme Court precedent, circuits are split on a variety of issues regarding the interactive process and reasonable accommodations.[178] For example, circuits are split on which circumstances the offering of a reassignment is a reasonable accommodation.[179] The Seventh Circuit held that automatic reassignment may not be possible when the employer already has a most-qualified policy in place.[180] In contrast, the Tenth Circuit recently held that failure to reassign a disabled employee to a vacant position violates the ADA.[181]

Circuits are also split on whether an employer must rescind a discharge if it later learns that an employee's terminable behavior was due to a mental disability.[182] Although the EEOC regulations state that employers do not need to rescind a discharge for an individual who violated a company

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173. *See Barnett*, 228 F.3d at 1116.
174. *Id.*
175. *Id.*
176. *See supra* Section II.C.2.
177. *See supra* Section II.C.2.
178. For example, circuits are split on which circumstances the offering of a reassignment is a reasonable accommodation. *Compare* EEOC v. United Airlines, Inc. (*United Airlines II*), 693 F.3d 760, 764 (7th Cir. 2012) ("Assuming that the district court finds that mandatory reassignment is ordinarily reasonable, the district must then determine (under *Barnett* step two) if there are fact-specific considerations particular to United's employment system that would create an undue hardship and render mandatory reassignment unreasonable."), *with* EEOC v. TriCore Reference Labs., 849 F.3d 929, 938 n.8 (10th Cir. 2017) ("The EEOC's view that TriCore admitted to a violation arises from both the text of the ADA and our case law.").
179. *See* Letourneau, *supra* note 170, at 1373.
180. *See id.* at 1374.
181. *See TriCore Reference Labs.*, 849 F.3d at 938 n.8.
182. *See* Hensel, *supra* note 7, at 83; *see also* Fierro, *supra* note 143, at 432–33.

policy as a result of a mental disability that needed an accommodation,[183] the EEOC's regulations are not law.[184] Nonetheless, without a discernible framework delineated from Congress or the Supreme Court, most courts rely on the EEOC's guidelines.[185]

Finally, circuits are split as to whether an employer is put on constructive notice of an employee's disability and need of a reasonable accommodation when the employee has not expressly communicated such a disability or accommodation request.[186] The Eighth Circuit, for example, "has not consistently held a uniform rule regarding what information an employer must have before it is obligated to engage in the interactive process."[187] In contrast, as discussed above, the Ninth Circuit has implemented a reason to know standard for nearly two decades.[188] This uncertainty around constructive notice is troubling because it does not afford employers an opportunity to engage in the interactive process and find reasonable accommodations for employees[189] for fear of being held liable for regarded as discrimination.[190]

This ambiguity also spills into other areas of dispute resolution.[191] For example, a recent study on ADA arbitration showed that 64% of arbitrators cited legal authority other than the ADA statute.[192] Some arbitrators cited

183. EEOC, EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES question 31, ex. C (1997), https://www.eeoc.gov/policy/docs/psych.html [https://perma.cc/6LW7-D3YQ].

184. *See* Hensel, *supra* note 7, at 83. Courts occasionally give EEOC regulations *Chevron* deference, however, the regulations are not law. *See id.* at 83 n.77. For a brief explanation of the varying levels of judicial deference granted to the EEOC, see *infra* Section III.C.2.

185. *See* Fierro, *supra* note 143, at 432. The Seventh Circuit, for example, has held that an employee is not afforded a "second chance to control a controllable disability." *Id.*

186. *See* Rachel S. Kim, Note, *Help Me, Help You: Eighth Circuit Diminishes a Notice Requirement for Employees Seeking an ADA Accommodation:* Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016), 83 MO. L. REV. 409, 409–10, 417–18 (2018).

187. *Id.* at 5409–10 (citing Craig A. Sullivan, *The ADA's Interactive Process*, 57 J. MO. B. 116, 118–119 (2001)).

188. *See* Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated*, 535 U.S. 391 (2002).

189. *See infra* Section III.B.

190. *See supra* Section II.C.2.

191. *See* Stacy A. Hickox & Angela T. Hall, *Arbitration of Claims for Accommodations: A Fair Resolution?*, 52 U.S.F. L. REV. 31, 66 (2018).

192. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 830 (2013).

case law, while others cited EEOC guidelines or treatises.[193] Some arbitrated decisions did not cite any legal authority whatsoever.[194]

Without a clear trigger for the interactive process, employees are not fully benefiting from the reasonable accommodations guaranteed to them by the ADA.[195] Employers reasonably fear regarded as liability.[196] As discussed below, there are some simple ways that Congress can help both employees and employers with new legislation.[197]

3. Current Statistics Show More Plaintiffs Are Filing ADA Claims

In 2017, more than 35% of EEOC claims filed in California were based on disability.[198] In other words, disability claims have surpassed the amount of "claims filed based on any other protected characteristic, including race, sex, color, religion, national origin, or age."[199] Another recent study demonstrates that 59% of arbitrated claims decided in plaintiffs' favor developed because the employer had failed to interact properly.[200] Moreover, plaintiffs continue to file regarded as ADA claims after employers believe the interactive process has been triggered and begin discussing reasonable accommodations with the employee.[201]

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193. *Id.*
194. *Id.*
195. *See infra* Section III.B.
196. *See supra* Section II.C.2.
197. *See infra* Section IV.B.
198. *See* Kevin Rivera, *Accommodating Attorneys*, 41 L.A. LAW., Mar. 2018 at 20, 20.
199. *Id.*; *see EEOC Charge Receipts by State (Includes U.S. Territories) and Basis for 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www1.eeoc.gov/eeoc/statistics/enforcement/state_17.cfm [https://perma.cc/P4V7-NBZ4]. In California, the Department of Fair Employment and Housing (DFEH) also reported similar findings. Rivera, *supra* note 198 ("[The DFEH] reported that the majority of employment-based discrimination claims it received in 2016 were based on disability." (citing CAL. DEP'T FAIR EMP'T & HOUS., 2016 ANNUAL REPORT (2017))). The EEOC may "utilize regional, State, local, and other agencies" to enforce equal employment laws. 42 U.S.C. § 2000e-4(g)(1) (2012). In California, the EEOC and DFEH have a work-sharing agreement. *See State and Local Agencies*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/field/losangeles/fepa.cfm [https://perma.cc/XF9F-HBLX].

> The EEOC works with the Fair Employment Practice Agencies (FEPAs) and Tribal Employment Rights Offices (TEROs) to manage charges of discrimination and the protection of the employment rights of Native Americans. The EEOC contracts with approximately 90 FEPAs nationwide to process more than 48,000 discrimination charges annually. These charges raise claims under state and local laws prohibiting employment discrimination as well as the federal laws enforced by the EEOC.

Id.

