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CO-WORKER MORALE, CONFIDENTIALITY, AND THE AMERICANS WITH DISABILITIES ACT

Lisa E. Key*

INTRODUCTION

Title I of the Americans with Disabilities Act1 ("ADA") requires covered employers2 to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability who is either an applicant or an employee.3 Thus, although the ADA does not require an employer to take affirmative action—an employer is not required to hire a person with a disability if there is another applicant who is more qualified4—an employer cannot prefer or select an individual who does not have a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation.5 In other words, an employer may not consider an individual’s need for a reasonable accommodation in making employment decisions.6 An employer is only relieved of the duty to make a reasonable accommodation if the accommodation would impose an undue hardship on the operation of the employer’s business.7 This Article addresses the question of whether the effect of an accommodation on the morale of co-workers should be considered in determining whether the accommodation will impose an undue hardship on an employer.

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2. Covered employers are those engaged in an industry affecting commerce and who have fifteen or more employees. Id. § 12111(5)(A).
3. See id. § 12112(b)(5)(A).
5. 29 C.F.R. app. § 1630.9(b) (1996).
6. Id.
Part I of this Article begins by examining factors that affect employee morale. This part then explores the legitimacy of an employer's desire to maintain high employee morale by considering the likely effects of a loss in morale on an employer's business. Finally, Part I briefly considers possible effects that accommodations under the ADA could have on co-worker morale.

Because there is little case law under the ADA addressing the issue of co-worker morale, Parts II and III of this Article examine the role that co-worker morale has played in other antidiscrimination statutes. Part II begins with an analysis of co-worker morale under Title VII of the Civil Rights Act of 1964 ("Title VII"). The section first considers how co-worker rights impact the fashioning of remedies under Title VII generally. Part II continues with an examination of cases in which an employee alleged discrimination based on an employer's failure to make reasonable accommodations to religious needs. These cases are significant because Title VII places an obligation on employers that is similar to an employer's obligation under the ADA. As with the ADA, Title VII requires employers to make reasonable accommodations to the religious needs of employees unless doing so would cause an undue hardship.

Part III of this Article analyzes cases decided under the Rehabilitation Act of 1973 ("Rehabilitation Act") in which co-worker morale was a factor. Like the ADA, the Rehabilitation Act prohibits discrimination against persons with disabilities and requires covered entities to make reasonable accommodations for persons with disabilities unless doing so would impose an undue hardship. Its application,
however, is limited to the federal government, federal contractors, and recipients of federal funds.\textsuperscript{20} Cases decided under the Rehabilitation Act are of particular import because the ADA was modeled after the Rehabilitation Act and courts are to look to decisions interpreting the Rehabilitation Act for guidance in interpreting analogous provisions of the ADA.\textsuperscript{21}

Part IV examines applicable provisions of the ADA and interpretations of these provisions by the Equal Employment Opportunity Commission ("EEOC")\textsuperscript{22} to determine whether the decisions shed any light on the proper role of co-worker morale in the context of undue hardship.\textsuperscript{23} Part IV also discusses relevant case law under the ADA.\textsuperscript{24} Part V of this Article sets forth a proposal delineating the circumstances in which a loss of morale resulting from an accommodation would be an appropriate factor for courts to consider in determining whether the accommodation imposes an undue hardship.\textsuperscript{25} This proposal adopts a balanced approach in which both the rights of the employee with the disability and the rights of the employer are considered and, therefore, is consistent with the overall tenor of the ADA.

I. THE LEGITIMACY OF MORALE

A. What Is Morale and Why Should We Care If It Is Hurt?

Morale is not something one can touch, see, smell, taste, or hear. Rather, it is intangible. It is an attitude, a sense of spirit. However, morale is not invisible. Its existence is seen through the behaviors it

\textsuperscript{20} 29 U.S.C. §§ 793, 794.
\textsuperscript{21} Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996), cert. denied, 65 U.S.L.W. 3647 (U.S. Mar. 21, 1997); see also H.R. REP. No. 101-485, pt. 2, at 67 (1990) (noting that the concept of "undue hardship" is derived from and should be interpreted consistently with regulations implementing the Rehabilitation Act); S. REP. NO. 101-116, at 36 (1989).
\textsuperscript{22} The EEOC is authorized to issue regulations governing private employment discrimination. 42 U.S.C. § 12116.
\textsuperscript{23} See infra notes 220-47 and accompanying text.
\textsuperscript{24} See infra notes 248-54 and accompanying text.
\textsuperscript{25} See infra notes 255-77 and accompanying text.
produces. If one were to observe a group of people that was charged with performing a task, for example, one could probably come to a conclusion regarding the morale of the group based on the conduct of the group and the manner in which individuals interacted within the group.

Webster’s Dictionary defines morale as “the mental and emotional condition (as of enthusiasm, confidence, or loyalty) of an individual or group with regard to the function or tasks at hand” and “the level of individual psychological well-being based on such factors as a sense of purpose and confidence in the future.”26 This definition suggests that a number of factors contribute to morale, including having a sense of purpose and having confidence in the future. It also suggests that morale is tied to other attitudes, such as enthusiasm, confidence, and loyalty. In other words, if morale is high, enthusiasm, confidence, and loyalty will likely also be high. If morale is low, enthusiasm, confidence, and loyalty will likely be low.

A study of employees at Sears, Roebuck and Co. supports the idea that factors such as an individual’s sense of purpose and confidence in the future impact morale.27 Based on data from a survey of over 36,000 employees, the study concludes that tangible factors, such as level of pay, hours worked, and the physical working environment, did not have as significant an impact on morale as intangible factors, such as recognition of performance and fairness of treatment.28 Recognition of performance is clearly tied to a validation of one’s sense of purpose. Further, a person who does not believe that he or she will be treated fairly will surely have difficulty maintaining confidence in the future.

Theodore Caplow, a professor of sociology at the University of Virginia, reached a similar conclusion with respect to the link between an employee’s belief that he or she is being treated fairly and that employee’s morale.29 Professor Caplow found that the manner in which rewards and punishments are distributed in the workplace is critical to the level of employee morale, with the perception by employees that

27. See James C. Worthy, Lean But Not Mean: Studies in Organization Structure 35 (1994). The Sears study was based on a survey that was completed by more than 36,000 employees between 1939 and 1942. Id. at 27. Each employee was given a “morale score” that was derived from answers to a series of questions. Id. at 28. The morale score measured the employee’s attitude toward the company and toward his or her work. Id. The conclusions reached by the study were based on an examination of differences between employees with high morale scores and employees with low morale scores. Id. at 30-35.
28. Id. at 35.
rewards and punishments are distributed justly being a key factor.\textsuperscript{30} Feelings of injustice are created when there are discrepancies between how an employee expects to be treated and how he or she is actually treated.\textsuperscript{31} To create or maintain high morale, rewards and punishments must therefore be both predictable and consistent with the level of effort put forth, the amount of sacrifices made, the employee's organizational status, and the rewards and punishments received by others.\textsuperscript{32} Preventing disruptions or alterations in the expectational interests and rights of employees is crucial. If it appears that an employee is not rewarded despite meeting performance criteria or, conversely, if it appears that an employee is rewarded even though performance criteria have not been met, morale will be hurt.\textsuperscript{33} As Professor Caplow emphasized, it is the perception of injustice that is most significant.\textsuperscript{34}

