ARTICLES

Work Hours and Disability Justice

JEANNETTE COX*

Courts frequently conclude that the Americans with Disabilities Act (ADA) cannot curb the common employer practice of firing or refusing to hire people unable to work forty or more hours per week. Even courts that occasionally require temporary part-time schedule accommodations typically do so only to facilitate a prompt return to standard hours. They fail to acknowledge that the ADA also requires employers to accommodate long-term disabilities.

Close examination of the case law suggests that two factors influence courts' treatment of the ADA's part-time schedule accommodation. First, case law incongruities confirm Michelle Travis's hypothesis that the forty-hour norm heavily influences courts' thinking about the reasonableness of part-time schedule accommodations. Second, the case law suggests that courts are sensitive to the reality that existing part-time and full-time opportunities differ on metrics other than total compensation and hours worked, such as per-hour compensation, benefits eligibility, and advancement opportunities. Courts fear that implementing the ADA's part-time schedule accommodation would result in higher quality part-time opportunities than are otherwise currently available.

These insights suggest that increasing the availability and status of part-time work would reduce courts' concern that the ADA's part-time schedule accommodation creates an unusually favored class of part-time workers. Similarly, removing structural incentives that lead employers to prefer long hours may reduce courts' reluctance to acknowledge that the ADA modifies long-hours culture. These reforms would not only benefit people with disabilities but would also assist the large number of people—disabled and not—disadvantaged by the current bifurcation between standard "full-time" positions and more marginal "part-time" work.

---

* Professor of Law and Director of Faculty Research and Development, University of Dayton School of Law. © 2022, Jeannette Cox. I thank Nicole Porter for helpful comments. I also thank the organizers of the American Association of Law Schools (AALS) Annual Meeting, Disability Law Section's Future of Accommodations Panel on January 5, 2022, and the 16th Annual Colloquium on Scholarship in Employment and Labor Law hosted by Vanderbilt Law School on October 15, 2021.

TABLE OF CONTENTS

INTRODUCTION 3

I. THE UNFULFILLED PROMISE OF PART-TIME SCHEDULE ACCOMMODATIONS 7

II. COURTS' ATEXTUAL RATIONALES FOR IGNORING THE ADA'S PART-TIME SCHEDULE ACCOMMODATION 10

A. THE "PART-TIME POSITIONS DO NOT EXIST" APPROACH 10

1. The "Part-Time Positions Do Not Exist" Approach in Practice 11

2. The "Part-Time Positions Do Not Exist" Approach Contravenes the ADA's Text 12

3. The "Part-Time Positions Do Not Exist" Approach Mischaracterizes Supreme Court Case Law 14

B. THE "FULL-TIME HOURS ARE ESSENTIAL" APPROACH 16

1. The "Full-Time Hours Are Essential" Approach in Practice 17

2. The Conflict Between the "Full-Time Hours Are Essential" Approach and the ADA 19

III. COURTS' UNSTATED REASONS FOR REFUSING TO ENFORCE THE ADA'S PART-TIME SCHEDULE ACCOMMODATION 21

A. NEW EVIDENCE DEMONSTRATING THAT THE FORTY-PLUS HOUR NORM IS DEEPLY ENTRENCHED. 22

1. Courts' Disparate Treatment of Unusually Long Hours Versus Standard Hours 22

2. Courts' Preference for *Temporary* Part-Time Schedule Accommodations 23

B. RELUCTANCE TO CREATE A FAVORED CLASS OF PART-TIME WORKERS 25

1. Judicial Resistance to the Family and Medical Leave Act's Reduced Leave Schedule 25

2. Judicial Reluctance to Conclude the ADA Provides Individuals with Disabilities Part-Time Opportunities Unavailable to Others 26

IV. STRUCTURAL REFORMS TO ACHIEVE WORK-HOUR JUSTICE FOR PEOPLE WITH AND WITHOUT DISABILITIES 27
A. CREATING PARITY BETWEEN FULL-TIME AND PART-TIME WORK 28
B. REDUCING EMPLOYERS' INCENTIVES TO PREFER LONG HOURS 28
C. TYING WORK-HOUR REFORM TO BROAD CONVERSATIONS ABOUT EQUITY 29
D. REFORMING THE LANGUAGE THAT DESCRIBES WORK HOURS 30

CONCLUSION 30

INTRODUCTION

> [P]ushing our bodies and minds excessively means something different to people with chronic illnesses: it means danger, risk of relapse, hospitalization, long-lasting or permanent damage to our capacities to function . . . . And sometimes it is simply impossible . . . .[1]

For people with chronic illnesses, working standard hours can require "[s]urrendering social/leisure time" and allocating virtually all non-work hours to bed rest.[2] Some people, even if they sacrifice all other activities, simply cannot work the hours most U.S. jobs demand. They experience forty-hour workweeks as "major barriers" to employment.[3] Workweeks that exceed forty hours—which many jobs require—exclude even larger numbers of people from their preferred occupations.[4]

Part-time employment opportunities are often unavailable. Many industries require all employees, or at least new hires, to work long hours. Employer-created part-time positions, when they exist, often carry a distinctly second-class status. Compared to full-time opportunities involving the same job tasks, part-time opportunities typically provide less job security and fewer advancement

1. Susan Wendell, *Unhealthy Disabled: Treating Chronic Illnesses as Disabilities*, HYPATIA, Fall 2001, at 17, 25.

2. R.J. Purc-Stephenson, Samantha K. Jones & Carissa L. Ferguson, *"Forget About the Glass Ceiling, I'm Stuck in a Glass Box": A Meta-Ethnography of Work Participation for Persons with Physical Disabilities*, 46 J. VOCATIONAL REHAB. 49, 55 (2017).

3. *See id.* at 56 (using eight-hour shifts as an example of a work schedule that presents a "major barrier[]").

4. *See* LONNIE GOLDEN, INT'L LAB. OFF., THE EFFECTS OF WORKING TIME ON PRODUCTIVITY AND FIRM PERFORMANCE: A RESEARCH SYNTHESIS PAPER 4 (2012) (finding that about 28% of full-time workers regard their overtime work as mandatory). Longer hour requirements are especially common in professional and managerial positions. *See, e.g.*, Harry Bradford, *Top-Level Professionals View 40-Hour Work Week as Part-Time: Report*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/americans-now-view-40-hou_n_888231 [https://perma.cc/X8Q4-MNXQ] (describing a Center for American Progress report finding that "37.9 percent of men with professional and managerial positions worked over 50 hours a week between 2006 and 2008").

opportunities.[5] Part-time opportunities also frequently lack the employer-sponsored health insurance plans, retirement accounts, and other benefits that accompany full-time positions.[6] Exacerbating these inequities, "[t]here has been a notable increase in the part-time pay penalty" in recent years, resulting in a nearly 30% gap in *hourly* compensation between full-time and part-time workers with similar education levels.[7]

This bifurcation between standard full-time jobs and marginal part-time jobs is so culturally entrenched that many courts conclude that the Americans with Disabilities Act (ADA) cannot bridge it. Using reasoning strikingly at odds with the ADA's text, they declare that "[w]hether a company will staff itself with part-time workers, full-time workers, or a mix of both is a core management policy with which the ADA was not intended to interfere."[8] Some courts go so far as to conclude that "the Americans with Disabilities Act protects only persons who over the long run are capable of working full time."[9] In this way, courts fail to acknowledge that the ADA's list of reasonable accommodations expressly includes "part-time or modified work schedules."[10]

Unlike other contested ADA accommodations, which have been the subject of extensive academic commentary,[11] the ADA's part-time schedule accommodation

5. *See* Natalie Smith & Paula McDonald, *Facilitating Sustainable Professional Part-Time Work: A Question of Design?*, 22 J. MGMT. & ORG. 205, 218 (2016); ORG. FOR ECON. COOP. & DEV., OECD EMPLOYMENT OUTLOOK: MOVING BEYOND THE JOBS CRISIS 221 (2010), https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2010_empl_outlook-2010-en [https://perma.cc/JPG6-A4WY].

6. LISA SCHUR, DOUGLAS KRUSE & PETER BLANCK, PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED? 54 (2013).

7. LONNIE GOLDEN, ECON. POL'Y INST., PART-TIME WORKERS PAY A BIG-TIME PENALTY 1–2, 11 (2020), https://www.epi.org/publication/part-time-pay-penalty/ [https://perma.cc/5QYE-S9X2]; *see also id.* at 11 (finding that, without controlling for education level and demographics, part-time workers earned nearly 53% less per hour than full-time workers during 2003 to 2018); *id.* at 12 (finding that, within industries and occupations that permit part-time work, part-time workers earn 20% less per hour than full-time workers in the same industry and occupation); Nicole Buonocore Porter, *Choices, Bias, and the Value of the Paycheck Fairness Act: A Response Essay*, 29 A.B.A. J. LAB. & EMP. L. 429, 439 (2014) ("American workplaces do not offer good part-time positions as those in other countries do. For example, in the United States, workers who work forty-four hours per week make twice as much as those working thirty-four hours per week." (footnote omitted)).

8. Terrell v. USAir, 132 F.3d 621, 626–27 (11th Cir. 1998); *see also* Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954, 960 n.4 (4th Cir. 2021) (citing *Terrell* to reach the same conclusion).

9. Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001).

10. 42 U.S.C. § 12111(9)(B).

11. For example, at least twenty law review articles have focused on the ADA's "reassignment to a vacant position" accommodation. *See, e.g.*, Christina M. Loguidice, Note, *Mandatory Reassignment as a Reasonable Accommodation Under the Americans with Disabilities Act Turns "Nondiscrimination into Discrimination,"* 84 BROOK. L. REV. 1059 (2019); Lawrence D. Rosenthal, *Most-Qualified-Applicant Hiring Policies or Automatic Reassignment for Employees with Disabilities? Still A Conundrum Almost Thirty Years After the Americans with Disabilities Act's Enactment*, 70 BAYLOR L. REV. 715, 723 (2018); Amy Rankin, *Unreasonable Accommodation: Examining* EEOC v. St. Joseph's Hospital, Inc. *and Noncompetitive Reassignment*, 50 LOY. L.A. L. REV. 817 (2017); Danielle Bogaards, *Examining the Americans with Disabilities Act's Reassignment Provision Through an Equal Protection Lens*, 43 HASTINGS CONST. L.Q. 677 (2016); Lawrence P. Postol, *ADA Open Issues: Transfers to Vacant Positions, Leaves of Absence, Telecommuting, and Other Accommodation Issues*, 8 ELON L. REV. 61, 63 (2016); Michelle Letourneau, *Providing Plaintiffs with Tools: The Significance of* EEOC v. United

has received scant attention. Only a handful of scholars, most notably Michelle Travis and Nicole Porter, have highlighted the striking incongruence between the ADA's textual promise of part-time schedule accommodations and many courts' conclusions that the ADA cannot require them.[12]

Building on Travis's and Porter's critiques of courts' treatment of the ADA's part-time schedule accommodation, this Article identifies two distinct lines of reasoning courts employ to sidestep the ADA's text: the "Part-Time Schedules Do Not Exist" approach and the "Full-Time Hours Are Essential" approach. It demonstrates that both approaches rely on extraordinarily shaky rationales. It also identifies incongruities in the case law that confirm Travis and Porter's hypothesis that the forty-hour norm drives courts' non-implementation of the ADA's part-time schedule accommodation.

