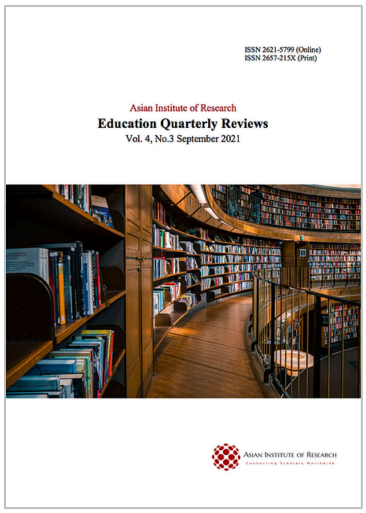

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Teaching in the Aftermath of a Pandemic: Must an Employer Provide an Accommodation for Commuting for a Disabled Employee?

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Abstract
Part I of the paper discusses the Americans with Disabilities Act or ADA, its requirements, and various protections for persons who suffer from a recognized disability which impacts their ability to work under certain circumstances and conditions. The context of this study is American higher education. Part II will discuss the obligation of an employer to offer a "reasonable accommodation" of the nature sought by an employee which would permit the employee to continue teaching while otherwise meeting all of the obligations imposed on faculty members under appropriate university policies. Specifically, the research question considered in Part II relates to whether "commuting" is a covered activity under the ADA which would trigger the responsibility of providing the employee with a reasonable accommodation, allowing an employee to teach in the employee's preferred combination of online and hybrid modalities.

Keywords: Americans with Disability Act, Accommodation, Undue Burden, Commuting, Essential Function, Online and Hybrid Teaching

PART I – A DETAILED ANALYSIS OF THE AMERICANS WITH DISABILITY ACT

> *"A key feature of the ADA prohibits discrimination against persons with disabilities in employment. That means employers must provide reasonable workplace accommodations for employees with disabilities, as long as the accommodations do not cause an undue burden on the employer. Reasonable accommodations are changes to a job, workplace, or the way a job is carried out that allow an employee with a disability to perform a job for which they are qualified"* (Social Security Administration, 2021).

1. Introduction

Consider this scenario. Professor Rachael Gatherer has been teaching at the University of South Hampton (USH) for nearly forty years. Professor Gatherer has been a productive member of the university community, publishing more than 175 academic articles with colleagues and students, winning numerous awards for teaching, and giving exemplary service to the university, to the School of Corporate Communications, and to her profession.

However, about fifteen years ago, Professor Gatherer was diagnosed with Lyme Disease. As a result, commuting to the university has been increasingly more difficult and teaching classes while lecturing in a standing position and moving about the classroom has also become more problematic. In addition, over the years, Professor Gatherer has experienced severe ear infections caused during air travel which have impaired her ability to hear her students clearly and to answer questions in the classroom once she returns to the USH campus from a trip involving air travel.

The University, however, offers classes in a variety of teaching modalities that would accommodate these factors, while giving Professor Gatherer the opportunity to fulfill her responsibilities under USH's Faculty Manual. These options include teaching fully online or teaching in what may be described in a hybrid format, meeting classes and conducting activities in a limited number of in person contacts and also online as well, or in a combination of the two modalities. In fact, Professor Gatherer actually was assigned classes by her Department Chair over two semesters based upon these factors utilizing these modalities—a schedule which was approved by the Dean of the School, Dr. James Hayes. Using the technologies supported by USH, Professor Gatherer has successfully taught her classes for the past eighteen months during the Pandemic and has met all the other obligations of a faculty member in terms of conducting regular office hours online, and participating in faculty governance and committee meetings.

Now, Dean Hayes wishes to impose a new requirement on all faculty, partly in response to the Pandemic, which saw USH move to an online (synchronous or asynchronous) modality only, and later adding a hybrid flexible, or HyFlex, modality in which each class session and learning activity was offered in-person, synchronously online, and asynchronously online, and students could decide how to participate (see Lederman, 2020). The Dean has announced that all faculty members would be required to be physically present on campus once each week and faculty would no longer be afforded the opportunity to continue to teach a schedule based completely on online or hybrid classes.

Professor Gatherer wishes to continue her teaching at USH and seeks an accommodation based on her physical disabilities. However, the Director of Human Services at USH has informed Professor Gatherer that the university will only accommodate her disabilities by providing a classroom chair and microphone, but that her request to teach online and in a hybrid format, based on difficulties encountered while commuting to the university, had been denied.

Professor Gatherer has appealed the decision of the Director of Human Services, asking who in fact made the decision, who had been consulted in any deliberative process, and the basis for the denial. Meanwhile, Professor Gatherer has sought the guidance of the local Equal Employment Opportunity Commission (EEOC) to investigate whether her rights under the *Americans with Disabilities Act* (ADA) of 1990 or the *ADA Amendments of 2008* have been violated.

This paper will discuss the implications of this scenario and the questions which arise in that context. Part I of the paper will discuss the ADA, its requirements, and various protections for those who suffer from a recognized disability which impacts their ability to continue to work under present circumstances and conditions. Part II of the paper will discuss the obligation of an employer such as USH to offer a "reasonable accommodation" of the nature sought by Professor Gatherer which would permit her to continue in her chosen profession of teaching while otherwise meeting all of the obligations imposed on faculty members under the USH Faculty Manual.