A loss in employee morale can damage a business in a number of significant ways. As the definition of morale in Webster's Dictionary suggests, lowered morale can negatively affect the enthusiasm, confidence, and loyalty of employees.\textsuperscript{35} Lowered morale can cause increased friction and decreased cooperation among co-workers, increased employee lateness and absenteeism, and a higher employee turnover rate.\textsuperscript{36} Each of these can result in increased costs to the busi-

\textsuperscript{30} Id. at 140-41; see also J. Stacy Adams, Toward an Understanding of Inequity, J. Abnormal & Soc. Psychol. 422, 424 (1963) (noting that feelings of inequity exist when a person perceives that his job inputs and outcomes are obverse to what he perceives to be the inputs and outcomes of another).

\textsuperscript{31} Caplow, supra note 29, at 142. For a general discussion of distributive justice and the role that third-party managers play, see George Caspar Homans, Social Behavior: Its Elementary Forms 232-64 (Robert K. Merton ed., 1974).

\textsuperscript{32} Caplow, supra note 29, at 142-43. Professor Caplow notes that employees may receive unequal rewards or punishments for nearly identical actions without creating a sense of injustice as long as the unequal treatment is based on established policy and is completely predictable. Id. at 142; see also Homans, supra note 31, at 269-72 (tying job satisfaction to concepts of distributive justice).

\textsuperscript{33} Caplow, supra note 29, at 142-43.

\textsuperscript{34} Id. at 141; see also Adams, supra note 30, at 424 (pointing out that how a situation is perceived, and not necessarily the actual situation, is critical to feelings of inequity).

\textsuperscript{35} See supra note 26 and accompanying text.

\textsuperscript{36} See Caplow, supra note 29, at 156-57 (noting that indicators of high morale include a stable or declining turnover rate and levels of lateness and absenteeism that do not interfere with the organizational program); Richard T. Mowday et al., Employee-Organization Linkages: The Psychology of Commitment, Absenteeism, and Turnover 141 (1982) (noting several studies that show a correlation between employee commitment and levels of tardiness, absenteeism, and turnover); Worthy, supra note 27, at 202-03 (finding that the concern of managers in having good employee relations is in part driven by a desire to reduce friction and promote teamwork); Ronald Paul Yuzuk, The Assessment of Employee Morale 38-39 (1961) (finding a correlation between job satisfaction and levels of absenteeism and turnover); see also Homans, supra note 31, at 264. Professor Homans suggests that distributive justice is...
ness by requiring that additional time and money be spent on resolving conflicts, rearranging work schedules, and recruiting and hiring replacement employees. Thus, employers have a legitimate economic interest in promoting and maintaining high employee morale.

B. Accommodations and Morale

The ADA requires covered employers to make reasonable accommodations to enable a qualified individual with a disability to perform the essential functions of a given job. Because the determination of what constitutes a reasonable accommodation is dependent upon the job at issue and the specific limitations of the individual requiring the accommodation, the statute does not mandate that certain accommodations be made. It does, however, list some of the more common accommodations that may be required. The list includes: (1) making existing facilities accessible to and usable by employees with disabilities; (2) restructuring a job by reallocating or redistributing marginal, nonessential functions of the job; (3) permitting part-time or modified work schedules; (4) reassigning an employee with a disability to a vacant position; (5) acquiring or modifying equipment; and (6) providing readers or interpreters.

realized when rewards are in proportion to investments, that the realization of distributive justice leads to decreased friction in relationships, and that this in turn should lead to increased efficiency. See id. at 269-72.

37. See MOWDAY ET AL., supra note 36, at 76, 154 (noting the administrative costs associated with employee absenteeism and turnover).

38. Consequently, employers have a legitimate economic interest in creating a work environment that appears fair and in which the expectation interests and rights of employees are not altered or disrupted. Some commentators and courts, however, have failed to appreciate the correlation between the expectation interests and rights of employees and the costs to employers. See, e.g., Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996) (stating that an accommodation that would have violated the seniority system under a collective bargaining agreement posed a conflict "not so much between the rights of the disabled individual and his employer . . ., but between the rights of the disabled individual and those of his co-workers"), cert. denied, 65 U.S.L.W. 3647 (U.S. Mar. 21, 1997) (No. 96-7525); Barbara A. Lee, Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent, 14 BERKELEY J. EMP. & LAB. L. 201, 223-24 (1993) (arguing that under the ADA the expectations of co-workers are irrelevant in determining whether an accommodation imposes an undue hardship on an employer because nothing in the statute suggests that the needs of co-workers are a consideration).


40. Id. app. § 1630.9.

41. 42 U.S.C. § 12111(9) (1994); see also 29 C.F.R. app. § 1630.2(o). The Interpretive Guidance clarifies that the statutory list is not intended to be exhaustive and that there are many other types of accommodations that, depending on the specific circumstances, may be considered reasonable. 29 C.F.R. app. § 1630.2(o).

42. 42 U.S.C. § 12111(9); see also 29 C.F.R. app. § 1630.2(o) (interpreting what is meant by "job restructuring").
by the EEOC describes additional accommodations that could be required, such as providing accessible transportation, reserving parking spaces, and permitting guide dogs.\textsuperscript{43} The possibilities are virtually limitless.

The manner in which an accommodation can hurt the morale of co-workers can be broken down into three categories. First, morale might be damaged because of the animus, negative stereotypes, or unfounded fears of co-workers. For instance, assume a company hires an individual who has cerebral palsy and is in a wheelchair.\textsuperscript{44} To accommodate that employee's disability, the company agrees to alter the employee's work space to allow the employee's wheelchair to fit comfortably. A co-worker who has nearby work space becomes disgruntled, not because of any direct impact either the person with cerebral palsy or the accommodation is having on the co-worker's job, but merely because the co-worker finds the person with cerebral palsy "offensive."

In the second category, morale is hurt because an employee is receiving an accommodation that is perceived by co-workers as preferential treatment.\textsuperscript{45} There is no direct impact or actual hardship imposed on co-workers. However, their expectational interests and rights have been disrupted because it appears that the employee with the disability is being rewarded despite not meeting established criteria or in a manner that is contrary to established policy.

For example, assume that a company has established a policy that working on a flex-time schedule is not permitted. Several employees would prefer to work on a flex-time schedule and have made requests to do so, but their requests have been denied. The company then hires an individual who has a disability and whose medication makes it impossible for him or her to function well in the morning. The com-

\textsuperscript{43} 29 C.F.R. app. § 1630.2(o).

