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DESIGNING A FLEXIBLE WORLD FOR THE MANY: "ESSENTIAL FUNCTIONS" AND TITLE I OF THE AMERICANS WITH DISABILITIES ACT

Michael J. Powers[1]

This Note explores how courts interpret the meaning of "essential functions" under Title I of the Americans with Disabilities Act. To be protected under the ADA, a plaintiff must be able to perform the "essential functions" of her job with or without a reasonable accommodation. In general, courts follow one of two approaches when interpreting this phrase. The first approach narrowly focuses on the employer's judgment regarding which functions are essential. The second approach considers the employer's judgment, but looks beyond to consider the broader employment relationship. This Note argues that these different approaches have led to varying levels of scrutiny, which ultimately hinders the ADA's efforts to eliminate discrimination. This Note asserts that these different approaches exist because Section 12111(8) fails to clearly indicate which one courts should follow. As a result, courts are able to apply that level of scrutiny they consider appropriate, instead of that level of scrutiny Congress intended. To clarify the proper test that courts should follow, this Note proposes a statutory amendment to Section 12111(8). This Note concludes that this amendment is the most effective way to make Title I's protections more robust.

Introduction

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act (ADA or Act). Standing on the South Lawn of the White House, the President declared that the Act was "landmark" legislation amounting to a "comprehensive declaration of equality for people with disabilities" similar in historical significance to the passage of the Civil Rights Act of 1964 that mandated fair and equal treatment for people of color.[2] For President Bush and those members of Congress who fought for the Act's passage, July 26 represented nothing short of "another 'Independence Day,' . . . [when] 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" in which they are guaranteed "the

1. J.D. Candidate, December 2014, University of Michigan Law School. The author would like to thank Professor Bagenstos for his invaluable comments and insight and the *Journal of Law Reform* Notes Office for its continued support and hard work.

2. Press Release, President George H. W. Bush, Remarks During Ceremony for the Signing of the Americans with Disabilities Act, The White House, at 1-2 (July 26, 1990) (on file with author).

opportunity to blend fully and equally into the rich mosaic of the American mainstream."[3] To usher in this new era, the ADA would act as "a sledgehammer" to breakdown barriers that "separated Americans with disabilities from the freedom they could [previously] glimpse, but not grasp."[4]

Around the time the Act passed, roughly sixty-six percent of working age individuals with disabilities were unemployed. A similar proportion of such individuals wanted to work.[5] Overcoming the low level of employment for individuals with disabilities was an important hurdle in this new era. In a survey of high level managers and supervisors in the private sector, the International Center for the Disabled found that roughly seventy-five percent of respondents believed that job discrimination was an important barrier to increased employment.[6] Another seventy to eighty percent of managers and supervisors thought that antidiscrimination laws should be extended to protect disabled job applicants.[7] Deeply imbedded stereotypes, misconceptions about productivity and insurance costs, and fears about negative impacts on work environments all contributed to the low number of individuals with disabilities in the workforce.[8]

One particular concern was an employer's use of unnecessary job requirements to screen out certain groups of individuals from consideration.[9] For example, an employer might require caseworkers at a counseling center to possess a valid driver's license.[10] Although seemingly innocuous, this requirement prevents people who cannot obtain a valid license—including individuals with epilepsy—

3. *Id.* at 1-2.

4. *See id.* at 3.

5. ICD Survey I (1986) (waiting for ILL). This low level of employment impacted the personal lives of individuals with disabilities. *See* SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 12 (Yale Univ. Press 2009). For example, individuals with disabilities who were not working reported feeling less economically self-sufficient, less active in community life, and less satisfied with life compared to individuals without disabilities. *See* H.R. REP. NO. 101-485(III), at 25 (1990).

6. *See* HARRIS (LOUIS) & ASSOCIATES ET AL., THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS 23 (1987) ("ICD Survey II"). The exact percentages responding "Yes" to the question of whether discrimination by private-sector employers remained a barrier were the following: seventy-two percent (top managers); seventy-six percent (EEO officers); eighty percent (department heads and line managers); and seventy percent (small business managers).

7. *See id.* at 25.

8. *See id.* at 23; NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES 31, 33 (1986).

9. *See* H.R. REP. NO. 101-485(II), at 33.

10. *See* H.R. REP. NO. 101-485(III), at 33; E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, Chapter IV, § 4.3, http://www.adaportal.org/Employment/Browse_TAM_I/Chapter_IV_4-3.html.

from employment in that job. Implementing such a requirement is especially suspect because possessing a valid driver's license is only tangentially related to a caseworker's day-to-day tasks. A subtler use of unnecessary job criteria would be to require office assistants to use a QWERTY keyboard and mouse to enter data into a computer, instead of some other technology.[11]

Despite Congress's best efforts to eliminate the use of unnecessary job requirements, employers continue to deny workplace opportunities to individuals on this basis. This Note argues that dodging Title I's prohibition on discrimination remains too easy in part because the Act fails to require a searching inquiry into the employer's rationale for implementing different requirements. Part I presents three tools that courts use when interpreting the meaning of "essential functions." Part II introduces two different approaches to the "essential functions" inquiry and suggests why the second approach—focusing on a wide range of factors other than just the employer's judgment—is preferable. Finally, Part III offers two reforms to Section 12111(8) that would make it more difficult for an employer to use unnecessary job requirements to discriminate against individuals.

I. TITLE I AND SECTION 12111(8) OF THE ADA

Section 12111(8) is the crossroads for all employment discrimination claims brought under Title I of the Americans with Disabilities Act. To be protected under the Act, the plaintiff must prove that she is "qualified" within the meaning of Section 12111(8). This involves a two-step process.[12] First, the plaintiff must possess the requisite qualification standards for the job.[13] This is typically resolved with little difficulty.[14] Second, and more difficult, the plaintiff must be able to perform the "essential functions" of the job with or without a reasonable accommodation.[15]

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11. *See id.*
12. Bates v. United Parcel Serv., Inc., 511 F.3d 974, 990 (9th Cir. 2007).
13. *Id.*
14. For example, a UPS package-car driver job may require the plaintiff to prove that she filled out a completed job application, possesses a valid driver's license, or has a certain level of seniority within the company. *Id.* at 982-83. Although proving that the plaintiff satisfies the job's prerequisites is usually not difficult, efforts to separate qualification standards from essential functions can involve difficult line-drawing problems. These problems present an additional area for research, but are not the subject of this Note.
15. 42 U.S.C. § 12111(8) (2012). Whether the plaintiff requires a reasonable accommodation and whether an accommodation allows her to perform the essential functions of the job are not topics of this Note.

This second step is problematic because Section 12111(8) does not explain what makes a particular task "essential." In its entirety, Section 12111(8) states only the following:

> The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires. For the purposes of this subchapter, 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.[16]

Instead of explaining what makes a particular task "essential," Section 12111(8) directs courts to consider the employer's judgment. The text fails to explain what sources beyond the employer's judgment could be considered, however. A judge trying to resolve a discrimination claim may feel uneasy relying only on the employer's opinion regarding whether it discriminated against the employee. As Part II explains, courts—including the same federal circuit—take different approaches to the "essential functions" inquiry. Some courts narrow their inquiry to the employer's opinion, while others look beyond the employer's opinion and consider several different factors.