200. Hickox & Hall, *supra* note 191, at 37.
201. *See, e.g.*, Johnson v. Ford Motor Co., No. 15 C 11540, 2019 WL 172760, at *1, *2–6 (N.D. Ill. Jan. 11, 2019). An employee filed suit for regarded as discrimination under

This upsurge in ADA claims shows how valuable amending the ADA would be to employees, employers, enforcement agencies, and judicial economy.[202] By clarifying what triggers the interactive process, employees will have a better opportunity to be awarded a reasonable accommodation in the workplace.[203] Additionally, employers will be explicitly notified that the employee is requesting a reasonable accommodation and will be uninhibited in discovering that accommodation without the *in terrorem* of regarded as liability.[204] This approach will assure that employees receive reasonable accommodations without filing a lawsuit,[205] which will promote judicial economy.[206] Finally, enforcement agencies, such as the EEOC, will be better able to enforce egregious ADA violations instead of simple misunderstandings.[207]

B. Policy Goals Remain Unattainable Under the Current ADA

Congress enacted Title I of the ADA to protect disabled individuals in the workplace.[208] With its 2008 amendment, the ADA should be offering "unprecedented opportunities . . . [for] work in competitive integrated employment,"[209] and a "new framework for equality."[210] The ADA aims

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the ADA when employer requested employee to fill out disability leave request when plaintiff's psychiatrist rendered plaintiff "'totally disabled' and unable to work at the time" due to "major depression" and anxiety. *Id.* at *2.

202. *See infra* Section IV.B.

203. *See infra* Section III.B.

204. *See supra* Section II.C.2.

205. *See infra* Section III.C.3.

206. *See infra* Section IV.B.

207. *See infra* Section III.C.2.

208. Americans with Disabilities Act of 2008, Pub. L. No. 110-325, § 2(a)(1), (4), 122 Stat. 3553, 3553 (2008) (codified as amended at 42 U.S.C. § 12101 (2012)) ("[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and [to] provide broad coverage . . . . The holdings of the Supreme Court . . . have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."); *see also* Jennifer Mathis, *The Importance of Framing Federal Mental Health Policy Within a Disability Rights Framework*, 42 HUM. RTS. 14, 14 (2017) ("[T]he Americans with Disabilities Act . . . expand[s] opportunities for people with disabilities to participate as full members of society.").

209. Mathis, *supra* note 208, at 14.

210. Jamelia N. Morgan, *One Not Like the Other: An Examination of the Use of the Affirmative Action Analogy in Reasonable Accommodation Cases Under the Americans with Disabilities Act*, 46 CAP. U. L. REV. 191, 192 (2018).

to protect employees and applicants from "invidious discrimination."[211] Under the ADA, employees have two powerful causes of action: one for traditional forms of discrimination and another for an employer's failure to make reasonable accommodations.[212] Additionally, some commentators suggest that the regarded as prong helps ensure statutory protection for disabled as well as nondisabled individuals in the workplace.[213]

However, these statutory protections only offer forms of legal recourse.[214] This means that disabled individuals might only enjoy the protections of the ADA when they file a lawsuit against an employer.[215] This approach is backward-looking and not forward-looking because it focuses on whether an employer has already violated the ADA.[216] Instead, the ADA should focus on ensuring statutory protection without needing to enter a courtroom.[217] Without this pivotal change, ADA-protected employees may continue to face discrimination or suffer from a lack of reasonable accommodations and only find redemption after an employer's violation.[218] This statutory flaw is easily identified by the increase in ADA claims filed.[219]

Furthermore, the high rates of unemployment for mentally disabled individuals show that mentally disabled individuals are still not enjoying

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211. Elizabeth E. Aronson, *Perceived-As Plaintiffs: Expanding Title VII Coverage to Discrimination Based on Erroneous Perception*, 67 CASE W. RES. L. REV. 235, 253 (2016). The ADA also protects against disparate treatment. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003). However, this Comment is focused on balancing the need for reasonable accommodations with allegations of disparate treatment—not disparate impact. *See supra* Section II.C. For an explanation of the interplay between disparate impact and reasonable accommodations, see generally Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 901–12 (2004).

212. 42 U.S.C. § 12112(b)(5) (2012). The employer's affirmative obligation to offer reasonable accommodations is comparable to affirmative action, in that employers must take steps to ensure workplace diversity. Morgan, *supra* note 210, at 192–93.

213. Aronson, *supra* note 211, at 255; Samuel Brown Petsonk & Anne Marie Lofaso, *Working for Recovery: How the Americans with Disabilities Act and State Human Rights Laws Can Facilitate Successful Rehabilitation for Alcoholics and Drug Addicts*, 120 W. VA. L. REV. 891, 903–04 (2018) (citing 42 U.S.C. § 12102(3)(A) (2012)).

214. *See* Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 302 (2003) ("[A] civil rights enforcement approach . . . focuses—perhaps counterproductively—on backwards-looking 'blaming and sanctioning' rather than on moving forward to design systems that maximize the likelihood that [discrimination ceases]." (footnotes omitted)); Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931, 1012 (2003).

215. *See infra* Section III.C.3.

216. *See infra* Section III.C.3.

217. *See infra* Section III.C.3.

218. *See infra* Section III.C.3. For a comparison of mental health law and disability law, see Mathis, *supra* note 208, at 14–16.

219. *See supra* Section III.A.3.

the full and equal opportunities of the workplace.[220] As of 2017, more than 60% of work-aged individuals with mental disabilities were unemployed.[221]

These statistics hurt employees, employers, and the government's budget. These unemployment rates hurt persons with mental disabilities who are seeking employment.[222] They also undermine employers because turnover and understaffing result in a "loss of productivity, earnings, and human potential."[223] Finally, these unemployment rates cost the country $25 billion in disability payments annually.[224]

C. Previously Recommended Solutions Still Fall Short

Scholars and practitioners have proposed a number of solutions to help protect mentally disabled employees under the ADA.[225] However, these solutions neglect the employer's role in the interactive process and cultivation of workplace dynamics.[226] Additionally, some suggestions include placing more responsibility on the EEOC.[227] However, the EEOC is an enforcement agency—not a legislative authority.[228] Finally, the current proposed solutions focus on legal recourse instead of ensuring ADA protections at the outset.[229]

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220. *See* Fierro, *supra* note 143, at 430.

221. *Id.*

222. Unemployment can be debilitating for both disabled and nondisabled individuals because "[w]ork in American society is a source of meaning and respect, and exclusion from work and productive activity undermines self-worth and reinforces devaluation and social stigma." David Mechanic, *Cultural and Organizational Aspects of Application of the Americans with Disabilities Act to Persons with Psychiatric Disabilities*, 76 MILBANK Q. 5, 6 (1998).