\textsuperscript{44} In each of the examples given, it will be presumed that the employee receiving the accommodation is an individual with a disability. Section 12102(2) of the ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(2). Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). To be substantially limited in a major life activity means to be unable to perform an activity that the average person in the general population can perform or to be significantly restricted as to the condition, manner, or duration in which the activity can be performed in comparison to the average person in the general population. \textit{Id.} § 1630.2(j)(1).

\textsuperscript{45} See James G. Frierson, \textit{An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality}, 1992 \textit{Lab. L.J.} 308, 310 (noting that furnishing accommodations to employees with nonobvious disabilities without explaining the reason to co-workers will potentially lead to complaints and decreased morale).
pany agrees to accommodate this employee by allowing the employee to come to work at whatever time he or she is able, as long as the employee works a minimum of forty hours per week. Co-workers, who are unaware of the employee's disability, perceive this as unfair and unjust and, as a result, morale is hurt. In this situation, co-worker morale is not damaged because of prejudice or lack of understanding. The co-workers are not even aware that the employee working flex-time has a disability. Rather, co-worker morale has been damaged because of a perception of unfairness or injustice based on the information available to them, and that perception has been caused by the accommodation. It is irrelevant that the employees' perception is inaccurate. As Professor Caplow stressed, it is not whether there is an actual injustice that is significant, it is whether employees perceive there to be an injustice.\footnote{See \textit{supra} notes 29-34 and accompanying text.}


Not only is there an employee who appears to be receiving preferential treatment, but, in addition, co-workers are either denied a reward despite having met established criteria or are punished in spite of compliance with established rules and policies. As with the second category, the expectational interests and rights of co-workers are disrupted, there is a perception of unfairness or injustice, and morale deteriorates.\footnote{See Rosalie K. Murphy, Note, \textit{Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act}, 64 \textit{S. CAL. L. REV.} 1607, 1632 (1991) (acknowledging that some accommodations will require reassignment of unpleasant tasks, which may cause feelings of unfairness).}

For example, assume that an unpleasant task, such as emptying and scrubbing out garbage bins, is assigned to a particular category of employee. The employees within that category share the task equally by rotating who is responsible for completing the undesirable job. The
company hires an employee who can perform all the essential functions of the job but who, because of a degenerative muscle disorder, is unable to perform the task of emptying and scrubbing out the garbage bins. As an accommodation, the company relieves the employee with the disability of the obligation to perform this task which the company has determined to be marginal and nonessential to the job. Consequently, each of the other employees in this job category are required to perform this unpleasant task more frequently. This is perceived as an undeserved punishment. In addition, the employee receiving the accommodation, who is not required to perform the unpleasant task at all, is perceived as being given an undeserved reward.

II. COMPLIANCE WITH TITLE VII AND EFFECTS ON CO-WORKER MORALE

A. In General

In most instances, compliance with Title VII is mandatory regardless of the cost to the employer and regardless of the effect on co-worker morale.\(^49\) This result is logical because compliance with Title VII will rarely have a direct impact on co-workers jobs or job-related rights. Thus, any resulting negative effect on morale is most probably the result of animus, prejudice, or negative stereotypes.

In those cases in which compliance with Title VII would have a direct impact on the legitimate rights of co-workers, the United States Supreme Court has held that those rights may be taken into account in fashioning an equitable remedy.\(^50\) Although these cases do not speak in terms of loss of morale—and there is no reason why they should because the cost to an employer of compliance is irrelevant under Title VII—the cases do recognize that the elimination of discrimination can have an impact on the rights and interests of co-workers and that this impact is legitimate and should not be ignored.\(^51\)

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49. An employer is allowed to hire individuals on the basis of religion, sex, or national origin if such a characteristic is a bona fide occupational qualification reasonably necessary to the normal operations of the employer's business. 42 U.S.C. § 2000e-2(e). Even under these circumstances, however, an employer may not refuse to hire an individual because of the preferences of co-workers. See 29 C.F.R. § 1604.2(a)(1)(iii). One exception to this general rule is made in connection with religious observances. An employer is required to make accommodations for the religious observances of an employee only to the extent that doing so would not impose an undue hardship on the employer's business. 42 U.S.C. § 2000e(j); id. § 2000e-2(a)(1). This is discussed in more detail infra notes 63-139 and accompanying text.


For example, in *Ford Motor Co. v. EEOC*, Ford was sued under Title VII for gender discrimination. The plaintiffs, all female, had applied for jobs at Ford and alleged that they were not hired because of their gender. Ford attempted to toll its liability for back pay in the event that the suit was successful by offering the plaintiffs the jobs that they had previously been denied. Ford refused to grant the plaintiffs seniority retroactive to the time of the alleged discrimination, however. The question before the Court was whether, under Title VII, an employer's failure to offer retroactive seniority precludes the tolling of back pay liability.

The Court held that Ford had effectively tolled its back pay liability despite not having offered the plaintiffs retroactive seniority. In support of its decision, the Court acknowledged the importance of seniority rights and emphasized the burden that a rule conditioning the tolling of back pay liability on a job offer that included retroactive seniority would impose on innocent employees. The Court explicitly stated that it is permitted to consider the rights of innocent third parties, such as existing employees, in deciding an employer's obligations under Title VII.

The Court's decision in *Ford Motor Co.* does not mean that the rights and interests of innocent third parties always outweigh the rights of people who have suffered discrimination. However, if implementation of an equitable remedy under Title VII will impinge on the rights and expectations of nonvictim employees, the harm it will cause may be taken into consideration. As the Court stated in *Inter-

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52. Ford Motor Co., 458 U.S. at 223.
53. Id. at 221-22.
54. Id. at 222-23.
55. Id. at 222.
56. Id. at 220.
57. Id. at 230-34.
58. Id. at 239. The Court noted that seniority can play a central role in deciding how to allocate the benefits and burdens of employment among employees, including decisions involving promotion, layoff, transfer, vacation days, and shift assignments. Id. at 239 n.28.
59. Id. at 239.
60. Id. The Court's language in this regard could arguably be read narrowly to apply only in those circumstances where plaintiffs have alleged, but not yet proven, discrimination. For instance, the Court stated that "we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination." Id. at 240. However, the Court, in its analysis, cited favorably to *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978), in which the Court refused to order a Title VII remedy that would significantly harm innocent third parties even though discrimination was proven. Ford Motor Co., 458 U.S. at 239.
The importance of these decisions with respect to the ADA and co-worker morale is twofold. First, these decisions recognize that elimination of discrimination, although an important goal, does not always override competing interests even under Title VII. There are times when it is too much to expect affected parties merely to be understanding. Second, and more importantly, these decisions signify an acknowledgment by the courts that co-workers have rights and interests that are both legitimate and significant and that these rights and interests may be affected, often negatively, in the process of eliminating discrimination. This is as true with respect to accommodations required by the ADA as it is for remedies imposed by Title VII. Thus, it is possible that a loss in morale occasioned by a remedy imposed on an employer under Title VII or an accommodation made by an employer under the ADA may be the result of something other than animus or a lack of understanding on the part of co-workers. It may be the result of employees not being given what established policies indicate they should receive and the resulting perception of unfairness and injustice.