Additionally, this Article provides a new explanation for courts' refusal to implement the ADA's part-time schedule accommodation. Close analysis of the part-time schedule case law suggests that courts are sensitive to the reality that existing part-time opportunities typically differ from full-time opportunities on metrics other than total compensation and hours worked. Even though the Equal Employment Opportunity Commission (EEOC) has concluded that the ADA

Airlines, Inc., 90 NOTRE DAME L. REV. 1373, 1414 (2015); Michael Creta, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693, 1693 (2014); Edward Hood Dawson, III, *Mandated Reassignment for the Minimally Qualified*, 117 W. VA. L. REV. 735 (2014); Taylor Brooke Concannon, *Don't Throw the Baby Out with the Bathwater: Taking the Seventh Circuit's Decision in* EEOC v. United Airlines, Inc. *Too Far [693 F.3d 760 (7th Cir. 2012)]*, 52 WASHBURN L.J. 613, 613–14 (2013); Erica Gelfand, *Mandatory Reassignment and the ADA: The "Reassignment to a Vacant Position" Clause and the Scope of Duty It Imposes on Employers*, 4 DEPAUL J. FOR SOC. JUST. 313, 315 (2011); Nicholas A. Dorsey, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443 (2009); Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 195 (2009); Carrie L. Flores, *A Disability Is Not a Trump Card: The Americans with Disabilities Act Does* Not *Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195, 198 (2008); Catherine L. Odom, *Merit or Mandatory Preference?: The Effect of* Huber v. Wal-Mart Stores, Inc. *on the Application of the ADA's Reassignment Provision*, 61 ARK. L. REV. 389 (2008); Jared Hager, Note, *Bowling for Certainty: Picking Up the Seven-Ten Split by Pinning Down the Reasonableness of Reassignment After* Barnett, 87 MINN. L. REV. 2063 (2003); Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 931 (2003); Matthew B. Robinson, Comment, *Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act*, 47 ST. LOUIS U. L.J. 179 (2003); Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 442 (2002); Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1048 (2000); John E. Murray and Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721 (2000); Jeffrey S. Berenholz, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act*, 15 HOFSTRA LAB. & EMP. L.J. 635 (1998).

12. *See, e.g.*, Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CALIF. L. REV. 837, 870–71 (2017); Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 99 n.106 (2016); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 70–71 (2014); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 21–36 (2005).

does not require employers to provide employees receiving part-time schedule accommodations the same pay and benefits they provide full-time employees, courts nonetheless fear that the ADA's part-time schedule accommodation would provide disabled workers higher quality part-time opportunities than nondisabled workers.

This explanation for courts' reluctance to enforce the ADA's part-time schedule accommodation suggests that structural reforms will be necessary to smooth the path for courts to implement this accommodation. One such reform would require employers to treat part-time and full-time work comparably by providing equal per-hour compensation. It would also require prorated access to health insurance, job security, training, advancement opportunities, and other benefits currently contingent on full-time status. This equalization of part-time and full-time opportunities will reduce courts' fears that the ADA's part-time schedule accommodation would create a favored class of part-time workers.

Another set of structural reforms would aim to reduce employers' incentives to prefer long hours. For example, basing eligibility for "small business" benefits and regulatory exemptions on a measure other than total number of employees (such as profits or total hours worked) would reduce employers' incentives to prefer a small staff working long hours over a larger staff working shorter hours. Reforming the Fair Labor Standards Act to require overtime compensation for more long-hour jobs would have a similar effect. On a broader level, relieving employers of the obligation to provide health insurance (via adoption of a single-payer healthcare system) would also reduce employers' incentives to prefer a small staff working long hours over a larger staff working shorter hours.

These reforms would not only help people excluded by standard-hour norms but would also assist the large number of people—disabled and not—currently unable to find jobs with benefits and adequate per-hour compensation. To make ends meet, they often work multiple part-time jobs that lack the per-hour compensation and benefits that accompany full-time positions.[13] Equalizing per-hour compensation and benefits between full-time and part-time work would not only make part-time work more equitable but would also likely increase employers' willingness to accommodate all their employees' hour preferences, whether for sixty hours or for twenty.

This argument proceeds as follows. Part I outlines the ADA's textual promise of part-time schedule accommodations. Part II identifies and critiques two distinct threads of reasoning that courts employ to neutralize the ADA's part-time schedule accommodation: the "Part-Time Schedules Do Not Exist" approach and the "Full-Time Hours Are Essential" approach. It demonstrates that both approaches rely on faulty reasoning that contravenes the ADA's text.

---

13. LONNIE GOLDEN, ECON. POL'Y INST., STILL FALLING SHORT ON HOURS AND PAY: PART-TIME WORK BECOMING NEW NORMAL 38 (2016), https://files.epi.org/pdf/114028.pdf [https://perma.cc/2SXM-8UFN].

Part III unpacks courts' motivations for refusing to follow the ADA's text. Building on Travis's and Porter's work, it identifies incongruities in the case law that confirm Travis's and Porter's hypothesis that the forty-hour norm drives courts' non-implementation of the ADA's part-time schedule accommodation. Going beyond Travis's and Porter's hypothesis, it also argues courts are reluctant to create a favored class of part-time workers. Despite the EEOC's conclusion that employers need not provide part-time schedule accommodation recipients the same pay and benefits full-time employees receive, courts nonetheless fear that part-time schedule accommodations will provide higher quality part-time opportunities to disabled workers than nondisabled workers. This concern leads courts to deny plaintiffs the part-time schedule accommodations that the ADA promises.

Part IV surveys a range of reform possibilities to advance the ADA's goal of integrating people excluded by work-hour norms. It suggests that equalizing part-time and full-time opportunities may reduce courts' fears that the ADA's part-time schedule accommodation would create a favored class of part-time workers. Similarly, removing structural incentives that lead employers to prefer long hours may reduce courts' inclination to conclude that the ADA cannot disrupt long-hours culture. Adopting these and other reforms will help smooth the path for courts to recover the ADA's textual promise of part-time schedule accommodations.

I. THE UNFULFILLED PROMISE OF PART-TIME SCHEDULE ACCOMMODATIONS

The ADA's employment provisions, modeled on Title VII of the Civil Rights Act of 1964, acknowledge that physical and cultural architecture often excludes disabled people from their desired employment opportunities. It accordingly requires employers to install ramps, purchase adaptive equipment, hire sign language interpreters, and otherwise adjust standard operating procedures in order to "reasonabl[y] accommodat[e]" people with disabilities.[14]

The ADA's reasonable accommodations provision expressly includes adjustments to the forty-plus-work-hour norm. It provides that

> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, *part-time or modified work schedules*, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[15]

---

14. *See* 42 U.S.C. § 12111(9).
15. *Id*. (emphasis added).

House and Senate committee reports explaining the ADA repeatedly note the need for part-time schedule accommodations, explaining that "[s]ome people with disabilities are denied employment opportunities because they cannot work a standard schedule."[16] The regulations for Section 504 of the Rehabilitation Act of 1973, which predate the ADA, similarly provide that "part-time or modified work schedules" are reasonable accommodations.[17]

As the Supreme Court has explained, the ADA contemplates that plaintiffs' burdens in a failure-to-accommodate case are minimal: after demonstrating that the accommodation is necessary and effective, plaintiffs must simply show that the accommodation "seems reasonable on its face, *i.e*., ordinarily or in the run of cases."[18] Arguably, due to Congress's decision to expressly include part-time schedules in the statutory list of reasonable accommodations, plaintiffs requesting part-time schedule accommodations do not even need to make this minimal showing.[19]

An employer may avoid providing a necessary reasonable accommodation only by proving the affirmative defense of "undue hardship,"[20] meaning "significant difficulty or expense," when considered in light of the employer's financial resources, number of employees, workplace structure, and other factors.[21] In the words of the Supreme Court, an employer relying on the undue hardship defense "must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[22]

For some positions, such as a flight attendant assigned to long-haul flights, an employer might show that the operational advantages of requiring employees to

---

16. H.R. REP. NO. 101-485, pt. 2, at 62 (1990); S. REP. NO. 101-116, at 31 (1989).

17. 45 C.F.R. § 84.12(b) (2020); *see also id.* § 84 app. A (emphasizing that "[r]easonable accommodation includes modification of work schedules, including part-time employment"); H.R. REP. NO. 101-485, pt. 2, at 149 ("The definition of the term 'reasonable accommodation' included in the bill is comparable to the definition in the section 504 legal framework. The term includes: . . . part-time or modified work schedules . . . ."). The same language appears in regulations implementing Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. 41 C.F.R. §§ 60-741.2()(2)(ii), -300.2(v)(2)(ii) (2021).

18. US Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

19. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 142 (2d Cir. 1995) (concluding that the plaintiff met her burden of production on reasonableness because her requested accommodation was listed in "the regulations implementing Section 504 and the cases applying the Rehabilitation Act"); Hursey v. City of Newburgh, No. 07 Civ. 1374 (CS), 2008 WL 11517806, at *5 (S.D.N.Y. Sept. 22, 2008) (citing *Borkowski* for the proposition that an "accommodation contemplated by ADA and regulations is sufficient to meet plaintiff's burden of production on reasonableness of proposed accommodation" and thus "a change in work schedule is, at least on its face, a 'plausible accommodation'"); *cf. Barnett*, 535 U.S. at 402–03 (concluding that although "reassignment to a vacant position," an accommodation listed in the ADA, would "normally . . . be reasonable within the meaning of the statute," reassignments that violate the rules of a seniority system "will ordinarily be unreasonable"). *But see* Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998) ("Plaintiff asserts that the ADA establishes that part-time work is per se a reasonable accommodation because the statute lists 'part-time or modified work schedules' as possible accommodations. . . . We disagree . . . .").

20. 42 U.S.C. § 12112(b)(5)(A).

21. *Id.* § 12111(10).

22. *Barnett*, 535 U.S. at 402.

work continuously for an extended period would make part-time schedules an undue hardship. However, for the vast majority of jobs, it will be difficult for employers to demonstrate that dividing an existing position into two would create "significant difficulty or expense."[23] For example, it probably would not cause a secondary school "significant difficulty or expense" to staff six one-hour Spanish courses with two three-hour instructors rather than a single full-day instructor. The incremental increase to the school's supervisory and administrative burdens would likely be far less than the expense of other ADA accommodations, such as paying "qualified readers or interpreters" to assist blind and deaf employees.[24] In fact, economic research suggests that part-time workers' greater productivity typically offsets the coordination challenges and start-up costs associated with part-time work.[25]

The handful of decisions that have embraced the ADA's part-time schedule accommodation illustrate its workability.[26] For example, one court concluded that a reasonable jury could determine that a part-time schedule was a reasonable accommodation for a sanitation worker whose rare eye condition made him unable to work pre-daylight hours.[27] Another court determined that a part-time schedule was a reasonable accommodation for a sales representative with post-polio syndrome.[28] Similarly, another court determined that a part-time schedule

23. 42 U.S.C. § 12111(10)(A).

24. *Id.* § 12111(9)(B).