Part I proceeds to consider some of the tools courts use to determine which tasks fall into the category of "essential functions." The first tool is the plain meaning of essential functions. Next is the congressional intent behind the adoption of the "essential functions" language. The final tool is interpretive guidelines established by the Equal Employment Opportunity Commission (E.E.O.C.). Although these tools are available to courts, they are applied inconsistently and unpredictably. As a result, the meaning of "essential functions" remains hard to pin down.

A. *Plain Meaning of "Essential Functions"*

The plain meaning of "essential" is a convenient starting place to consider what that phrase includes. Discovering the word's plain

16. *Id.* (emphasis added).

meaning is complicated, however, because "essential" has two plausible definitions.[17] In common parlance, "essential" can refer to something that is logically necessary[18] or fundamentally important.[19] For example, a certain level of physical stamina and endurance is "essential" to the firefighter responsible for entering dwellings and rescuing people during emergencies. These characteristics are "indispensable" because without them the firefighter cannot perform a core function of her position.

An "essential" task does not require such strict logical necessity, however. Instead, that term may refer to a task that is relatively important, but that is not absolutely required to successfully perform the job. Although interpersonal skills are not "absolutely necessary" for a firefighter—her ability to rescue does not necessarily relate to her ability to communicate—the local fire department's hiring committee may think that they are of such importance that any applicant who does not possess them will not be hired.

The preceding example suggests that describing something as "essential" causes some uncertainty with regard to what the speaker means. Although courts do not explicitly interpret the plain meaning of "essential functions," their opinions touch on the two different meanings.[20] For example, in cases involving applicants for the position of correctional officer, courts consistently hold that those applicants must be able to physically restrain inmates during an emergency.[21] Correctional officers exist to ensure public safety and order. Therefore, being able to restrain others is absolutely

17. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 663 (2d ed. 1987). To be sure, once a court decides that a particular function is "essential" the plaintiff must be able to perform it with or without a reasonable accommodation. In this sense, performance of the function becomes "absolutely necessary." Here, my comments relate to how courts initially determine which functions of the job are essential. In other words, the two meanings relate to how courts reach the decision as to which functions fall within the "essential functions" category.

18. *Id.* Essential: *adj.* 1. absolutely necessary; indispensible.

19. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 427 (11th ed. 2005). Essential: *adj.* 2.a.: of the utmost importance. *See also* OneLook, http://onelook.com (last visited Aug. 25, 2014) (database of online dictionaries).

20. *See* Equal Emp't Opportunity Comm'n v. Picture People, Inc., 684 F.3d 981 (10th Cir. 2012); Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007) (asking employer to prove connection between purported essential function and Department of Transportation hearing test); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001).

21. *See* Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 724 (6th Cir. 2000); Martin v. Kansas, 190 F.3d 1120, 1123 (10th Cir. 1999) (overruled on other grounds); Miller v. Illinois Dep't of Corr., 107 F.3d 483, 485 (7th Cir. 1997).

necessary before an applicant can be hired as a correctional officer.[22]

Describing a task as logically necessary is helpful when, like in the correctional officer context, the job's purpose is more discrete. The more discrete a job's purpose, the clearer the relative importance of each task becomes. Problems arise, however, when the job's purpose is harder to define. In this situation, courts will balance several different factors to determine the relative importance of the contested job requirement.[23]

Considering the relative importance of different job requirements can create difficult line-drawing problems. For example, if the various tasks of a job are plotted along a spectrum from unimportant to absolutely necessary, then a court must decide the point at which tasks become "essential." Because the plain meaning of "essential" does not clearly delineate this point, courts must look beyond Section 12111(8) to determine where it lies. The next section will explore one of the first sources beyond the text that many courts look: congressional intent.

B. Congressional Intent behind "Essential Functions"

There are nine Congressional Reports (Reports) that detail the ADA's contents and underlying purpose. These Reports include a wide range of information such as studies and other facts that went into the drafting of the Act. Three of these Reports focus primarily on Title I and the meaning of its provisions. These reports come from the Senate Committee on Labor and Human Resources, the House Education and Labor Committee, and the House Judiciary Committee, and contain three helpful rules for constructing the meaning of "essential functions."

The first rule is that "essential" refers to the "fundamental" tasks of the position. It does not refer to "marginal" tasks. Juxtaposing "fundamental" with "marginal" suggests two basic propositions: first, that different tasks have different levels of importance, and

22. *See* 29 C.F.R. § 1630.2(n)(2)(i) (2012) (stating that a particular task is essential if "the reason the position exists is to perform that function").

23. *See Picture People, Inc.*, 684 F.3d at 1000 (Holloway, J., dissenting); *Skerski*, 257 F.3d at 280 (holding that "[a]lthough 'may climb poles' is listed as an aspect of one of Time Warner's essential functions, the failure of both job descriptions to list 'climbing' under the heading 'Essential Functions' suggests one could view climbing as a *useful skill or method* to perform the essential functions of the job but that it is not itself an essential function of the installer technician position.") (emphasis added).

second, that "fundamental" tasks have a closer relation to the job's overall purpose than those tasks that are "marginal."

Protecting an employer's use of "fundamental" tasks, but not "marginal" tasks is an important concept. At the time the Act was drafted, employers used unrelated tasks to unfairly disqualify applicants.[24] The drafters of Title I were concerned that if an employer could use unnecessary tasks—such as requiring caseworkers at a counseling center to possess a valid driver's license[25]—to screen applicants, then it could mask discriminatory practices.[26] Therefore, the drafters constrained Title I's protection to those tasks that closely related to the job's core function.

The second rule of construction is that an applicant does not have to perform an essential function in a particular manner. This idea is closely related to the concept of "reasonable accommodation" also contained in Section 12111(8).[27] By definition, a reasonable accommodation recognizes that individuals with disabilities may perform tasks differently than individuals without disabilities.[28] Relating these two ideas, the House Judiciary Committee noted that "essential functions are those which must be performed, even if the manner in which particular job tasks comprising those functions are performed, or the equipment used in performing them, *may be different for an employee with a disability* than

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24. The distinction between tasks that are "fundamental" and "marginal" is found throughout the legislative history on Title I. *See* H.R. REP. NO. 101-485(III), at 33-34 (1990); 29 C.F.R. § 1630.2(n)(1) (2012); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1230 (11th Cir. 2005); Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 27 (1st Cir. 2002) (explaining that employer's requirement that applicants to the position of Emergency Medical Technician be able to lift seventy pounds was "tested . . . only on rare occasions"); E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, *supra* note 10.

25. For example, an employer that required caseworkers at a counseling center to possess a valid driver's license or hairdressers to communicate orally barred individuals with epilepsy and individuals who could not communicate orally from such jobs. *See* H.R. REP. NO. 101-485(III), at 33; E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, *supra* note 10.