223. Fierro, *supra* note 143, at 430 (citing NAT'L ALL. ON MENTAL ILLNESS, THE HIGH COSTS OF CUTTING MENTAL HEALTH (2010), http://static1.1.sqspcdn.com/static/f/1267826/18732875/1339608141220/Unemployment.pdf? [https://perma.cc/822J-9263]).

224. *Id.*

225. *See infra* Section III.C.1.

226. *See* Sonya Smallets, *Understanding Leaves: The Interaction Between Medical Leave Under FMLA/CFRA and Leaves of Absence as Reasonable Accommodation for a Disability Under FEHA*, 43 S.F. ATT'Y, Winter 2017, at 54, 57. Although the author focuses on California-specific employee rights, the author's suggestion that the employer simply "do more" is still vague. *Id.* Employers can only do more when they know what more there is to do; employees should play a more dominant role in initiating the interactive process. *See infra* Section IV.B.1.

227. *See infra* Section III.C.2.

228. *See infra* Section IV.A.

229. *See infra* Section III.C.3.

1. Other Approaches Fail to Clarify the Interactive Process's Trigger

Academics and practicing attorneys have taken some momentous first steps toward defining what should trigger the interactive process. However, these suggestions have delved too far into complicated factors tests[230] and public education ploys[231] rather than simplifying the interactive process. Other recommended solutions, such as documenting meetings with employees, training management, and mediation, also fail to proactively protect mentally disabled employees.

Some commentators have suggested that a factors test[232] might help guide employers in determining whether the interactive process has been triggered.[233] However, this approach just adds more facts to an already fact-intensive inquiry.[234] Moreover, a factors test is a backward-looking approach; it presumes that litigation has already ensued.[235] The goal of the ADA, however, is not just to vindicate previously wronged employees.[236] The goal of the ADA is to protect disabled employees in the workplace without going to court.[237]

Other commentators have recommended educating employers about their responsibilities under the ADA.[238] "Education" presumes, however, that there is a concrete topic about which employers can be educated. Currently, employer obligations under an interactive process are so complicated and contradictory that education cannot do the job; this approach depends on

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230. *See, e.g.*, Fierro, *supra* note 143, at 425, 437 (suggesting a three-factor test for determining whether an employer should restore employment for an ADA-covered employee whose termination was due to behavior resulting from an unknown mental disability).

231. *See, e.g.*, Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL'Y 1, 27 (2018) ("[E]ducation about the ADAAA provisions for judges, practitioners, and plaintiffs is seriously warranted.").

232. Factors tests are commonly used in employment and labor law cases because the workplace varies tremendously from industry to industry, location to location, and manager to manager. For example, courts use factors tests to determine whether a worker or volunteer worker is an employee covered under federal employment laws. *See, e.g.*, Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 434–35 (5th Cir. 2013).

233. *See, e.g.*, Fierro, *supra* note 143, at 425.

234. *See* Stanley Santire, *The Road to Reasonable Accommodation in Dealing with Employees with Special Needs*, 55 HOUS. LAW., Jan.–Feb. 2018, at 12, 12 ("For lawyers dealing with disability discrimination claims, the adventure is dealing with ADA rights and obligations and coping with challenging terms like 'disability' and 'reasonable accommodation.' The clearest guide on that road is to keep in mind that just as each employee claiming a disability is a unique human being, the circumstances are different for each employer from whom an accommodation is claimed.").

235. *See infra* Section III.C.3.

236. *See supra* Section II.B.

237. *See supra* Section II.B.

238. *See, e.g.*, Edmonds, *supra* note 231, at 27 ("[E]ducation about the ADAAA provisions for judges, practitioners, and plaintiffs is seriously warranted.").

an erroneous assumption that the ADA's interactive process is a simple process.[239] Education and outreach are only effective when there are clear regulations and expectations in place.[240] Before government agencies can implement the educational approach, the interactive process trigger needs to be clarified.[241]

Others suggest that employers document any interactions with employees to protect against potential lawsuits. Without a statutory overhaul, documentation may be the best an employer can do.[242] Failing to document the stages of the interactive process, such as discussions about potential reasonable accommodations, is generally considered a "trap" among practitioners.[243] Although this may be accurate, this Comment looks at what is best for both the employer, as well as the employee. Additionally, an employer can only document the interactive process once it knows the process has been triggered.[244] Instead, the best defense for employers, and the best course of action for employees, would be to require a clear disclosure so that both parties know that the interactive process has been triggered.[245]

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239. *See supra* Section III.A.2.

240. Neither employees nor employers are mind readers. Both need clear guidelines so that they know what is expected of them. This is why employers, and not just employees, need clear guidance in the workplace, especially when any deviations may result in employer liability. *See* KEN BLANCHARD & GARRY RIDGE, HELPING PEOPLE WIN AT WORK: A BUSINESS PHILOSOPHY CALLED "DON'T MARK MY PAPER, HELP ME GET AN A" 97 (2009) ("All good performance starts with clear goals. If people don't know what they're supposed to accomplish, how can they possibly [excel]?").

241. *See infra* Section IV.B.1.

242. *See, e.g.*, Maria Danaher, *Employee's Failure to Engage in Interactive Process Supports Dismissal of ADA Claim*, EMP. L. MATTERS (May 15, 2017), https://www.employmentlawmatters.net/2017/05/articles/ada/employees-failure-actively-engage-interactive-process-supports-dismissal-ada-claim/ [https://perma.cc/HWM6-3UGN] ("The instructive value of this opinion to employers is clear: the success of [the employer] in this case is based upon . . . documentation, which relied on job descriptions, statements from the [employer's] HR department and [the employee's] own unchanging statements regarding her concern over [essential job functions].").

243. *See, e.g.*, Scott M. Abbott, *Five ADA Traps for Employers to Avoid*, 24 NEV. LAW., Jan. 2016, at 12, 14 ("[D]ocumentation is an employer's best defense to a 'failure to accommodate' complaint."). This article seems to suggest that employers are trying to get away with something and that documentation proves they engaged in the interactive process. *See id.* This Comment, in contrast, suggests that an employer's "best defense" would be to follow the interactive process once the employee explicitly triggers the process. *See infra* Section IV.B.1.

244. *See infra* Section IV.B.1.

245. *See infra* Section IV.B.1.

Some previously proposed solutions involve implementing management training to identify mental health disabilities and directing identified employees toward treatment.[246] However, this approach risks regarded as liability.[247] For example, some employer-required tests allow employers to predict, often successfully, whether an employee has a mental disability.[248] Yet, it is debatable whether employers are legally allowed to offer these tests to candidates as well.[249] Additionally, post-offer screening may also lead to employer liability.[250]

Other commentators have suggested mediation to help with the interactive process.[251] In fact, this approach might be an ideal guide for the interactive process.[252] For example, this approach will help ensure proper documentation.[253] Mediation is also very flexible, so it should give employers and employees ample opportunity to discover the best reasonable accommodation for each employee.[254] However, mediation does not address what *triggers* the interactive process.[255] This approach presumes that the interactive process

246. *See, e.g.*, Ballard & Henry, *supra* note 86, at 62.