B. Cases Involving Religious Needs

The provisions of Title VII that most closely resemble the ADA are those governing the obligations of employers with respect to the religious needs of employees. Title VII requires employers to make a reasonable accommodation to an employee's religious observance or practice unless doing so would impose an undue hardship on the employer's business. Although the statutory requirements of Title VII and the ADA have virtually identical wording, there is one significant difference between the provisions. The threshold for finding undue hardship is much lower under Title VII than under the ADA. An

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64. Under Title VII, an accommodation that requires an employer to bear more than a de minimis cost is deemed to impose an undue hardship. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). The legislative history of the ADA specifically rejects the applicability of the de minimis standard announced in Hardison in favor of a significantly higher standard. H.R. REP. No. 101-485, pt. 2, at 68 (1990); S. REP. NO. 101-116, at 36 (1989). Likewise, the EEOC has indicated that the undue hardship defense as used in the ADA is unlike the undue hardship defense as used in connection with religious accommodations under Title VII in that an em-
employer satisfies the undue hardship burden under Title VII merely by demonstrating that an accommodation will require more than a de minimis cost. In contrast, an employer must show substantially more difficulty or expense to satisfy the undue hardship standard under the ADA. Cases analyzing what constitutes an undue hardship under Title VII are nonetheless relevant to the ADA, specifically, for purposes of this Article, with respect to the question of whether the effect of an accommodation on co-workers is a factor to be considered in assessing whether an accommodation will impose an undue hardship.

The leading case with respect to religious accommodations and undue hardship under Title VII is the United States Supreme Court's decision in Trans World Airlines v. Hardison. The plaintiff in Hardison made a request to his employer, Trans World Airlines ("TWA"), to have the Sabbath off in accordance with his religious beliefs but was refused. The plaintiff brought suit, claiming that TWA had discriminated against him on the basis of religion by failing to make reasonable accommodations to his religious practices.

A collective bargaining agreement between TWA and the union that represented TWA employees provided that preferences with respect to shift assignments and days off were to be made on the basis of seniority. In finding that the requested accommodation would cause an undue hardship to TWA, the Court stressed that accommodating the plaintiff would require depriving another employee of his or her contractual rights under the collective bargaining agreement. To allow the plaintiff his preference of not working on Saturdays would mean requiring a more senior employee to work in his place, despite the more senior employee's contractual right granting him or her a preference over the plaintiff for not working on Saturdays. The Court stated that it "would be anomalous to conclude that... Congress meant that an employer must... deprive [some employees] of

65. Hardison, 432 U.S. at 84.
67. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1049 n.12 (7th Cir. 1996) (noting that Congress, in rejecting the de minimis rule announced in Hardison, did not intend to reject the overall holding of the case), cert. denied, 65 U.S.L.W. 3647 (U.S. Mar. 21, 1997) (No. 96-7525).
69. Id. at 67-69.
70. Id. at 69.
71. Id. at 67.
72. Id. at 80.
73. Id. at 81.
their contractual rights, in order to accommodate or prefer the religious needs of others."74 While the Court in part relied on section 703(h) of Title VII,75 which affords special protection to bona fide seniority and merit systems,76 the existence of section 703(h) was not critical to the Court’s decision.77 What was critical was the interference of the proposed accommodation with the bona fide rights of co-workers, regardless of the source of those rights.78 The Court’s decision in Hardison thus provides a clear endorsement of the principle that the effect of an accommodation on co-workers is a valid consideration in determining whether the accommodation imposes an undue hardship on the employer in the collective bargaining context.

Despite this endorsement in Hardison, the more specific question of the role of co-worker morale in the undue hardship equation under Title VII remains. In Cummins v. Parker Seal Co.,79 a case decided before Hardison, the Sixth Circuit considered this question. The facts were similar to Hardison; the plaintiff, after being fired for refusing to work on the Sabbath, charged his employer with failing to make a reasonable accommodation to his religious practices and observances in violation of Title VII.80 The plaintiff was fired when co-workers who were forced to substitute for him on Saturdays complained to their employer.81 In analyzing whether not requiring the plaintiff to work on Saturdays would cause an undue hardship, the Sixth Circuit stated that “[t]he objections and complaints of fellow employees, in

74. Id.
75. Id.
76. Section 703(h) provides that, notwithstanding anything else contained in Title VII, “it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(h) (1994).
77. Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1049 n.13 (7th Cir. 1996) (noting that the structure and language in Hardison make apparent that the decision did not depend on section 703(h), rather, section 703(h) merely supported the conclusion already reached by the Court), cert. denied, 65 U.S.L.W. 3647 (U.S. Mar. 21, 1997) (No. 96-7525).
78. Hodges, supra note 47, at 601-02 (finding that “[w]hile Section 703(h) was cited as support for the Court's conclusion in Hardison, a close reading of the opinion indicates that the rights of other employees, which were created in part by the collective bargaining agreement, were the linchpin of the holding”).
79. 516 F.2d 544, 550 (6th Cir. 1975).
80. Id. at 545. In contrast to Hardison, however, in Cummins there did not appear to be a collective bargaining agreement or any other written agreement regarding the employer’s policy for assigning work on Saturdays. This factor was not specifically discussed by the court.
81. Id.
and of themselves, do not constitute undue hardship."82 The court did not reject the legitimacy of considering effects on morale altogether, however. In fact, the court conceded that it was possible for employee morale problems to become so severe as to constitute an undue hardship, but it stated that employee discontent would have to rise to the level of creating chaotic personnel problems.83

Two factors unrelated to the question of the relevance of co-worker morale in the undue hardship equation were critical to the Sixth Circuit’s decision, however. First, the court found that the employer could have taken steps to alleviate the dissension among its employees, such as requiring the plaintiff to work on Sundays or requiring the plaintiff to substitute for his co-workers on a more equitable basis.84 Thus, the negative impact on co-worker morale was partially due to the employer’s actions and not the accommodation per se. Second, the court was clearly applying a standard greater than the de minimis standard later announced in Hardison. According to the court, to show undue hardship, the employer must demonstrate that the accommodation would have a “dire effect” on the operations of its business.85

Soon after its decision in Cummins, the Sixth Circuit again considered the issue of co-worker morale in Reid v. Memphis Publishing Co.86 In Reid, the court found that the proposed accommodation, not requiring the plaintiff to work Saturdays, would create havoc and serious morale problems among co-workers.87 Making the accommodation would have required co-workers with seniority to substitute for the plaintiff on Saturdays.88 The burden of the accommodation on co-

82. Id. at 550; see also Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520-21 (6th Cir. 1975) (refusing to find that accommodation would cause an undue hardship on the basis that it might result in “grumbling” among co-workers).