Specifically, the research question which we consider in Part II relates to whether "commuting" is a covered activity under the ADA which would trigger the responsibility of USH to provide a reasonable accommodation in the form of allowing Professor Gatherer to teach in the preferred combination of online and hybrid modalities.

2. The Americans with Disabilities Act

The *Americans with Disabilities Act of 1990* or ADA is a civil rights law that prohibits discrimination based on disability (Rothstein, 2000). Barancik (1998) noted: "When Congress enacted the Americans with Disabilities Act ("ADA") in 1990, approximately 43,000,000 Americans had one or more physical or mental disabilities." That number had grown to approximately 54 million in 2021 (National Network, 2021).

In creating the ADA, The Congress specifically found in Section 12101 that:

> "(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
> (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;
> (7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
> (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."

The ADA requires covered employers to provide "reasonable accommodations" to employees with disabilities which will permit an employee to continue to work. In addition, the ADA imposed "accessibility requirements" on certain public accommodations (Burgdorf, 1991; Parry, 1992).

The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The Act prohibits discrimination in several areas against people with disabilities. Title III states that:

> "No individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

The ADA also applies to a wide range of *facilities* whose operations "affect commerce." Coverage includes restaurants, bars, and other food serving establishments. The ADA does not apply to (1) private clubs exempted from coverage under Title II of the *Civil Rights Act of 1964* (see Hilton, 1987; Johnson, 1995; Livergood, 2001); (2) religious organizations or entities controlled by such organizations (Sepper, 2016; Payne, 2021); and (3) multifamily buildings, which are covered by the 1988 *Federal Housing Amendments Act* [Fair Housing Act] (generally Jeter, 2016).

2.1. A Brief History

The ADA is said to have its roots in Section 504 of the *Rehabilitation Act of 1973,* which prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors (Chamusco, 2017). Perkins (2018, p. 55) stated: "With the enactment of Section 504, Congress recognized that the inferior social and economic status of people with disabilities was not a consequence of the disability itself, but instead was a result of societal barriers and prejudices."

In 1986, the National Council on Disability (NCD), an independent federal agency that makes recommendations to the President and Congress on policies affecting Americans with disabilities, recommended the enactment of a federal Americans with Disabilities Act. The NDC had issued a report, "*Towards Independence,"* in which the Council had examined incentives and disincentives existing in federal legislation which would impact the independence and full integration of people with disabilities into American society. According to its website, "The NCD is comprised of a team of Presidential and Congressional appointees, an Executive Director appointed by the Chair, and a full-time professional staff" (National Council on Disability, 2021).

The NCD drafted the initial version of the bill which was introduced in the House and Senate in 1988 by Senator Lowell Wicker (R-Conn.) and Representative Tony Coelho (D-Cal) (see Mayerson, 1992). A revised bipartisan version of the ADA was later introduced by Senators Tom Harkin (D-Iowa) and David Durenberger (R- Minn.), and Representatives Tony Coelho (D-Cal.) and Hamilton Fish (R-N.Y.) in the 101st Congress. The ADA passed the Senate by a vote of 76 to 8. The final version passed the House by a vote of 377 to 28 (see Colker, 2004).

The bill was signed into law on July 26, 1990, by President George H. W. Bush. [Picture 1.] Rosenthal (2005, p. 895) reports that "At the signing of the ADA, President Bush observed the following: 'With today's signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.'" The ADA was later amended in 2008 and signed by President George W. Bush, with changes that became effective as of January 1, 2009.

Interestingly, the bill faced opposition from several religious groups such as the Association of Christian Schools International, who opposed the ADA in its original form, primarily because the ADA had deemed religious institutions as "public accommodations" and would have required churches to make structural changes to ensure access people with disabilities in Section 12187. The "cost" argument was successful in keeping religious institutions from being labeled as "public accommodations" under the Act (see Ramey, 2007).

The National Association of Evangelicals testified against the ADA's Title I employment provisions on grounds that the regulation of the internal employment of churches was "... an improper intrusion [of] the federal government" and a violation of "religious liberty" (Lawton, 1990).

Members of the business community likewise opposed the ADA on more practical grounds. For example, in offering testimony before Congress, a representative of the Greyhound Bus Lines stated that the act had the potential to "deprive millions of people of affordable intercity public transportation and thousands of rural communities of their only link to the outside world" (see Feinberg, 2021). The US Chamber of Commerce argued that the costs of the ADA would be "enormous" and would have "a disastrous impact on many small

businesses struggling to survive" (Congressional Digest, 1989, p. 297). The National Federation of Independent Businesses, an organization that lobbies for small businesses, called the ADA "a disaster for small business" (Mandel, 1990; see also generally Stapleton & Burkhauser, 2004).

In signing the bill, President George H. W. Bush rejected these views and stated:

> "I know there may have been concerns that the ADA may be too vague or too costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation; and we've been committed to containing the costs that may be incurred.... Let the shameful wall of exclusion finally come tumbling down."