26. Leaders both inside and outside of the movement shared the belief that the lack of employment opportunities was less the result of applicants' inability to perform the job than the result of discrimination. *See* H.R. REP. NO. 101-485(II), at 35 (1990); ICD SURVEY II, *supra* note 6, at 23; TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES, *supra* note 8, at 31, 33; NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE: PROGRESS ON LEGISLATIVE RECOMMENDATIONS FROM "TOWARD INDEPENDENCE" 46 (1988).

27. *See* H.R. REP. NO. 101-485(III), at 32; E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, *supra* note 10; *Gillen*, 283 F.3d at 24.

28. *See* 42 U.S.C. § 12111(9) (2012); H.R. REP. NO. 101-485(III), at 33 ("The incorporation of the requirement of reasonable accommodation into the definition of 'qualified individual with a disability' is meant to indicate that essential functions are those which must be performed, even if the manner in which particular job tasks comprising those functions are performed, or the equipment used in performing them, may be different for an employee with a disability than for a non-disabled employee.").

for a non-disabled employee."[29] In a job that requires the use of computers, for instance, the essential function is not the ability to manually enter information or visually read information on the computer screen, but rather the more general "ability to access, input, and retrieve information from the computer" without regard to method of performance.[30]

This discussion suggests that the meaning of "essential" closely relates to the purpose of the job. Instead of focusing on the manner in which the job is performed, the use of "essential" directs attention away from particulars to the common denominator of achieving the job's desired results. By directing attention away from on-paper job requirements and toward the applicant's on-the-job ability, the drafters of Title I indicated that "essential" is a flexible term.[31] Congressional Committee Reports suggest that focusing on results instead of a particular physical ability is one of the most important protections that Title I offers because "misconceptions about the abilities and inabilities of persons with disabilities" were pervasive among employers.[32]

The third and final rule of construction relates to the method of analysis the drafters intended courts to use: a multi-factored, balancing test. As the drafters noted, when conducting the essential functions inquiry, courts must "review the job duty not in isolation, but in the context of the actual work environment."[33] Only by weighing multiple aspects of an employee's job could courts determine the relative importance of each function and whether the particular function in question is "essential."[34]

These three rules of construction remain broad parameters for a court to follow. Although they provide some guidance, these rules do not clarify *how much* weight to give to the employer's judgment.[35] If courts have only these rules to rely upon, then consistently and

29. *See* H.R. Rep. No. 101-485(III), at 33 (emphasis added).

30. *Id.*

31. *See* Bagenstos, *supra* note 5, at 20; *Gillen*, 283 F.3d at 29.

32. H.R. Rep. No. 101-485(III), at 32.

33. *Id.* at 33.

34. To be sure, the legislative history does not indicate to what extent courts should involve themselves in analyzing the relative importance of each function. This is a key shortcoming of the statute because the more robust the court's inquiry, the harder it becomes for employers to mask marginal tasks as essential. *See* H.R. Rep. No. 101-485(III), at 33; 29 C.F.R. § 1630.2(n) (2012); E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, *supra* note 10.

35. The House Judiciary Committee considered whether there should be a presumption created in favor of such judgment and expressly rejected it. Although § 12111(8) indicates that "consideration shall be given" to the employer's judgment, the Committee stated that such language "simply assures that the employer's determination of essential functions is considered." H.R. Rep. No. 101-485(III), at 34.

predictably deciding which functions fall under Section 12111(8)'s purview will be difficult.

To reliably determine the essential functions of the position in question, courts must look elsewhere.

C. Equal Employment Opportunity Commission Interpretive Guidance

The Equal Employment Opportunity Commission's Interpretive Guidance (Guidance) is the next best source to consider.[36] The Guidance presents a list of seven relevant factors courts should consider when deciding whether a particular function is essential. These factors include the following:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.[37]

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36. Congress empowered the E.E.O.C. to enact regulations that inform courts and employers regarding the meaning of the ADA's various provisions. *See* 29 C.F.R. 1630 (appendix) (first paragraph).

37. 29 C.F.R. § 1630.2(n)(3) (2012). Additionally, the Guidance presents three reasons why a particular function should count as essential: the position exists to perform the task, there are a limited number of other employees who could perform the task, or the function is highly specialized. 29 C.F.R. § 1630.2(n)(2) (2012). Moreover, these factors are not exclusive. In explaining how to determine whether a function is essential, the E.E.O.C. states that "all relevant evidence should be considered" and that "[g]reater weight will not be granted to the types of evidence included on the list than to types of evidence not listed." Appendix to Pt. 1630, Interpretive Guidance, 29 C.F.R. Ch. XIV (2013), at 396. It appears the E.E.O.C. wanted courts to analyze the above factors and then conclude, based on one or more of the specified reasons, whether a particular function is "essential." *See id.* at 396-97 (explaining that Part 1630 lists various types of evidence that should be considered in determining whether a particular function is essential).

Using these factors to guide the essential functions inquiry has the primary benefit of creating a consistent and predictable analytical framework. Unlike the three rules of construction from the legislative history that suffer from a high level of generality, these factors help narrow the trier of fact's attention to specific and objective considerations. As a result, using these factors might contribute to more robust decision-making because courts would consider a more complete set of factual circumstances.

In addition to listing factors for a court to consider, the E.E.O.C., like the House Judiciary Committee, believed that essential functions closely relate to the employee's on-the-job performance. In a manual designed to help employers comply with Title I, the E.E.O.C. suggested that employers, when "identifying an essential function to determine if an individual with a disability is qualified," should "focus on the *purpose* of the function and the *result* to be accomplished, rather than the manner in which the function presently is performed."[38] In a job that requires moving heavy packages to a storage room, for instance, the essential function is the ability to accomplish this task, irrespective of whether doing so involves lifting or carrying the packages in a certain way.[39] This example, in addition to those cited in the Reports, suggests that the same job can be accomplished multiple ways. As a result, a court should not focus on whether the applicant can perform the job according to only one method of performance. Rather, the court should focus on whether the applicant can achieve the job's "desired result" using an alternative method of performance that takes into account her unique abilities.[40]

Although the Guidance is available to courts, its consistent application is hampered by being non-binding. Courts are free to use these factors as much or as little as they want. Furthermore, the list of factors is not exhaustive—courts can choose some factors on the list, or look beyond to consider an entirely different set of factors. The non-binding and non-exhaustive nature of these factors undercuts their effectiveness. Thus, the extent to which courts use these factors differs across jurisdictions.[41]

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38. E.E.O.C. Technical Assistance Manual (1992) at 34 (emphasis in original).

39. E.E.O.C. Employment Provisions (Title I) Technical Assistance Manual, Chapter V, § 5.5(f), http://www.adaportal.org/Employment/Browse_TAM_I/Chapter_V_5-5.html.