25. *See* Andrea Garnero, Stephan Kampelmann & François Rycx, *Part-Time Work, Wages, and Productivity: Evidence from Belgian Matched Panel Data*, 67 INDUS. & LAB. RELS. REV. 926, 948–49 (2014) (observing that at a certain threshold (variously twenty, twenty-five, or thirty hours per week) "certain negative aspects of part-time jobs (start-up costs, coordination problems, lower accumulation of human capital, etc.) are more than off-set by positive effects"); Annemarie Künn-Nelen, Andries De Grip & Didier Fouarge, *Is Part-Time Employment Beneficial for Firm Productivity?*, 66 INDUS. & LAB. RELS. REV. 1172, 1172 (2013) (finding that a 10% increase in the proportion of part-time workers is associated with a 4.8% increase in firm productivity); Annemarie Nelen, Andries De Grip & Didier Fouarge, *Is Part-Time Employment Beneficial for Firm Productivity?* 1–2 (Inst. for the Study of Lab. (IZA), Discussion Paper No. 5423, 2011) (finding, based on a dataset of Dutch pharmacies, that "[a] larger part-time employment share leads to greater firm productivity"); *cf.* Francesco Devicienti, Elena Grinza & Davide Vannoni, *The Impact of Part-Time Work on Firm Productivity: Evidence from Italy*, 27 INDUS. & CORP. CHANGE 321, 323 (2018) (finding that although a reduction in daily working time reduced firm productivity by 1.45%, a reduction in number of days worked had no negative effects on firm productivity); Jill E. Perry-Smith & Terry C. Blum, *Work-Family Human Resource Bundles and Perceived Organizational Performance*, 43 ACAD. MGMT. J. 1107, 1109–10, 1114 (2000) (finding, based on U.S. firm data from the National Organizations Survey, that policies allowing flexible scheduling had productivity-enhancing effects).

26. *See, e.g.*, Alexander v. Boeing Co., No. C13-1369RAJ, 2014 WL 3734291, at *10 (W.D. Wash. July 28, 2014) ("[P]laintiff has presented sufficient evidence to demonstrate that a flexible schedule or partial days would have been a reasonable accommodation . . . .").

27. Hursey v. City of Newburgh, No. 07 Civ. 1374 (CS), 2008 WL 11517806, at *5 (S.D.N.Y. Sept. 22, 2008).

28. Holmes v. Sw. Reg'l Med. Ctr., Inc., No. 12-CV-225-JED-PJC, 2014 WL 5431195, at *11 (N.D. Okla. Oct. 24, 2014) (finding a triable issue on an accommodation claim when "it could be inferred that [employer] terminated [plaintiff] so that it would not have to continue to accommodate [plaintiff] by allowing her to work part-time").

could be a reasonable accommodation for an auto parts store worker experiencing fatigue due to multiple sclerosis.[29]

II. COURTS' ATEXTUAL RATIONALES FOR IGNORING THE ADA'S PART-TIME SCHEDULE ACCOMMODATION

Despite this evidence of the workability of part-time schedule accommodations, courts in many jurisdictions hold that the ADA cannot require an employer to reduce the hours of a standard-hour job, split a standard-hour position into two positions, or permit job sharing.[30] Instead of requiring, as the ADA demands, that employers prove that such modifications would cause undue hardship, these courts reduce the ADA's part-time schedule accommodation to a suggestion employers are free to ignore.

Courts employ two distinct lines of reasoning to conclude that the ADA's part-time schedule accommodation is a nullity. The first approach concludes that employers need not provide part-time schedule accommodations unless they have an existing part-time vacancy (the "Part-Time Positions Do Not Exist" approach). The second approach concludes that full-time hours are an "essential job function," and thus the inability to work full time disqualifies plaintiffs from ADA coverage (the "Full-Time Hours Are Essential" approach). Although each employs different reasoning, both approaches ignore the ADA's text.

A. THE "PART-TIME POSITIONS DO NOT EXIST" APPROACH

The "Part-Time Positions Do Not Exist" approach concludes that the ADA requires part-time schedule accommodations only when they amount to another ADA-listed accommodation: "reassignment to a vacant position."[31] Within this framework, employers who have not voluntarily created part-time positions need not provide part-time schedule accommodations. And employers whose part-time positions are currently full can terminate or refuse to hire disabled workers who need part-time schedule accommodations. To justify this conclusion, courts characterize job-sharing arrangements not as spreading existing job tasks across two employees, but as requiring the employer to do something that sounds more onerous: "create a new part-time position where none previously existed."[32]

Courts adopting this approach do not require employers to demonstrate that allowing part-time hours would actually cause the "significant difficulty or expense" necessary to establish the undue hardship defense.[33] Instead, they

29. Meinen v. Godfrey Brake Serv. & Supply, Inc., No. CIV. 10-5077-JLV, 2012 WL 4364669, at *4 (D.S.D. Sept. 24, 2012). *See also* Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 121 (2d Cir. 2004) (holding that a reasonable jury could conclude that the removal of a doctor's night and weekend duties due to his rare illness was a reasonable accommodation).

30. *See infra* notes 40 and 71.

31. 42 U.S.C. §12111(9)(B).

32. White v. Standard Ins. Co., 529 F. App'x 547, 550 (6th Cir. 2013) (citing Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007)).

33. 42 U.S.C. §§ 12111(10)(A)–(B), 12112(b)(5)(A); *see, e.g.*, Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954, 956 (4th Cir. 2021).

categorically conclude that the ADA cannot override an employer's refusal to consider the feasibility of part-time hours.[34]

1. The "Part-Time Positions Do Not Exist" Approach in Practice

The Eleventh Circuit's *Terrell v. USAir* decision is the leading early example of the "Part-Time Positions Do Not Exist" approach.[35] It concluded that an airline could terminate a disabled reservation agent who needed a half-time schedule because, at the time of her request, the airline only had full-time positions for reservation agents.[36] Notably, the airline acknowledged that it had employed half-time reservation agents both a few years before and a few months after the plaintiff's accommodation request.[37] Although this evidence would appear to demonstrate the feasibility of a part-time schedule accommodation, the court treated it as irrelevant.[38] Instead, emphasizing that the airline lacked vacant part-time positions at the time the plaintiff requested a part-time schedule accommodation, the court held that the ADA could not require the airline to "*create* a part-time position."[39]

Following *Terrell*, many courts have adopted the mantra that the ADA cannot require employers to "*create* a part-time position."[40] For example, both the Fifth and Sixth Circuits applied this reasoning to conclude that employers can deny customer service desk workers' job-sharing requests without showing undue hardship.[41] Similarly, the District of Massachusetts excused a school district from

34. *See, e.g.*, *Perdue*, 999 F.3d at 960 n.4 (noting that the ADA's part-time schedule accommodations "may be required only when 'the employer has part-time jobs readily available'" (quoting Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998)).

35. 132 F.3d at 626–27.

36. *Id.*

37. *Id.* at 625.

38. *Id.*

39. *Id.* at 626.

40. *Id.*; *see, e.g.*, Gonzalez v. United Parcel Serv., 777 F. App'x 735, 738 (5th Cir. 2019) (per curiam); White v. Standard Ins. Co., 529 F. App'x 547, 550 (6th Cir. 2013); Curry v. Sec'y, Dep't of Veterans Affs., 518 F. App'x 957, 964–65 (11th Cir. 2013) (per curiam); Tjernagel v. Gates Corp., 533 F.3d 666, 673 (8th Cir. 2008); Lamb v. Qualex, Inc., 33 F. App'x 49, 59 (4th Cir. 2002); Treanor v. MCI Telecomms. Corp., 200 F.3d 570, 575 (8th Cir. 2000); Eustace v. Springfield Pub. Schs., 463 F. Supp. 3d 87, 117 (D. Mass. 2020); Williams v. Cadence Bank, No. 5:16cv266/MCR/GRJ, 2018 WL 7360632, at *7 (N.D. Fla. Oct. 9, 2018); Coad v. Buckman Lab'ys, Inc., No. 1:14-cv-254-NT, 2016 WL 1089229, at *11 (D. Me. Mar. 18, 2016); Matthews v. Vill. Ctr. Cmty. Dev. Dist., No. 5:05-cv-344-Oc-10GRJ, 2006 WL 3422416, at *15 (M.D. Fla. Nov. 28, 2006); *cf.* Butler v. Direct TV, No. B201173, 2008 WL 4491896, at *4–*5 (Cal. Ct. App. Oct. 8, 2008) (applying *Terrell*'s reasoning to the California Fair Employment and Housing Act); Whalen v. N.J. Mfrs. Ins. Co., No. L-2785-05, 2012 WL 3166601, at *15 (N.J. Super. Ct. App. Div. Aug. 6, 2012) (per curiam) (applying *Terrell*'s reasoning to the New Jersey Law Against Discrimination); Muller v. Exxon Rsch. & Eng'g Co., 786 A.2d 143, 151 (N.J. Super. Ct. App. Div. 2001) (same).

41. *Gonzalez*, 777 F. App'x at 738 (concluding, in a case where the plaintiff asked for his customer service desk job to be reduced to four hours, that "[t]here is no evidence that [employer] had any part-time positions available that were suitable for [plaintiff]—or indeed evidence that any such position *ever* existed. He could not name any employees who worked part-time in his position. And he only asserted, without supporting evidence, that '[b]ased on [his] past experience,' such part-time positions could exist. His request for part-time work would require [employer] to essentially create a new position for him. That is not a reasonable accommodation required by the ADA." (fourth and fifth alterations in

demonstrating that a science teacher's job-share request would cause undue hardship because, although the teacher had demonstrated that the school had permitted other employees to job share, she was unable to show "there was an explicitly part-time science position available."[42]

The Fourth Circuit recently applied this reasoning to conclude that even employers with formal job-sharing policies need not provide job-sharing accommodations to disabled employees. Despite the employer's history of accommodating other workers by splitting full-time positions into two part-time positions, the court concluded that the employer did not run afoul of the ADA by refusing to do the same for the plaintiff and her proposed job-share partner.[43] Instead of requiring the employer to prove undue hardship, the court reasoned that the plaintiff's desired job-share "position" did not exist unless the employer granted its approval. Effectively conflating the ADA's part-time schedule accommodation with the ADA's "reassignment to a vacant position" accommodation, the court concluded that the ADA could require an employer to allow part-time hours only when the employer had an existing part-time vacancy.[44]

2. The "Part-Time Positions Do Not Exist" Approach Contravenes the ADA's Text

The conclusion that the ADA cannot require employers to reduce disabled workers' hours sidesteps the ADA's text in several important ways. First, by

original) (citation omitted)); *White*, 529 F. App'x at 550 (holding that an employer need not "create a new part-time position where none previously existed" (citing Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 869 (6th Cir. 2007))).

42. *Eustace*, 463 F. Supp. 3d at 117.

43. For a discussion of how the employer's disparate treatment of the disabled worker in this case appears to violate the ADA, independent of the ADA's reasonable accommodation provision, see Jeannette Cox, *The "Essential Functions" Hurdle to Disability Justice*, 84 OHIO ST. L.J. (forthcoming 2023) (manuscript at 29–31) (on file with author).