The Equal Employment Opportunity Commission (EEOC), created by the *Civil Rights Act of 1964,* to enforce Title VII of that Act, prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin, was given the responsibility to interpret provisions of the ADA with regard to discrimination in employment against people with disabilities.

2.2. Controversy and Change

From the start, the definition of a disability would include both mental and physical medical conditions. A condition need not be permanent to be classified as a disability. In 1995, the EEOC issued significant guidance regarding disabilities. The guidance defined and explained the terms "impairment," "major life activities," and "severely or significantly" which are important determinants of whether a person has a disability under the ADA. The guidance also addressed the question of how to determine whether an employer should regard an individual as having an impairment that substantially limits the major life activity (EEOC, 1995).

The 1995 guidance provided:

- "The definition of a disability under the ADA may differ from the definition of a disability under other laws.
- An investigator should not consider the availability of mitigating measures that lessen or temporarily relieve a person's disability, such as medication, prosthetic devices, or auxiliary aids, when determining whether an individual has a disability under the ADA.
- An impairment is defined as a physiological disorder affecting one or more of a number of body systems, or a mental or psychological disorder. Conditions such as physical characteristics, common personality traits, and environmental, cultural, and economic disadvantages are not defined as impairments under the ADA.
- Added to the list of major life activities previously identified by the EEOC are mental and emotional processes, such as thinking, concentrating, and interacting with other people. Other major life activities cited by the EEOC include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, and lifting.
- The duration of an impairment is one of the factors to consider when determining whether an impairment substantially limits a major life activity. It is not essential for an impairment to be permanent to be considered a disability -- for instance, it is possible for temporary impairments that take a significantly long time to heal, long-term impairments, or potentially long-term impairments of indefinite duration to be considered disabilities. However, short-term, temporary impairments or restrictions generally are not defined as substantially limiting and, therefore, generally do not qualify as disabilities under the ADA" (see EEOC, 1995).

However, in interpreting the ADA, the EEOC developed regulations limiting an individual's impairment to one that "severely or significantly restricts" a major life activity, which was seen by many as *limiting* the rights of the disabled (Eichhorn, 1999).

2.3. The ADA Amendments Act of 2008

In response to deficiencies in the ADA, Congress amended the original Act. On September 25, 2008, President George W. Bush signed the *ADA Amendments Act of 2008* (ADAAA) into law (Feldblum, Barry, & Benfer, 2008; Barry, 2010). [Picture 2.] The ADAAA broadened the definition of "disability," extending the ADA's protections to a greater number of people and directed the EEOC to amend its regulations and replace its "severely or significantly" language with the phrase "*substantially limits*" – a more favorable standard to individuals with a disability.

The ADAAA rejected the United States Supreme Court's definition of "major life activities" in *Toyota Motors Mfg., Ky. v. Williams* (2002). It also added to the ADA examples of "major life activities" (Parry and Allbright, 2008, p. 695) including, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working" as well as the operation of several specified major bodily functions." In 2008, a report issued by the House Committee on Education and Labor found that the ADAAA "makes it absolutely clear that the ADA is intended to provide broad coverage to protect anyone who faces discrimination on the basis of disability."

Regulations issued by the EEOC in 2011 provide a list of conditions that may be classified as disabilities, including deafness, blindness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, attention deficit hyperactivity disorder, Human Immunodeficiency Virus (HIV) infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other mental or physical conditions also may constitute disabilities, depending on what the individual's symptoms would be in the absence of "mitigating measures" such as medication, therapy, the use of assistive devices, or other means of restoring function, which might occur during an "active episode" of the condition (EEOC, 2011).

Interestingly, certain specific conditions that are widely considered as anti-social, or which involve an illegal activity, such as kleptomania, pedophilia, exhibitionism, voyeurism, etc. have been excluded under the definition of "disability" in order to prevent abuse of the statute's purpose to provide access to an individual with a genuine disability. Generally, an employee or job applicant who engages in the use of illegal drugs or suffers from "substance use disorder" (Aoun & Appelbaum, 2019) is *not* considered as "otherwise qualified" when a covered entity takes an adverse action based on such use. At present, gender identity, gender dysphoria, or sexual orientation may also be excluded under the ADA definition of "disability," but may otherwise be protected under other legislation more broadly prohibiting discrimination in employment or in other areas (Hunter & Brown, 2015; Cox, 2019; Kennedy, 2019) or may be the benefit of changing views on the issue (see National Center for Transgender Rights, 2017, citing *Blatt v. Cabela's Retail*, 2017; Levi & Barry, 2021).

As a result, the amended ADA defines a *covered disability* as "a physical or mental impairment that substantially limits one or more major life activities, a history of having such an impairment, or being regarded as having such an impairment" (see Barry, 2010). The ADA defines a *person with a disability* as an individual "who has a physical or mental impairment that substantially limits one or more major life activity. This includes people who have a record of such an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability. The ADA also makes it unlawful to discriminate against a person based on that person's association with a person with a disability" (National Network, 2021).

3. Burdens of Proof

The issue of "who must prove" is often a critical issue in disability litigation or in deciding which employment policies a party can implement. In *US Airways, Inc. v. Barnett* (2002), the United States Supreme Court set forth the burdens of proof for an individual with an alleged disability and for an employer in an ADA lawsuit alleging failure to provide a reasonable accommodation.

