

ADVERSE EMPLOYMENT ACTIONS IN FAILURE-TO-ACCOMMODATE CLAIMS: MUCH ADO ABOUT NOTHING

NICOLE BUONOCORE PORTER*

This Article addresses a circuit split in the disability law jurisprudence. Under the Americans with Disabilities Act (ADA), employees generally bring two types of claims against their employers—discrimination claims and failure-to-accommodate claims. Succeeding on a discrimination claim requires proving that the employee suffered an adverse employment action. Succeeding on a failure-to-accommodate claim does not. But several courts—including a recent case in the Tenth Circuit—have added this adverse-employment-action requirement into failure-to-accommodate claims. In doing so, these courts have camouflaged important issues about an employer’s obligation to provide a reasonable accommodation to disabled employees. Although I believe that courts that require an adverse employment action in failure-to-accommodates claim do so in error, the main contribution of this Article is to reveal how courts have obscured and confused broader disability-accommodation issues by imposing that requirement.

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INTRODUCTION

The Americans with Disabilities Act (ADA)¹ prohibits employers from discriminating against individuals with disabilities. But, unlike other anti-discrimination statutes that generally only prohibit employers from taking adverse employment actions based on protected characteristics,² the ADA also has a statutory provision that defines discrimination to include the failure to provide reasonable accommodations to qualified employees.³ Thus, most cases under the ADA either proceed as (1) disparate treatment claims, arguing that an adverse employment action was motivated by the plaintiff's disability, or (2) claims that the employer failed to provide an accommodation to a disabled employee. Courts agree that the first category of cases proceed under the familiar *McDonnell Douglas*⁴ burden-shifting framework.⁵ But most courts have further modified the plaintiff's prima facie

¹ 42 U.S.C. §§ 12101–12213 (2012).

² These antidiscrimination statutes include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012), which prohibits discrimination based on race, color, sex, religion, and national origin, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2012), which prohibits discrimination based on age.

³ 42 U.S.C. § 12112(b)(5)(A) (listing “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” as a form of discrimination).

⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This was a race discrimination case under Title VII. Because there was no direct evidence of discrimination, the Court had to decide how plaintiffs should go about proving that an adverse employment action was caused by a discriminatory motive when the plaintiff only has circumstantial evidence. *Id.* at 801. The Court set up a three-part burden-shifting framework. First, the plaintiff must establish a prima facie case. Because this case involved the employer's refusal to rehire the plaintiff after a lay-off, the Court described the plaintiff's prima facie case as follows: (1) the plaintiff belongs to a racial minority; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) the plaintiff was rejected; and (4) the position remained opened and the employer continued to seek applicants. *Id.* at 802. If the plaintiff can establish this, then the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Assuming the employer meets this burden, then the burden shifts back to the plaintiff to establish that the defendant's articulated reason was a mere pretext for discrimination. *Id.* at 804. Because *McDonnell Douglas Corp.* was a failure-to-rehire case, *id.* at 796, which is not a very common fact pattern, most courts have modified the prima facie case to cover a variety of factual situations. Thus, in a termination case, the plaintiff generally will be required to demonstrate: (1) that she is in a protected class; (2) that she was qualified for the position held; (3) that she suffered an adverse employment action; (4) that someone similarly situated but outside the protected class was treated better. *See, e.g.,* *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123 (9th Cir. 2000) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802).

⁵ *See McDonnell Douglas Corp.*, 411 U.S. at 802–04. Courts adopt the *McDonnell Douglas* framework for disability discrimination cases; specifically, the plaintiff's prima facie burden entails proving that: (1) the plaintiff is disabled; (2) the plaintiff is qualified; (3) the plaintiff suffered an adverse employment action; (4) the employer knew or should have known of the plaintiff's disability; and (5) the position remained open or the plaintiff was replaced by a non-disabled person.

case in failure-to-accommodate claims.⁶ It is this modified burden-shifting framework that has spawned a recent circuit split. Specifically, courts disagree on whether an “adverse employment action” is a required element in failure-to-accommodate claims.⁷ This Article argues that the circuit split is based on a fundamental misunderstanding of the (admittedly complex) issues surrounding failure-to-accommodate claims.

In May 2019, the Tenth Circuit, sitting en banc, reheard oral arguments⁸ in *Exby-Stolley v. Board of County Commissioners*, which had held that an adverse employment action is a required element in a failure-to-accommodate claim under the ADA.⁹ The panel’s holding was surprising to me because, as someone who has studied extensively in this area,¹⁰ it is clear to me that a failure-to-accommodate claim does not require an adverse employment action.¹¹ Where did the Tenth Circuit go wrong? As it turns out, the court in *Exby-Stolley* (along with a couple of other courts) required the plaintiff to demonstrate an adverse employment action when the case actually involves other issues surrounding an employer’s obligation to provide reasonable accommodations to employees with disabilities.¹²

In this Article, I argue that the “issue” of whether a failure-to-accommodate claim requires an adverse employment action often camouflages three other issues, specifically (1) whether a requested accommodation is *reasonable*,¹³ (2) whether the employer actually violated

E.g., *Whitfield v. Tennessee*, 639 F.3d 253, 259 (6th Cir. 2011) (quoting *Macy v. Hopkins Cty. Sch. Bd. of Educ.*, 484 F.3d 357, 365 (6th Cir. 2007), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012)). Some courts combine the third, fourth, and fifth elements to state that the plaintiff has to show that “she suffered from an adverse employment action because of her disability.” *See, e.g.*, *Hoppe v. Lewis Univ.*, 692 F.3d 833, 839 (7th Cir. 2012).

⁶ *See* cases cited *infra* Section II.B.

⁷ *See infra* Part II.

⁸ Patrick Dorrian, *Full 10th Cir. Weighs Proof Needed for ADA Accommodation Claim*, BLOOMBERG L. (May 7, 2019, 6:06 AM), <https://news.bloomberglaw.com/daily-labor-report/full-10th-cir-weighs-proof-needed-for-ada-accommodation-claim>.

⁹ 906 F.3d 900, 902 (10th Cir.), *reh’g en banc granted*, 910 F.3d 1129 (10th Cir. 2018).

¹⁰ I am the author of one casebook and seventeen law review articles in the disability law area. *See, e.g.*, STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, *DISABILITY LAW: CASES AND MATERIALS* (2017); Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527 (2013) [hereinafter Porter, *Martinizing*]; Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014).

¹¹ *See infra* note 149.

¹² *See infra* Section II.A, Part III.

¹³ This first issue, whether an accommodation is reasonable, encompasses at least two subissues that both fall under the umbrella of whether and when an accommodation is reasonable, including whether an employer must accommodate an employee if the accommodation is not necessary to perform the essential functions of the job and whether the employer has to provide employees their *preferred* accommodation. *See infra* Section III.A.

the obligation to provide a reasonable accommodation,¹⁴ and (3) whether proof of causation and discriminatory intent is required in failure-to-accommodate claims.¹⁵

This Article first describes the Tenth Circuit's holding and reasoning in the *Exby-Stolley* case. I then briefly detail this circuit split on the issue of whether an adverse employment action is required in failure-to-accommodate claims. Finally, I explain how courts that require an "adverse employment action" are often confusing the requirement for other, legitimate issues that frequently present in failure-to-accommodate cases.