44. *Id.* at 956–62; *cf. Whalen*, 2012 WL 3166601, at *15 ("[I]n light of the fact that the company concluded that all IT positions required full-time presence in the office, plaintiff failed to show that there were reasonable accommodations available . . . ."). Courts apply identical reasoning to affirm employers' refusals to modify mandatory overtime policies to accommodate people whose disabilities limit their capacity to work over forty hours per week. For example, the Eighth Circuit held that a plaintiff unable to work more than forty hours per week "fails to show a reasonable accommodation existed because all of [the employer]'s production jobs required overtime." *Tjernagel*, 533 F.3d at 673. Some jurisdictions further narrow the circumstances in which disabled workers may obtain part-time schedules by holding that the employer's duty to reassign a disabled worker applies only when the disabled worker is the most qualified applicant for the vacancy. In those jurisdictions, the part-time schedule accommodation does not even do the minimal work of giving disabled people priority for placement in vacant part-time positions. Instead, they must compete to fill part-time vacancies on the same terms as all other applicants, just as disabled workers did prior to the enactment of the ADA's reasonable accommodation provision. *See* U.S. EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1345–46 (11th Cir. 2016) (holding that the ADA's "reassignment to a vacant position" accommodation does not require employers to prefer employees with disabilities for vacancies when the employer's normal practice is to fill vacancies with the most qualified applicant); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (same); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (same). *But see* EEOC v. United Airlines, Inc., 693 F.3d 760, 764–65 (7th Cir. 2012); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304–05 (D.C. Cir. 1998) (en banc).

holding that employers who do not want to permit part-time work need not do so, it contravenes the ADA's requirement that employers provide part-time schedule accommodations. Just like the ADA's other listed accommodations—which include modifying physical facilities—the ADA's text does not require part-time schedules only when the employer voluntarily chooses to provide them; they are instead a statutory duty limited solely by reasonableness and the affirmative defense of undue hardship.[45]

Second, the "Part-Time Positions Do Not Exist" approach ignores Congress's choice to separately list "part-time or modified work schedules" and "reassignment to a vacant position" as two distinct accommodations.[46] By concluding that the ADA requires part-time schedule accommodations only when they amount to "reassignment to a vacant position," courts collapse the ADA's part-time schedule accommodation into the reassignment accommodation. In so doing, they violate the well-established principle of statutory interpretation, recently affirmed by the Supreme Court, that courts should "avoid a reading which renders some words altogether redundant."[47]

Collapsing the ADA's part-time schedule accommodation into the reassignment accommodation also contravenes the ADA's legislative history, which treats part-time schedules and reassignments as two distinct accommodations. A Senate committee report, for example, spends an entire paragraph discussing "[p]art-time or modified work schedules," explaining that "[s]ome people with disabilities are denied employment opportunities because they cannot work a standard schedule."[48] The paragraph that follows treats reassignment as an entirely different accommodation: it begins by stating that "[r]easonable accommodation may *also include* reassignment to a vacant position.[49]

Finally, the ADA's usage of the term "employment position" bars courts' conclusions that part-time schedule accommodations impermissibly "*create* new positions"[50] rather than modify existing ones. The ADA provides that employers cannot discriminate against individuals "who, with or without reasonable accommodation, can perform the essential functions of *the employment position* that such individual holds or desires."[51] This language signals that it is inappropriate to characterize the ADA's listed reasonable accommodations—including "part-time or modified schedules"—as *creating* a new position. Instead, a part-time schedule accommodation enables an individual with a disability to work "the employment position that such an individual holds or desires."[52] Accordingly, the

45. 42 U.S.C. §§ 12111(9), 12112(b)(5)(A).

46. *See id.* § 12111(9).

47. Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1360 n.3 (2020) (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995)).

48. S. REP. NO. 101-116, at 31 (1989).

49. *Id.* (emphasis added). A House committee report similarly treats the two accommodations as different and distinct. *See* H.R. REP. NO. 101-485, pt. 2, at 62–63 (1990).

50. Perdue v. Sanofi-Aventis U.S., LLC, 999 F.3d 954, 962 (4th Cir. 2021) (emphasis added).

51. 42 U.S.C. § 12111(8) (emphasis added); *see also* 42 U.S.C. § 12111(9).

52. 42 U.S.C. § 12111(8).

conclusion that a part-time schedule accommodation impermissibly "*creates* a new position" contravenes the ADA's text. Within the ADA's structure, employers must permit part-time schedule accommodations when necessary to enable a disabled worker to perform the position's essential functions so long as the part-time schedule will not cause the employer undue hardship.

3. The "Part-Time Positions Do Not Exist" Approach Mischaracterizes Supreme Court Case Law

In addition to contravening the ADA's text, the "Part-Time Positions Do Not Exist" approach mischaracterizes Supreme Court case law. In *Terrell v. USAir*, the leading early "Part-Time Positions Do Not Exist" case, the Eleventh Circuit claimed that the Supreme Court's remand instructions in *School Board of Nassau County v. Arline* supported the conclusion that the ADA's part-time schedule accommodations duty only requires "reassignment to a vacant position" accommodations.[53] Since *Terrell*, many courts have cited *Arline* for the same proposition.[54] They fail to acknowledge that the *Arline* decision actually said nothing about the ADA's part-time schedule accommodation, and that a post-*Arline* Supreme Court opinion rejects *Terrell*'s reasoning.

The sole issue *Arline* decided was that disability discrimination law protects people with potentially contagious illnesses.[55] After making this determination, the Supreme Court instructed the district court to assess whether the plaintiff's work as an elementary school teacher posed a significant risk of disease transmission.[56] The Court noted that, if the district court determined that the risk was significant, it should carefully consider whether risk-reducing accommodations could enable the plaintiff's continued employment. In a footnote, the Court explained:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was

53. *See* Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998) ("[E]mployers are only required to provide 'alternative employment opportunities reasonably available under the employer's existing policies.'" (quoting Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 289 n.19 (1987))). *Terrell* built on similar use of *Arline* by the U.S. District Court for the District of Columbia in a case later reversed by the U.S. Court of Appeals for the D.C. Circuit. *See* Whitbeck v. Vital Signs, Inc., 934 F. Supp. 9, 16 (D.D.C. 1996), *rev'd on other grounds*, 116 F.3d 588 (D.C. Cir. 1997) (concluding that employers do not have to provide part-time accommodations). *Whitbeck* relied on a First Circuit case, which cited *Arline*. *See* August v. Offs. Unlimited, Inc., 981 F.2d 576, 581 n.4 (1st Cir. 1992) ("[E]mployers 'are not required to find another job for an employee who is not qualified for the job he or she was doing.' Employers are only required not to 'deny an employee alternative employment opportunities reasonably available under the employer's existing policies.'" (quoting *Arline*, 480 U.S. at 289 n.19)).

54. *See, e.g.*, Curry v. Wilkie, No. 2:12-CV-0608-SLB, 2019 WL 1226112, at *12 (N.D. Ala. Mar. 15, 2019); Williams v. Cadence Bank, No. 5:16cv266/MCR/GRJ, 2018 WL 7360632, at *7 (N.D. Fla. Oct. 9, 2018); Matthews v. Vill. Ctr. Cmty. Dev. Dist., No. 5:05-cv-344-Oc-10GRJ, 2006 WL 3422416, at *16 (M.D. Fla. Nov. 28, 2006).

55. *See Arline*, 480 U.S. at 275, 285–86.

56. *Id.* at 288–89.

> doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.[57]

Within the context of the Court's remand instructions, this footnote does not support the *Terrell* court's conclusion that the ADA's part-time schedule accommodation applies only when employers have existing part-time vacancies. The *Arline* plaintiff never requested a part-time schedule; she instead desired to continue working full-time as an elementary school teacher or, if that was not possible, to be reassigned to a full-time administrative position or a full-time position teaching secondary or adult education.[58]

The *Arline* footnote does not take a position on part-time schedule accommodations. Instead, it simply affirms the appellate decision it reviewed, which had remanded the case to the district court "'for further findings as to whether the risks of infection precluded Mrs. Arline from being "otherwise qualified" for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position' or in some other position."[59] Accordingly, *Terrell*'s conclusion that *Arline* supports its "Part-Time Positions Do Not Exist" approach is unjustified.

Continued reliance on *Arline* to support the "Part-Time Positions Do Not Exist" approach is even more unjustified after the Supreme Court's decision in *US Airways v. Barnett*.[60] In *Barnett*, the Supreme Court expressly quoted the ADA's list of reasonable accommodations—including "part-time or modified work schedules"—to illustrate that the ADA requires an employer to provide people with disabilities work opportunities not normally available under the employer's existing policies.[61] The Court explained that, by definition, a reasonable accommodation "requires the employer to treat an employee with a disability differently."[62] It stressed that "the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."[63]

Nevertheless, even after *Barnett*, some courts continue to present *Terrell*'s mischaracterization of *Arline* as "well-settled ADA precedent.'"[64] Selectively

57. *Id.* at 289 n.19.

58. *See* Arline v. Sch. Bd. of Nassau Cnty., 772 F.2d 759, 765 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987); *see also Arline*, 772 F.2d at 761 ("In the alternative, she claimed that even if nonsusceptibility to tuberculosis was a necessary physical qualification for teaching small children, the school district should have offered her 'reasonable accommodation' in the form of an administrative job or a temporary position teaching less susceptible persons such as older students or adults . . . .").

59. *Arline*, 480 U.S. at 277 (quoting *Arline*, 772 F.2d at 765).

60. *See* 535 U.S. 391, 398 (2002).

61. *Id.*

62. *Id.* at 397.

63. *Id.*

64. Curry v. Wilkie, No. 2:12-CV-0608-SLB, 2019 WL 1226112, at *12 (N.D. Ala. Mar. 15, 2019); *see also* Williams v. Cadence Bank, No. 5:16cv266/MCR/GRJ, 2018 WL 7360632, at *7 (N.D. Fla. Oct. 9, 2018); Matthews v. Vill. Ctr. Cmty. Dev. Dist., No. 5:05-cv-344-Oc-10GRJ, 2006 WL 3422416, at *16 (M.D. Fla. Nov. 28, 2006).

quoting from the *Arline* Court's observation that employers "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies,"[65] they falsely claim that *Arline* supports the proposition that "employers are *only* required to provide 'alternative employment opportunities reasonably available under the employer's existing policies" and that, accordingly, the ADA never requires employers to reduce the hours of a standard-hour job, split a standard-hour position into two positions, or permit job sharing.[66] This mischaracterization of Supreme Court precedent illustrates the extreme lengths courts employ to contravene the ADA's express textual endorsement of part-time schedule accommodation.

B. THE "FULL-TIME HOURS ARE ESSENTIAL" APPROACH

The "Full-Time Hours are Essential" approach, although different from the "Part-Time Positions Do Not Exist" approach, similarly gives employers freedom to exclude people unable to work standard hours. Ignoring the ADA's textual endorsement of part-time schedule accommodations, it reasons that employers' preferred hours are "essential" even in situations in which the employer could easily spread a job's tasks across two employees working shorter hours.

Courts employing the "Full-Time Hours are Essential" approach emphasize that the ADA defines "qualified individual" to mean "an individual who, with or without reasonable accommodation, can perform *the essential functions* of the employment position that such individual holds or desires."[67] Emphasizing the structure of this definition, courts stress that the ADA's reasonable accommodation mandate cannot remove any of a job's "essential functions."[68]

Then, ignoring legislative history that explains "'essential functions' means job tasks," such as driving, lifting, or communicating,[69] courts characterize the capacity to work the employer's preferred hours as itself an "essential function" that the reasonable accommodation mandate cannot remove.[70] Within this framework, courts nullify the ADA's part-time schedule accommodation by reasoning that an accommodation request that involves "working only four hours each day

---

65. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 289 n.19 (1987).