40. Skerski v. Time Warner Cable Co., 257 F.3d 273, 280 (3d Cir. 2001) (noting that the legislative history behind Section 12111(8) indicates that the essential function inquiry "focuses on the desired result rather than the means of accomplishing it").

41. *Compare* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005) (relying on E.E.O.C. factors while conducting essential functions inquiry), *with* Gratzl v. Office of Chief Judges of 12th, 18th, 19th, and 22nd Judicial Circuits, 601 F.3d 674 (7th Cir. 2010) (conducting essential functions inquiry without relying on E.E.O.C. factors).

Taken together, the plain meaning, the three rules of construction from the legislative history, and the E.E.O.C. factors provide the basic background for interpreting the meaning of "essential functions." Indeed, courts typically use at least one of these sources when conducting the essential functions inquiry. The problem that arises, however, is that courts do not have a consistent analytical framework. Some courts guide their analysis using the E.E.O.C. factors, while other courts pay them little or no attention. Still other courts confine their analysis to the text of Section 12111(8), while others look beyond the text to consider Title I's legislative history. Part II will discuss how courts use these various sources when determining whether discriminatory job requirements are essential.

II. SECTION 12111(8) AND DISCRIMINATORY JOB REQUIREMENTS IN THE CASE LAW

The ability to define a job's essential functions allows employers to undermine Title I's mandate of eliminating discrimination against individuals with disabilities. As long as employers can draw a connection between the function at issue and the job's purpose, the plaintiff is at a disadvantage to win her discrimination claim. In the absence of a limiting principle, the ambiguity of the phrase "essential functions" dilutes Title I's protections against employment discrimination. Individuals with disabilities continue to be subjected to discriminatory selection criteria, but clarifying the meaning of "essential functions" would help counteract Section 12111(8)'s current weakness.

Part II analyzes how courts address discriminatory job requirements. These requirements present sensitive concerns because they explicitly screen out an applicant on the basis of her disability.[42] Examples of such job requirements include requiring an employee with vertigo to work on a conveyor belt[43] or a nurse with rheumatoid arthritis to lift patients onto hospital beds.[44] Eliminating the

42. *See* Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 722-23 (6th Cir. 2000) (determining whether deputy sheriff with severe physical restrictions must physically restrain inmates); Stone v. City of Mount Vernon, 118 F.3d 92, 94 (2d Cir. 1997) (deciding whether paraplegic firefighter must engage in fire suppression activities); Barnes v. Nw. Iowa Health Ctr., 238 F. Supp. 2d 1053, 1068, 1082-83 (N.D. Iowa 2002) (analyzing whether employee with rheumatoid arthritis had to lift patients onto hospital beds); S. REP. NO. 101-116, at 35 (1989).

43. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1221-22 (11th Cir. 2005).

44. *Barnes*, 238 F. Supp. 2d at 1082-83.

unjustified use of such requirements is the linchpin of Title I's protections.[45] Thus, how courts analyze such requirements is a good way to see how effective Section 12111(8) is to combat potential discrimination. This Part contends that there are two main approaches that courts take when conducting the essential functions inquiry.

A. *Favoring the Employer's Judgment*

The first approach is characterized by deferring to an employer's judgment regarding which job functions are essential. Instead of analyzing different factors relating to the employment relationship, this approach typically begins and ends with considering the employer's opinion. The case of *Equal Emp't Opportunity Comm'n v. Picture People, Inc.*[46] is illustrative. Picture People terminated Jessica Chrysler, a congenitally deaf employee, because her lack of oral communication skills allegedly burdened the operation of Picture People's business.[47] The E.E.O.C. sued Picture People on behalf of Chrysler, alleging that Picture People unlawfully discriminated against her under Title I. At issue was whether the essential functions of Chrysler's position included "verbal" communication skills or "effective" communication skills.[48] A majority of the Tenth Circuit agreed that verbal communication skills were essential.[49]

The court began its discussion by listing the seven E.E.O.C. factors.[50] It quickly narrowed its attention, however, to Picture People's opinion that oral communication skills were essential.[51] Restricting focus to the employer's judgment was appropriate because the essential function inquiry "is not intended to second

45. S. Rep. No. 101-116, at 34 (stating that "[t]he requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability . . . . If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criteria must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do an essential function of the job.").

46. 684 F.3d 981 (10th Cir. 2012).

47. *Id.* at 985-86.

48. Picture People originally hired Chrysler for the position of "performer," which required working in the camera room where she interacted daily with patrons in oftentimes stressful and chaotic situations. Over the span of her employment, Chrysler conducted between fifteen and twenty photo sessions with different families. *Id.* at 983-84, 986-87.

49. *Id.* at 987.

50. *Id.* at 986.

51. *Id.*

guess the employer or to require [it] to lower company standards."[52] As long as the function in question is "job-related, uniformly enforced, and consistent with business necessity, the employer has a right to establish what a job is and what is required to perform it."[53]

Based on Picture People's requirement that employees possess the ability to verbally communicate, and its contention that nonverbal communication impacted the efficient operation of its business, the majority concluded that all applicants to Chrysler's position "must be able to verbally communicate with customers."[54] The majority ended its analysis by noting that "nothing suggests that gestures, pantomime, and written communication are similarly effective and efficient [as oral communication]."[55]

Gratzl v. Office of Chief Judges of 12th, 18th, 19th, and 22nd Judicial Circuits also demonstrates this approach to the essential functions inquiry.[56] Jeanne Gratzl, a court reporter hired to work in a control room and who suffered from incontinence, sued her employer after new workplace rules required all court reporters to rotate through in-court proceedings.[57] Due to her condition, Gratzl was unable to participate in such rotations without imposing a significant burden on courtroom procedures.[58]

In analyzing whether rotation through in-court proceedings was an essential function of her position, the Seventh Circuit gave considerable weight to the employer's judgment.[59] Referring to Title I employment discrimination claims more generally, the Seventh Circuit clarified that not only will it consider the employer's opinion as evidence of which functions are essential, but that it will *presume* such an opinion to be correct.[60] The Seventh Circuit affirmed the employer's judgment because Gratzl failed to present enough evidence to rebut this presumption.[61]

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52. *Id.* (quoting Hennagir v. Utah Dep't of Corr., 587 F.3d 1255, 1262 (10th Cir. 2009)) (internal quotations omitted).

53. *Id.*

54. *Id.* Chrysler's position while employed by Picture People, Inc. was "performer."

55. *Id.* at 986-87.

56. 601 F.3d 674 (7th Cir. 2010).

57. *Id.* at 676-79.

58. *Id.* at 677.

59. *Id.* at 679.

60. *Id.* (emphasis added). Interestingly, an amendment that would have created a presumption in favor of the employer's opinion regarding which functions are essential was specifically rejected during Title I's drafting process. H.R. REP. NO. 101-485(III), at 33 (1990).

61. *Gratzl*, 601 F.3d at 679-80.