I

THE TENTH CIRCUIT'S DECISION IN *EXBY-STOLLEY*

In this case, the plaintiff, Laurie Exby-Stolley, worked as a health inspector for the county, a job that required her to inspect restaurants and other establishments.¹⁶ In 2009, she broke her arm on the job, a break which required two surgeries and made many of her inspection tasks more difficult. Therefore, it took her longer to complete her tasks, which, in turn, put her behind schedule for the number of inspections she was required to complete.¹⁷ When she was reprimanded for being behind on her work, she requested a meeting to discuss accommodations to her job. The employer temporarily accommodated her by giving her a part-time office job.¹⁸ Shortly thereafter, she requested another meeting to discuss more permanent accommodations, which she had hoped would allow her to perform her regular job. Although no accommodations were agreed upon that would allow the plaintiff to perform her original job, the parties dispute exactly what happened at that meeting.¹⁹ The bottom line is that the plaintiff believed she was being forced to resign in lieu of being terminated while the defendant argued that the plaintiff resigned voluntarily.²⁰ Of significance to this Article, the jury resolved this issue in the defendant's favor—it found that the plaintiff had not proven that she was discharged from employment.²¹ The jury also accepted the defendant's argument that the placement of the plaintiff in the temporary part-time position was not an adverse employment

¹⁴ This issue also involves two subissues, including whether a delay in providing an accommodation violates the employer's obligation to provide a reasonable accommodation under the ADA and a simple factual issue as to whether the employer actually denied the plaintiff a reasonable accommodation. See *infra* Section III.B.

¹⁵ See *infra* Section III.C.

¹⁶ *Exby-Stolley v. Bd. of Cty. Comm'rs*, 906 F.3d 900, 902 (10th Cir.), *reh'g en banc granted*, 910 F.3d 1129 (10th Cir. 2018).

¹⁷ *Id.* at 903.

¹⁸ *Id.*

¹⁹ *Id.* at 903–04.

²⁰ *Id.* at 903–05.

²¹ *Id.* at 905.

action because she agreed with the change and the move did not cause her pay to be decreased.²²

The plaintiff appealed, alleging, among other things, that the district court erred in instructing the jury that she had to prove that she had suffered an adverse employment action.²³ The Tenth Circuit disagreed.²⁴

The court engaged in a lengthy discussion about whether an adverse employment action is a necessary element of a failure-to-accommodate claim. The court quoted the statute, in which the opening provision states: “No covered entity shall *discriminate against a qualified individual on the basis of disability in regard to* job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, *and other terms, conditions, and privileges of employment.*”²⁵ The court emphasized that the provision requires the discrimination to be “in regard to” some feature of the employment relationship and concluded that it is this language that requires proof of an adverse employment action.²⁶ The court then stated that the “terms-and-conditions-of-employment language” applies to failure-to-accommodate claims because the relevant provision states:

(b) As used in [§ 12112(a)], the term “discriminate against a qualified individual on the basis of disability” includes—

....

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.²⁷

The court stated that what this paragraph does is simply provide disabled individuals with a cause of action even when they have not demonstrated that the employer treated a disabled employee worse than an able-bodied individual; in other words, no comparator is needed in a failure-to-accommodate claim.²⁸ But because § 12112(b)(5)(A) does not say that the failure to accommodate automatically satisfies the “terms-and-conditions” language in § 12112(a), the employee still needs to prove that the discrimination was “in regard to job application procedures, . . . [or] other

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 906 (alterations omitted) (quoting 42 U.S.C. § 12112(a) (2012) (emphasis added)).
Id. at 906 (alterations omitted) (quoting 42 U.S.C. § 12112(a) (2012) (emphasis added)).

²⁶ *Id.*

²⁷ *Id.* at 907 (alteration in original) (quoting 42 U.S.C. § 12112(b) (emphasis added)).

²⁸ *Id.*

terms, conditions, or [sic] privileges of employment.”²⁹ In other words, the plaintiff in a failure-to-accommodate claim still has to prove an adverse employment action.

The court believed that the confusion over this issue derives from the confusion over using the *McDonnell Douglas* framework³⁰ in failure-to-accommodate claims.³¹ The court stated that, even though it is not necessary to prove an intent to discriminate in a failure-to-accommodate case under the ADA, the rest of the *McDonnell Douglas* framework still applies and one element of that framework is demonstrating that the plaintiff suffered an adverse employment action.³² The court then stated:

In short, once we recognize that to require an adverse employment action is simply to require that the discrimination be “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges or [sic] employment,” 42 U.S.C. § 12112(a), it is evident that the requirement applies to every discrimination claim under the ADA, including those based on failure to make reasonable accommodations.³³

The court then explained why Tenth Circuit precedent is not contrary to its opinion, arguing that many of the opinions relied upon by the plaintiff and the dissent were mere dicta and therefore should not be used to conclude that there is not an adverse employment action requirement in failure-to-accommodate cases.³⁴ Similarly, the court argued that the First, Second, Seventh, Eighth, Ninth, and D.C. Circuits all have held that there *is* an adverse employment action requirement in a failure-to-accommodate claim.³⁵ The court also distinguished cases cited by the plaintiff and the dissent.³⁶

Next, the court addressed the plaintiff’s argument that any failure to reasonably accommodate an employee is automatically an adverse employment action. The court recognized that although most failure-to-accommodate cases involve a termination (and a termination is obviously an adverse employment action), it is possible for there to be a failure-to-

²⁹ *Id.* at 908 (alteration in original) (quoting 42 U.S.C. § 12112(a)).

³⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

³¹ *Exby-Stolley*, 906 F.3d at 908.

³² *Id.* at 908–11.

³³ *Id.* at 911.

³⁴ *Id.* at 911–13.

³⁵ *Id.* at 914 (first citing *Colón-Fontáñez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011); then citing *Parker v. Sony Pictures Entm’t, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001); then citing *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999); then citing *Fenney v. Dakota, Minn. & E.R.R.*, 327 F.3d 707, 711 (8th Cir. 2003); then citing *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012); and then citing *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997)).

³⁶ *Id.* at 914–16.

accommodate case that is not connected to an adverse employment action.³⁷ After citing to non-ADA cases involving transfers that did not constitute adverse employment actions, the court gave the example of an employer failing to accommodate an employee who uses a wheelchair by refusing to move her office a few feet closer to the entrance, stating that this “may not be an adverse employment action if requiring the employee to travel the extra distance is a mere inconvenience.”³⁸

Finally, the court addressed the specific facts of the case, noting the following: (1) the part-time position for Exby-Stolley with the same pay was not an adverse employment action; (2) failing to create a new position for her was not an adverse employment action; (3) the employer did not fire her or force her to resign (as the plaintiff alleged); and (4) a delay in providing an accommodation is not enough, stating that “[w]e are not willing to say in these circumstances that an employer’s failure to immediately accommodate a request by a disabled employee is in itself an adverse employment action.”³⁹

The dissent criticized the majority’s analysis of the law, distinguishing the cases cited by the majority and explaining why the cases the majority referred to as mere dicta should be binding on the court.⁴⁰ Ultimately, the dissent stated that it would reverse the district court’s judgment and remand for a new trial.⁴¹

II

THE CIRCUIT SPLIT

The press surrounding the Tenth Circuit’s decision to rehear *Exby-Stolley* en banc seems to indicate that there is definitely a circuit split on the issue of whether an adverse employment action is part of the plaintiff’s prima facie case in a failure-to-accommodate claim.⁴² The Tenth Circuit itself recognized very few cases that do not require an adverse employment action.⁴³ But the Tenth Circuit missed *many* published opinions that do not require adverse employment actions in failure-to-accommodate cases.⁴⁴ And in only one of the cases cited by the Tenth Circuit was the issue of adverse employment action discussed in any depth, and it was not dispositive in any

³⁷ *Id.* at 917.

³⁸ *Id.*

³⁹ *Id.* at 918.

⁴⁰ *Id.* at 920–25 (Holmes, J., dissenting).

⁴¹ *Id.* at 925 (Holmes, J., dissenting).

⁴² *See, e.g.,* Dorrian, *supra* note 8.

⁴³ *See Exby-Stolley*, 906 F.3d at 914–16 (discussing the two contrary circuit opinions cited by the plaintiff and dissent).