247. *See supra* Section II.C.2.

248. *See* Hensel, *supra* note 7, at 92 (discussing the screening tests and the Minnesota Multiphasic Personality Inventory (MMPI) test).

249. *Id.* at 92. For a 1992 argument in favor of employer testing, see David W. Arnold and Alan J. Thiemann, *To Test or Not to Test: The Status of Psychological Testing Under the Americans with Disabilities Act (ADA)*, 6 J. BUS. & PSYCHOL. 503, 503–06 (1992).

250. *See* Hensel, *supra* note 7, at 93.

251. *See, e.g.*, Katheryn E. Miller, *Mediating the Interactive Process*, 46 COLO. LAW., May 2017, at 35, 37 ("Mediation is a uniquely suited interactive process that offers the parties optimal solutions. Mediation as the interactive process can alleviate . . . difficulties to the benefit of all parties.").

252. *See id.* ("A trained third-party neutral facilitates the conversation, which emphasizes sharing and clarifying information. It is a flexible process where the parties can safely explore options to maximize outcomes.").

253. *See id.* at 38. Mediation helps ensure documentation for a number of reasons: Through mediation, the interactive process will be well documented by the mediator. There will not be a question as to whether the interactive process occurred. The process is designed to maximize the opportunity to find a reasonable accommodation that both the employer and the employee find to be reasonable. The employer's concerns about hardship can be vetted without fear of allegations of discrimination, and the employee can raise his or her fears, including those of retaliation, knowing that the concerns will be addressed. *Id.*

254. *See id.* ("The process is flexible. It should be approached in a collaborative manner. How long it takes depends on the issues presented. It can take a couple of hours, multiple sessions, or several months. It depends on [the] availability of information and complexity of the issues. The mediator can assist the employer to track and obtain missing information and set deadlines for moving through the process.").

255. Mediation presumes that a dispute already exists. *See* JENNIFER E. BEER & CAROLINE C. PACKARD, THE MEDIATOR'S HANDBOOK 3 (rev. & expanded 4th ed. 2012).

has already been triggered because mediation postulates that an issue or dispute is recognized by both opposing parties.[256]

Thus, Congress should amend the ADA[257] to ensure that ADA-protected employees get the reasonable accommodations they need without jumping through hoops that could otherwise include: navigating intricate factors tests, meeting with management who lack adequate knowledge of the ADA, signing unnecessary paperwork just so that the company has "documentation," being constantly studied by "trained" supervisors, or sitting through a mediation process *after* the employer has failed to offer the employee reasonable accommodations.

2. The EEOC's Limited Role

Some commentators look to the original draft of the ADAAA to conclude that courts should defer to the EEOC's guidance.[258] This historical approach recognizes that Congress created the EEOC, and enacted the ADA, to ensure a broad range of protection in the workplace.[259] Although a court may give the EEOC's guidelines considerable weight because Congress gave the

256. *Id.*

257. *See infra* Section IV.B.

258. *See, e.g.*, Olsen, *supra* note 7, at 1520. "Congress could clarify that it did not intend courts to defer to an employer's judgment. . . . Congress could clarify its intent that the EEOC has authority to issue regulations with the force of law." *Id.* at 1514.

259. *See id.* at 1520. Congress was concerned that the foundations of the American workplace excluded persons with disabilities:

> People with disabilities were measured against benchmarks of productivity. The modern factory not only caused disabilities, but it mass-produced notions of difference as inferior and impairments as damning. It is from this period that many modern conceptions of ideal or normal workers were drawn. Current oppression of people with disabilities is thus connected all the way back to the birth of the modern American workplace.

Id. at 1521 (quoting Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 97 (2008)). Successful employee stereotypes were centered only around persons *without* disabilities:

> Indeed, the ideal worker is one who performs the job in the *precise* way that the employer has mandated, even if there are other ways of accomplishing this task that do not impose an undue hardship on the employer. But this ideal worker is the very norm the ADA intended to challenge.

Id. at 1521–22.

agency the authority to issue regulations implementing the ADA, courts are actually not bound by any EEOC guidelines.[260]

Granting judicial deference may give the EEOC more autonomy over the enforcement process.[261] However, this approach disregards the fact that the EEOC already has limited resources and that a shift in enforcement practices may overwhelm the agency.[262] As some authors note, the EEOC already has limited resources.[263] Instead, the EEOC should remain an enforcement agency.[264] The agency is not intended to be a legislative body or an extension of the judicial branch.[265]

Allowing the EEOC to stay focused on enforcement, rather than legislation, will better maintain the integrity of the ADA.[266] Encouraging disclosure by requiring it as an element in failure to accommodate claims better conserves government resources and promotes judicial economy.[267] In other words, this scheme allows the EEOC to allocate its resources to compel compliance only against intentional failures to accommodate.[268] Additionally, this

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260. *See* Ballard & Henry, *supra* note 86, at 35. Courts occasionally give the EEOC *Chevron* deference. *See, e.g.*, Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 573 (4th Cir. 2015) (giving deference to EEOC's inclusion of interacting with others as a major life activities on its regulatory list). For an in-depth look at varying levels of judicial deference, see Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 32 A.B.A. J. LAB. & EMP. LAW 93, 94–98 (2016).

261. Jennifer Bennett Shinall, *Less Is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49, 61 (2016) ("On one hand, substituting administrative enforcement for judicial enforcement gives the agency control over the claims and issues pursued.").

262. *Id.* at 62 ("Or they may all make the same choice—for example, if everyone chooses an administrative remedy over a judicial remedy, disastrous consequences may ensue if the agency is not equipped to handle every claim. Moreover, if claimants are not forced to choose, and instead are allowed to pursue simultaneous administrative and judicial remedies, serious questions arise regarding the efficiency and wastefulness of duplicative enforcement actions.").

263. *See* Hickox & Hall, *supra* note 191, at 62 (describing the EEOC as having very limited resources); Shinall, *supra* note 261, at 52 ("The Equal Employment Opportunity Commission (EEOC), the federal agency in charge of administering employment discrimination charges, is notoriously underfunded, [which] result[s] in a backlog of cases, long wait times for charge investigation, and fewer resources for the agency to litigate claims in the public interest.").

264. Shinall, *supra* note 261, at 59 ("Most of the scholarly concerns raised regarding the agency, however, are structural in nature. These arguments contend that even if Congress were more generous with the EEOC's funding, fundamental flaws would remain in the design of employment discrimination law enforcement.").

265. *See id.* at 60 ("Many scholars have lamented the EEOC's lack of adjudicative authority, but how much adjudicative authority the agency should have remains a source of debate.").