The Tenth and Seventh Circuits are not alone in deferring to an employer's judgment.[62] Other courts agree that an employer's judgment should not be second-guessed during the essential function inquiry.[63] The reliance that these courts place on an employer's judgment is supported by the text of Section 12111(8). The express language of the statute makes clear that the employer's opinion regarding which functions are essential must factor into a court's analysis.[64] Because many judges focus primarily, or even exclusively, on the text of a statute when interpreting its meaning, it is no surprise that the employer's judgment plays a prominent role in many courts' analysis.[65]

There are additional reasons to focus on the employer's judgment. An employer's opinion—clearly expressed in written job descriptions or deposition testimony—may be readily available. Interpreting the meaning of "essential" through other sources can be more difficult and time-consuming. Additionally, treading into the depths of legislative materials is not an attractive alternative to clear statements contained in written job descriptions or deposition testimony.[66]

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62. *See* McBride v. BIC Consumer Prods. Mfg. Co., Inc., 583 F.3d 92, 98 (2d Cir. 2009) ("a court must give substantial deference to an employer's judgment"); Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001) ("[i]n the absence of evidence of discriminatory animus, courts generally give 'substantial weight' to the employer's judgment"); Weigert v. Georgetown Univ., 120 F. Supp. 2d 1, 14 (D.C. 2000) ("[c]ourts defer 'to the employer's judgment'"); Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 682 (5th Cir. 1996) ("whenever an employer gives written descriptions of the essential functions of a job, those descriptions are entitled to substantial deference"); Johnson v. Georgia Dep't of Human Res., 983 F. Supp. 1464, 1473 n.7 (N.D. Ga. 1996) ("the employer did not consider that function to be minor and it is to the employer's judgment . . . that this Court must defer.").

63. *See* Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006) ("our inquiry into essential functions 'is not intended to second guess the employer'") (quoting Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004)); DePaoli v. Abbott Labs., 140 F.3d 668, 674 (7th Cir. 1998) ("we do not otherwise second-guess the employer's judgment in describing the essential requirements for the job").

64. 42 U.S.C. § 12111(8) (2012) ("For purposes of this subchapter, 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.").

65. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. Chi. L. Rev. 636, 639 (1999); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 61 (1994).

66. *See* Easterbrook, *supra* note 65; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 71, 71-74 (1994).

B. Totality of the Circumstances Approach

The second approach to discriminatory job requirements is very different than the first approach. Courts taking the second approach typically reduce the emphasis of the employer's judgment and consider it as one factor among many.[67] Instead of deferring to the employer's opinion regarding which functions are essential, these courts focus on the highly factual nature of the employment relationship.[68]

Courts that fall into this second category more closely scrutinize the employer's rationale for adopting the job requirement in question. For example, in *Gillen v. Fallon Ambulance Serv., Inc.*[69] the plaintiff, a genetic amputee, was denied the position of Emergency Medical Technician (EMT) because she did not have functional use of two hands.[70] Instead of deferring to the employer, the First Circuit clarified that the essential functions inquiry cannot depend on only the employer's judgment. Rather, the inquiry must "involve[ ]

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67. *See* Ward v. Massachusetts Health Research Inst., Inc., 209 F.3d 29, 34 (1st Cir. 2000) ("[w]hile we generally give substantial weight to the employer's view of job requirements in the absence of evidence of discriminatory animus, it is only one factor in the analysis"); Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 (3d Cir. 1998) ("while 'inquiry into the essential functions is not intended to second guess an employer's business judgment' . . . whether a particular function is essential 'is a factual determination that must be made on a case by case basis [based on] *all* relevant evidence' ") (quoting 29 C.F.R. pt. 1630, app. § 1630.2(n) (emphasis in original); Arline v. School Bd. of Nassau County, 772 F.2d 759, 764-65 (11th Cir. 1985) (aff'd, 480 U.S. 273 (1987)) ("[t]he court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives").

68. *See* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 991 (9th Cir. 2007) (stating that "the ADA and implementing regulations direct fact finders to consider" at least six different factors when considering whether a function is essential); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1230 (11th Cir. 2005) (noting that whether a function is essential "is evaluated on a case-by-case basis by examining a number of factors"); Davidson v. Am. Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2003) ("[d]etermining whether a particular function is essential is a factual inquiry"); Skerski v. Time Warner Cable Co., 257 F.3d 273, 279 (3d Cir. 2001) ("none of the factors [outlined in E.E.O.C. Interpretive Guidance] nor any of the evidentiary examples alone are necessarily dispositive"); Deane v. Pocono Med. Ctr., 142 F.3d at 148 (" 'the employer's judgment as to which functions are essential' and 'written job descriptions prepared before advertising or interviewing applicants' are two *possible* types of evidence . . . but . . . such evidence is not to be given greater weight simply because it is included in the" E.E.O.C. Interpretive Guidance) (quoting E.E.O.C. Interpretive Guidance) (emphasis in the original); Stone v. City of Mount Vernon, 118 F.3d 92, 97 (2d Cir. 1997) ("considerations set out in this regulation [E.E.O.C. Guidance] are fact intensive . . . . the regulations themselves state that the evidentiary examples provided are not meant to be exhaustive"); Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995) (observing that "the ADA and implementing regulations direct fact finders to consider" at least five different factors when considering whether a function is essential).

69. 283 F.3d 11 (1st Cir. 2002).

70. There were two job requirements at issue. The first was the applicant's ability to lift seventy pounds. The First Circuit concluded that this was not an essential function of the

fact-sensitive considerations . . . determined on a case-by-case basis."[71] In reversing the district court's grant of summary judgment for Fallon Ambulance Service (Fallon), the employer, the First Circuit focused on the plaintiff's ability to safely lift patients onto stretchers using only one hand.[72]

Believing that "a court should give consideration to what an employer deems essential, but also should take care to ensure that such functions *are essential in fact*," the First Circuit refused to defer to Fallon's judgment that a two-handed lift was an essential function.[73] Fallon argued that suspending the two-handed requirement would interfere with its ability to safely respond to emergencies. Putting this argument aside, the First Circuit focused on other evidence, including Fallon's conditional offer of employment to the plaintiff, which suggested that the two-handed requirement was not essential.[74] Additionally, the Massachusetts Department of Public Health (MDPH) certified the plaintiff to work as an EMT for another employer, further suggesting that functional use of two hands was not required by the position.[75]

C. Totality of the Circumstances Approach is Preferable

The First Circuit's willingness to look beyond the employer's judgment is striking given that the two-handed lift requirement was imposed because of safety concerns that arise when EMTs respond to emergencies.[76] Some courts are more willing to defer to the employer when the job implicates public safety concerns.[77] The First

EMT position because the employer enforced it infrequently. *Id.* at 27. The second requirement involved " '[l]ifting *with two hands* individually up to 70 pounds for a total height of 6 inches from knuckle height occasionally.' " *Id.* at 18 (emphasis added).

71. *Id.* at 25.

72. *Id.* at 27-28.