⁴⁴ *See infra* Section II.B.

of them.⁴⁵ In other words, contrary to the Tenth Circuit's assertion in *Exby-Stolley*, the weight of the authority is on the other side. All of this leads me to argue in Part III that the adverse employment action issue is simply being confused with other issues surrounding an employer's obligation to reasonably accommodate its employees.

A. *Cases Requiring an Adverse Employment Action*

As stated above, the Tenth Circuit in *Exby-Stolley* cited to several decisions in other circuits that allegedly required an adverse employment action in failure-to-accommodate cases.⁴⁶ However, a closer look at those cases reveals that the adverse employment action issue was either not present in them or not dispositive.

For instance, in *Colón-Fontáñez v. Municipality of San Juan*,⁴⁷ the entire issue was whether the plaintiff was a qualified individual under the ADA.⁴⁸ The court held that she was not qualified and never engaged in a discussion of whether the plaintiff suffered an adverse employment action with regard to her failure-to-accommodate claim.⁴⁹

In *Parker v. Sony Pictures Entertainment, Inc.*,⁵⁰ the plaintiff took an extended medical leave due to a back injury.⁵¹ When plaintiff's leave expired and he failed to return to work, the company terminated him.⁵² The central dispute between the parties was whether the plaintiff was able to return to work at the end of his leave and the extent to which he informed his employer of that ability.⁵³ The entire issue on appeal was whether the plaintiff's disability caused the employer to terminate him.⁵⁴ Because the plaintiff was terminated, the issue of adverse employment action was not in dispute.

In *Foster v. Arthur Andersen, LLP*,⁵⁵ the plaintiff had an administrative job that required a substantial amount of typing,⁵⁶ which eventually caused

⁴⁵ See *infra* Section II.A.

⁴⁶ *Exby-Stolley*, 906 F.3d at 914 (first citing *Colón-Fontáñez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011); then citing *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 108 (2d Cir. 2001); then citing *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999); then citing *Fenney v. Dakota, Minn. & E.R.R.*, 327 F.3d 707, 711 (8th Cir. 2003); then citing *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012); and then citing *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1099 (D.C. Cir. 1997)).

⁴⁷ 660 F.3d 17.

⁴⁸ *Id.* at 32.

⁴⁹ *Id.* at 32–36.

⁵⁰ 260 F.3d 100.

⁵¹ *Id.* at 104.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 107–08.

⁵⁵ 168 F.3d 1029 (7th Cir. 1999), *abrogated on other grounds by* *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

⁵⁶ *Id.* at 1031.

carpal tunnel syndrome, although she was initially told it was tendinitis.⁵⁷ At some point, she asked for a light typing accommodation for her injury,⁵⁸ and later that day she was suspended for thirty days without pay and then terminated the following day.⁵⁹

This case best illustrates courts' confusion about the distinction between discrimination claims that do not rest on a failure to accommodate and those that do. The court recognized that there are two distinct types of disability discrimination claims: failure-to-accommodate and disparate treatment.⁶⁰ But then the court set out the following elements for a prima facie case of failure to accommodate:

[A] plaintiff who has suffered an adverse employment action must show that: (1) she was or is disabled; (2) the defendant was aware of her disability; (3) she was otherwise qualified for her job; and (4) the disability caused the adverse employment action (a factor which is implied if not stated).⁶¹

The court spent the remainder of the discussion discussing whether the plaintiff could prove the fourth element of the prima facie case, namely whether the plaintiff's termination was caused by her disability.⁶² Because the plaintiff was suspended and then terminated, there was no question that she suffered an adverse employment action.

Of all the cases the Tenth Circuit cited in *Exby-Stolley*, the Eighth Circuit case of *Fenney v. Dakota, Minnesota & Eastern Railroad* is the only one that actually discussed the adverse employment action element.⁶³ Here, the plaintiff was missing his thumb, part of one other finger, and also had limited use of his right arm.⁶⁴ He was an "on-call" railroad engineer, which meant that the employer was required to notify such engineers at least ninety minutes before they would be needed at work.⁶⁵ The plaintiff (as well as other on-call engineers) had usually received this call more than ninety minutes in advance; in the plaintiff's case, he would receive it two and a half to three hours ahead of his shift, which gave him sufficient time to get himself ready

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1031–32.

⁶⁰ *Id.* at 1032.

⁶¹ *Id.* (citations omitted).

⁶² *Id.* at 1033–34.

⁶³ 327 F.3d 707, 716–18 (8th Cir. 2003) (reversing a grant of summary judgment to the employer where, among other things, the plaintiff had produced enough evidence to support the assertion that he had suffered a constructive demotion and, therefore, an adverse employment action).

⁶⁴ *Id.* at 710.

⁶⁵ *Id.*

for work.⁶⁶

New management instituted a uniform two-hour advance notification time for all on-call employees.⁶⁷ Because this was not enough time for the plaintiff to get ready and get to work on time, he requested a longer notification period as a reasonable accommodation. The employer refused, stating that “it would only accommodate [the plaintiff]’s request if he could show written documentation that Dakota’s previous management had ‘guaranteed’ the advance call.”⁶⁸ The plaintiff didn’t have this documentation, so he sought an alternative accommodation of reassignment to a job with regular hours.⁶⁹ However, the only such job was a weekend conductor position, which offered regular but fewer workdays and paid less.⁷⁰ To avoid termination (presumably for failure to arrive to work on time), the plaintiff took the weekend conductor position and then filed a lawsuit.⁷¹ The district court granted the employer’s motion for summary judgment.⁷²

On appeal, the court stated that, to establish a prima facie case, the plaintiff must show that he “(1) has a ‘disability’ within the meaning of the ADA, (2) is a ‘qualified individual’ under the ADA, and (3) ‘suffered an adverse employment action as a result of the disability.’”⁷³ The court recognized that disparate treatment claims are treated differently from failure-to-accommodate claims when it comes to the allocations of burdens of proof.⁷⁴ But it then stated that the plaintiff must “first make a facial showing that he has an ADA disability and that he has suffered an adverse employment action. Then he must make a facial showing that he is a ‘qualified individual.’”⁷⁵

Despite the court erroneously requiring an adverse employment action, the plaintiff had no trouble proving that element; lower pay and fewer hours

⁶⁶ *Id.* The court does not state this explicitly, but I assume from reading the opinion that the plaintiff needed extra time to get ready because of his disability. *Cf. id.* at 715–16 (discussing evidence that the plaintiff experienced, to some extent, delays in performing various tasks related to caring for himself).

⁶⁷ *Id.* at 710. I call such an action “withdrawn accommodations.” For my discussion of this phenomenon, see Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 *DRAKE L. REV.* 885, 890, 896, 915–17 (2015) (describing disagreement among courts as to what effect, if any, an employer’s previous provision of an accommodation should have on the analysis of a request for accommodation and proposing a solution that would integrate such previous accommodations into courts’ analyses).

⁶⁸ *Fenney*, 327 F.3d at 710–11.

⁶⁹ *Id.* at 711.

⁷⁰ *Id.*

⁷¹ *Id.* at 711 & n.3, 718.

⁷² *Id.* at 711.

⁷³ *Id.* (quoting *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 490 (8th Cir. 2002)).

⁷⁴ *Id.* at 711–12.

⁷⁵ *Id.* at 712.

was clearly an adverse employment action.⁷⁶ The court referred to what happened to Fenney as a “constructive demotion,” which it analyzed identically to a constructive discharge.⁷⁷ Because a reasonable person in the plaintiff’s position would believe he had no choice other than to take the less desirable position, the court stated, “[t]hus, Fenney was faced with the following choice—take a lower paying job, one that he could report to on time, or show up to work late repeatedly, and risk discharge. Therefore, a reasonable person could conclude that that Fenney had no choice at all.”⁷⁸

The court was correct that Fenney suffered an adverse employment action, but it is not clear to me why the failure-to-accommodate claim would not have survived without pointing to an adverse employment action. In other words, if Fenney had sued *after* the employer had refused to accommodate him by giving him advance notification of his shifts but *before* suffering demotion, that claim should have succeeded. Fenney could have performed the essential functions of the on-call engineer position with a reasonable accommodation of additional notice, and this accommodation would likely be found reasonable.