266. *See supra* Section III.B.

267. *See infra* Section IV.B.1. For a brief explanation of the EEOC's involvement in ADA claims, see also Kristi Bleyer, *The Americans with Disabilities Act: Enforcement Mechanisms*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 347, 347–48 (1992).

268. *See supra* Section III.B.

approach would streamline cases because it reduces the number of causes of action that a plaintiff, or the EEOC, may file.[269]

3. Proactive Versus Reactive Solutions

Finally, the biggest problem with the ambiguous trigger of the interactive process and its previously proposed solutions is that the current legal mechanisms in place are reactive and not proactive measures.[270] Courts are generally seen as "holders of residual lawmaking and reactive law enforcement powers."[271] In response to gaps in statutory law, legislatures may direct enforcement agencies and regulators to issue their own guidelines.[272] Although this approach helps patch the holes in the legal framework, it is still not proactive law because enforcement agencies do just that—enforce. Enforcing a law is reactive.[273] Proactive law focuses on guaranteeing statutorily protected rights without going to court.[274] Proactive law encourages clear regulations that are easy to follow so that all parties involved preserve statutorily protected rights.[275]

To better effectuate the policy goals of the ADA,[276] Congress should include disclosure as an element of failure to accommodate claims.[277] By requiring disclosure as an element, employees must have disclosed to their employer that they have a disability before they can bring failure to accommodate claims.[278] By requiring disclosure as an element during the

269. Generally, claim preclusion promotes judicial economy. *See* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion To Avoid a Bifurcated Suit*, 92 MICH. L. REV. 683, 715 n.186 (1993).

270. *See generally* Pistor & Xu, *supra* note 214.

271. *Id.* at 1012.

272. *See id.* at 932. "[A] law [is] complete if a law enacted today unambiguously stipulates for all future contingencies; otherwise a law is incomplete." *Id.* Legislatures may draft "incomplete law" for a variety of reasons, including bad drafting, inability to adapt to socioeconomic and technological advancements, the existence of other previously enacted laws, or a lack of resources. *Id.* at 932–33.

273. *See id.* at 935 ("Courts are designed to be reactive law enforcers.").

274. *Id.*

275. *See id.* Proactive law can be issued by regulators. *Id.*

276. *See supra* Section III.B.

277. *See infra* Section IV.B.1.

278. Currently, plaintiffs are not required to show that they have disclosed mental disabilities to their employers in failure to accommodate claims. *See supra* Section II.C.1. Instead, a plaintiff may let the jury draw an inference that the employer had a reason to know that the plaintiff had a mental disability that requires a reasonable accommodation. *See supra* Section II.C.1.

trial—the reactive phase of the ADA—employees will disclose and explicitly trigger the interactive process far before going to court—during the proactive phase of the ADA. Thus, in the best case scenario, trial would be avoided because employers have an opportunity to accommodate their employee. Additionally, discouraging regarded as claims filed alongside failure to accommodate claims will coax employers to engage in the interactive process in good faith for as long as necessary to find a reasonable accommodation for employees.[279] By adjusting the elements in failure to accommodate claims, the ADA becomes a more proactive law, and protects employees without entering the courtroom.[280]

In sum, today's employers are increasingly more likely to hire an ADA-protected employee and then find themselves hesitant to offer reasonable accommodations without a clear trigger from employees.[281] Employees are increasingly bringing both failure to accommodate and regarded as discrimination claims.[282] Unfortunately, these trends show that employees are still dissatisfied with their employment opportunities under the ADA because they have not received the reasonable accommodations that they need to be successful.[283] Alternatively, they have been discriminated against when an employer concludes they may have a disability for fear of liability for failing to offer reasonable accommodations.[284] The fact that plaintiffs are bringing either of these claims to court shows that ADA-protected employees are still not receiving the full benefits of equal opportunities in the workplace.[285] This result frustrates the purpose of the ADA and leaves employees with only reactive solutions for vindication. It is time for Congress to amend the ADA with today's trends in mind.

IV. PROPOSALS: CONGRESS SHOULD REQUIRE EXPLICIT EMPLOYEE DISCLOSURE TO TRIGGER THE INTERACTIVE PROCESS AND LIMIT ALTERNATIVE PLEADING IN ADA CLAIMS

Congress should amend the ADA in two ways. First, failure to accommodate claims should require employees to have explicitly disclosed a mental disability to the employer.[286] Second, Congress should disallow regarded

279. *See infra* Section IV.B.2.
280. *See* Pistor & Xu, *supra* note 214, at 935.
281. *See supra* Section III.A.
282. *See supra* Sections III.A.3, II.C.2.
283. *See supra* Sections III.A.3, II.C.1.
284. *See supra* Sections III.A.3, II.C.2.
285. *See supra* Section III.B.
286. *See infra* Section IV.B.1.

as discrimination claims to be alternatively pleaded with failure to accommodate claims.[287]

A. Congressional Leadership

Congress should pass legislation that helps promote disclosure because federal law is a uniform way to guarantee equal rights in the workplace for mentally disabled employees.[288] Additionally, legislating is Congress's job; lawmaking is not an enforcement agency's job.[289] Writing the amendment will do more than create law—it will create policy.[290] Thus, Congress needs to take a role in the ADA amendment process because Congress's job is to "mak[e] good policy for the nation."[291] Furthermore, because the ADA includes rather ambitious policy goals, Congress should take responsibility for amending the ADA.[292]

Although the 2008 amendments have furthered the ADA's policy goals of offering mentally disabled employees legal protections in the workplace,[293] those protections are only leveraged after a failure to accommodate or postdiscrimination.[294] With the influx of mental disability diagnoses, the likelihood that an employer will employ a person with a mental disability is very high.[295] Thus, Congress should furnish employers with the tools they need to ensure their employees enjoy equal opportunities in the workplace.