73. *Id.* at 27 (emphasis added). *But see* Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006) (maintaining that courts should defer to the employer's opinion because the "inquiry into essential functions 'is not intended to second guess the employer' "); Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001) (concluding that "courts generally give 'substantial weight' to the employer's judgment as to what functions are essential.' "). In both *Mulloy* and *Kvorjak*, the central issue was whether presence at work was an essential function of the plaintiff's position. The First Circuit's willingness to defer to the employer in "presence at work" cases, but to apply greater scrutiny in cases like *Gillen* further suggests that courts can be as critical or as hands-off as they want.

74. *Gillen*, 283 F.3d at 27.

75. *Id.* at 19 and 28.

76. *Id.* at 19.

77. *See, e.g.*, Atkins v. Salazar, 677 F.3d 667, 671-72 (5th Cir. 2011) (holding that employer lawfully imposed discriminatory requirement against diabetic park ranger despite absence of diabetes-related incident).

Circuit, however, justified its conclusion as achieving "one of the primary goals of the ADA: 'to prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual's disability rather than on the individual's actual characteristics.'"[78] The more a court inquires into the relationship between the plaintiff's actual characteristics, the job's purpose, and the job requirement at issue, the more confident the court can be that the employer either is or is not unlawfully discriminating against the applicant.

Scrutinizing the employer's opinion is therefore critically important to protecting the plaintiff against unlawful discrimination.[79] In many ways, the *Gillen* and *Picture People* courts begin from the same set of facts. In each case, the employer denied the plaintiff employment because she could not perform a discriminatory job requirement. Each plaintiff could successfully achieve the "desired results" of her job, however.[80] Thus, the divergent conclusions reached by these courts stem less from factual differences than from differences in the method of analysis used. Whereas the Tenth Circuit focused on the employer's opinion and *how* the plaintiff performed the job, the First Circuit went beyond the employer's opinion and focused on whether the plaintiff, based on her actual characteristics, could achieve the job's "desired results."[81]

The problem is that current Section 12111(8) supports both approaches.[82] Although proponents of the first approach ground their analysis in the text of the statute, nothing in the language of

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78. *Gillen*, 283 F.3d at 29 (quoting EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1097 (6th Cir. 1998)). The dissenting opinion in *Picture People* similarly proclaimed that a reviewing court must keep the employer from " 'turn[ing] every condition of employment [. . .] into [. . .] an essential job function.' " Restricting the essential functions inquiry to Chrysler's physical inabilities is dangerous because it "eliminate[s] an entire class of disabled persons" from applying for a particular position. 684 F.3d 981, 997-98 (10th Cir. 2012).

79. *See* S. REP. NO. 101-116, at 35 (1989) ("Hence, the requirement that job selection procedures be 'job-related and consistent with business necessity' underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the job, but that even if they do provide such a measure, a disabled applicant is offered a 'reasonable accommodation' to meet the criteria that relate to the essential functions of the job at issue.").

80. Chrysler did not receive any customer complaints against her while employed by Picture People, Inc. *Picture People*, 684 F.3d at 995. If her communication skills were truly a problem, then it is reasonable to expect that a customer would have filed a complaint with the employer. Instead of filing a complaint, one family liked Chrysler's work so much that they returned for another portrait session. *Id.*

81. Skerski v. Time Warner Cable Co., 257 F.3d 273, 280 (3d Cir. 2001) (noting that the legislative history behind Section 12111(8) indicates that the essential function inquiry "focuses on the desired result rather than the means of accomplishing it").

82. *Compare* S. REP. NO. 101-116, at 36 (1989) (describing the importance of examining all selection criteria to make sure that "paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant"), *and* H.R. REP. NO. 101-

Section 12111(8) says that an employer's judgment is the *only* factor to consider. In fact, the text is silent regarding how much weight should be assigned to the employer's judgment. The only confident conclusion based on the text is that such judgment must play *some* role in the essential functions inquiry.

Because "deference" suggests a hands-off approach, courts that accept the employer's judgment as given risk overlooking discriminatory practices. This, in turn, risks eliminating different groups of individuals from the workforce.[83] Looking beyond the text to consider the underlying goals of Section 12111(8) helps clarify what courts ought to consider during the essential functions inquiry.

Instead of a hands-off approach, the drafters of Title I envisioned somewhat of a cat and mouse game between courts and employers. The ADA allows employers to use job requirements that are "job-related" and "consistent with business necessity," even if their application discriminates against certain groups of individuals.[84] It is the role of the courts to make sure that an employer's reasons for using such requirements are justified and not a smokescreen for unlawful discrimination. Therefore, courts must examine how the requirement at issue—for example, the two-handed lift in *Gillen*—relates to the most important aspects of the job. .

Current Section 12111(8) fails to mention this delicate balancing.[85] In failing to do so, courts continue to reach inconsistent results based on varying levels of "deference" and "scrutiny" applied

485(III), at 33 (1990) (underscoring that it is necessary to "review the job duty not in isolation, but in the context of the actual work environment"), *and* Appendix to Pt. 1630, Interpretive Guidance, 29 C.F.R. Ch. XIV (2013), at 396 (clarifying that "all relevant evidence should be considered" when determining which functions are essential), *with* S. Rep. No. 101-116, at 23 (1989) (stating that "consideration should be given to the employer's judgment regarding what functions are essential"), *and* H.R. Rep. No. 101-485(II), at 55 (1990) (affirming that consideration should be given to the employer's judgment regarding what functions are essential), *and* Appendix to Pt. 1630, Interpretive Guidance, 29 C.F.R. Ch. XIV (2013), at 396 (cautioning that the essential functions inquiry "is not intended to second guess an employer's business judgment with regard to production standards . . . nor to require employers to lower such standards"), *and* Section 12111(8) (stating that "consideration shall be given" to the employer's judgment).

83. *Picture People*, 684 F.3d at 997.

84. Section 12112(b)(6).

85. See S. Rep. No. 101-116, at 19, 24 (1989) ("[Title I] provides that employment decisions must not have the purpose of effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability."). The Senate Report also notes that "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity." *Id.* at 34.

to the employer's job requirements. Part III proposes two amendments to Section 12111(8) that would help fix this problem.

III. AMENDING THE TEXT OF SECTION 12111(8)

Considered separately, the current text of Section 12111(8), its legislative history, and the E.E.O.C. factors fail to satisfactorily define "essential functions." Synthesizing these sources, however, lays the groundwork for reforming Section 12111(8) and making Title I's protections more effective.

This Part proposes two reforms to current Section 12111(8) that would clarify the understanding of "essential functions." First, the statutory text should expressly mention that "essential functions" closely relates to achieving the "desired results" of the position. Second, the statutory text should incorporate the seven factors from the Guidance. Providing courts with a set of guidelines will help clarify that the employer's judgment is only one factor among many to consider. The rest of this Part discusses each reform in turn.