In order to establish a claim of disability discrimination under the ADA, a plaintiff must prove three things by a preponderance of the evidence: First, that she [or he] was disabled within the meaning of the Act. Second, that with or without reasonable accommodation she [or he] was able to perform the essential functions of [the] job. And, third, that the employer discharged her [or him] in whole or in part because of her [or his] disability (*Katz v. City Metal Co.*, 1996).

In order to defeat a defendant's motion for a summary judgment, which would result in a dismissal of a suit based on an allegation of discrimination against a disabled person, "the plaintiff/employee need only show that a [requested] 'accommodation' seems reasonable on its face…." Once the plaintiff has shown that the accommodation is "reasonable," the burden of proof (sometimes called the "burden of going forward") then shifts to the defendant/employer to provide specific evidence proving that reasonable accommodation would cause an undue hardship under in the particular circumstances (*U.S. Airways v. Barnett*, 2002).

4. Individual Titles (Sections) of the ADA

The language of the ADA tracks closely the language found in other legislation outlawing discrimination in employment. In fact, many of the titles or sections of the ADA mandate close association with various administrative departments and agencies for interpretation or enforcement.

Title I applies in a wide-variety of employment situations (see Dunn, 2018). The statute defines "covered entities" to include employers with 15 or more employees, as well as employment agencies, labor organizations, and joint labor-management employment committees. There are strict limitations when a covered entity can ask job applicants or employees disability-related questions or require them to undergo medical examination. All medical information is required to be kept confidential.

Prohibited actions include firing or refusing to hire someone based on a real or perceived disability; segregation of employees based on a disability or the perception of a disability; and harassment based on a disability, or the perception of a disability. An important provision of the ADA deals with retaliation or coercion (Section 12203) (Eichhorn, 2002). Any individual who exercises a right under the ADA, or who assists others in exercising a right, is protected from retaliation or coercion by an employer. Any form of retaliation or coercion, including threats, intimidation, or interference, is prohibited if it is intended to or does interfere with the exercise of any right under the ADA.

Title II prohibits disability discrimination by all "public entities" at the local level (including school districts, municipalities, cities, or counties) and also by entities which operate at the state level (see Brooks, 2019). The U.S. Department of Justice assures compliance with Title II regulations by public entities. Regulations cover access to all programs and services offered by a public entity. Access includes *physical access* described in the ADA *"Standards for Accessible Design"* (Aldousari, Abdulaziz, & Alwadei, 2021) and also access to *programs* that might be affected negatively by discriminatory policies or procedures undertaken by a covered entity.

Title II also applies to public transportation provided by public entities as prescribed through regulations issued by the U.S. Department of Transportation. Title II includes the National Railroad Passenger Corporation (Amtrak), along with all other commuter authorities. This section regulates the provision of para-transit services by public entities that provide certain regular or fixed-route services. ADA also sets minimum requirements for appropriate *space layout* in order to facilitate the operation of wheelchairs on public transportation.

In addition, Title II applies to all state and local public housing, housing assistance programs, and housing referrals made by public authorities. The Office of Fair Housing and Equal Opportunity is charged with enforcing this provision of the ADA.

Title III deals with “public accommodations” and certain commercial facilities deemed to be “public accommodations.” According to Stowe (2000, p. 297), “To those ends, the protections Congress afforded to the disabled under the ADA extend to numerous aspects of public life, including employment, public services such as transportation, and public accommodations.” Under Title III, no individual may be discriminated against on the basis of disability with regards to the “full and equal enjoyment” of the goods, services, facilities, or accommodations of any place of public accommodation by any person who “owns, leases, or operates” a place of public accommodation. The term “public accommodations” is very broad and includes most places of lodging (such as inns, motels, and hotels), recreation, transportation, education, and dining facilities, along with stores, care providers, and “places of public displays” such as museums, libraries, and galleries.

In most cases, the mandates of the ADA are *not* retroactive. However, under Title III, all new construction (including modifications or alterations of structures or buildings) after the effective date of the ADA (approximately July 1992) must be fully compliant with the *Americans with Disabilities Act Accessibility Guidelines,* which are found in the Code of Federal Regulations (2021).

Title III may also require proactive actions on the part of certain public accommodations. Thus, under Title III, a "failure to remove" certain architectural barriers in existing facilities may constitute a violation of the ADA. The standard applied is whether "removing barriers" (typically defined as “bringing a condition into compliance” with the 2008 ADAAA) is "readily achievable,” which Title III defines as "... easily accomplished without much difficulty or expense.” This requirement is not absolute, but involves a balancing test between the cost of the proposed action and the ability of a business and/or owners of the business to effect any change.

Under the 2010 revisions of Department of Justice regulations, newly constructed or altered swimming pools, wading pools, and spas must provide an accessible means of entrance and exit to pools for disabled people. However, for example, the requirement of providing access may be conditioned on whether providing access through a fixed lift is "readily achievable,” taking into account cost as one factor.