B. Proposed ADA Amendments

Congress can make two simple adjustments to the ADA. First, Congress should amend the ADA to require employee disclosure as an element in failure to accommodate claims. Disclosure would thus explicitly trigger the interactive process and give employers an opportunity to find a reasonable

287. *See infra* Section IV.B.2.
288. *See* Long, *Divergent Interpretations*, *supra* note 46, at 478 ("In short, federal law has traditionally set the standard for individual rights in the employment context, with state legislatures and courts taking their cues from federal law.").
289. *See* Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 139 (2011) ("Lawmaking is the most primary, fundamental part of a legislator's job.").
290. *See id.* at 140–41. "A responsible legislator must learn both [policymaking and lawmaking]." *Id.* at 141.
291. *Id.* at 143.
292. *See id.*
293. *See supra* Sections II.A.2, III.B.
294. *See supra* Section III.C.3.
295. *See supra* Section III.A.1.

accommodation for their employees instead of learning about a disability upon the filing of a lawsuit. Although this type of approach may infringe on privacy law,[296] the ADA's policy goals of guaranteeing employee workplace opportunities far outweigh any such concerns.[297]

Second, Congress should limit alternative pleading in failure to accommodate claims so as to bar pleading both regarded as discrimination and failure to accommodate causes of action. This amendment will encourage employers to engage in the interactive process and guarantee reasonable accommodations for employees without entering a courtroom.[298] Additionally, encouraging disclosure by barring regarded as claims may help diffuse stigma about mental disabilities because so much of the population is or will be diagnosed with a mental disability within their lifetimes.[299] Congress should encourage the employee to play a larger role in requests for accommodation by requiring employee disclosure that triggers the interactive process.[300]

1. Employee Disclosure of Disability Should Be an Element of Failure to Accommodate Claims

Granted, *requiring* disclosure of a mental disability diagnosis, its symptoms, and treatment, threatens privacy law.[301] However, *encouraging* disclosure would not infringe on privacy rights. Congress can encourage disclosure by requiring disclosure as an element in failure to accommodate claims. This means that employees are not required to divulge a mental diagnosis if they choose; however, they would be unable to sue an employer for failure to accommodate. Disclosure here is meant to facilitate the interactive process and ensure that mentally disabled employees get the reasonable accommodations that they need and deserve under the ADA.[302] Encouraging disclosure will

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296. *See* Jennifer Mathis, *Mental Health Privacy: Do Inquiring Minds Really Need to Know?*, 41 HUM. RTS. 10, 10 (2016).

297. The majority of public policy cases compare "the private arrangement of citizens as equal to public arrangements and tries to strike a balance between the two." Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 689 (2016).

298. *See supra* Section III.C.3.

299. This Comment disagrees with the suggestion that sharing medical information with decision-makers "perpetuate[s] prejudice and deter[s] individuals from seeking help." Mathis, *supra* note 208, at 10.

300. *See infra* Section IV.B.1.

301. *See* Mathis, *supra* note 208, at 10 ("The last several years have brought an unusual number of public calls to change privacy rules to permit or require greater disclosure of individuals' mental health information—including details about their symptoms, diagnoses, history, and/or treatment.").

302. This Comment does not address any link between mental disability and violence, nor does it contest the premise that disclosure fails to facilitate safer work environments.

help make employees with mental disabilities part of the solution—not part of the problem.[303]

Persons with mental disabilities may not realize how failing to disclose a medical condition actually impairs their job performance and career opportunities.[304] When an employer already presumes an employee's underperformance is not medically related, an employer may be less inclined to initiate any dialogue about improving job performance.[305] This inhibits career development and infringes upon crucial professional relationships that lead to advancement in the workplace.[306] Disclosure will also help prevent employers from perceiving an employee's disability as a disingenuous

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See Mathis, *supra* note 208, at 11. Admittedly, there may be occasions when persons with disabilities may instigate workplace violence—but this is rarely *because of* the disability:

> [R]ecent proposals to permit or require greater scrutiny of individuals' mental health information are poorly suited to accomplish their asserted goal of preventing violent or dangerous conduct. Studies have shown repeatedly that mental illness is a very poor predictor of future violence. Indeed, only about four percent of violence is attributable to individuals with mental illness, and even in those rare instances when such individuals do engage in violence, it is frequently other risk factors, such as co-occurring substance use disorders, rather than the symptoms of mental illness, that cause the conduct.

Id. Rather, this Comment focuses on leveraging disclosure as a way to unequivocally trigger the interactive process and help mentally disabled employees get the reasonable accommodations that they need to be successful in the workplace. *See supra* Section III.C.3.

303. *See* Hensel, *supra* note 7, at 102 ("It is conventional wisdom that the easiest kind of value to see is the kind you are used to seeing. By taking a broader perspective and recognizing the value in employees who think and approach problem solving differently, employers will simultaneously benefit themselves and people with [autism spectrum disorder (ASD)].").

304. Miller, *supra* note 251, at 37. Failing to request a reasonable accommodation can hurt an employee's career prospects:

> Employees often lack understanding and awareness of their rights. Fear of retaliation or stigma deters requests for accommodation. Although medical conditions are entitled to confidentiality, breach of confidentiality is common, and anxiety can exist over perceived or actual hostility from supervisors and coworkers. Although delay in treatment and accommodation can lead to a decline in condition, job performance, and work relationships, this is often exactly what happens. Employee advocates wait too long to get involved.

Id.

305. *See id.* ("All of these circumstances can erode trust and lead to deterioration in the supervisor-employee relationship. As the situation spirals downward, the options for finding a reasonable accommodation dissipate. Positions harden and personal resentment grows on both sides.").

306. *See id.* ("The employee may end up blaming the company or the supervisor, while the company ends up wanting to get rid of the 'problem employee.'").

excuse, rather than a legitimate mental disability covered under the ADA.[307] Furthermore, these barriers may actually aggravate an employee's existing condition.[308]

Currently, the ADA's disclosure requirements are quite limited.[309] Employers can only ask about disabilities and diagnoses once a job offer has been extended, and those inquiries are limited to whether the candidate can perform the essential functions of the job.[310] Additionally, the Health Insurance Portability and Accountability Act (HIPPA) only authorizes disclosure in extremely limited situations, such as in emergencies.[311]

Furthermore, requiring disclosure to plead failure to accommodate may actually help ensure a diverse workforce and reduce negative stigmas about mentally disabled employees.[312] By teaching employees about tolerance,

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307. *See* Steve Metzger & Nancy Leonard, *The Americans with Disabilities Act After a Quarter Century*, 34 ACC DOCKET 46, 49–50 (2016). Persons with disabilities can protect their work reputations by disclosing early:

> Employees who cannot find it in themselves to report to work and perform their jobs in a minimally satisfactory manner will go to great lengths to protect themselves from the consequences of their behavior. Notably, if some of those employees devoted the same kind of energy and attention to coming to work and doing their jobs, they would[] [not] be on the progressive discipline track in the first place. One such method of self-preservation involves a sudden announcement by the employee that he has a medical condition, usually of a psychological or emotional nature, that was, to that point, unknown to the employer and often to the employee himself. The announcement usually comes toward the end of the progressive discipline process and, sometimes, even after the employee has been advised of his impending termination. The employee has now cloaked himself with the protections of the ADA in an effort to stop the termination. The employee sometimes will point to the alleged medical condition as the cause of the poor performance or unacceptable behavior. Often, though, the employee merely makes the announcement in the hope that the existence of a disability will be enough to stop the termination. The play sounds something like this—"I was on step four of the progressive disciplinary policy and the next step was termination. I told Big Company that I had post traumatic stress disorder and that my inappropriate behavior toward my supervisor was caused by the condition. Two days later I was fired. I was fired because I told Big Company that I had a disability."