83. Cummins, 516 F.2d at 550. The idea of an accommodation not being required if it would “create chaotic personnel problems” arose out of an earlier Sixth Circuit decision. See Dewey v. Reynolds Metals Co., 429 F.2d 324, 330 (6th Cir. 1970), aff’d by an equally divided court, 402 U.S. 689 (1971). In Dewey, the court found that the employer had not violated Title VII when it fired the plaintiff for refusing to work on Sundays in contravention of a collective bargaining agreement. Id. The plaintiff was allowed to arrange for replacements on his own, but his employer refused to arrange replacements for him. Id. The court stated that to accede to the plaintiff’s demands would “create chaotic personnel problems” and, therefore, it was not required. Id. At the time the action arose, however, the regulations did not speak of undue hardship and were much clearer that an employer could require all of its employees to work on Sundays without violating the statute. See id. at 329-30. It is unclear from this decision, therefore, whether “chaotic personnel problems” would rise to the level of undue hardship.

84. Cummins, 516 F.2d at 550.

85. Id.

86. 521 F.2d 512 (6th Cir. 1975).

87. Id. at 521.

88. Id. at 516.
workers was aggravated by the fact that there were only a small number of other employees able to perform the work. Thus, the effect of the accommodation on co-worker morale was relied upon by the court in finding that the proposed accommodation would create an undue hardship.

Following the Supreme Court's decision in *Hardison*, two courts have had the opportunity to explore further the relationship between co-worker morale and undue hardship. The Fifth Circuit addressed the issue in *Brener v. Diagnostic Center Hospital*. The claim in *Brener*, as in *Hardison* and *Reid*, involved an employee whose religious beliefs prohibited him from working on the Sabbath and a number of religious holidays. In contrast to *Hardison*, however, there was not a collective bargaining agreement or any other written policy with regard to shift assignments. The plaintiff, an Orthodox Jew, was one of five pharmacists employed by the Diagnostic Center Hospital. The pharmacy operated seven days a week. On weekdays, four pharmacists were scheduled to work eight-hour shifts. On weekends, one pharmacist was scheduled to work a twelve-hour shift on Saturday and a fourteen-hour shift on Sunday. The pharmacists met to arrange their own schedules. It was their practice to rotate shifts so that each pharmacist was scheduled to work every fifth weekend.

The plaintiff, after being scheduled to work on a Saturday, approached the pharmacy director to ask him to order a trade of schedules, which the director did even though it was contrary to his past policy of not interfering with the pharmacists' schedules. Eventually, the plaintiff arranged trades on his own for Saturdays by agreeing to work more Sundays but requested the director to order trades on a number of Jewish holy days for which the plaintiff would agree to

89. *Id.* at 515.
90. *Id.* at 521.
91. See, e.g., Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141 (5th Cir. 1982); see also infra notes 111-24 and accompanying text (discussing *Opuku-Boateng*); infra notes 92-109 and accompanying text (discussing *Brener*).
92. 671 F.2d 141 (5th Cir. 1982).
93. *Id.* at 143.
94. *See id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
work Christmas holidays. The other pharmacists began to complain regarding the special treatment of the plaintiff and the director refused to order any more trades on the plaintiff’s behalf due to the rising morale problems. The director indicated that the plaintiff was free to arrange any trades he wanted on his own. The plaintiff brought suit alleging that his employer had failed to make reasonable accommodations to his religious practices.

The principal accommodation that the plaintiff was requesting was that the pharmacy director order other employees to trade shifts with the plaintiff. Despite the fact that the plaintiff’s request did not violate any written policy, the Fifth Circuit noted that it had resulted in a disruption of established work routines and a lowering of morale among the other employees when the proposed accommodation had been tried in the past. The court found that this was sufficient to cause an undue hardship on the employer. To characterize the complaints by the other employees as mere grumbling, according to the court, was to underestimate the actual imposition on their work environment.

A slightly different result was reached on virtually identical facts by the Ninth Circuit in Opuku-Boateng v. California. The plaintiff had been appointed as a plant inspector at a border inspection station. There were fifteen inspectors employed by the station, which operated twenty-four hours a day, seven days a week. Although there was not a collective bargaining agreement, departmental policy required that work assignments be made as equitably as possible. This meant that all employees were required to work “an equal number of undesirable weekend, holiday, and night shifts.” The plaintiff informed his supervisor that he would not be able to work during the Sabbath but that he was willing to work other undesirable shifts in

102. Id.
103. Id.
104. Id.
105. Id. at 143-44.
106. Id. at 146-47.
107. Id. at 147.
108. Id.
109. Id.
110. 95 F.3d 1461 (9th Cir. 1996).
111. Id. at 1465.
112. Id.
113. Id.
114. Id. Employees were also required to be assigned varying shifts to avoid collusion between inspectors and truck drivers. Id.
place of the Sabbath assignments he would normally receive.\textsuperscript{115} The plaintiff was informed that his appointment would not be processed if he refused to work on the Sabbath.\textsuperscript{116}

In refusing to find that the plaintiff's proposed accommodation would cause an undue hardship, the Ninth Circuit observed that the accommodation would not deprive other employees of any contractually established rights or privileges of any kind.\textsuperscript{117} More importantly, however, was the fact that the proposed accommodation would not have resulted in a privilege to the plaintiff or any real burden to the other employees.\textsuperscript{118} The court stressed that in \textit{Hardison} not all employees were required to work weekends; those with seniority were permitted to take weekends off.\textsuperscript{119} Thus, requiring an employee with greater seniority to work in Hardison's place on Saturdays would have afforded Hardison a benefit and imposed a burden on the more senior employee.\textsuperscript{120} This was in contrast, the court said, to the situation before it in which all employees were required to work an equal number of undesirable shifts.\textsuperscript{121} As long as the plaintiff worked his share of undesirable shifts, of which plenty were available on Sundays, holidays, and nights, he would not be receiving any preferential treatment nor would any cognizable burden be placed on his co-workers.\textsuperscript{122} Thus, the court rejected the district court's finding that morale problems with a significant impact could arise if the accommodation were made and, instead, concluded that any hypothetical morale problems that would arise were "clearly insufficient to establish undue hardship."\textsuperscript{123}

Although \textit{Brener} and \textit{Opuku-Boateng} appear to be at odds with one another, both courts agreed that negative morale resulting from an accommodation can be a factor in assessing whether the accommodation imposes an undue hardship. Both decisions also recognize that depriving co-workers of rights or privileges, imposing a burden on co-workers, or granting a preference to an employee requesting an ac-

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 1470.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}. This presumes, of course, that working on a Sunday, holiday, or night is as undesirable as working on a Saturday. This question apparently was not raised and was not discussed by the court.
\item \textit{Id. at 1473.}
\end{enumerate}
accommodation can lead to lowered morale. The only issue on which the decisions appear to diverge significantly is the circumstances under which the damage to morale is legitimate—when have rights and privileges of co-workers been deprived, when has a burden been imposed on co-workers, or when has the employee requesting the accommodation been granted a preference.

At first glance, it seems that the court in Brener required less of an impact on co-workers to support a finding of undue hardship than the court in Opuku-Boateng. In reality, this may not have been the case. Assuming in Opuku-Boateng that the workers considered Sunday, holiday, and night shifts to be at least as undesirable as Saturday shifts, the court was absolutely correct in finding that the proposed accommodation would produce no actual hardship to co-workers or benefit to the plaintiff. All employees would still be working the same number of undesirable shifts as they would if the accommodation were not made. In addition, there was very little evidence presented to the court indicating that morale would in fact suffer as a result of the accommodation.