Court challenges and administrative rule making have identified various exceptions to Title III. As noted earlier, many private clubs and religious organizations may not be bound by Title III. In addition, historic properties, including those that are listed or that are eligible for listing in the *National Register of Historic Places*, or properties designated as “historic” under state or local law, are required to comply with the provisions of Title III of the ADA to the "maximum extent feasible.” However, if complying with ADA standards would "threaten to destroy the historic significance of a feature of the building," then alternative solutions or strategies for providing access may be implemented (see Goodall, Pottinger, Dixon, & Russell, 2005; Gissen, 2019).

4.1. Auxiliary Services and Aids

As a core requirement, the ADA requires that a public accommodation must take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than a non-disabled individual because of the absence of auxiliary aids and services, *unless* the public accommodation (i.e., a business) can demonstrate that taking such steps would fundamentally alter the “nature of the goods, services, facilities, privileges, advantages, or accommodations being offered” or would result in an undue burden, involving a significant difficulty or expense.

The ADA provides certain mandates for providing disabled persons with auxiliary aids, equipment, and services assist disabled persons who exhibit a hearing, vision, or speech disability to communicate with persons who do not have such a disability (see Parry & Allbright, 2008). Some of these mandates might be especially relevant in a university environment for both students and faculty and may be key test to determine if a course—or the

professor who is delivering it—is meeting the educational requirements for students—no matter the modality of its delivery.

The term "auxiliary aids and services" includes:

> "Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
>
> Qualified readers; taped texts; audio recordings; Brailed materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

Acquisition or modification of equipment or devices; and other similar services and actions."

4.2. Is There a Captioning Requirement for Disabled Students?

Title IV of the ADA amended the *Communications Act of 1934* by adding a section which requires that all telecommunications companies in the U.S. take steps to ensure functionally equivalent services for consumers with disabilities, notably those who are deaf or hard of hearing, and those with speech impairments.

Captioning is a type of auxiliary aid or service that is required for entertainment, educational, informational, and training materials. These materials must be captioned for deaf and hard-of-hearing audiences at the time they are produced and distributed. Interestingly, the *Television Decoder Circuitry Act of 1990* requires that all televisions larger than 13 inches sold in the United States after July 1993 have a special built-in decoder that enables viewers to watch closed-captioned programming. The *Telecommunications Act of 1996* directs the Federal Communications Commission (FCC) to adopt rules requiring closed captioning of most television programming. The FCC's rules on closed captioning became effective January 1, 1998.

5. The "Reasonable Accommodations" Requirement for Employees

The EEOC provides that employers are only required to accommodate disabilities of which they are aware. Interestingly, the U.S. Department of Labor refers to accommodations as "productivity enhancers." The ADA requires reasonable accommodations as they relate to three aspects of employment:

1. Ensuring equal opportunity in the application process;
2. Enabling a qualified individual with a disability to perform the essential functions of a job; and
3. Making it possible for an employee with a disability to enjoy equal benefits and privileges of employment.

The key to the ADA may be found in its provisions relating to the requirement that covered entities are required to provide what are termed as *"reasonable accommodations"* to job applicants and employees with disabilities. As Rosenthal (2005, p. 895) noted: "One of the ADA's most noticeable features is that in addition to prohibiting employers from firing and failing to hire individuals with disabilities, it places an affirmative obligation on employers to accommodate an employee's or a candidate's disability…."

A "reasonable accommodation" may be seen as a change in the *usual or typical* work environment or a modification of a workplace policy (Travis, 2021) that the person needs because of a disability. A "reasonable accommodation" can include, among other things, special equipment that allows the person to perform the job; job restructuring which may include part-time or modified work schedules, or scheduling changes; and changes to the way work assignments are meted out, chosen, or communicated to employees. Facility enhancements may include ramps, accessible restrooms, and providing ergonomic workstations.

Granting an employee an adjusted work schedule (such as a different teaching modality in the educational environment) as a reasonable accommodation may involve modifying a standard work schedule or other employment policies. In some instances, an employer's refusal to modify a workplace policy, such as a change to leave or attendance policy, may constitute disparate treatment [behavior toward someone because of a protected characteristic under Title VII of the United States Civil Rights Act], as well as constituting a failure to provide a reasonable accommodation.

6. Undue Hardship

Courts will often be called upon to determine the reasonableness of an accommodation on a case-by-case basis. What might be reasonable in one context may not be in another. However, as a general rule, an employer is not required to provide an accommodation that would involve an *'undue hardship,"* which is defined as a significant difficulty or expense for an employer (Porter, 2019). To show that a particular accommodation would present an undue hardship, an employer would have to demonstrate that it was too *costly or extensive, or disruptive* to other employees carrying out their job responsibilities to be adopted in that workplace.

According to EEOC *Enforcement Guidance*, referenced by Shinn (2016), "there are three important points that companies should carefully consider when assessing a request for a reasonable accommodation under the ADA:

> "First, this case [*Searls v. Johns Hopkins Hospital*, 2016] reinforces that an "undue hardship" defense, will be available to employers only upon a showing of significant difficulty or expense in providing a disabled worker an accommodation.
>
> Second, in making the assessment, the "financial realities of the particular employer" will be taken into account.
>
> Third, "undue hardship" generally means "unduly expensive" by considering an employer's overall operational budget and financial standing — not just the finances of a single department or unit employing the individual."