A. Reference to the "Desired Results" of the Position

Individuals with disabilities may perform a certain task differently because of their unique physical or cognitive characteristics. Unless the employer can prove that employment would cause an undue burden or that the employee truly cannot perform what the job demands, the employer should not be allowed to terminate such an individual. Otherwise, employers place value judgments on one method of performance over another to the detriment of the employee with the disability. As long as the employee can achieve the result of the position with reasonable or no additional cost, each method of performance should be valued equally.[86] The description of essential functions in the legislative history and E.E.O.C. regulations reinforces this idea.[87]

Focusing on "desired results" aligns with Title I's underlying goal of eliminating unlawful discrimination. Unlike other federal legislation that prohibits employment discrimination on the basis of race

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86. H.R. REP. No. 101-485(III), at 33 (1990) ("essential functions are those which must be performed, even if the manner in which particular job tasks comprising those functions are performed, or the equipment used in performing them, may be different for an employee with a disability than for a non-disabled employee."). *See also* Section 12101 ("physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society").

87. *See* discussion *supra* Parts I.B, I.C.

or gender, the ADA lets an individual's disability remain "visible" during the hiring phase. For example, the employer is allowed to consider how an applicant's disability helps or hinders her ability to perform the job[88] and can make the hiring decision accordingly. In the words of Professor Robert C. Post, this means that disabled applicants do not have an "audition screen" to stand behind when applying for a job.[89]

For Title I to guard against unlawful discrimination, it must do so in a way different from traditional antidiscrimination statutes. Filling this gap is precisely where the concept of "desired results" is aimed. Encouraging courts to focus on how applicants might be able to perform the job in relatively low-cost, alternative ways both reinforces each individual applicant's feeling of self-worth and protects each applicant from unfair discrimination that bears no relation to the job.

Amending the statutory text to include a reference to "desired results" assumes that on some level courts will look beyond the employer's judgment. For example, this might require courts to consider nontraditional ways to perform a job. The First Circuit in *Gillen* noted that the two-hand requirement was outdated because it was based on "historical fact—how EMT work traditionally has been performed."[90] In other situations, courts might treat a particular task as a "useful skill or method to perform the essential functions of the job."[91]

These various approaches are required if the equality principal underlying the ADA is to have effect. Without scrutinizing how the plaintiff's actual characteristics relate to performing the job, courts make it easier for employers to use discriminatory practices.[92] Arguably, this is precisely what the Tenth Circuit failed to do in *Picture People*.[93] Chrysler performed her job without receiving any documented complaints from customers,[94] but the majority nonetheless

88. *See* 42 U.S.C. § 12113 (2012); Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 28-29 (1st Cir. 2002). *See generally* Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1 (2000)

89. *See* Post, *supra* note 88, at 11-12.

90. *Gillen*, 283 F.3d at 28.

91. Skerski v. Time Warner Cable Co., 257 F.3d 273, 280 (3d Cir. 2001).

92. *See* Davidson v. Am. Online, Inc., 337 F.3d 1179, 1191 (10th Cir. 2003) (" 'an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description' ") (quoting Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1071 (9th Cir. 2000)).

93. *See* Equal Emp't Opportunity Comm'n v. Picture People, Inc., 684 F.3d 981, 998-99 (10th Cir. 2012) (dissenting opinion).

94. There was even evidence that a family rebooked another photo session with Chrysler because it liked her so much. *Id.* at 995.

concluded that verbal communication was an efficient, and therefore necessary, skill.

As noted in Part II, focusing the essential functions inquiry on methods of performance risks eliminating entire groups of individuals from the workforce. It also reduces the hiring question to a one-dimensional focus on the applicant's current physical or cognitive ability, instead of expanding consideration to the applicant's potential.[95] Overall, this makes hiring decisions much more rigid. Although Title I allows employers to consider an applicant's disability, the drafters aspired to have employers look beyond this characteristic. The "essential functions" inquiry was designed as a flexible tool to shift emphasis away from physical "differences" to whether the applicant could achieve the desired results of the position. Shifting this emphasis would help integrate individuals with disabilities into the workforce and American society.

B. Clarifying the Weight of the Employer's Judgment

Section 12111(8) leaves little doubt that courts must consider the employer's opinion when determining whether a particular function is essential. The reasons for this are clear. Employers often know how particular jobs relate to the surrounding office or factory. They also typically know what role each job plays and what goals each job is meant to achieve. Although these informational advantages make the employer's opinion a good place to *begin* the essential functions inquiry, they do not justify making such opinion the only consideration. The Congressional Reports and E.E.O.C. Guidance suggest that an employer's opinion is only one factor among many to consider during the essential functions inquiry.[96] Section 12111(8) is inadequate, however, because it does not list other factors to consider or even to what extent the employer's

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95. *Id.* at 1000 ("Moreover, lawsuits like Ms. Chrysler's are precisely the mechanism Congress envisioned for correcting such injustice [allowing discrimination to deny persons with disabilities from fully participating in society]."). To be sure, there are certain situations—where public safety is a huge concern. For example, courts agree to take this risk in the context of prison guards and park rangers.

96. *See* S. REP. NO. 101-116, at 35 (1989) (describing the importance of examining all selection criteria to make sure that "paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant"); H.R. REP. NO. 101-485(III), at 33 (1990) (underscoring that it is necessary to "review the job duty not in isolation, but in the context of the actual work environment"); Appendix to Pt. 1630, Interpretive Guidance, 29 C.F.R. Ch. XIV (2013), at 396 (clarifying that "all relevant evidence should be considered" when determining which functions are essential).

opinion should be used as evidence. By mentioning only the employer's judgment, the statute risks having courts over rely on such judgment.

The Reports mentioned in Part I strongly suggest that "deferring" or giving "substantial weight" to employers limits Title I's effectiveness. As the Reports mention, one of Title I's targets—if not its *main* target—was employers.[97] For example, the requirement that selection criteria "actually measure skills required by the job" was critical to counteract pervasive employer-based discrimination.[98] More specifically, the Senate Committee on Labor and Human Resources reported that "stereotypes and misconceptions" about the productivity and cost of employing persons with disabilities were shared across the population and that "[e]very government and private study on the issue" concluded that such discrimination led employers to use selection criteria that barred disabled individuals from jobs.[99] The House Education and Labor Committee also cited discrimination's pernicious effect on the opportunities for disabled individuals, stating that unfair job requirements remained an "inexcusable barrier" to increased employment among individuals with disabilities.[100]

Deferring to employers is problematic because it risks allowing managers and executives—the very targets of Title I's antidiscrimination mandate—to implement requirements without providing a justification. As mentioned in Part II, the unique nature of the ADA requires courts to play somewhat of a cat and mouse game with employers. Some discriminatory job requirements—those that are job-related and consistent with business necessity—

97. *See* S. Rep. No. 101-116, at 8-9 and H.R. Rep. No. 101-485(III), at 33 (noting the multitude of discriminatory practices used by employers to deny individuals with disabilities employment); H.R. Rep No. 101-485(III), at 31 ("The underlying premise of [Title I] is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive."); S. Rep. No. 101-116, at 35 (observing that "[e]very government and private study on the issue [of employment discrimination] has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity"); H.R. Rep. No. 101-485(II), at 71 (1990) (incorporating the Senate Report's finding that "employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity").