In contrast, it is entirely possible that the accommodation proposed in Brener would impose a significant burden on co-workers if implemented. Absent the proposed accommodation, co-workers would be required to work one out of every five weekends. If the accommodation was made, co-workers would have to work two out of every five weekends. Although the employees would only have to work one day per weekend (on Saturday), it is conceivable, if not likely, that this is a less desirable working situation. If this were the case, then the court in Brener was also absolutely correct in finding in that situation that the proposed accommodation would cause an undue hardship. The court’s finding is further supported by the fact that the court had evidence that when the accommodation had previously been tried, co-worker morale suffered.

This analysis is also consistent with the Sixth Circuit’s decision in Cummins. As previously discussed, the court in Cummins first recognized that lowered co-worker morale can be a factor in assessing whether an accommodation will result in an undue hardship. The Cummins court then refused to find undue hardship, despite employee complaints regarding the accommodation, when it was possible

124. Although the court in Opuku-Boateng indicated that an employer has a stronger argument of undue hardship when rights or privileges are embodied in a contract, the court did not opine that this is essential. See id. at 1470.
125. See id. at 1473-74.
to structure the accommodation in a manner that would not impose a burden on co-workers or result in a preference to the employee requesting the accommodation.\textsuperscript{127}

A line of cases involving workers whose religious tenets prohibit membership in or contributions to labor organizations provides further support for this analysis.\textsuperscript{128} The accommodation requested by the employee in all of these cases was to be excused from having to pay union dues.\textsuperscript{129} In all but one case, however, the employee offered to make a contribution to a charity in an amount equal to the union dues.\textsuperscript{130} In the only case in which the employee also refused to make a corresponding charitable contribution, \textit{Yott v. North American Rockwell Corp.}, the employee’s religious tenets forbade involuntary charitable contributions as well as contributions to labor organizations.\textsuperscript{131} Employers, in raising an undue hardship defense, asserted that making the accommodation would result in serious dissension among co-workers.\textsuperscript{132}

The only case in which this argument was accepted was \textit{Yott}.\textsuperscript{133} In every other case, the courts rejected the employer’s claim of undue hardship.\textsuperscript{134} As the Seventh Circuit pointed out in \textit{Nottelson v. Smith Steel Workers D.A.L.U. 19806}, the plaintiff who was requesting the accommodation was not receiving a preference because he was bearing the same financial burden as his co-workers.\textsuperscript{135} The court also noted that the financial injury to co-workers and the union as a result of the loss of the plaintiff’s dues was minimal at best.\textsuperscript{136} In contrast, the plaintiff in \textit{Yott} would have received a preference because his financial burden would have been less than that of his co-workers, yet he would still have received all of the benefits of union representation.

The court in \textit{Yott} also noted that, in the past, when all workers had not been required to belong to the union, there had been substantial ani-

\textsuperscript{127} Id.


\textsuperscript{129} \textit{Nottelson}, 643 F.2d at 448; \textit{Yott}, 602 F.2d at 906; \textit{Burns}, 589 F.2d at 405; \textit{Anderson}, 589 F.2d at 399.

\textsuperscript{130} See \textit{Nottelson}, 643 F.2d at 448; \textit{Yott}, 602 F.2d at 907; \textit{Burns}, 589 F.2d at 405; \textit{Anderson}, 589 F.2d at 399.

\textsuperscript{131} \textit{Yott}, 602 F.2d at 907.

\textsuperscript{132} \textit{Burns}, 589 F.2d at 406; see \textit{Yott}, 602 F.2d at 908-09; \textit{Anderson}, 589 F.2d at 401-02.

\textsuperscript{133} \textit{Yott}, 602 F.2d at 909.

\textsuperscript{134} \textit{Nottelson}, 643 F.2d at 452; \textit{Burns}, 589 F.2d at 406-07; \textit{Anderson}, 589 F.2d at 402.

\textsuperscript{135} \textit{Nottelson}, 643 F.2d at 451.

\textsuperscript{136} Id. at 452.
mosity and friction among workers. It thus found that the proposed accommodation would result in discord and unrest and, as a result, would create an undue hardship.

Thus, in reviewing cases under Title VII involving accommodations to religious practices, a trend is apparent. Courts have accepted that such accommodations can impose on and interfere with the rights and privileges of co-workers. Courts have also recognized that such accommodations may hurt morale. Further, in those cases in which morale is hurt because an accommodation infringes upon the rights or privileges of co-workers, imposes a burden upon co-workers, or grants a preference to the employee requesting the accommodation, courts have been willing to consider the effect on morale in determining whether the accommodation will cause an undue hardship. Thus, the courts, in effect, have treated these as legitimate causes of lowered morale. This is in contrast to those cases in which morale had been or would be hurt, but there was no evidence of any legitimate cause. In these cases, courts refused to find undue hardship. Perhaps this indicates a recognition by those courts that, to the extent morale had been or would be hurt, the cause of the loss of morale must be something that was not legitimate, such as prejudice or stereotypes, and that to find undue hardship in those instances would be to contravene the purpose of the statute.

III. Reasonable Accommodations, Co-Worker Morale, and Undue Hardship Under the Rehabilitation Act

The duties imposed on employers under the ADA are virtually identical to those imposed on the federal government and federal contractors by the Rehabilitation Act. For example, regulations adopted under the Rehabilitation Act, like the statutory provisions of the ADA, require covered employers to make reasonable accommodations necessary to enable qualified persons with disabilities to perform all the essential functions of a particular job unless doing so would cause an undue hardship. Furthermore, the legislative history of the ADA specifically directs courts to look to the Rehabilitation Act in interpreting the term “undue hardship” as it is used in the

137. Yot, 602 F.2d at 909.
138. Id.
139. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).
140. See supra note 19 and accompanying text. For a general discussion of the judicial development of undue hardship under the Rehabilitation Act, see David Harger, Comment, Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act: Reducing the Effects of Ambiguity on Small Businesses, 41 U. KAN. L. REV. 783, 795-802 (1993).
ADA. Thus, cases decided under the Rehabilitation Act are particularly persuasive in determining, under the ADA, what factors are to be considered in deciding whether an accommodation will impose an undue hardship.

As with Title VII, earlier decisions under the Rehabilitation Act focused not on co-worker morale in particular, but on whether an accommodation infringed upon the rights or preferences of co-workers, imposed a burden on co-workers, or gave preferential treatment to the employee requesting the accommodation. For example, in Treadwell v. Alexander, the Eleventh Circuit considered whether a reasonable accommodation could be made for the plaintiff's heart condition. The plaintiff had applied for a job as a park technician with the Army Corps of Engineers. The job required that the employee be able to walk at least six hours a day and stand for another hour. Because the plaintiff was only capable of walking a mile a day, he was not hired. The court, in considering whether the reassignment of some of the job tasks to other employees would cause an undue hardship, focused on the fact that only two to four other workers were on duty at any given time. According to the court, to require other workers to perform several job tasks normally assigned to the plaintiff in addition to their own job tasks would impose an undue hardship on the employer.