The EEOC (2021) has set out some of the factors that will determine whether a particular accommodation presents an undue hardship on a particular employer:

- the nature and cost of the accommodation;
- the financial resources of the employer;
- the number of workers at the business or facility;
- the impact of the accommodation on the facility's expenses, resources or operations;
- the employer's overall size, nature and resources;
- the type of operations impacted by the accommodation; and
- the nature of the business, including size, composition, and structure; and
- accommodation costs already incurred in a workplace.

An employer cannot claim undue hardship based on convenience, prior practices, customer preferences (Westergard, 2020), or the fears, prejudices, or assumptions that customers or other employees might harbor

toward an individual with a disability. Nor can a claim of undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees who have not been similarly accommodated.

However, the provision of a reasonable accommodation only requires that the employer modify a policy for an employee who requires such an accommodation because of a disability. The employer may continue to apply its normal or usual policies to other employees.

PART II – THE ADA AND COMMUTING: THE RESEACH QUESTION

> *Is "commuting" a covered activity under the ADA which would trigger the responsibility of providing a reasonable accommodation in the form of allowing Professor Gatherer to teach in the preferred combination of online and hybrid modalities.*

An important question raised regarding the mandates of the ADA is whether the ADA requires employers to provide an accommodation for an employee who has difficulty commuting to and from work because of his or her disability? A separate but related issue is whether the employer must provide commuting assistance to a disabled employee?

The relationship of the ADA to commuting raises several discreet questions:

1. Do provisions of the ADA relate to commuting?
2. Does the ADA require an employer to offer "commuter assistance" to an employee whose disability impacts on the employee's ability to perform essential work functions?
3. Must the employer offer an accommodation relating to commuting to an employee with a disability which would allow the employee to absent themselves from the workplace under certain circumstances, but which would allow the employee to perform the "essential functions" of the job with the use of certain "teaching modalities"?
4. If an employer is required to offer an accommodation to a disabled employee, what is the nature of the accommodation? Specifically, in the context of the scenario involving Professor Gatherer, does a reasonable accommodation include the ability of an employee such as Professor Gatherer to teach remotely (i.e., online) or if the disability does not completely rule out commuting under all circumstances, through a hybrid teaching modality?
5. Reflecting the earlier discussion of "burden of proof" in a suit brought under the ADA, would providing such an accommodation place an "undue burden" on the employer where the employer maintains that presence at the workplace is an "essential function" of the job or where productivity or morale might be impacted?
6. Finally, what recommendations might be offered to an employer under these circumstances to avoid pitfalls and unnecessary controversy relating to employees with disabilities and issues relating to commuting?

7. Commuting Assistance vs Commuting Accommodation: What the Case Law Indicates

According to Merley (2019), "There is no consensus in the federal courts as to whether employers must offer accommodations to assist a disabled employee in commuting to and from work. The majority seems to conclude that such accommodations are not needed because commuting is not part of the employee's job responsibilities or work environment." A decision from the Fifth Circuit Court of Appeals in *Trautman v. Time Warner Cable Texas, LLC* (2018) "falls squarely" within this view.

The First Circuit also addressed the reasonableness of accommodating commuters under the ADA. In *Jacques v. Clean-Up Group, Inc.* (1996), the employer prevailed based on a factual finding that the plaintiff could not

perform the essential functions of the job and that the requested accommodation was not reasonable. But Millman and Kabir (2011) noted that "it is significant that the issues went to the jury… neither the district court nor the court of appeals found that the employee's commute did not have to be accommodated *as a matter of law.*" After a trial, the jury found for the employer on the plaintiff's ADA claims and the plaintiff appealed. The First Circuit upheld the jury verdict and explained that the evidence presented at trial supported the jury's finding that the plaintiff was not "otherwise qualified" to perform the essential function of the job and that there was ample evidence to demonstrate that furnishing transportation to the plaintiff imposed an undue burden on the employer.

Millman and Kabir (2011) conducted a study of cases decided by various U.S. Courts of Appeals which have also addressed the issue and provided another perspective. They cited a decision of the U.S. Court of Appeals for the Second Circuit which stated that employers *may* be obligated under the ADA to accommodate requests by a disabled employee for assistance with her commute to work (see *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, 2011). While *Nixon-Tinkelman* dealt with providing transportation assistance to a disabled employee, the Court referenced three possible courses of conduct for the employer, which included allowing the plaintiff to work from home. While not definitive, the authors cited "current trends among the Circuit Courts of Appeals" and state that "*Nixon-Tinkelman* case marks the latest and perhaps most far-reaching foray by a federal appeals court suggesting otherwise. In some cases, it may in fact be reasonable for an employer to accommodate commute-related requests – especially if changes in shifts or assignments are at issue."

In *Colwell v. Rite Aid Corp.* (2010), the Third Circuit ruled that "under certain circumstances the ADA can obligate an employer to accommodate an employee's disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change to a workplace condition that is entirely within an employer's control and that would allow the employee… to perform her job" (see Millman & Kabir, 2011, note 6). The Court held that changing the plaintiff's work schedule "in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates."