98. H.R. Rep. No. 101-485 (III), at 31.

99. S. Rep. No. 101-116, at 35. *See also* H.R. Rep. No. 101-485(II), at 33 (citing studies and testimony indicating that discrimination remains an "inexcusable barrier" to increased employment for persons with disabilities); H.R. Rep. No. 101-485(III), at 31 (affirming that stereotypes and misconceptions about the abilities of persons with disabilities are pervasive).

100. H.R. Rep. No. 101-485(II), at 33.

are lawful, but without scrutinizing an employer's rationale, courts cannot determine whether any given requirement is justified. Instead of favoring the employer, the drafters strongly suggested that courts should carefully analyze an employer's stated reasons for implementing the requirement at issue.

Incorporating the factors from the E.E.O.C. Guidance into the statutory language would provide courts with a concrete set of guidelines to consider.[101] As noted in Part I, the Guidance recommends that "all relevant evidence should be considered" during the essential functions inquiry.[102] Because no single factor is dispositive, "[g]reater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed."[103] Incorporating these factors would clarify that the essential functions inquiry is factual in nature. Instead of narrowing focus to a single factor, this amendment would expand a court's perspective to the totality of the employment relationship.

The nature of the employment relationship makes a multi-factored test the preferred solution. Workplaces and jobs differ across various industries and sectors of the economy. One occupation—for example, "assembly line worker"—may have different responsibilities, expectations, and hiring criteria based on the particular nature of the workplace in which the job is situated. What may be an essential function to an assembly line worker in a Ford plant in Detroit, MI, for instance, might only be marginal to an assembly line worker in a Boeing plant in Seattle, WA. Furthermore, assembly line workers in the Ford plant itself may have such a diversity of assignments that what is essential to one worker is not essential to another. All of these differences can impact the purpose, or "essence," of any single job. Inquiries into the purpose of a job therefore must be flexible and sensitive to the particular circumstances of each case. Narrowing a court's attention to a subset of factors—at the extreme, one factor—decreases the test's flexibility and severs the inquiry from its intended purpose: determining whether the plaintiff can perform the essential functions of *this* or *that* job.

101. As a reminder, these factors include: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared by the employer; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the employee to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past employees in the job; and (7) the work experience of current employees in the same or similar jobs. 29 C.F.R. § 1630.2(n) (2012).

102. *See supra* Part I.C; Appendix to Pt. 1630, Interpretive Guidance, (2013), at 396.

103. Interpretive Guidance, 29 C.F.R. Ch. XIV, at 396.

Incorporating the E.E.O.C. factors into Section 12111(8) would transform what is currently a rule-like approach focusing on a single factor into more of a standard-like approach. As Professor Kathleen Sullivan writes, a categorical, or rule-like, approach "defines bright-line boundaries and then classifies fact situations as falling on one side or the other."[104] Many courts, including the Seventh and Tenth Circuits, follow such a categorical approach. Beginning from the list of tasks the employer deems essential, such courts ask whether the plaintiff can perform the task at issue. If she cannot, then the court concludes that she is not a "qualified individual" and that her lawsuit must fail. The purpose of Title I, however, is to maintain a flexible test that captures the unique circumstances presented by the particular plaintiff and job.

Clarifying the weight of the employer's opinion and incorporating the E.E.O.C. factors are not drastic changes. Many courts, for instance, already acknowledge the inherently factual nature of the essential functions inquiry and apply a multi-factored balancing approach using the seven factors.[105] Furthermore, the Congressional Reports are littered with references to the many factual considerations that courts should take into account.[106] The key point is to incorporate these ideas into the express language of Section 12111(8), thereby clarifying that the essential functions inquiry is fact-dependent.

According to Professor Sullivan, making this change may have the residual impact of leveling the playing field between employers and job applicants.[107] The employer holds a superior position to influence a court's ultimate decision of which functions are essential because it produces the very job descriptions that that court will rely upon at trial. The employer also holds a superior position to understand the overall structure of the workplace and the role of each job within that structure.[108] Deferring to the employer, given its informational advantage over the plaintiff, tips the scales further in its favor. Because a standard-like approach reduces the relative weight of any one consideration, the "incentive[ ] for exploitation

104. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 59 (1992).

105. *See supra* note 68.

106. *See supra* note 82.

107. Sullivan, *supra* note 106, at 66-67.

108. *See* Bates v. United Parcel Serv., Inc., 511 F.3d 974, 991 (9th Cir. 2007) (agreeing with the Eighth Circuit's approach in *Benson*); Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995) (holding that an employer who disputes the plaintiff's claim that she can perform the essential functions must put on evidence establishing those functions because "much of the information which determine those essential functions lies uniquely with the employer").

in situations in which knowledge or access to information is distributed unequally" is reduced.[109] This makes the essential functions inquiry fairer by redistributing advantage to the plaintiff.[110]

A question that arises is: Once Section 12111(8) incorporates this list of factors, how should courts treat the employer's judgment? One solution is to allow the employer to explain how the requirement at issue is necessary to achieving the desired results of the job. Allowing the employer to provide a preliminary explanation recognizes its informational advantage in the workplace. A court should not, however, give undue weight to this judgment and should then allow the plaintiff a chance to explain how she can perform the job a different way than the employer suggests is necessary. For example, the plaintiff in *Gillen* could have argued that the two-handed lift requirement was not necessary to effectively respond to emergencies because other EMTs, including herself, were already performing the job without the functional use of two hands.[111]

The key inquiry during this back-and-forth between the employer and plaintiff revolves around the job's intended goals. Instead of proving the importance of a requirement by showing how long it has existed or how many employees must perform it, the employer must explain how performing that requirement relates to the desired results. Keeping the focus of the litigation on this relationship forces the employer to articulate a meaningful reason for denying the plaintiff the job. In the future, this will help encourage employers to implement fair and meaningful requirements.

CONCLUSION

Twenty-four years ago, the Americans with Disabilities Act was passed to eliminate unlawful discrimination against individuals with disabilities. As then-President Bush remarked, the Act was intended to knock down barriers for such individuals and usher them into mainstream American society. Although the Act has helped advance the disability rights movement, it has done an inadequate job of preventing employer-based discrimination. Employers continue to use unnecessary job requirements that unjustifiably screen out applicants on the basis of their disability, and courts often fail to sufficiently scrutinize the employer's judgment to make sure that discriminatory job requirements are lawful.

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109. Sullivan, *supra* note 106, at 66.
110. *Id.* at 66-67.
111. *Cf.* Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 19 (1st Cir. 2002).

This Note has argued that Title I ought to be amended. This amendment would encourage courts to take a broad approach to the "essential functions" inquiry. Instead of beginning and ending the inquiry with the employer's opinion, this amendment proposes that courts consider other factors to ensure that the employer's reasons for using the discriminatory requirement relate to the actual day-to-day performance of the job. This inquiry is crucial to making sure that such a requirement is actually related to the goal of the job and that individuals with disabilities are not unfairly discriminated against.