Id.

308. Miller, *supra* note 251, at 37 ("As stress increases, the employee's medical condition can worsen, further complicating the situation.").

309. *See* Mathis, *supra* note 208, at 12 ("The Americans with Disabilities Act (ADA), HIPAA, and other laws already provide sufficient latitude for employers, licensing bodies, families, and regulators to review individuals' mental health information in situations where it is actually relevant.").

310. *Id.*

311. *See id.*

312. *See* Hensel, *supra* note 7, at 101–02 ("There is no question that the next decade will see increasing numbers of individuals with ASD applying for jobs and working in the labor force. Whether or not they experience success will be highly dependent on the actions of employers and their compliance with federal anti-discrimination laws. Employers must structure the hiring and interview process to eliminate unnecessary barriers to people with

employers would play a vital role in promoting the ADA's policy goals of ensuring equal opportunities in the workplace, as well as leverage a best practice.[313]

Moreover, maintaining confidentiality may actually hurt an employee's or applicant's integration into the workplace.[314] Although not necessary under this Comment's proposed solution, keeping coworkers involved in the reasonable accommodation process may actually lead to better acceptance and equality in the workplace.[315] This is because "[p]eople usually are more receptive to an idea if they contributed to its development."[316] This collaborative approach will lead to more open communication between colleagues.[317] Furthermore, this approach would likely result in increased employee satisfaction and higher productivity.[318]

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autism that are unrelated to the position in question. The law requires employers to engage in an interactive process and provide the reasonable accommodations that are necessary to enable these workers to succeed. Employers also must carefully consider how to structure the workplace environment to enable employees with autism to meet conduct rules and expectations. In light of the more expansive definition of disability under the ADAAA, employers who ignore such mandates will be exposed to legal liability in the future. It is critical to recognize that employers' legal compliance in this regard has the potential to benefit both employees with ASD and their employers. Individuals with ASD bring very real strengths to the table and have the potential to be significant assets to employers who invest in their training and development. . . . Hiring this population may also lead to increased business and goodwill from consumers. One study found that almost all consumers would 'prefer to give their business to companies that employ people with disabilities.'" (citing Gary N. Siperstein et al., *A National Survey of Consumer Attitudes Toward Companies that Hire People with Disabilities*, 24 J. VOCATIONAL REHABILITATION 3, 6 (2006))).

313. *See id.* at 97.

314. Rose A. Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89, 90 (1993).

315. *Id.* at 92.

316. *Id.* at 100.

317. *Id.* at 102.

318. *See* Porter, *supra* note 48, at 262–63 ("Although this next finding is fairly obvious, it still bears mentioning. The study found that employees who had their accommodations granted had better attitudes about the workplace. They had higher perceptions of organizational support and higher job satisfaction. Furthermore, granting accommodations seemed to have a positive spillover effect on other employees. Both employees with and without disabilities reported various positive effects because of accommodations given. Almost half of both groups of employees reported that the accommodations have improved the employees' interactions with coworkers. Other benefits reported included improved productivity, greater employee retention, improved morale and job satisfaction, decreased employee stress at work, improved employee attendance, improved workplace safety, improved employee ability to acquire training or new skills, and greater ability for the company to promote a qualified employee." (footnotes omitted)).

Many academics consider a candidate or employee's voluntary disclosure of any disability to be disadvantageous,[319] which stems from disability bias in the United States and may be "particularly true for individuals with mental impairments, given the strong history of stigma against this group."[320] As a result, many persons with disabilities refrain from any disclosure.[321] However, this Comment's proposed solution puts the employer on notice and shifts the employer's focus from wondering whether an employee is disabled and in need of an accommodation to proactively interacting with the employee and doing what is best for the employee.[322] Engaging in the interactive process early on is an economically efficient approach to ensuring workplace equality.[323] This approach should alleviate any additional stress the employee may bear and shift the burden of initiating the interactive process to the employer.[324] Furthermore, this approach will also usher in an era of stronger tolerance for fellow employees.[325]

Additionally, reducing mental health privacy will actually help employees attain greater autonomy in the workplace because it will put employers on notice and explicitly trigger the interactive process.[326] Some authors suggest that the current burdens associated with ADA claims put employees on trial twice.[327] However, requiring disclosure may actually reduce the number

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319. *E.g.*, Hensel, *supra* note 7, at 87.

320. *Id.*

321. *See generally id.* at 89.

322. *See id.* at 88 (suggesting that disclosure helps explain an autistic candidate's "patchwork quilt" résumé). "In light of this reality, employers in many respects are better off if the employee discloses upfront. With disclosure, the focus more quickly moves from an emphasis on disability to one of ability." *Id.* at 90.

323. *See* Olsen, *supra* note 7, at 1518 ("[T]his approach could avoid the expense and time involved in litigation over failure to accommodate claims, even if the employer would ultimately prevail on summary judgment." (citing Amy Knapp, Comment, *The Danger of the "Essential Functions" Requirement of the ADA: Why the Interactive Process Should Be Mandated*, 90 DENV. U. L. REV. 715, 728 (2013))).

324. *See id.* at 1518–19 ("Thus, both from an employer's perspective *and* with the goal of reaching the reasonable accommodation analysis, the reasonable accommodation requirement should be an earlier and more robust process. That is, constructive knowledge should be sufficient to initiate the duty to reasonably accommodate.").

325. *See id.* at 1519 ("[S]ensitivities towards the disabled community in the workplace must change. The purpose of the ADA and the ADAAA is to emphasize that an individual's right to participate in society does not diminish simply by virtue of her disabilities.").

326. *But see* Mathis, *supra* note 296, at 13 ("Reducing mental health privacy helps no one.").

327. *See, e.g.*, Olsen, *supra* note 7, at 1498 ("First, the employee caries the burden of proving she is qualified. Second, courts defer to the employer's judgment as to the employee's qualified status. This process puts the plaintiff's disabled status on trial for a second time—the first being the court's determination of whether she is indeed disabled—which frustrates congressional intent to create broad protections for people with disabilities."); *see also* Santire, *supra* note 234, at 13 ("Beyond showing proof of disability, the employee, or the applicant for employment, must show qualification for the job regardless of the impairment.

of plaintiffs that need to endure that two-step trial because it will give employers an opportunity to engage in the interactive process and find a reasonable accommodation for the employee. Thus, with a reasonable accommodation, an ADA-protected employee will be better positioned to meet—or exceed—expectations and enjoy a flourishing career.[328]

Moreover, disclosure may actually promote a fundamental principle of public interest law: "Representation of the unrepresented and the underrepresented."[329] This principle is only observed when law protects a minority's statutorily protected rights.[330] Thus, the ADA's goals are actually to guarantee the rights of persons with mental disabilities—not to compensate those individuals retroactively for having suffered discrimination.[331]

Furthermore, disclosure aligns with a common perception of justice: the "justice as fairness" theory.[332] The justice as fairness theory focuses on how a diverse community "decide[s] once and for all what is to count among

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This is a two-step process. First, the individual must have the requisite skill, experience, education and other requirements for the relevant job. . . . [T]he second step is to prove or demonstrate an ability to perform the essential job functions with or without reasonable accommodation.").