In *Colwell*, the Third Circuit distinguished its holding from one that "makes employers 'responsible for how an employee gets to work,'" and noted that the plaintiff did not "ask for help in the method or means of her commute." The Court explained, however, a jury could "decide whether a shift change was a reasonable accommodation under the circumstances."

Similar to the Third Circuit's decision in *Nixon-Tinkelman*, the Ninth Circuit "recognized that an employer has a duty to accommodate an employee's limitations in getting to and from work" (citing *Humphrey v. Memorial Hosp. Ass'n* (2001) and held that the accommodation requested by the plaintiff was in fact reasonable. "Thus the plaintiff had raised a triable issue of fact as to whether her employer failed to reasonably accommodate her."

Batiste (2021) reinforces this perspective and notes that:

> "According to informal guidance from the ADA Policy Division of the Equal Employment Opportunity Commission, while employers do not have to actually transport an employee with a disability to and from work (unless the employer provides employee transportation to and from work as a perk of employment), employers may have to provide other accommodations…. such as changing an employee's schedule so he can access available transportation, reassigning an employee to a location closer to his home when the length of the commute is the problem, *or allowing an employee to telecommute"* (emphasis added).

Batiste (2021) argues that the underlying rationale why an employer may be required to provide such accommodations is that "the employer typically controls employee schedules and work locations so when a schedule (or work location) poses a barrier to an employee with a disability, the employer must consider reasonable accommodation to overcome the barrier."

8. Working from Home- Or, In the Academic Environment, Online or Hybrid Teaching

Hutchison (2020) states that "If a work schedule or work location becomes a barrier to an employee with a disability, their employer may be required to provide reasonable accommodation to overcome the barrier to their job."

Support for this proposition comes from the EEOC. According to the EEOC, working from home is considered a reasonable accommodation under the ADA. "Not all people with disabilities need to or want to work from home, but for some it can provide the flexibility they need to succeed on the job"—especially where an employee has difficulty in commuting to and from work due to a disability-related reasons" (Social Security Administration, 2020). *DeRosa v. Nat'l Envelope Corp.* (2010) suggests that an employer may provide a reasonable accommodation to disabled employee who was unable to commute by allowing the employee to work from home for a period of two years.

The situation at USH offers a unique challenge. Assuming that a "return to campus" is safe for bother students and faculty, university administrators have announced that "opening up" the campus and returning to in-person teaching will be the highest priority for the new academic year. In addition, all faculty will be required to support this decision by maintaining a "physical presence" on campus at least once each week. What effect will this have on the argument relating to possible accommodation for teaching either online or within a hybrid format?

Batiste (2021) offers a cautionary note: "As with any accommodation under the ADA, when considering accommodations related to commuting to and from work, employers can choose among effective accommodation options and do not have to provide an accommodation that poses an undue hardship."

Roth (2018) argues that in recent years, "particularly with technology making it easier for employees to work remotely, courts have struggled to determine whether onsite attendance is an essential job function under the Americans with Disabilities Act. This question is often dispositive because only qualified individuals—those who can perform a job's essential functions with or without a reasonable accommodation—are protected by the ADA."

8.1. "Essential Functions"

An individual who receives an accommodation or who is seeking an accommodation must be able to perform the *essential functions of the job* and *meet the normal performance requirements.*

Several courts which have addressed this issue have expressed hesitancy to consider telecommuting (i.e. teaching online) as a "reasonable" accommodation given that attendance at the workplace is an essential function of almost every job. As noted by the EEOC (2021), "Most jobs require that employees perform both 'essential functions' and 'marginal functions.'

The '**essential functions'** are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important." Is presence on campus a "marginal" or "essential" function?

In *Dunn v. Faithful & Gould, Inc.* (2018), a United States District Court in South Carolina ruled that an employee who could not get to his worksite for a six-month period could not perform the essential functions of his job and thus his employer did not violate the ADA in terminating his employment. In essence, the *Dunn* court concluded that onsite attendance was an *essential function* of Dunn's job. The District Court gave significant weight to the judgment of Dunn's supervisor that onsite attendance was essential to performing his job and Dunn's own statements to his doctor that he could *not* perform his job from home**.**

The *Dunn* court stated:

> "A job function is essential when 'the reason the position exists is to perform that function,' when there [are not] enough employees available to perform the function, or when the function is so specialized that someone is hired specifically because of his or her expertise in performing that function' (citing *Jacobs v. N.C. Admin. Office of the Courts*, 2015) "[I]f 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." Other relevant evidence includes the employer's judgment as to the essential functions of the job, the amount of time spent performing the function, and the consequences of not requiring the function of the employee."

What might be some of the factors that might apply in making a determination? In *Smith v. Ameritech* (1997) the Fifth Circuit held that a sales representative who requested to work from home failed to establish that his was one of the "exceptional circumstances" that could be considered reasonable for an employer to accommodate. In *Vande Zande v. Wisconsin* (1995), the Seventh Circuit held that the ADA does not require employers "to allow disabled workers to work at home, where there productively would be greatly reduced." And, in *Tyndall v. Nat'l Educ. Ctrs., Inc.* (1994), the Fourth Circuit found that "except in the unusual case where an employee can effectively perform all work-related duties from home, an employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."