The Tenth Circuit also cited a case from the Ninth Circuit, which required an adverse employment action in a failure-to-accommodate case.⁷⁹ But the dispositive issue in that case was whether the plaintiff was qualified to perform the essential functions of a neo-natal intensive care unit nurse despite her almost constant absences.⁸⁰ Because the plaintiff was terminated, whether she suffered an adverse employment action was not in dispute.⁸¹

One of the early cases that erroneously required an adverse employment action was *Marshall v. Federal Express Corp.*,⁸² where the plaintiff injured her back and could not return to work without lifting restrictions.⁸³ The employer advised her to apply for other jobs at Federal Express for which she was qualified.⁸⁴ She was informed of one job as an Operations Agent, but a manager, relying on a senior manager’s belief that Federal Express’s nepotism policy prohibited spouses from working in the same location, told her that she could not apply for that job because her husband already worked at the same location.⁸⁵ It turned out that the senior manager was wrong about the policy (it only prohibited family members or spouses’ supervising each other), but, by the time the plaintiff figured that out, it was too late to apply

⁷⁶ See *id.* at 717–18.

⁷⁷ *Id.* at 717.

⁷⁸ *Id.* at 718.

⁷⁹ *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012).

⁸⁰ *Id.* at 1237, 1241.

⁸¹ *Id.* at 1237.

⁸² 130 F.3d 1095, 1099 (D.C. Cir. 1997).

⁸³ *Id.* at 1096–97.

⁸⁴ *Id.* at 1097.

⁸⁵ *Id.*

for the job (which, at any rate, was ultimately withdrawn for budgetary reasons).⁸⁶

In addressing the plaintiff's claim that the employer failed to accommodate her by allowing her to apply for the Operations Agent position, the court stated:

As the language of § 12112(a) makes clear, for discrimination (including denial of reasonable accommodation) to be actionable, it must occur *in regard to* some adverse personnel decision or other term or condition of employment. Here, the only adverse action before us is denial of the chance to apply for the Operations Agent job. In regard to that, both parties agree, Marshall required no accommodation at all: she was as capable of performing the job as anyone. . . . Thus there is no adverse action before us with any nexus to a possible denial of reasonable accommodation.⁸⁷

Thus, the adverse employment action issue was not dispositive in this case because she was not denied an accommodation.

What this Section reveals is that, even though the Tenth Circuit relied on these other circuits' opinions as evidence that an adverse employment action is required in failure-to-accommodate cases,⁸⁸ the persuasiveness of these cases is fairly called into question because the issue of whether the plaintiff suffered an adverse employment action did not determine the courts' dispositions of these cases. Accordingly, it is possible (even likely) that the courts were listing the requirement that the plaintiff demonstrate an adverse employment action as an element of the prima facie case without thoroughly considering whether it belongs as an element in a failure-to-accommodate claim.

B. Cases Not Requiring an Adverse Employment Action

The Tenth Circuit in *Exby-Stolley* focused only on two published cases that either the plaintiff or the dissent cited in favor of the position that an adverse employment action was not required⁸⁹—*EEOC v. AutoZone, Inc.*,⁹⁰ and *EEOC v. LHC Group, Inc.*⁹¹ But the Tenth Circuit missed many other cases that do not require adverse employment actions in failure-to-

⁸⁶ *Id.*

⁸⁷ *Id.* at 1099.

⁸⁸ See *Exby-Stolley v. Bd. of Cty. Comm'rs*, 906 F.3d 900, 914 (10th Cir.), *reh'g en banc granted*, 910 F.3d 1129(10th Cir. 2018).

⁸⁹ *Id.* at 914–16.

⁹⁰ 630 F.3d 635, 638–39, 638 n.1 (7th Cir. 2010) (reversing district court's grant of summary judgment on the ground that the plaintiff was not disabled within the meaning of the ADA).

⁹¹ 773 F.3d 688, 703–04, 703 n.6 (5th Cir. 2014) (affirming the district court's grant of summary judgment to the defendant on the plaintiff's abandoned failure-to-accommodate claim but reversing its grant of summary judgment to the defendant as to plaintiff's discriminatory termination claim where several factual issues remained in dispute).

accommodate claims. While it is true that most of these cases did not turn on the adverse employment action issue, neither did any of the cases cited by the majority in *Exby-Stolley* in favor of its position that an adverse employment action was an element of a failure-to-accommodate claim.⁹²

The vast majority of cases⁹³ (correctly in my opinion) require the following prima facie case: (1) the plaintiff has a disability under the ADA; (2) the plaintiff is qualified; (3) the employer was aware of the plaintiff's need for an accommodation; and (4) the employer refused to accommodate the plaintiff. Courts that have so held in published opinions (with some insignificant variations in the wording of the elements) include the First Circuit,⁹⁴ Second Circuit,⁹⁵ Third Circuit,⁹⁶ Fourth Circuit,⁹⁷ Fifth Circuit,⁹⁸

⁹² See *supra* Section II.A.

⁹³ See Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong Has No Place in a Failure to Accommodate Disability Claim*, 36 *HAMLIN L. REV.* 497, 509 (2013) (asserting that “the vast majority of courts” do not expressly require a standalone adverse employment action for failure to accommodate claims under the ADA).

⁹⁴ See, e.g., *Sepúlveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549, 553 (1st Cir. 2018) (citing *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 454 (1st Cir. 2016)); *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599, 604 (1st Cir. 2017) (quoting *Rocafort v. IBM Corp.*, 334 F.3d 115, 119 (1st Cir. 2003)); *EEOC v. Kohl’s Dep’t Stores, Inc.*, 774 F.3d 127, 131 (1st Cir. 2014) (quoting *Freadman v. Metro. Prop. & Cas. Ins.*, 484 F.3d 91, 102 (1st Cir. 2007)).

⁹⁵ See, e.g., *Sheng v. M&TBank Corp.*, 848 F.3d 78, 86 (2d Cir. 2017) (quoting *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96–97 (2d Cir. 2009)); *Noll v. IBM Corp.*, 787 F.3d 89, 94 (2d Cir. 2015) (quoting *McBride*, 583 F.3d at 97); *McMillan v. City of New York*, 711 F.3d 120, 125–26 (2d Cir. 2013) (quoting *McBride*, 583 F.3d at 97).

⁹⁶ See, e.g., *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 504 (3d Cir. 2010) (citing *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 761 (3d Cir. 2004)) (relying on *Williams* for the proposition that failure to accommodate is itself an adverse employment action in ADA discrimination claims); *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 611 n.4 (3d Cir. 2006) (citing *Williams*, 380 F.3d at 771) (“[T]he failure to reasonably accommodate a disabled and qualified employee constitutes an adverse employment action for purposes of the ADA.”).

⁹⁷ See, e.g., *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015) (quoting *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013)); *Wilson*, 717 F.3d at 345 (quoting *Rhoads v. FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2001)).

⁹⁸ See, e.g., *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 703 n.6 (5th Cir. 2014); *Feist v. La., Dep’t of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013).

Sixth Circuit,⁹⁹ Seventh Circuit,¹⁰⁰ and even the Tenth Circuit¹⁰¹ (albeit in cases whose discussions the *Exby-Stolley* court ignored as mere dicta).¹⁰²

III

EXPLAINING THE CONFUSION

Others have argued that the position taken by the Tenth Circuit, requiring an adverse employment action in a failure-to-accommodate claim, is wrong.¹⁰³ I agree. This Article takes as its starting point that requiring an adverse employment action in failure-to-accommodate claims is wrong.¹⁰⁴ But the point of this Article is to explain *why* the courts are confused about this issue. The position taken by the Tenth Circuit, that failure-to-accommodate claims require adverse employment actions, is confusing the adverse employment action element with other rules surrounding the obligation of an employer to reasonably accommodate its employees.