The decision in Carty v. Carlin was reached on similar grounds. The plaintiff in Carty became disabled after working for the United States Postal Service for a number of years. Because his disability caused him to no longer be qualified to perform all of the essential functions of his current position, he was discharged. The plaintiff brought a claim alleging that the Postal Service, by not transferring him to another position for which he was qualified, failed to accom-

142. See Vande Zande, 44 F.3d at 542.
144. Treadwell, 707 F.2d at 474.
145. Id.
146. Id. at 476.
147. Id. at 475-76.
148. Id. at 478.
149. Id.
151. See id. at 1188-89.
152. Id. at 1183.
153. Id.
moderate his disability.\textsuperscript{154} The Postal Service argued that the Rehabilitation Act did not require it to make such an accommodation.\textsuperscript{155} At the time, the regulations under the Rehabilitation Act did not specifically enumerate reassignment as a required accommodation.\textsuperscript{156} In analyzing whether such an accommodation was required, the court specifically adopted the Supreme Court's approach in \textit{Ford Motor Co.} in which the Court cautioned against infringing the rights of innocent employees when fashioning Title VII remedies.\textsuperscript{157} The court found that automatically reassigning the plaintiff to another position could give the plaintiff a preference by eliminating his need to compete for the position with other qualified employees and could also violate the rights of co-workers provided in their collective bargaining agreement with the Postal Service.\textsuperscript{158} Thus, the court concluded that the Postal Service had no obligation to reassign the plaintiff.\textsuperscript{159}

More recent cases decided under the Rehabilitation Act have specifically considered morale in the context of whether an accommodation imposes an undue hardship.\textsuperscript{160} One of the first of these cases, \textit{Wallace v. Veterans Administration},\textsuperscript{161} involved a recovering drug user who had applied for a job as a nurse in a hospital intensive care unit. Her treating physician recommended that she be hired but that she be restricted in access to controlled substances, in particular, injectable narcotics, for a probationary period.\textsuperscript{162} The hospital refused to hire

\textsuperscript{154} Id.
\textsuperscript{155} Id. at 1184.
\textsuperscript{156} See id. at 1188. In 1992, regulations adopted by the EEOC under the Rehabilitation Act were amended to require reassignment in some cases. 29 C.F.R. § 1630.2(o)(2)(11) (1992).
\textsuperscript{157} Carry, 623 F. Supp. at 1189 (citing to Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)).
\textsuperscript{158} Id.
\textsuperscript{159} Id.; see also Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (finding no obligation to assign the plaintiff to permanent light duty if it would interfere with rights of other employees under a collective bargaining agreement); Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985) (holding that an employer has no obligation to restructure a job in a manner that would usurp the rights of co-workers under a collective bargaining agreement); Davis v. United States Postal Serv., 675 F. Supp. 225, 232-36 (M.D. Pa. 1987) (finding that an employer is not obligated to assign an employee to another position when doing so would give the employee preferential treatment over other employees and conflict with the terms of a collective bargaining agreement); cf. Buckingham v. United States, 998 F.2d 735, 741-42 (9th Cir. 1993) (finding that the rights of co-workers are not violated and, therefore, an employer is required to reassign an employee as a reasonable accommodation when a collective bargaining agreement merely requires that one of every four reassignments be based on seniority).
\textsuperscript{161} Wallace, 683 F. Supp. at 759.
\textsuperscript{162} Id. at 759-60.
her on the basis that she was not able to perform all the functions of the job, that is, she could not administer narcotics.\textsuperscript{163} The hospital claimed that it was not required to waive this job requirement because, among other things, staff morale would have been affected.\textsuperscript{164} The court did not dismiss the effect on morale as an illegitimate or improper consideration. It did, however, find that the hospital had not met its burden of proof in establishing a legitimate impact on morale and, therefore, the court rejected the hospital's claim.\textsuperscript{165} The only evidence that the hospital had offered with respect to the effect on morale of hiring the plaintiff was the testimony of a nurse who stated that she did not believe that drug addiction was a disease and that she would not like working with a restricted nurse.\textsuperscript{166} The court soundly admonished the hospital, stating that "the V.A.'s refusal to accommodate is based on 'conclusory statements that are being used to justify reflexive reactions grounded in ignorance and capitulation to public prejudice.'"\textsuperscript{167} The court concluded that the only reason the hospital refused to hire the plaintiff was because it was "unenlightened and uneducated," which the court found unacceptable.\textsuperscript{168}

The employer in \textit{Davis v. Frank}\textsuperscript{169} also tried to argue that it was not required to make a particular accommodation because of the effect it would have on co-worker morale. The plaintiff in \textit{Frank}, who was completely deaf, was employed by the Postal Service and had applied for the position of time and attendance clerk.\textsuperscript{170} The Postal Service's collective bargaining agreement provided that the position was to be awarded to the most senior qualified bidder.\textsuperscript{171} The plaintiff was the most senior bidder, but she was not awarded the position on the basis that she was not able to answer the telephone.\textsuperscript{172} The court first found that answering the telephone was not an essential function of the job.\textsuperscript{173} The court then addressed whether accommodating the plaintiff by excusing her from answering the telephone would impose

\begin{itemize}
  \item \textsuperscript{163} \textit{Id.} at 760.
  \item \textsuperscript{164} \textit{Id.} at 766.
  \item \textsuperscript{165} \textit{Id.} at 767.
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.} (quoting \textit{Arline v. School Bd. of Nassau County}, 722 F.2d 759, 765 (11th Cir. 1985), \textit{aff'd}, 480 U.S. 273 (1987)).
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} 711 F. Supp. 447, 455 (N.D. Ill. 1989).
  \item \textsuperscript{170} \textit{Id.} at 448-49.
  \item \textsuperscript{171} \textit{Id.} at 449.
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.} at 454. There were two factors that influenced the court's conclusion. First, other post offices did not require the time and attendance clerk to answer the telephone. \textit{Id.} at 451. Second, the duty of answering the telephone was added to the list of required job tasks for that position for the first time when the vacancy arose for which the plaintiff applied. \textit{Id.} at 449-50.
\end{itemize}
an undue hardship on her employer.174 Her employer argued that the accommodation would impose an undue hardship because it would lower the morale of co-workers who, because they answer the telephone on a rotating basis, would have to answer the telephone more often.175 The plaintiff, however, had offered to do extra paper work to make up for the fact that she could not answer the telephone.176 The court, in rejecting the employer’s claim, stated that “the possibility of lowered morale does not rise to the level of ‘undue hardship.’”177

What the court meant by this statement is unclear, however. The court may have meant that, in order to show undue hardship, an employer must demonstrate more than a mere possibility of lowered morale. The court may have meant that lowered morale, although possibly a factor in the undue hardship assessment, is never enough on its own to create an undue hardship. The court even may have meant that morale was not a legitimate factor for consideration. The court also may have meant nothing more than that, in the case before it, the possibility of lowered morale did not rise to the level of undue hardship. Each of these is a reasonable interpretation with the result being that the decision offers little in the way of guidance.