9. Some Observations and Suggestions

The questions raised in the fact pattern concerning Professor Gatherer and USH may come down to a determination whether Professor Gatherer, who is "ready and willing and able" to fulfill her teaching responsibilities ("essential functions") through a combination of online and hybrid teaching, would nevertheless be deemed non-qualified for the job and thus not protected by the ADA because she is unable to meet the requirement of in-person presence on campus. This question may turn on whether the jury believes "presence on campus" is an essential element of Professor Gatherer's job as a university professor. Recall that USH had offered Professor Gatherer a chair and a microphone to accommodate her disability and did not challenge the fact that Professor Gatherer had demonstrated a disability that would entitle her to "some accommodation" under the ADA.

Dunn v. Faithful and & Gould (2018) "illustrates well that a case-by-case analysis required in determining whether a job function such as onsite attendance is essential and that the essential nature of a function can actually change over time. Thus, in considering potential accommodations, employers should always conduct an individualized assessment to determine whether any job function, including onsite attendance, is an essential function of a particular position."

The law firm of Barnes and Thornburg (2021) provides some excellent advice to employers who are faced by the conundrum of conflicting questions concerning the relationship between commuting, reasonable accommodations, and the ADA: "It is always prudent to play it safe and engage in the interactive process with employees to discuss proposed accommodations. Once a proposed accommodation is identified, an employer can work with outside counsel to discuss whether the request would be deemed 'reasonable' under the ADA."

Millman and Kabir (2011) presciently added: "Employers should be aware that their obligation to engage in the interactive process under the ADA may be triggered as soon as these requests arise – especially if these requests are precipitated by employer decisions that impact an employee's commute. Employers are advised to consult with legal counsel to assess the extent of their legal obligations when confronted with requests by disabled employees to accommodate their commute to work" (see also Miller, 2017).

For the employee, it is critical that he or she understands the nature of any disability and the accommodation that he or she are seeking and whether that accommodation might place an "undue burden" on their employer.

The case of Professor Gatherer may not be unique as the United States slowly returns to some normalcy after more than 18 months of dealing with a Pandemic that has impacted greatly on the educational environment—for both students and faculty. However, it does pose a realistic question when a faculty member who is disabled and entitled to the protections of the ADA is seeking to continue to work—although through delivery of a course in a non-traditional manner that has in recent years become more common with the onset explosion of modalities available to deliver an educational product (see Griffin, 2020).

Travis (2021, p. 230) writes insightfully:

> "The lessons of COVID-19 should rekindle this potential by demonstrating the malleability of our conventional workplace design. For individuals with disabilities, this means that full-time face-time requirements should no longer be treated as 'essential job functions,' thereby enabling full assessment of workplace flexibility accommodation requests. Using the lessons of COVID-19, it's time for judges to re-examine their assumptions about the defining features of 'work' and empower antidiscrimination law to more meaningfully expand equal employment opportunities."

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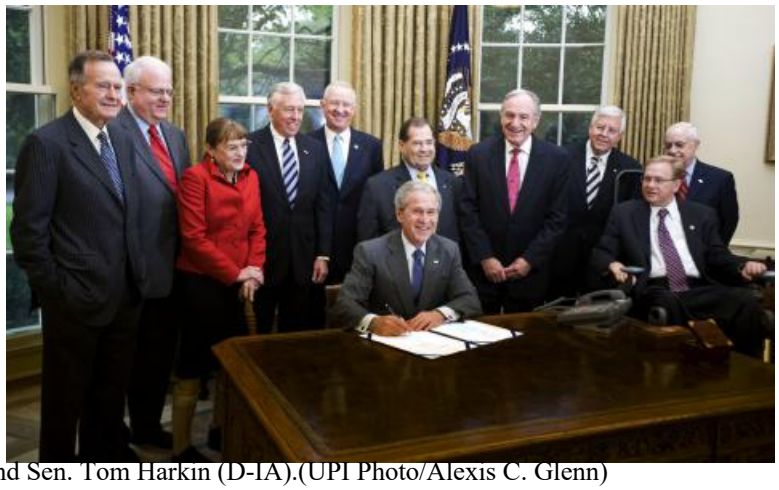
Picture 1:
On July 26, 1990, President George H. W. Bush signed the Americans with the Disabilities Act during a ceremony in the Rose Garden. Sitting beside him from left to right are Evan Kemp, Chairman of the Equal Employment Opportunity Commission, and Justin Dart, Chairman of the President's Committee on Employment of People with Disabilities. Standing behind him from left to right are Reverend Harold Wilke and Swift Parrino, Chairperson, National Council on Disability. Photo credit: George Bush Presidential Library and Museum/NARA.



Picture 2:
On September 25, 2008, President George W. Bush signed the ADA Amendments Act. It changed the ADA definition of 'disability' to ensure all people with disabilities could receive the law's protections. Standing behind President Bush are (L to R) Cheryl Sensenbrenner, wife of Rep. Jim Sensenbrenner (R-WI), House Majority Leader Rep. Steny Hoyer (D-MD), Rep. Buck McKeon (R-CA), Rep. Jerry Nadler (D-NY), and Sen. Tom Harkin (D-IA).(UPI Photo/Alexis C. Glenn)