In this Part, I argue that the Tenth Circuit's focus on adverse employment actions is much ado about nothing and is instead camouflaging three other issues,¹⁰⁵ specifically (1) whether a requested accommodation is *reasonable* and required; (2) whether the employer actually violated the obligation to provide a reasonable accommodation; and (3) whether causation and intent are required in failure-to-accommodate claims.

⁹⁹ See, e.g., *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603 (6th Cir. 2018) (quoting *Johnson v. Cleveland City Sch. Dist.*, 443 F. App'x 974, 982–83 (6th Cir. 2011)); *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 869 (6th Cir. 2007) (quoting *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 452 (6th Cir. 2004)) (noting, where employer had conceded that the plaintiff was disabled and did not provide an accommodation, that the plaintiff must show he was qualified for the positions he sought); *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997) (citing *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996)).

¹⁰⁰ See, e.g., *Guzman v. Brown Cty.*, 884 F.3d 633, 642 (7th Cir. 2018) (citing *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005)); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853 (7th Cir. 2015) (citing *James v. Hyatt Regency Chi.*, 707 F.3d 775, 782 (7th Cir. 2013)); *Brumfield v. City of Chicago*, 735 F.3d 619, 631 (7th Cir. 2013) (citing *Sears, Roebuck & Co.*, 417 F.3d at 797).

¹⁰¹ See, e.g., *Punt v. Kelly Servs.*, 862 F.3d 1040, 1050 (10th Cir. 2017) (quoting *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 (10th Cir. 2012)); *Sanchez*, 695 F.3d at 1177 (citing *Woodman v. Runyon*, 132 F.3d 1330, 1344 (10th Cir. 1997)).

¹⁰² See *supra* note 34 and accompanying text.

¹⁰³ See, e.g., *Brennan*, *supra* note 93, at 498, 503, 514.

¹⁰⁴ For the reasons why this is an erroneous analysis of failure-to-accommodate claims under the ADA, see *id.* at 503–15 (arguing that statutory text, agency guidance, sound legal reasoning, and public policy all point toward recognizing that failure-to-accommodate claims should not require an adverse employment action).

¹⁰⁵ To be clear, I do not believe that the Tenth Circuit held the way it did in *Exby-Stolley* because of a bias against disability discrimination cases. Instead, it seems far more likely to me that its holding is simply born out of confusion—the ADA is a complex statute and even those of us who spend most of our lives studying it still debate its meaning.

A. *Whether a Requested Accommodation Is Reasonable and Required*

Some requested accommodations are simply not reasonable. For instance, in the Tenth Circuit’s *Exby-Stolley* decision, the court noted that the employer denied the plaintiff’s request to create a new position for her.¹⁰⁶ The court addressed this request as part of its analysis of whether the plaintiff had proven that she suffered an adverse employment action.¹⁰⁷ However, the court could have simply concluded that requests to create new positions are *never* reasonable accommodations.¹⁰⁸ Similarly, the two issues below frequently arise when courts attempt to determine whether an accommodation is reasonable and required.

1. *Accommodations That Are Not Necessary to Perform the Essential Functions of the Job*

In some cases, the accommodation the plaintiff requested is not necessary to allow her to perform the essential functions of her job; instead, it is desired to allow her to enjoy the privileges of employment that other, non-disabled employees can enjoy. For instance, imagine that an employer has an on-site cafeteria or gym. It is not strictly necessary that an individual with a disability be able to access either of those places in order to perform the essential functions of her job. And yet, it is easy to see why an employee with a disability would want to enjoy those benefits of employment alongside her non-disabled colleagues (or colleagues who are not visibly disabled). Whether or not employers have to provide those accommodations is subject to frequent litigation and could frequently be obscured by courts’ focus on the adverse employment action issue.

The EEOC’s position on this issue is that the ADA *does* require employers to provide accommodations so that employees with disabilities can enjoy the “benefits and privileges of employment” equal to those without disabilities.¹⁰⁹ The EEOC’s guidance refers to “training,” “employee assistance programs . . . , credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation,” and “parties or other social functions.”¹¹⁰

¹⁰⁶ *Exby-Stolley v. Bd. of Cty. Comm’rs*, 906 F.3d 900, 918 (10th Cir.), *reh’g en banc granted*, 910 F.3d 1129(10th Cir. 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *See* *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) (“The ADA does not require an employer to create a new position in order to accommodate an employee with a disability”); *Hoskins v. Oakland Cty. Sheriff’s Dep’t*, 227 F.3d 719, 729 (6th Cir. 2000); *see also* *Porter, Martinizing, supra* note 10, at 546 (pointing to the statutory basis for the rule that creating new positions to accommodate employees is *per se* unreasonable).

¹⁰⁹ U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <https://www.eeoc.gov/policy/docs/accommodation.html>.

¹¹⁰ *Id.*

One of the first cases to discuss an accommodation of this type was *Vande Zande v. Wisconsin Department of Administration*, where the plaintiff was a paraplegic who used a wheelchair and sought particular accommodations from her employer.¹¹¹ The plaintiff complained that her employer did not go far enough in providing her accommodations in two respects; the first (her request to work from home full-time with no requirement that she use sick pay) is not at issue here.¹¹² The second is. She requested to have the sink and counter lowered in the kitchenette in her building to an appropriate height for those using wheelchairs.¹¹³ The employer agreed to install a lower shelf in the kitchenette, but refused to lower the sink, even though it would have only cost the employer \$150.¹¹⁴ Lowering the sink in the kitchenette is the type of accommodation that I am discussing here. While not necessary to allow the plaintiff to perform the essential functions of her job, this accommodation would allow her to enjoy the benefits and privileges of employment just as non-disabled employees enjoy them. Instead, the court denied the accommodation based on its analysis of the costs and benefits of providing the accommodation:

Given the proximity of the bathroom sink, Vande Zande can hardly complain that the inaccessibility of the kitchenette sink interfered with her ability to work or with her physical comfort. Her argument rather is that forcing her to use the bathroom sink for activities (such as washing out her coffee cup) for which the other employees could use the kitchenette sink stigmatized her as different and inferior. . . . [W]e do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers. The creation of such a duty would be the inevitable consequence of deeming a failure to achieve identical conditions “stigmatizing.” That is merely an epithet. We conclude that access to a particular sink, when access to an equivalent sink, conveniently located, is provided, is not a legal duty of an employer. The duty of reasonable accommodation is satisfied when the employer does what is necessary to enable the disabled worker to work in reasonable comfort.¹¹⁵

Despite not definitively deciding if and when employers have to provide accommodations that allow employees to enjoy the benefits and privileges of employment, this case has been cited by courts on both sides of the issue of whether employers have to provide accommodations that are not necessary to allow the employee to perform the essential functions of the job.

This issue was further discussed in *Feist v. Louisiana, Department of*

¹¹¹ 44 F.3d 538, 543–46 (7th Cir. 1995).

¹¹² *Id.* at 544.

¹¹³ *Id.* at 545.

¹¹⁴ *Id.* at 545–46.

¹¹⁵ *Id.* at 546.