66. *Curry*, 2019 WL 1226112, at *12 (emphasis added) (quoting Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998)) (relying on *Terrell*, which quoted *Arline*, 480 U.S. at 389 n.19); *see also Williams*, 2018 WL 7360632, at *7 (quoting *Terrell*, 132 F.3d at 626–27 and *Arline*, 480 U.S. at 289 n.19); *Matthews*, 2006 WL 3422416, at *16 (quoting *Arline*, 480 U.S. at 289 n.19).

67. *Id.* § 12111(8).

68. *See, e.g.*, Pullins v. Conagra Brands, Inc., No. 3:19-cv-21, 2020 WL 3057861, at *9 (S.D. Ohio June 9, 2020) ("[A] reasonable accommodation 'does *not* include removing an "essential function" from the position, for that is *per se* unreasonable.'"); Davis v. Microsoft Corp., 70 P.3d 126 132–33 ("Given the definition of 'essential functions,' as that term is used in [disability discrimination law, the] law does not require an employer to eliminate such a job duty.").

69. H.R. REP. NO. 101-485, pt. 2, at 55–56 (1990); S. REP. NO. 101-116, at 26 (1989); *see also* 29 C.F.R. § 1630.2(n)(1) (2021) ("The term *essential functions* means the fundamental job *duties* of the employment position . . . ." (second emphasis added)).

70. *See, e.g.*, White v. Standard Ins. Co., 895 F. Supp. 2d 817, 837 (E.D. Mich. 2012), *aff'd*, 529 F. App'x 547 (6th Cir. 2013) ("Plaintiff, in seeking to permanently have part-time employment, effectively requested that an essential function of her position be eliminated . . . .").

does not allow [the plaintiff] to work eight to ten hours each day."[71] The Seventh Circuit has embraced this "Full-Time Hours Are Essential" approach especially forcefully, concluding—in stark contravention of the ADA's text—that people who are "physically incapable of working full time . . . [are] not within the Act's protections."[72]

1. The "Full-Time Hours Are Essential" Approach in Practice

Caroselli v. Allstate Insurance Co. illustrates the "Full-Time Hours Are Essential" approach.[73] After a business restructuring, Allstate insisted that Corinne Caroselli, who had been hired to work three days a week (and had done so for two years), begin working full-time.[74] When Caroselli explained that her disability (fibromyalgia) precluded full-time hours, Allstate terminated her.[75] Despite undisputed evidence that Caroselli had consistently performed well, the court concluded that Allstate's decision to lengthen Caroselli's hours (or, in other words, Allstate's decision to begin characterizing full-time hours as "essential") meant that Caroselli—who continued to need part-time hours—was unable to perform the "essential function" of full-time hours.[76] In this way, the court excused Allstate from any obligation to explain why it did not hire a second part-time worker to supplement Caroselli, an option which likely would have been less expensive than terminating Caroselli and replacing her with a new, full-time hire.[77]

71. *Pullins*, 2020 WL 3057861, at *9. *See also* Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1048 (8th Cir. 1999) (concluding that an insurance claims representative who "was limited to only four hours per day" could not perform the "essential function" of full-time hours); Lauby v. Swanson, No. 96-3301, 1997 WL 561334, at *4 (6th Cir. 1997) (concluding that full-time hours were an essential function); Brooks v. Lab'y Corp. of Am., No. 04-0084-CV-W-SOW, 2005 WL 2250827, at *14 (W.D. Mo. Sept. 15, 2005), *aff'd per curiam*, 226 F. App'x 615 (8th Cir. 2007) ("An employee who has a full-time position, but who is only able to return to work on a part-time basis, is not qualified to perform the essential functions of their full-time position." (citation omitted)); Konspore v. Friends of Animals, Inc., No. 3:10cv613 (MRK), 2012 WL 965527, at *11 (D. Conn. Mar. 20, 2012) (holding that "full-time work was itself an essential function"); Hoffman v. Zurich Fin. Servs., No. 06 C 4980, 2007 WL 4219414, at *6 (N.D. Ill. Nov. 28, 2007) (concluding that the plaintiff's "inability to work a full-time schedule for her full-time job means that [she] was not a qualified individual").

72. DeVito v. Chi. Park Dist., 270 F.3d 532, 534 (7th Cir. 2001); *see also* Lamb v. Qualex, Inc., 33 F. App'x 49, 51–53, 56–57 (4th Cir. 2002) (holding, in a case where the plaintiff had requested reduced hours, that "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA" (citing Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 213 (4th Cir. 1994))).

73. *See* No. 01 C 6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004).

74. *Id.* at *4–*5.

75. *Id.* at *2.

76. *Id.* at *4–5.

77. *Cf.* GOLDEN, *supra* note 7, 11 (finding that, within industries and occupations that permit part-time work, part-time workers earn 20% less per hour than full-time workers in the same industry and occupation); Meinen v. Godfrey Brake Serv. & Supply, Inc., No. CIV. 10-5077-JLV, 2012 WL 4364669, at *4 (D.S.D. Sept. 24, 2012) (noting that the cost of employing a single full-time employee was far more expensive than employing two part-time employees to do the same work because the full-time employee was paid 44% more in wages than the combined cost of two part-time employees and entitled to benefits); EEOC, EEOCM1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 7.8 (1992), https://www.eeoc.gov/laws/guidance/

Courts frequently use the same logic to excuse employers from justifying their refusal to adjust unusually long work-hour requirements.[78] For example, in *Davis v. Microsoft Corp.*, the plaintiff, who experienced fatigue due to a chronic hepatitis C infection, argued that his sixty-to-eighty-hour job was susceptible to easy division because it consisted of servicing two distinct accounts.[79] He further noted that Microsoft had previously, on a temporary basis, divided his sixty-to-eighty-hour job into two thirty-to-forty-hour jobs.[80] Despite this evidence demonstrating the feasibility of job sharing, the court did not require Microsoft to demonstrate undue hardship. Instead, the court accepted at face value Microsoft's assertion that sixty-to-eighty-hour weeks were an "essential function."[81] The majority rejected the dissenting judge's argument, better grounded in the text of the Washington Law Against Discrimination (and, analogously, the ADA), that "an employer's 'culture' of requiring long hours of employment, standing alone, is never an essential element of a job."[82]

As this exchange between the majority and dissent in *Davis* illustrates, courts adopting the "Full-Time Hours Are Essential" approach heavily defer to employers' views that long hours are essential. For example, the following two sentences

technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act [https://perma.cc/VL3S-BSN4] ("An employee who is reassigned to a lower paying job or provided a part-time job as an accommodation may be paid the lower amount that would apply to such positions, consistent with the employer's regular compensation practices.").

78. *See, e.g.*, McNeil v. Union Pac. R.R. Co., 936 F.3d 786, 791 (8th Cir. 2019) (holding that overtime is an essential function); Faidley v. United Parcel Serv. of Am., Inc., 889 F.3d 933, 941 (8th Cir. 2018) (en banc) (same); Rincon v. Am. Fed'n of State, Cnty. & Mun. Emps., 638 F. App'x 631, 632–33 (9th Cir. 2016) (upholding summary judgment because the plaintiff was not a "qualified individual" where her forty-hour work restriction prevented her from "working extended hours and six to seven day weeks"); Agee v. Mercedes-Benz U.S. Int'l, Inc., 646 F. App'x 870, 875–76 (11th Cir. 2016) (per curiam) (holding that overtime is an essential function); Tjernagel v. Gates Corp., 533 F.3d 666, 673 (8th Cir. 2008) (holding that mandatory overtime, including working six to seven days a week, is an essential function); Tardie v. Rehab. Hosp. of R.I., 168 F.3d 538, 543–44 (1st Cir. 1999) (concluding, in dicta, that an accommodation of a forty-hour work week was unreasonable as a matter of law because working fifty to seventy hours was an essential function); Johnson v. Ford Motor Co., No. 17-cv-11412, 2019 WL 78893, at *11 (E.D. Mich. Jan. 2, 2019), *aff'd*, 786 F. App'x 598 (6th Cir. 2019) (holding that ten-hour shifts are an essential function); Mattingly v. Univ. of S. Fla. Bd. of Trs., 931 F. Supp. 2d 1176, 1184 (M.D. Fla. 2013) (holding that twelve-hour shifts are an essential function); EEOC. v. AT&T Mobility Servs. LLC, No. 10-13889, 2011 WL 6309449, at *8 (E.D. Mich. Dec. 15, 2011) (holding that working fifty-five to sixty hours per week is an essential function); Jackson v. Simon Prop. Grp., Inc., 795 F. Supp. 2d 949, 961 (N.D. Cal. 2011) (holding that working fifty to seventy hours per week is an essential function); Nance v. Quickrete Co., No. 4:06CV00058, 2007 WL 1655154, at *4 (W. D. Va. June 5, 2007) (holding that fourteen-hour days were an essential function). *But see* Roberts v. Bayhealth Med. Ctr., Inc., No. 13-1779-LPS, 2015 WL 5031961, at *1–2 (D. Del. Aug. 25, 2015) (finding triable issue as to whether twelve-hour shifts were an essential function of a rehabilitation nurse position); Larson v. Seagate Tech., Inc., No. 00CV2507, 2001 WL 1608844, at *1–3 (D. Minn. Dec. 7, 2001) (finding that whether twelve-hour shifts were an essential function was a jury question).

79. 70 P.3d 126, 129, 132–34 (Wash. 2003) (en banc) (applying the Washington Law Against Discrimination's "essential functions" language, which the court interpreted identically to the ADA).

80. *Id.* at 129.

81. *Id.* at 132–34.

82. *Id.* at 141 (Chambers, J., dissenting).

contain the entirety of the *Caroselli* court's reasoning for concluding that full-time hours were "essential":

> The undisputed evidence shows that Allstate determined that, as a result of the increase in the volume of work and client demands, a Channel Manager is required to work a full-time schedule. Caroselli does not dispute that all of the Channel Managers reporting to Caroselli's supervisor work a full-time schedule.[83]

These two facts—(1) the employer requires full-time hours and (2) the plaintiff concedes the employer requires full-time hours—amount to deferring to the employer's preference. The third fact added by many courts—that a single part-time worker could not accomplish the same amount of work as a single full-time worker—similarly stacks the deck against part-time schedule accommodations.[84]

Courts adopting the "Full-Time Hours Are Essential" approach rely heavily on language in the ADA that provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[85] Courts fail to acknowledge that this language applies solely to *job tasks*, not to the accommodation-eligible structural elements of work such as schedules and hours.

2. The Conflict Between the "Full-Time Hours Are Essential" Approach and the ADA

The "Full-Time Hours Are Essential" approach elides the ADA's crucial distinction between job tasks (termed "essential functions"[86]) and work hours. As the primary House committee report on the ADA explains, the term "'essential functions' means job tasks," such as driving, lifting, or communicating.[87] By contrast, full-time schedules are not, by themselves, an essential function. They are instead a structural aspect of work that is typically severable from job tasks.

---

83. Caroselli v. Allstate Ins. Co., No. 01 C 6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004).

84. *See, e.g.*, White v. Standard Ins. Co., 529 F. App'x 547, 549–50 (6th Cir. 2013) (holding that a customer service agent who needed a four-hour schedule was unqualified because she "acknowledged on deposition that she was unable to complete the requirements of the position in a four-hour day, and other employees were then assigned on a rotating basis to cover her accounts for the other four hours of the day"); Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1048 (8th Cir. 1999) (concluding that the plaintiff "was limited to only four hours per day and she made no showing that the essential functions of her full-time job [as an insurance claims representative] could be performed in four hours" (citing Burnett v. W. Res., Inc., 929 F. Supp. 1349, 1356–57 (D. Kan. 1996))).