328. A job is not the same as a career. Rather, a career is a series of jobs that is personally rewarding, involves development and not just training, and "require[s] a high degree of commitment." Joy E. Pixley, *Differentiating Careers from Jobs in the Search for Dual-Career Couples*, 52 SOC. PERSP. 363, 364 (2009). Additionally, because employers benefit from long-term employees and low turnover, a pique in organizational behavior has led to increased interest in "job design theory." Job design theory aims to create "stimulating jobs [that] are associated with motivating psychological states that contribute to favorable attitudinal and behavior work outcomes." Yitzhak Fried et al., *Job Design in Temporal Context: A Career Dynamics Perspective*, 28 J. ORGANIZATIONAL BEHAV. 911, 911 (2007). For an examination of typical career paths, see generally Rachel A. Rosenfeld, *Job Mobility and Career Processes*, 18 ANN. REV. SOC. 39 (1992). A key reason to differentiate between jobs and careers is that careers are associated with more pay. *See* Pixley, *supra* ("Careers [are] also seen as offering high levels of extrinsic rewards, especially income."). Higher pay is important here because the ADA aims to give mentally disabled individuals economic independence. *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 53 (2000) ("Central to [the legislature's] enthusiasm was a belief that the new Act would promote the independence and economic self-sufficiency of millions of people with disabilities.").

329. David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 328 (1996).

330. *See id.* ("Representation involved the defense of another's interests.").

331. *See id.* at 329 ("[P]rocedure-based conceptions of justice fail to provide an adequate framework for public interest law because the pursuit of a substantively better society is an essential component of any movement for legal reform or enforcement of pre-existing rights.").

332. *Id*. at 330.

them as just and unjust."[333] This collaborative approach mirrors the democratic processes required for community buy-in[334] in a diverse society.[335] Thus, public interest law suggests achieving equal opportunity in the workplace requires a collaborative approach that endorses employee disclosure.[336] Moreover, this approach will ensure that employees see the proactive benefits of the ADA—receiving reasonable accommodations—rather than defaulting to the ADA's reactive solutions—heading to court.

2. Failure to Accommodate Claims Should Not Be Alternatively Pleaded with Regarded As Claims

Employee disclosure could actually be disadvantageous for an employer —not an employee.[337] This is because an "[e]mployers' early knowledge of disability, particularly one linked to interpersonal deficits, strengthens the ability of the applicant to qualify for class membership under the 'regarded as' prong of the ADA should litigation ensue."[338] This is particularly troubling because even without disclosure or accommodation request, courts have found that an employee's "odd" behavior "was sufficient to give notice of an individual's disability and need for accommodation."[339]

Thus, a congressional bar against pleading both a failure to accommodate claim and a regarded as discrimination claim will promote judicial economy.[340] In other words, disclosure will explicitly trigger the interactive process and make the issue of whether the employer knew or should have known about the employee's mental disability easier to investigate, which will help eliminate frivolous claims at summary judgment.[341] Moreover, this approach undermines

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333. JOHN RAWLS, A THEORY OF JUSTICE 207 (1971). For a brief discussion of John Rawls's potential influence on modern political theory, see also Brooke Ackerly, *John Rawls: An Introduction*, 4 PERSP. ON POL. 75, 75–78 (2006).

334. Effective management requires employee buy-in. *See* John Adler & Jay Youngdahl, *The Odd Couple: Wall Street, Union Benefits, and the Looting of the American Worker*, 19 NEW LAB. F. 80, 84 (2010) ("An effective organizational structure—with buy-in across the labor movement—must be developed, which clarifies the true effects of labor's present activity . . . .").

335. *See* Esquivel, *supra* note 329, at 331.

336. For a brief history of equal opportunity laws in the United States, see Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 485–89 (2014).

337. *See* Hensel, *supra* note 7, at 89.

338. *Id.*

339. *Id.* "This may be a particularly persuasive argument in cases in which the employee's disorder affect her ability to engage in meaningful communication." *Id.*

340. For a closer look at the interplay of judicial economy and the floodgates argument, see generally Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 377–79, 420–21 (2003).

341. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 315 (1999) ("Today's caseloads make it a question of some moment whether judges legitimately may consider caseload effects when deciding a case.").

any "floodgates" argument because this statutory change would not establish a new right, it would only change the way a right is enforced.[342]

In sum, if employees learn that they are unable to alternatively plead both failure to accommodate and regarded as claims, they may feel compelled to take action in the workplace and speak to the employer rather than waiting for litigation to remediate their ADA-protected rights to reasonable accommodations. As more mentally disabled employees join the workforce, Congress should give employers the tools they need to best accommodate their new employees. Otherwise, the ADA, nearly thirty years old, is still ineffective. Without these minor, imperative adjustments to the ADA, employees will only find redemption retroactively—through litigation—and remain unable to enjoy the benefits of reasonable accommodations in the workplace.

V. CONCLUSION

Title I of the ADA imposes an ambiguous interactive process on employers because it does not put forth an explicit trigger. Because an employer may face liability for failing to engage in the interactive process when it has a reason to know that a mentally disabled employee needs a reasonable accommodation, but may also face liability for regarding an employee as disabled, employers are currently ensnared in an inescapable catch-22.

In considering mental, as opposed to physical, disabilities, this predicament often leaves employers unprepared or unwilling to help these employees because mental disabilities are not always obvious. An employer is less likely to initiate the interactive process if it can be held liable for regarding an employee as disabled when it triggers the interactive process. Because a number of mental disabilities are not easily identifiable or communicable, many employees are unable to benefit from the employer's affirmative duty to engage in the interactive process when an employer fears liability under the regarded as prong of the ADA. Unfortunately, this means that as the number of mental diagnoses steadily increases, employers will face inescapable liability, and the ADA will continue failing to protect mentally disabled employees.

Employers need better tools to help mentally disabled employees. This Comment strives to raise awareness around the ADA's ambiguous interactive

342. Stern, *supra* note 340, at 385–86 ("Thus the floodgates argument can appear in many types of cases[] but tends to recur in those cases where a litigant seeks to establish a new right or cause of action.").

process and proposes that Congress should require employee disclosure as an element in failure to accommodate claims. Additionally, Congress should bar the pleading of both failure to accommodate and regarded as discrimination in the same suit. These changes will finally eliminate the catch-22 and help achieve the important policy goals that the ADA set out to accomplish: equal opportunity for our colleagues with mental disabilities.