Justice, Office of the Attorney General, where the plaintiff claimed that the employer violated the ADA by refusing to provide a free on-site parking space to accommodate her disability (osteoarthritis of the knee).¹¹⁶ The district court had granted summary judgment to the defendant on the ground that the plaintiff's proposed accommodation was unrelated to the essential functions of her job.¹¹⁷ On appeal, the Fifth Circuit addressed whether the accommodation was required, even though it would not assist the plaintiff in performing the essential functions of her job.¹¹⁸ In holding that such accommodations should be required, the court made several arguments.¹¹⁹ First, the text of the ADA does not specify that the accommodation must "facilitate the essential functions of one's position."¹²⁰ Second, the requested parking spot "would presumably have made her workplace 'readily accessible to and usable' by her," which is an accommodation that is specifically mentioned in the statute.¹²¹ Third, the ADA's implementing regulations indicate that an accommodation does not have to relate to the performance of essential functions of the job; instead, the regulations suggest the contrary by including as reasonable accommodations "[m]odifications or adjustments that enable a covered entity's employee with a disability to *enjoy equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities."¹²² Fourth, as discussed above, "EEOC guidance explicitly provides that 'providing reserved parking spaces' may constitute reasonable accommodation under some circumstances."¹²³ Therefore, the court concluded that the district court "erred in requiring a nexus between the requested accommodation and the essential functions of [the plaintiff's] position."¹²⁴

The issue of whether an employer has to provide an employee with an accommodation that is not needed for the employee to perform the essential functions of her position is an important one, but it should not be confused with an adverse employment action requirement. Doing so will complicate this area of law and camouflages the importance of this issue.

2. *No Obligation to Provide the Plaintiff's Preferred Accommodation*

The issue of whether a plaintiff must demonstrate that she suffered an adverse employment action in failure-to-accommodate claims is also

¹¹⁶ 730 F.3d 450, 451, 453–54 (5th Cir. 2013).

¹¹⁷ *Id.* at 452.

¹¹⁸ *Id.* at 453–54.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 453.

¹²¹ *Id.* (quoting 42 U.S.C. § 12111(9)(A) (2012)).

¹²² *Id.* (citing 29 C.F.R. § 1630.2(o)(1) (2013)).

¹²³ *Id.* at 454 (quoting 29 C.F.R. pt. 1630 app. § 1630.2(o)).

¹²⁴ *Id.*

sometimes confused with the issue of whether an employer must provide the employee's preferred accommodation. For instance, in *Hoffman v. Caterpillar, Inc.*, the plaintiff's lawsuit involved a failure-to-accommodate claim based on the fact that the employer did not provide an accommodation that would allow the plaintiff to operate a high-speed scanner, which was a function of the job.¹²⁵ Instead, the employer accommodated her by allowing other employees run the high-speed scanner.¹²⁶ While the ADA requires an employer to provide accommodations that include the removal of non-essential job duties, the court noted that "nothing in the statute requires an employer to accommodate the employee so that she may perform any nonessential function that she chooses."¹²⁷ Although the court might have explicitly stated that not providing this particular accommodation to operate the high-speed scanner is not an adverse employment action, it instead relied on the more straightforward rule that employers are not required to provide employees with their preferred accommodation.¹²⁸

Similarly, in *Hoppe v. Lewis University*, the university accommodated the plaintiff's disability ("adjustment disorder with anxiety and depressed moods") by offering her three different office locations when she submitted a request to transfer offices, as well as a fourth that she ultimately accepted but did not use.¹²⁹ The court held that the employer had done all that was required to accommodate the plaintiff; there was no requirement to give the employee her preferred accommodation.¹³⁰ Again, not giving the plaintiff her preferred office space could also be classified as a non-adverse employment action, but the court sensibly relied on the more straightforward rule that the plaintiff is not entitled to her preferred accommodation (in this case, her preferred office space).

This issue was also addressed in *Noll v. IBM Corp.*, where the plaintiff was a deaf man who filed a lawsuit against his employer for its failure to provide captioning or transcripts of content on the company intranet.¹³¹ Originally, the plaintiff requested on-screen captioning, but IBM provided him with transcripts instead.¹³² However, obtaining these transcripts was not always easy; it sometimes took quite some time (more than five days) for the transcripts to be generated and made available.¹³³ The plaintiff was also fluent in American Sign Language, and, though he used interpreters when he

¹²⁵ 256 F.3d 568, 577 (7th Cir. 2001).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 692 F.3d 833, 837–38 (7th Cir. 2012).

¹³⁰ *Id.* at 840.

¹³¹ 787 F.3d 89, 92–93 (2d Cir. 2015).

¹³² *Id.* at 93.

¹³³ *Id.*

attended live meetings, he did not find interpreters effective for videos.¹³⁴ He filed a lawsuit, complaining that the employer failed to accommodate him by providing him with immediate captioning for all videos and immediate transcripts for all audio files.¹³⁵

The court stated that although accommodations must be effective, an employer is “not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee.”¹³⁶ Instead, the court stated that “[a]ll that is required is effectiveness.”¹³⁷ The court noted that IBM offered the plaintiff multiple accommodations: ASL interpreters were available to him, he received transcripts upon request (albeit with a delay), and IBM provided on-screen captioning for some videos.¹³⁸ While the plaintiff experienced a delay in receiving the transcripts, ASL interpreters were available to translate videos and audio files for the plaintiff in real time.¹³⁹ The court acknowledged that using interpreters for videos was not the ideal accommodation for Noll (because it was tiring and confusing to switch back and forth between the video and the interpreter) but determined that it was still an effective accommodation;¹⁴⁰ the ADA does not require the employee’s preferred accommodation.¹⁴¹

In *Dick v. Dickinson State University*, the plaintiff worked as a custodian until she suffered two seizures “believed to have been caused in part by her use of [cleaning products]” in the course of her job.¹⁴² After being temporarily excused from working with the chemicals (e.g., she was excused from cleaning the floors), she continued to have some symptoms from residual exposure to the chemicals when other employees cleaned the floors.¹⁴³ Thus, she continued to request a further accommodation to avoid any exposure to chemicals containing neurotoxins.¹⁴⁴ This was difficult because her doctors were unsure which chemicals that were used to clean the floors were causing her symptoms.¹⁴⁵ Similar to the Tenth Circuit’s analysis described in Section II.A, the court engaged in a discussion regarding whether all failures to accommodate are adverse employment actions.¹⁴⁶ But ultimately, the case turned on whether the employer had done enough to

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 95.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 96.

¹⁴¹ *Id.* at 95.

¹⁴² 826 F.3d 1054, 1056 (8th Cir. 2016).

¹⁴³ *Id.* at 1056–57.

¹⁴⁴ *Id.* at 1057.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1060.

accommodate the plaintiff.¹⁴⁷ Even though the plaintiff argued that the employer could have done more to make sure she was not exposed to residual smells caused by the chemicals she needed to avoid, the court noted that an employer is not obligated to provide an employee with the accommodation that the employee prefers.¹⁴⁸ This is the better analysis.¹⁴⁹ Thus, instead of getting embroiled in whether being occasionally exposed to some offensive chemicals constituted an adverse employment action, the real issue was whether the employer had provided the plaintiff a *reasonable* and *effective* accommodation, which is not necessarily the plaintiff's *preferred* accommodation.

This issue was also discussed in *Kelleher v. Wal-Mart Stores, Inc.*¹⁵⁰ The plaintiff was employed as a stocker, working the overnight third shift, when she was diagnosed with multiple sclerosis.¹⁵¹ Based on this diagnosis, her doctor prescribed a work restriction of no ladder use.¹⁵² The employer accommodated this request informally until a Market Human Resources Manager realized that the ladder use restrictions did not allow her to perform the essential functions of her position.¹⁵³ Accordingly, the employer eventually determined that the position of overnight cashier would be a better fit because it did not require use of a ladder as an essential function and the position was less strenuous than the stocking position.¹⁵⁴ It also offered a twenty-cents-per-hour raise compared to the stocker position.¹⁵⁵ The plaintiff “expressed fear” about the position because she believed it would be more difficult for her because of her deteriorated speech and eyesight and “she was nervous that customers would make comments about her”; however, there is no dispute that she was capable of performing the overnight cashier position’s duties.¹⁵⁶

The court’s discussion of the legal elements of the plaintiff’s failure-to-accommodate claim is confusing. The court first stated: “To support her failure to accommodate claim, Kelleher ‘must establish both a *prima facie*

¹⁴⁷ *See id.* at 1060–61.