85. 42 U.S.C. § 12111(8).

86. *Id.*

87. H.R. REP. NO. 101-485, pt. 2, at 55–56 (1990); *see also* S. REP. NO. 101-116, at 26 (1989) ("The phrase 'essential functions' means job tasks that are fundamental and not marginal."); 29 C.F.R. § 1630.2(n)(1) (2021) ("The term *essential functions* means the fundamental job duties of the employment position . . . .").

By expressly providing that "part-time or modified schedules" may be reasonable accommodations, the ADA's text confirms that full-time hours are never themselves an essential job function.[88] Although the essential functions of some jobs (such as providing emergency snow removal services) may require the capacity to work long hours, the essential functions of most jobs do not. For example, providing customer service support, performing routine dental care, and teaching English as a second language can be successfully performed in units of time significantly less than a standard "full-time" schedule. As one of the few decisions explicitly rejecting the "Full-Time Hours Are Essential" approach explains, if it were the case that part-time schedule accommodations are unavailable in all jobs employers have deemed full-time, "the statutory suggestion that '[t]he term "reasonable accommodation" may include . . . part-time or modified work schedules,' would be superfluous."[89]

Decisions that wield ADA case law involving job tasks to deny part-time schedule accommodations demonstrate how the "Full-Time Hours Are Essential" approach conflates these concepts. For example, a First Circuit decision characterizes *Chiari v. City of League City*, an early ADA decision, as concluding that full-time hours are essential.[90] In reality, the *Chiari* court held against the plaintiff not because it found full-time hours essential, but because the plaintiff could no longer perform the job's essential tasks. The *Chiari* court explained: "[e]ven if [plaintiff] worked fewer hours, he still would not be able to climb buildings or climb into ditches, 'essential functions' of a construction inspector's job."[91] By citing *Chiari* in support of the different proposition that the ADA cannot require

---

88. *See* 42 U.S.C. § 12111(9)(B).

89. Cranman v. BB&T Ins. Servs., Inc., No. 405CV200, 2006 WL 8434111, at *7 (S.D. Ga. Sept. 11, 2006) (quoting 42 U.S.C. § 12111(9)(B)) (alteration in original); *see also* Hostettler v. Coll. of Wooster, 895 F.3d 844, 857 (6th Cir. 2018) ("[F]ull-time presence at work is not an essential function of a job simply because an employer says that it is. If it were otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week. That could mean denying leave for doctor's appointments, dialysis, therapy, or anything else that requires time away from work . . . ."); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 63–64 (2005) ("If either Congress or the EEOC had intended full-time work or rigid daily schedules to constitute 'essential job functions,' then they would not have listed these forms of 'part-time or modified work schedules' as reasonable accommodations, which, by definition, may not eliminate an essential function of the job."); Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 11, Davis v. Fla. Power & Light Co., Nos. 99-4076 & 99-10524 (11th Cir. June 11, 1999) ("[I]f the essential job function is characterized—incorrectly, we submit—as including . . . working a full 8 hours, then the disabled employee would not be entitled to a modified work schedule as an accommodation, even if a schedule modification would enable him or her to perform the job with no undue hardship on the employer. Such a result plainly is inconsistent with the ADA because it would rule out modified work schedules, an accommodation explicitly envisioned by the statute . . . .").

90. *See* August v. Offs. Unlimited, Inc., 981 F.2d 576, 581 n.4 (1st Cir. 1992) ("[T]he City does not have to create a new job for Chiari; therefore, it does not have to create a new part-time position for him." (quoting Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991))).

91. 920 F.2d at 318.

part-time schedule accommodations, the First Circuit elided the important distinction between job tasks and work hours.[92]

In addition to inappropriately conflating work hours with job tasks, courts taking the "Full-Time Hours Are Essential" approach ignore the inconsistency between their treatment of part-time schedule accommodation requests and requests for other ADA accommodations. Employers are not free to deny other listed ADA accommodations—such as the "acquisition or modification of equipment or devices"—simply because they do not want to provide them.[93] So long as these accommodations are reasonable, employers must provide them unless they can demonstrate the "significant difficulty or expense" necessary to establish the ADA's undue hardship defense.[94]

In sum, the "Full-Time Hours Are Essential" approach, like the "Part-Time Positions Do Not Exist" approach, contravenes the ADA's express textual endorsement of part-time schedule accommodations. Both approaches permit employers to exclude people unable to work long hours without demonstrating that reduced hours would cause undue hardship. The shaky justifications courts offer in support of both approaches invite closer examination of courts' unstated—and perhaps unconscious—reasons for refusing to enforce the ADA's part-time schedule accommodation.

III. COURTS' UNSTATED REASONS FOR REFUSING TO ENFORCE THE ADA'S PART-TIME SCHEDULE ACCOMMODATION

Close examination of the case law reveals that the current cultural bifurcation between higher quality full-time work and more marginal part-time work drives courts' reluctance to implement the ADA's part-time schedule accommodation. Although courts may not be consciously aware of the extent to which this cultural status quo influences their decisions, the case law suggests that the forty-hour norm is deeply entrenched in judicial thinking. It also suggests that courts are concerned that implementing the ADA's textual promise of part-time schedule accommodations would, in the current cultural context, create an unusually favored class of part-time workers.

---

92. *See August*, 981 F.2d at 581 n.4 (citing *Chiari* for the proposition that "courts have found no duty to accommodate handicapped employees by modifying the job schedule"); *see also* Butler v. Direct TV, No. B201173, 2008 WL 4491896, at *4 (Cal. Ct. App. Oct. 8, 2008) (citing *Chiari* for the proposition that the ADA cannot require employers to provide part-time schedule accommodations if the employer does not already have an appropriate part-time vacant position). Subsequent decisions in other jurisdictions have built upon the First Circuit's error to justify denying part-time schedule accommodations. *See, e.g.*, Terrell v. USAir, 132 F.3d 621, 626 (11th Cir. 1998) ("This type of accommodation by an employer, providing an entirely new part-time position for a disabled employee, courts have found is not required by the ADA." (quoting Whitbeck v. Vital Signs, Inc., 934 F. Supp. 9, 16 (D.D.C. 1996), *rev'd on other grounds*, 116 F.3d 588 (D.C. Cir. 1997))). *Whitbeck* relied on *August*'s mischaracterization of *Chiari* to conclude that the ADA does not require employers that lack vacant part-time positions to provide part-time schedules. *Whitbeck*, 934 F. Supp. at 16 (citing *August*, 981 F.2d at 581 n.4).

93. 42 U.S.C. §12111(9)(B).

94. *Id.* §§ 12111(10)(A), 12112(b)(5)(A).

A. NEW EVIDENCE DEMONSTRATING THAT THE FORTY-PLUS HOUR NORM IS DEEPLY ENTRENCHED

1. Courts' Disparate Treatment of Unusually Long Hours Versus Standard Hours

Courts' disparate treatment of unusually long hours versus standard hours suggests that work-hour norms drive courts' thinking about part-time schedule accommodations. Instead of focusing on whether an employer's hour preferences unnecessarily exclude people with disabilities, courts focus instead on whether an employer's hour requirements unnecessarily exceed the norm.

For example, the Tenth Circuit concluded that the ADA mandated a substantial change to a directional driller job that involved extremely demanding hours. As designed by the employer, the job required nonstop work (twenty-four hours a day) for two ten-to-twelve-day periods per month.[95] Reasoning that the plaintiff, who had hepatitis C and diabetes, needed "time off to rest and recover," the Tenth Circuit concluded that the ADA required the employer to split the job into two positions.[96] Shortly thereafter, however, a district court within the Tenth Circuit declined to extend this reasoning to a sixty-hour job.[97] Even though the plaintiff, a finance manager with multiple sclerosis, similarly needed more time to rest and recover, the court held that his request for a forty-hour week was "not, as a matter of law, a reasonable or even plausible accommodation."[98]

Cases from the District of Minnesota tell a similar story. Within the past decade, at least two District of Minnesota cases have concluded that the ADA's part-time schedule accommodation does not require an employer to accommodate disabled employees unable to work over forty hours per week.[99] By contrast, another District of Minnesota case held that a jury could conclude that an employer violated the ADA by refusing to accommodate a plaintiff's inability to work shifts exceeding twelve hours.[100]

This tendency to apply the ADA's part-time schedule accommodation only to hours that substantially exceed able-bodied work-hour norms fails to accomplish the ADA's goal of adjusting *standard* hour requirements to accommodate people with disabilities. It indicates that courts—likely unconsciously—prioritize the preservation of standard-hour norms over the ADA's goal to integrate disabled people that standard-hour norms exclude.

---

95. Carter v. Pathfinder Energy Servs., Inc., 662 F.3d 1134, 1147 (10th Cir. 2011).

96. *Id.*

97. Fralick v. Ford, No. 2:12-cv-1210-EJF, 2014 WL 1875705, at *1–2 (D. Utah May 9, 2014).

98. *Id.* at *6 (quoting Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1122 (10th Cir. 2004)).

99. *E.g.*, Chavira v. Crown Cork & Seal USA, Inc., No. 13-1734, 2015 WL 4920094, at *8–9 (D. Minn. Aug. 18, 2015) (holding that overtime is an essential function); Johnson v. City of Blaine, 970 F. Supp. 2d 893, 912 (D. Minn. 2013) (holding that "mandatory overtime was an essential" function).

100. Morrissey v. Laurel Health Care Co., 946 F.3d 292, 303 (6th Cir. 2019) (concluding that a jury could reasonably find that the plaintiff was constructively discharged when her employer refused to accommodate her inability to work shifts that exceeded twelve hours).

2. Courts' Preference for *Temporary* Part-Time Schedule Accommodations

Courts' disparate treatment of temporary and permanent part-time schedule requests further illustrates their prioritization of standard-hour norms. Some courts that hold the ADA cannot require permanent part-time schedules conclude that the ADA requires *temporary* part-time schedules for the purpose of facilitating "gradual return to full-time work."[101] They reason that the ADA can require temporary part-time schedules because, as with a medical leave, the employee resumes working full-time hours after a discrete, relatively short, period.[102] In other words, the full-time job remains unchanged while the employee is temporarily absent from the full-time job—or more accurately, a fraction of it. For example, in *EEOC v. Journal Disposition Corp*., a court held that a jury could find the ADA required an employer to allow a machinist to work just 25% of his usual work hours for twenty-four weeks.[103] The court relied on the principle that "[l]eave requests are not generally found to be unreasonable as a matter of law unless they are of indefinite duration, or are in excess of one year."[104]

Courts continue the medical leave analogy to justify their conclusion that the ADA cannot require *permanent* part-time schedules. They reason that requiring employers to provide part-time schedules on a long-term basis is tantamount to requiring employers to maintain employment relationships with people unable to work at all. In the words of one court: "[t]he ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence. Concomitantly, the ADA does not require an employer to permit an employee to work a full-time job on a part-time schedule indefinitely."[105] Courts adopting this view reason that the ADA cannot require

101. *See, e.g.*, DeVito v. Chi. Park Dist., 270 F.3d 532, 534 (7th Cir. 2001) (quoting Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 498 (7th Cir. 2000)); McNeil v. Union Pac. R.R. Co., 936 F.3d 786, 790–91 (8th Cir. 2019) (suggesting that a short-term restriction on overtime would have been reasonable but granting summary judgment to the employer because the employer reasonably believed the plaintiff's hours restriction was permanent); *Pals*, 220 F.3d at 498 (concluding that "gradual return to full-time work" can be a reasonable accommodation).

102. *See, e.g.*, Barnes v. Dep't of Corr., No. 18-cv-105-jdp, 2020 WL 5646328, at *2 (W.D. Wis. Sept. 22, 2020) ("[P]roviding a full-time employee with part-time work temporarily may be a reasonable accommodation, depending on the circumstances." (citing *Pals*, 220 F.3d at 498)); Coad v. Buckman Lab'ys, Inc., No. 1:14-cv-254-NT, 2016 WL 1089229, at *11 (D. Me. Mar. 18, 2016) (finding a triable issue as to whether the plaintiff was a qualified individual because "granting [her] a *temporary* part-time schedule might have made it possible for her to perform an essential function of her job—full-time work"); Cairo v. Starbucks Corp., No. 11-11750-DJC, 2013 WL 5229968, at *12 (D. Mass. Sept. 13, 2013) (reasoning that a jury could find that the requested accommodation did not involve "creating a new job" because it involved shifting plaintiff's hours for a limited and "discrete time period of one month").

103. EEOC v. J. Disposition Corp., No. 1:10-CV-886, 2011 WL 5118735, at *4 (W.D. Mich. Oct. 27, 2011).

104. *Id.*

105. Fanning v. Senior Flexonics, Inc., No. 97 C 0807, 1999 WL 642238, at *11 (N.D. Ill. Jan. 13, 1999) (citations omitted); *see also* Nartey-Nolan v. Siemens Med. Sols. USA, Inc., 91 F. Supp. 3d 770, 774 (E.D.N.C. 2015) (holding, in a case involving a six-hour daily work restriction, that "[w]hile gradual return to work may be a reasonable accommodation, . . . '[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to

permanent part-time schedules because the ADA does "not require an employer to wait indefinitely for the employee's medical conditions to be corrected."[106] For example, in *Nartey-Nolan v. Siemens Medical Solutions USA, Inc.*, the court dismissed a claim by a clerical employee whose scoliosis prevented her from working more than six hours per day because her doctor testified that her condition was unlikely to improve to the point where she could work eight-hour days. The court reasoned that "[w]hile gradual return to work may be a reasonable accommodation, . . . '[n]othing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect.'"[107]

This equation of indefinite part-time schedules with indefinite medical leave reduces the ADA's barrier-removing civil rights framework to a medicalized "time off to recover" framework. Rather than adjusting the work-hour norm to accommodate disabled people, it provides disabled people a short period of time to conform themselves to the work-hour norm. This interpretation of the ADA provides nothing for the large number of people whose work capacity falls below the norm for years, if not their entire lives. It blithely writes this group out of the ADA with the atextual conclusion that "the Americans with Disabilities Act protects only persons who over the long run are capable of working full time."[108]

---

achieve its intended effect'" (quoting Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995)) (second alteration in original)); Brooks v. Lab'y Corp. of Am., No. 04-0084-CV-W-SOW, 2005 WL 2250827, at *14 (W.D. Mo. Sept. 15, 2005) ("[The defendant] was not required to allow plaintiff to return to work on a part-time basis on the potential for her to recover and be able to resume her . . . position full-time at some unknown time in the future."), *aff'd per curiam*, 226 F. App'x 615 (8th Cir. 2007); White v. Standard Ins. Co., 895 F. Supp. 2d 817, 837, 839 (E.D. Mich. 2012) (holding for the employer because the "[p]laintiff, in seeking to permanently have part-time employment, effectively requested that an essential function of her position be eliminated"), *aff'd*, 529 F. App'x 547 (6th Cir. 2013); *cf.* Brooks v. State, No. L-1618-07, 2011 WL 3924832, at *10 (N.J. Super. Ct. App. Div. Sept. 8, 2011) (concluding that, under the New Jersey Law Against Discrimination, "[r]easonable accommodation need not include indefinite part-time work schedules" (citing Muller v. Exxon Rsch. & Eng'g Co., 786 A.2d 143, 150 (N. J. Super Ct. App. Div. 2001))); Hostettler v. Coll. of Wooster, 895 F.3d 844, 856 n.3 (6th Cir. 2018) (noting that the plaintiff "never claimed, nor do we hold, that [the plaintiff] had a right to perform her job on a part-time basis indefinitely"). *But see* Brady v. United Refrigeration, Inc., No. 13-6008, 2015 WL 3500125, at *4 n.15, *12 (E.D. Pa. June 3, 2015) (characterizing the plaintiff's ongoing need for three to six hours off work per week to address symptom flare-ups as reasonable "finite periods of medical leave").

106. Gonzalez v. United Parcel Serv., Inc., No. 5:15-CV-986-RCL, 2018 WL 4699274, at *12 (W.D. Tex. Sept. 28, 2018) (quoting Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 760 (5th Cir. 1996)), *aff'd sub nom.* Gonzalez v. United Parcel Serv., 777 F. App'x 735 (5th Cir. 2019). The Eighth Circuit has expressed a similar view toward Family and Medical Leave Act (FMLA) reduced leave schedules, discussed *infra* in Section III.B.1. *See* Wisbey v. City of Lincoln, 612 F.3d 667, 675–76 (8th Cir. 2010) (arguing, in a case where the plaintiff had asked to take reduced schedule leave, that "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends" (quoting Throneberry v. McGehee Desha Cnty. Hosp., 403 F.3d 972, 978 (8th Cir. 2005))), *abrogated on other grounds*, Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

107. *Nartey-Nolan*, 91 F. Supp. 3d at 774 (second alteration in original) (quoting *Myers*, 50 F.3d at 283).

108. Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007 (7th Cir. 2001).

B. RELUCTANCE TO CREATE A FAVORED CLASS OF PART-TIME WORKERS

In addition to demonstrating courts' strong deference to standard-hour norms, the case law indicates that courts are sensitive to the reality that employer-constructed full-time and part-time opportunities typically differ on many metrics other than total compensation and hours worked. In many industries, allowing a worker hired into a full-time position to work part-time gives that worker access to a part-time opportunity that would not otherwise exist. Depending on the employer's practices, it may also provide the worker access to benefits normally contingent on full-time hours, such as job security, employer-sponsored health insurance coverage, retirement benefits, and advancement opportunities.

Concern about creating an unusually favored class of part-time workers is on display in judicial reactions to both reduced schedule leave under the Family and Medical Leave Act (FMLA) as well as part-time schedules under the ADA.

1. Judicial Resistance to the Family and Medical Leave Act's Reduced Leave Schedule

The FMLA, in addition to providing eligible employees up to twelve weeks of unpaid leave per year, allows eligible employees with serious health conditions to modestly reduce their job's hours.[109] The FMLA calls this a "reduced leave schedule" and defines it as "a leave schedule that reduces the usual number of hours per workweek, or hours per workday."[110] As the Department of Labor (DOL) explains, "[a]n employee who never exhausts his/her 12 weeks of FMLA leave in a 12 months period (e.g., takes medical leave one day in a five-day workweek)" may use FMLA leave "indefinitely."[111] Accordingly, FMLA-eligible[112]

---

109. 29 U.S.C. § 2612(a)(1); U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter (July 10, 1998) ("Under FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 workweeks of leave in any 12 month period with group health plan benefits maintained during this time."); *see also* 29 C.F.R. § 825.204(c) (2014) ("The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.").

110. 29 U.S.C. § 2611(9); *see also* 29 C.F.R. § 825.202(a) (2014) ("A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time."). Although the FMLA requires employees to obtain employer permission to use reduced schedule leave after the birth or placement of a child for adoption or foster care, employees need not obtain employer permission to use reduced schedule leave for a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(A)–(B), (b)(1).

111. U.S. Dep't of Lab., Wage & Hour Div., *supra* note 109 ("The fact that [a health] condition is permanent and the employee will more than likely not be able to return to full employment in the near future would not diminish the employee's entitlement to FMLA leave, assuming the employee has met all of the employee eligibility tests under the Act."). Courts have held that employees may use FMLA reduced hour leave indefinitely to avoid mandatory overtime. *See, e.g.*, Verhoff v. Time Warner Cable, Inc., 299 F. App'x 488, 497 (6th Cir. 2008); Santiago v. Dep't of Transp., 50 F. Supp. 3d 136, 147–49 (D. Conn. 2014) (concluding that the FMLA allows an indefinite request for no overtime).

112. Forty-four percent of employees are ineligible for FMLA leave for one or more of the following reasons: (1) they have not worked for their current employer for at least twelve months, (2) they have not worked at least 1,250 hours for their current employer in the past twelve months, and/or (3) they are not at a physical work location where at least fifty employees work within seventy-five miles. Only 38% of low-wage workers are FMLA-eligible. *See* SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FMLA: WHO IS ELIGIBLE? 1–2 (2020),

employees that need a relatively small reduction to their hours need not risk courts' misinterpretations of the ADA's part-time schedule accommodation; they may instead use the FMLA to obtain a part-time schedule.

In keeping with their reactions to the ADA's part-time schedule accommodation, many employers have vehemently objected to the FMLA's reduced leave schedule provision. Pejoratively dubbing it the "Part-Time Employment for Full-Time Employees Act,"[113] they argue that it is unfair for employees with serious health conditions to "essentially work part-time, but reap the benefits of a full-time employee."[114] Using language that parallels their objections to the ADA's part-time schedule accommodation, employers complain that the FMLA's reduced leave schedule provision "results, in effect, in the creation of a new part-time position."[115] The largest source of employer frustration arises from the FMLA's requirement that employers must continue to provide workers on reduced leave schedules health insurance and other full-time benefits even when the employer does not normally provide those benefits to part-time employees.[116]

Although the clarity of the FMLA's text and accompanying DOL regulations have rendered these objections ineffective, the Eighth Circuit has expressed sympathy with employers' frustration over the DOL's position that the FMLA allows employees to work part-time hours in positions employers have designated full-time. It opined, in response to a request for ongoing reduced schedule leave, that "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends."[117]

2. Judicial Reluctance to Conclude the ADA Provides Individuals with Disabilities Part-Time Opportunities Unavailable to Others

EEOC guidance concludes that the ADA's part-time schedule accommodation is less generous than the FMLA's reduced leave schedule. According to the EEOC, the ADA only requires employers to provide the pay and benefits their policies extend to other part-time employees.[118] Although this significant concession to employer practice would seem to remove the concern, present in the FMLA, that the ADA's part-time schedule accommodation would create a

---

https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018PB1WhoIsEligible_StudyBrief_Aug2020.pdf [https://perma.cc/7B4Z-Y9JU].

113. GAIL A. GOOLKASIAN & HOLLY E. SPEHAR, EMPLOYEE LEAVE AND ACCOMMODATIONS LAW IN MASSACHUSETTS § 2.4.1(b) (4th ed. 2018).

114. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35578 (June 28, 2007) (to be codified at 29 C.F.R. pt. 825) (quoting comments from Madison Gas and Electric Company).