¹⁴⁸ *Id.* at 1060.

¹⁴⁹ This is the better analysis for two reasons. First, because a failure to provide a reasonable accommodation is an independent violation of the ADA (distinct from an employer not hiring, terminating, or taking other negative actions because of a person’s disability), there is no need for and should be no requirement of an adverse employment action once there has been a failure to accommodate. *See Brennan, supra* note 93, at 504–05. Second, deciding this case by using an adverse employment action requirement obscures the more straightforward analysis—that an employer is not required to provide an employee with their preferred accommodation.

¹⁵⁰ 817 F.3d 624 (8th Cir. 2016).

¹⁵¹ *Id.* at 628.

¹⁵² *Id.*

¹⁵³ *Id.* at 629.

¹⁵⁴ *Id.* at 629–30.

¹⁵⁵ *Id.* at 630.

¹⁵⁶ *Id.*

case of discrimination based on [her] disability and a failure to accommodate it.”¹⁵⁷ But then the court stated that “[i]n order for Kelleher to establish a prima facie case of discrimination based on disability, she must show (1) a qualifying disability; (2) qualifications to perform the essential functions of her position with or without reasonable accommodation; and (3) an adverse employment action due to her disability.”¹⁵⁸ What is confusing about this framework is that the court’s first quoted statement (that the plaintiff had to show a failure to accommodate her disability) is not reflected in the elements listed by the court in the second quoted statement above. This is probably because the court was citing to the elements for a disability discrimination claim, rather than a failure-to-accommodate claim.

But instead of simply discussing whether the employer adequately accommodated the plaintiff by moving her to the overnight cashier position (and citing to the well-known rule that employers are not required to provide employees with their *preferred* accommodations), the court’s analysis turned on whether Kelleher suffered an adverse employment action based on transfer to the overnight cashier position.¹⁵⁹ The court held that the transfer was not an adverse employment action because the cashier position did not materially change the terms or conditions of her employment—not only was the position less physically strenuous, but it was also accompanied by a raise.¹⁶⁰ The court’s discussion in this case was unnecessary. It simply could have held that the employer did provide her with an effective accommodation (the transfer) and that she is not entitled to her preferred accommodation.

Finally, looking to the facts of *Exby-Stolley*, the employer transferred the plaintiff into a position that she could perform with her restrictions, at the same pay she had been receiving.¹⁶¹ But the plaintiff did not like the position and continued to ask for additional or alternative accommodations.¹⁶² Instead of getting lost in the adverse employment action requirement, the court should have simply stated that the plaintiff was not entitled to her preferred accommodation.

B. *Whether the Employer Violated the Accommodation Obligation*

1. *Delay in Providing a Reasonable Accommodation*

Some courts have held that an “unreasonable delay may amount to a

¹⁵⁷ *Id.* at 631 (quoting *Schaffhauser v. UPS, Inc.*, 794 F.3d 899, 905 (8th Cir. 2015)).

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 631–32.

¹⁶⁰ *Id.*

¹⁶¹ *Exby-Stolley v. Bd. of Cty. Comm’rs*, 906 F.3d 900, 903–04 (10th Cir.), *reh’g en banc granted*, 910 F.3d 1129 (10th Cir. 2018).

¹⁶² *Id.*

failure to provide reasonable accommodations.”¹⁶³ Thus, in a First Circuit case, the fact that the employer took months to respond to the plaintiff’s request for an accommodation led to the court vacating the district court’s grant of summary judgment to the employer.¹⁶⁴

This is another area where the Tenth Circuit in *Exby-Stolley* was confused. In holding that there was no adverse employment action suffered by the plaintiff, the court pointed to the fact that the employer intended to keep trying to accommodate the plaintiff.¹⁶⁵ The court stated: “We are not willing to say in these circumstances that an employer’s failure to immediately accommodate a request by a disabled employee is in itself an adverse employment action.”¹⁶⁶ Instead, the court should have been deciding whether a delay in providing an accommodation is itself a failure to accommodate. That is a difficult, fact-sensitive issue, and it should not be buried underneath an adverse-employment-action requirement.

2. *Dispute over Whether the Employer Provided a Reasonable Accommodation*

Sometimes the issue in a case is simply a factual dispute over whether the employer actually provided a reasonable accommodation. The *Fenney* case discussed above is a good example of this phenomenon.¹⁶⁷

In *Fenney*, the court discussed whether the plaintiff’s “voluntary” transfer to a lower paying position was an adverse employment action (ultimately determining that it was because he had no choice but to take the demotion to avoid termination),¹⁶⁸ but the real issue that should have been discussed was why the employer did not give him the accommodation he requested—advance notice before being called in for a shift. It is not at all clear why that would not have been a reasonable accommodation. In other words, the court had no reason to decide whether the demotion was voluntary or not (and thus whether it was an adverse employment action or not) until and unless it had decided whether the extra notice was a reasonable accommodation. If it was a reasonable accommodation (which seems likely), then the employer was required to provide it, rather than forcing him into a

¹⁶³ See, e.g., *Valle-Arce v. P.R. Ports Auth.*, 651 F.3d 190, 200 (1st Cir. 2011).

¹⁶⁴ *Id.* at 201–02.

¹⁶⁵ *Exby-Stolley*, 906 F.3d at 918.

¹⁶⁶ *Id.*

¹⁶⁷ *Fenney v. Dakota, Minn. & E.R.R.*, 327 F.3d 707 (8th Cir. 2003). Recall that this case involved an on-call railroad engineer with a hand and arm injury, who needed (and received, for a period of time) extra time to get ready for work. *Id.* at 710. New management took away his accommodation, refusing to give him the extra notice he needed to show up for work on time. *Id.* at 710–11. To avoid termination, he transferred into a position with fewer hours and lower pay. *Id.* at 711. For more facts of this case, see *supra* notes 63–70 and accompanying text.

¹⁶⁸ See *supra* notes 76–8 and accompanying text.

lower-paying position with fewer hours.¹⁶⁹ But if it was not a reasonable accommodation, and assuming there were no other reasonable accommodations that would have allowed him to stay working as an on-call engineer, then there was nothing discriminatory about the employer's allowing him to transfer into the lower paying position.

Turning back to the *Exby-Stolley* case, the court discussed the fact that the employer had provided the plaintiff a part-time office job with the same pay as an accommodation.¹⁷⁰ Because the employer provided an accommodation that in all likelihood was reasonable, it satisfied its obligation under the ADA, and discussing this fact in terms of whether the plaintiff suffered an adverse employment action is simply wrong.

C. Causation and Intent in Failure-to-Accommodate Claims

As many courts have acknowledged, the *McDonnell Douglas* burden-shifting framework, which is aimed at establishing that the employer discriminated against an employee *because of* that employee's protected class, has no role in failure-to-accommodate cases.¹⁷¹ This is so, in part, because failure-to-accommodate claims do not require any discriminatory animus directed at the plaintiff by the employer; any failure to accommodate a known disability of a qualified employee violates the ADA regardless of whether the employer had a discriminatory animus against the disabled employee.¹⁷² Courts' failure to recognize this distinction sometimes leads them to instinctively rely on the burden-shifting framework of *McDonnell Douglas*, which, in turn, can sometimes lead them to adopting the framework wholesale, including the requirement that the plaintiff must prove an adverse employment action.

For instance, in *Marshall v. Federal Express Corp.*, discussed above, recall that the plaintiff injured her back, was no longer qualified to return to her former job, and tried to apply for an Operations Agent job.¹⁷³ A manager

¹⁶⁹ Reasonable accommodations include “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o)(1)(ii) (2019).