115. *Id.* (quoting comments from Seyfarth Shaw LLP on behalf of a not-for-profit health care organization).

116. *See* U.S. Dep't of Lab., Wage & Hour Div., *supra* note 109.

117. Wisbey v. City of Lincoln, 612 F.3d 667, 675 (8th Cir. 2010) (quoting Throneberry v. McGehee Desha Cnty. Hosp., 403 F.3d 972, 978 (8th Cir. 2005), *abrogated on other grounds*, Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

118. EEOC, *supra* note 77 ("An employee who is reassigned to a lower paying job or provided a part-time job as an accommodation may be paid the lower amount that would apply to such positions, consistent with the employer's regular compensation practices.").

favored class of part-time workers, that concern nonetheless appears to make courts reluctant to conclude the ADA requires permanent part-time schedule accommodations.

For example, in *Terrell v. USAir*, the leading early "Part-Time Positions Do Not Exist" case, part of the court's rationale for denying part-time schedule accommodations was concern that doing so would result in favoring the plaintiff over nondisabled part-time workers.[119] The court emphasized that the plaintiff made her request for a part-time schedule accommodation a few years after the employer furloughed all its part-time employees with the plaintiff's role.[120] The court stressed that, if the plaintiff had originally been hired into a part-time position, she would have been furloughed along with the rest of the part-time workforce.[121] Accordingly, the court reasoned, requiring the airline to provide the plaintiff a part-time schedule accommodation "would result in the non-disabled . . . being discriminated against—on the most basic of employment issues, that is, do you have a job at all—in favor of the disabled . . . ."[122]

In other cases denying part-time schedule accommodations, the concern about creating a favored class of part-time workers is less obvious but nonetheless present. For example, one court's conclusion that "the ADA does not require an employer to permit an employee to work a full-time job on a part-time schedule indefinitely"[123] echoes employers' concerns about the FMLA providing the special advantages of full-time work to people working less than full-time hours. Another court's conclusion that "[a] full-time position and part-time position are two separate positions, even if they might involve the same work"[124] similarly emphasizes that typical part-time and full-time opportunities provide different statuses, benefits, and per-hour compensation. Accordingly, the ongoing bifurcation between standard full-time jobs and lower quality, more marginal, part-time jobs appears to contribute to courts' reluctance to implement the ADA's part-time schedule accommodation.

IV. STRUCTURAL REFORMS TO ACHIEVE WORK-HOUR JUSTICE FOR PEOPLE WITH AND WITHOUT DISABILITIES

This explanation for courts' reluctance to implement the ADA's part-time schedule accommodation suggests that integrating people excluded by standard

---

119. 132 F.3d 621, 627 (11th Cir. 1998).

120. *Id.* at 625.

121. *Id.* at 627 ("To hold as plaintiff urges would create the anomaly that, if Plaintiff had been assigned to a part-time job one day *before* the part-time agents were furloughed, she would have been lawfully released with the other agents but, where she requested a part-time position soon *after* the part-time agents were furloughed, she would be legally entitled [under the ADA] to a permanent part-time position.").

122. *Id.* ("This would be an obvious problem. The ADA was never intended to turn nondiscrimination into discrimination. We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers." (citations omitted)).

123. Fanning v. Senior Flexonics, Inc., No. 97 C 0807, 1999 WL 642238, at *11 (N.D. Ill. Jan. 13, 1999) (citing Haschmann v. Time Warner Ent. Co., 151 F.3d 591, 601 (7th Cir. 1998)).

124. Butler v. Direct TV, No. B201173, 2008 WL 4491896, at *3 (Cal. Ct. App. Oct. 8, 2008).

work-hour norms will require significant structural reforms external to the ADA. In order to reduce courts' concerns that part-time schedule accommodations will create a favored class of part-time workers, reforms should focus on equalizing part-time and full-time work. These efforts will not only smooth the path for courts to enforce the ADA's textual promise of part-time schedule accommodations but will also make work more equitable for all workers—disabled or not—who do not fit the forty-hour norm.

A. CREATING PARITY BETWEEN FULL-TIME AND PART-TIME WORK

One strategy would require employers to treat part-time and full-time work comparably by providing equal per-hour compensation. It would also require employers to provide part-time workers the benefits full-time workers receive, albeit on a prorated basis that would reflect hours worked.[125] For example, if an employer normally deems full-time workers eligible for promotion after one year of service, half-time workers would be eligible after two years. Other benefits, such as retirement contributions and job security, could follow a similar model.

This equalization of part-time and full-time opportunities would likely reduce courts' fears that the ADA's part-time schedule accommodation would create a favored class of part-time workers. For example, had the law prevented employers from basing furlough decisions on part-time versus full-time status, it would have been more difficult for the Eleventh Circuit to conclude that the ADA cannot require part-time schedule accommodations in *Terrell v. USAir*.[126]

Creating parity between part-time and full-time opportunities would also likely make part-time work more attractive and feasible to a wider range of workers. It would normalize part-time work and, in many respects, enhance its status, which would help alleviate the marginalization currently experienced by many people who work part-time.

B. REDUCING EMPLOYERS' INCENTIVES TO PREFER LONG HOURS

Another set of reforms would focus on reducing structural incentives that nudge employers to prefer long hours. For example, basing eligibility for "small business" benefits and regulatory exemptions on a measure other than number of employees (such as profits or hours worked) may reduce some employers' incentives to prefer a smaller staff working longer hours instead of a larger staff working shorter hours.[127] More significant reforms, such as relieving employers of the

125. *See* Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 828–33 (2010) (advocating for a "Part-Time Parity Act," under which employers would be required to pay part-time workers equivalent hourly wages for equal work and provide pro-rata benefits).

126. *See supra* notes 119–22 and accompanying text.

127. Mirit Eyal-Cohen, *Down-Sizing the "Little Guy" Myth in Legal Definitions*, 98 IOWA L. REV. 1041, 1068–69, 1076–77, 1085 (2013) (noting that many small businesses' benefits are conditioned on the business's number of employees, including government contracting preferences, reduced fees for patent registration, the research and development tax credit, and small business benefits within the Affordable Care Act); *see also id.* at 1072–73, 172 n.181 (noting that many statutes contain small business exclusions from liability based on the employer's number of employees, including the Civil

obligation to provide health insurance (by adopting a single-payer healthcare system) would similarly reduce employers' incentives to prefer a smaller staff working long hours over a larger staff working more moderate hours.

An additional possible reform would shorten the standard workweek to reflect the work capacity of a wider range of Americans.[128] Research from countries that have adopted this reform indicates that it not only reduces the marginalization of people with disabilities but also improves health markers for all workers.[129] It also directly benefits employers by reducing absenteeism and accidents while increasing per-hour productivity.[130] Additionally, reforming the Fair Labor Standards Act to reduce the number of jobs exempt from overtime compensation would curb some employers' preferences for long hours.[131]

C. TYING WORK-HOUR REFORM TO BROAD CONVERSATIONS ABOUT EQUITY

These reforms would not only help people excluded by standard hour norms, but also assist the large number of people—disabled and not—currently unable to find jobs with adequate per-hour compensation and benefits. To survive, many people often work multiple part-time jobs that add up to long hours without the benefits and per-hour compensation that accompany full-time positions.[132]

Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, the Family and Medical Leave Act, the Worker Adjustment and Retraining Notification Act, and the Consolidated Omnibus Budget Reconciliation Act, which ensures that individuals have continued access to their health insurance in spite of certain events that otherwise would lead to termination of coverage); *cf.* Terrell v. USAir, 132 F.3d 621, 627 n.7 (11th Cir. 1998) (concluding that the ADA cannot require part-time schedule accommodations in part on the observation that "[m]any statutes and regulations exist that potentially affect an employer who has no part-time workers, but is later forced to hire part-time employees").

128. *See* Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 992 (2014); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Work Week in the United States*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 139–40 (Judy Fudge & Rosemary Owens eds., 2006); Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1957 (2000).

129. Inés Berniell & Jan Bietenbeck, *The Effect of Working Hours on Health*, ECON. & HUM. BIOLOGY, Dec. 2020, at 1, 2–9 (finding positive health effects when France reduced its standard workweek from thirty-nine to thirty-five hours and discussing research showing similar effects when South Korea reduced its standard hours from forty-four to forty); GOLDEN, *supra* note 4, at 8 ("There is a wealth of cases in which long or irregular working hours are associated with a range of physical and mental health and injury risks that limit long-run capacity to remain productive at work.").

130. GOLDEN, *supra* note 4, at 6 ("[S]horter hours are actually associated with higher rates of output per hour."); CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTÉ, THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 47 (1999) ("[F]irms that use part-time workers tend to indicate that there is less absenteeism and less turnover among them than among full-time workers. Further, part-time workers take fewer breaks and less personal time while on the job."); ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 73 (1997) ("If benefits for part-timers were prorated, there would be no cost—in money or efficiency—to splitting one job into two, or two jobs into three, or instituting flextime. It would probably increase the plant's efficiency.").

131. Gretchen Agena, Comment, *What's So "Fair" About It?: The Need to Amend the Fair Labor Standards Act*, 39 HOUS. L. REV. 1119, 1127 (2002) ("[T]he distinction between exempt and non-exempt employees is critical to employers. Obviously, employers receive 'more bang for their buck' if exempt employees work more than forty hours per week for no additional compensation.").

132. *See* GOLDEN, *supra* note 13.

Equalizing per-hour compensation and benefits between full-time and part-time work would benefit all employees by making employers more willing to honor employees' individual work-hour needs, whatever those needs may be.

D. REFORMING THE LANGUAGE THAT DESCRIBES WORK HOURS

Finally, reform efforts should aim to transform the language that describes work hours. The term "full-time" centers physically robust workers while framing others' efforts as fractions of that norm. When a twenty-hour job demands the vast majority of a worker's energy, terms such as "part-time" or "half-time" devalue that worker's contribution. Similarly, the language of "job sharing" enshrines the view that people working in job-sharing arrangements make only a partial contribution. Rather than valuing difference, this language devalues people unable to work "ideal" hours. More neutral phrasing, such as "forty-hour jobs" and "twenty-hour jobs" may help reduce the marginalization of people working fewer-than-average hours.

CONCLUSION

When signing the Americans with Disabilities Act into law, President George H.W. Bush famously declared: "[L]et the shameful wall of exclusion finally come tumbling down."[133] This wall metaphor did not refer solely to the architectural barriers that exclude people with disabilities, such as the stairs and narrow doorways difficult for wheelchair users to traverse. It also referred to barriers embedded in cultural practices.

Sadly, over thirty years after the ADA's enactment, the wall between full-time and part-time work opportunities continues to exclude many people with disabilities from their preferred occupations. Additionally, because the compensation associated with two half-time jobs rarely adds up to a full-time job, the bifurcation between part-time and full-time opportunities also locks many low-income people—disabled or not—into overwork with inequitable pay.

Creating parity for part-time work and removing employers' incentives to prefer long hours will not only help the people the ADA protects but also benefit employers and the economy as a whole. It will promote better health, greater productivity, and fuller utilization of the talents possessed by people currently marginalized by the bifurcation between full-time and part-time work opportunities.

---

133. President George H.W. Bush, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990) (transcript available at http://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037492-remarks-by-the-president-during-ceremony-for-the-signing-of-the-americans-with-disabilities-act-of-1990.html [https://perma.cc/48PU-P9N8]).