¹⁷⁰ *Exby-Stolley*, 906 F.3d at 918.

¹⁷¹ *See, e.g.*, *Punt v. Kelly Servs.*, 862 F.3d 1040, 1048 (10th Cir. 2017) (stating that failure-to-accommodate claims under the ADA do not require evidence of discriminatory intent); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (en banc) (noting that failure-to-accommodate claims apply the burden-shifting framework to determine whether the accommodations are reasonable, not to determine discriminatory intent).

¹⁷² *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Of course, the employer could attempt to establish an undue hardship defense. *See id.* (explaining the undue hardship defense available to employers under ADA).

¹⁷³ *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1097 (D.C. Cir. 1997); *see also supra* notes 82–6 and accompanying text.

erroneously informed the plaintiff that the transfer would violate Federal Express's nepotism policy against spouses working in the same location because her husband already worked there.¹⁷⁴ In discussing her claim that the employer's denial of the opportunity to apply for the Operations Agent job violated the ADA, the court stated:

As the language of § 12112(a) makes clear, for discrimination (including denial of reasonable accommodation) to be actionable, it must occur *in regard to* some adverse personnel decision or other term or condition of employment. Here, the only adverse action before us is denial of the chance to apply for the Operations Agent job. In regard to that, both parties agree, Marshall required no accommodation at all: she was as capable of performing the job as anyone. . . . Thus there is no adverse action before us with any nexus to a possible denial of reasonable accommodation.¹⁷⁵

Although the court seems to be discussing adverse employment actions, the real issue is whether the denial of the opportunity to apply for the position was *because of* her disability. The answer to that question was plainly no.¹⁷⁶ Although the court discussed the requirement for an adverse employment action, it was not at all dispositive to the case because the result of the case turned on whether there was any discriminatory motive in the employer's failure to allow her to apply for the Operations Agent position.

Similarly, in *Foster v. Arthur Andersen, LLP*,¹⁷⁷ the issue was one of causation. Despite *Foster* being one of the early cases that apparently started down the path of requiring adverse employment actions in failure-to-accommodate claims, the case did not deal with adverse employment actions at all. Instead, it mainly dealt with the issue of causation. The court stated the fourth factor of the prima facie case is that "the disability caused the adverse employment action (a factor which is implied if not stated)."¹⁷⁸ The court noted that the fourth element is often unstated because, in many failure-to-accommodate claims, the employer will admit that the employee's disability motivated the job action but will make arguments about whether the accommodation was reasonable or whether the employee was qualified.¹⁷⁹ The court then stated:

Our prior decisions on adverse action recognize that 'because of the disability' is an element of the prima facie case. Hence, an employee cannot state a cause of action for disability discrimination where his

¹⁷⁴ *Marshall*, 130 F.3d at 1097.

¹⁷⁵ *Id.* at 1099.

¹⁷⁶ *See id.* at 1099–1100 (discussing the nondiscriminatory reason—elimination of the position—for employer's actions).

¹⁷⁷ 168 F.3d 1029 (7th Cir. 1999).

¹⁷⁸ *Id.* at 1032.

¹⁷⁹ *Id.* at 1033.

employer terminated him for reasons unrelated to (*i.e.*, not because of) his disability. Accordingly, to state a *prima facie* case of disability discrimination for failure to accommodate the disability, a plaintiff must demonstrate all four of the elements listed above, including the claim that she was discharged because of her disability.¹⁸⁰

The rest of the court's discussion concerns the reasons for the plaintiff's termination and whether that reason was "because of" her disability.¹⁸¹ Thus, even though the court discussed the requirement of adverse employment actions, it confused the issue with one of causation, which was the dispositive issue in the case.

Before *Exby-Stolley*, the Tenth Circuit came to the better conclusion when addressing causation in failure-to-accommodate claims.¹⁸² The court explained that, assuming the employer had notice of the disability and the need for an accommodation, any failure to provide an accommodation established the "required nexus between the disability and the alleged discrimination without the need to delve into the employer's subjective motivations."¹⁸³ The court then listed the elements for the failure-to-accommodate claim: the plaintiff must demonstrate that "(1) she is disabled; (2) she is 'otherwise qualified'; and (3) she requested a plausibly reasonable accommodation."¹⁸⁴ Assuming the plaintiff can establish this, the employer has the burden to present evidence that rebuts one of the elements of the plaintiff's *prima facie* case or establishes an affirmative defense.¹⁸⁵

Unfortunately, the court in *Exby-Stolley* seemed to get this backwards. Although it recognized that some parts of the *McDonnell Douglas* framework are not necessary in failure-to-accommodate claims (specifically referring to the requirement that an employer treat disabled employees worse than non-disabled employees, which is one way of proving causation), it then went on to hold that the adverse employment action element of the framework is still necessary.¹⁸⁶

I am certainly not the first scholar to criticize the ubiquity of the *McDonnell Douglas* burden-shifting framework.¹⁸⁷ But courts should not

¹⁸⁰ *Id.* (citations omitted).

¹⁸¹ *Id.* at 1033–34.

¹⁸² *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1048 (10th Cir. 2017) (stating that showing failure to accommodate provides the necessary causation relationship for employee's claim).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1050 (quoting *Sanchez v. Vilsack*, 695 F.3d 1174, 1177 (10th Cir. 2012)).

¹⁸⁵ *Id.*

¹⁸⁶ *Exby-Stolley v. Bd. of Cty. Comm'rs*, 906 F.3d 900, 909–11 (10th Cir.), *reh'g en banc granted*, 910 F.3d 1129 (10th Cir. 2018).

¹⁸⁷ *See, e.g.*, Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 FLA. INT'L U. L. REV. 501, 501, 510–13 (2013) (discussing the harm of incorporating the *McDonnell Douglas* framework into claims under the Family and Medical Leave Act (FMLA)); Sandra F. Sperino,

allow the framework developed in the early days of Title VII to create confusion over the elements in failure-to-accommodate claims under the ADA.

CONCLUSION

Regardless of how the Tenth Circuit sitting en banc decides *Exby-Stolley*, this Article has hopefully demonstrated why the court might have been confused when it held that demonstrating an adverse employment action is required in failure-to-accommodate cases. Although it might be tempting to stick to the *McDonnell Douglas* framework that courts have been using for decades, a failure-to-accommodate claim under the ADA is not the same as a traditional discrimination claim under Title VII. Using the lack of an adverse employment action to dismiss failure-to-accommodate claims will cause confusion in the development of the law, regardless of whether the result would be the same or different.

For instance, in *Exby-Stolley*, the jury should have been instructed that the plaintiff has to establish that: (1) she had a disability under the ADA; (2) she was qualified; (3) the employer knew of her disability; and (4) the employer did not provide reasonable accommodations for the plaintiff's disability.¹⁸⁸ The jury still might have found for the employer because (a) the employer reassigned the plaintiff to a job making the same salary that met her restrictions, (b) there is no obligation to provide the plaintiff with her preferred accommodation, and (c) the jury credited the employer's version of events that the plaintiff quit and was not terminated or forced to resign. When courts focus on "adverse employment actions," they lose sight of the most important question in a failure-to-accommodate case—whether or not the employer failed to provide a reasonable accommodation to a qualified employee. I cannot predict how the Tenth Circuit will decide this case en banc, but I hope that, if they affirm the panel opinion in *Exby-Stolley*, other courts do not make the same mistake.

Revitalizing State Employment Discrimination Law, 20 GEO. MASON L. REV. 545, 569–72 (2013) (arguing that courts import the federal anti-discrimination frameworks into state law with little thought about how the federal law and state law might differ); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 151–59 (1997) (criticizing how courts apply the burden-shifting framework to ADA failure-to-accommodate claims).

¹⁸⁸ See, e.g., *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853 (7th Cir. 2015) (describing the elements of a prima facie failure-to-accommodate claim); see also *supra* Section II.B.