The decision of the court in DiPompo v. West Point Military Academy178 was more definite in its consideration of morale as a factor in determining whether an employer is required to make a particular accommodation. The plaintiff had severe dyslexia that resulted in his having a reading level below the fourth-grade level and having a limited short-term recollection of numbers (five forward and three reverse).179 The plaintiff applied for a job as a fire fighter but was denied based on his low-level reading ability.180 In defending its actions, the employer emphasized that each fire fighter was required, on a rotating basis, to serve a tour on house watch, which entailed answering the telephone, recording information in a daily log, and acting as the department’s dispatcher.181 House watch was not considered a desirable duty and was sometimes used as a disciplinary measure.182 As an accommodation to his dyslexia, the plaintiff requested that he

Indeed, the court found that the list of required job tasks was modified for the explicit purpose of preventing the plaintiff from obtaining the position. Id. at 452.

174. Id. at 454-55.
175. Id. at 455.
176. Id. at 451.
177. Id. at 455.
179. Id. at 893.
180. Id. at 888.
181. Id. at 890.
182. Id.
be excused from house watch duty. In evaluating the merits of the plaintiff's claim, the court indicated that to put such a requirement on the employer would ignore the effect of the requested accommodation on morale and that it did not read the statute or regulations as imposing such a requirement. In reaching its conclusion, the court stressed the possible damage to morale that would result if one firefighter were excused from a duty considered sufficiently burdensome that it was used as a disciplinary measure.

The court in Davis v. Meese also cited to morale as a basis for not requiring an employer to make a particular accommodation. The plaintiff in Meese, an insulin-dependent diabetic, sought employment as either a special agent or investigative specialist with the Federal Bureau of Investigation ("FBI"). The FBI enumerated several reasons why it had a policy of excluding insulin-dependent diabetics from both of these positions, which the court found to be rational based on safety concerns and valid medical opinions. The plaintiff requested, however, that as an accommodation he be assigned to limited duty so as to avoid exposure to potentially dangerous situations. While agents were temporarily placed on limited duty from time to time, there were no permanent limited-duty assignments available. The court found that such an accommodation would impose an undue hardship. The court's finding was based partially on the cost and the financial constraints placed on the FBI. In support of its decision, however, the court also stated that hiring a person for a limited-duty position would create a corresponding increase in the more rigorous duties of other employees and that this would have a harmful effect on morale.

The EEOC took a position consistent with DiPompo and Meese in Smith v. Brown. The complainant, a nurse, claimed that she was discriminated against on the basis of her disability, diabetes, when her employer refused to schedule her for only the day shift. She

183. Id. at 891.
184. Id. at 894.
185. Id.
187. Id. at 507.
188. Id. at 518.
189. Id. at 519.
190. Id.
191. Id.
192. Id. at 515-16.
193. Id.
195. Id. at *1.
claimed that moving her from shift to shift could cause a disruption in her daily routine that would be detrimental to her health.\textsuperscript{196} The evidence that the complainant offered regarding the detrimental health effects, however, was questionable.\textsuperscript{197} Her employer nonetheless attempted to accommodate the complainant but subsequently discontinued doing so, claiming that it was imposing an undue hardship, in part because of resulting morale problems—co-workers had complained that the complainant was being unduly favored.\textsuperscript{198} The EEOC determined that, based on the questionable detriment to the complainant as well as resulting scheduling difficulties and harm to morale, the employer was not required to make the requested accommodation.\textsuperscript{199} Although it cannot be said that the harm to morale standing on its own would have been enough to justify a finding of undue hardship, it was clearly a consideration.

The most significant decision regarding co-worker morale and its relationship to undue hardship, \textit{Barth v. Gelb},\textsuperscript{200} was rendered by the District of Columbia Circuit in 1993. The plaintiff was an employee of the Voice of America ("VOA").\textsuperscript{201} He suffered from an advanced and degenerative form of diabetes that required the care of a skilled endocrinologist.\textsuperscript{202} The plaintiff’s job was located in Washington D.C., but he wished to be admitted into the Foreign Service in order to work at the VOA’s overseas radio relay stations.\textsuperscript{203} His request for admission was denied, not because he was not qualified for the position, but because he could only serve in those posts that had advanced medical facilities.\textsuperscript{204}

The VOA maintained twelve overseas radio relay stations, of which only three or four had facilities available that met the plaintiff's medical requirements.\textsuperscript{205} Normally, employees were required to rotate among the various posts.\textsuperscript{206} The posts with advanced medical facilities were more urban and were used as short-term havens from the more remote hardship posts.\textsuperscript{207} In rejecting the plaintiff’s request to be as-

\begin{itemize}
\item \textsuperscript{196} \textit{Id.}.
\item \textsuperscript{197} \textit{Id.} at *4.
\item \textsuperscript{198} \textit{Id.} All other nursing personnel were required to rotate through the evening and night shifts. \textit{Id.} at *1.
\item \textsuperscript{199} \textit{Id.} at *4.
\item \textsuperscript{200} 2 F.3d 1180 (D.C. Cir. 1993).
\item \textsuperscript{201} \textit{Id.} at 1182.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.} at 1188.
\item \textsuperscript{207} \textit{Id.}
\end{itemize}
signed only to the non-hardship posts, the VOA did not argue that the plaintiff’s request was unreasonable or that it would cause a fundamental alteration in the nature of its program.\textsuperscript{208} In fact, the VOA often agreed to such assignments for existing employees in order to accommodate their family or medical situations.\textsuperscript{209} Instead, the VOA argued that granting the plaintiff’s request would cause an undue hardship to it.\textsuperscript{210}

The District of Columbia Circuit, in reaching its decision, first found a legitimate distinction between making accommodations to existing employees, which it said would presumably contribute to morale, retention, and productivity and making an accommodation for someone who is not currently part of the “family,” who is a “stranger.”\textsuperscript{211} Thus, the fact that the VOA made accommodations similar to what the plaintiff was requesting for its existing employees was not determinative.

The court then addressed the VOA’s argument that the proposed accommodation would impair employee morale, thereby causing an undue hardship.\textsuperscript{212} The plaintiff had responded to this argument by asserting that it was inappropriate to take morale into account.\textsuperscript{213} As support for his position, he cited to cases under Title VII in which the hostility or animus of others was rejected as a defense to race-based policies.\textsuperscript{214} The court pointed out that the plaintiff’s position confused animus against persons with disabilities with the damage to morale that could be caused by an accommodation.\textsuperscript{215} It gave as an example an admittedly extreme situation—an employee with eyes that were extra sensitive to light who requested as an accommodation that the employer’s entire operations be moved underground.\textsuperscript{216} The court stated that in assessing whether the request would impose an undue hardship, any animus that co-workers felt toward the individual because of his disability would not be a proper consideration.\textsuperscript{217} The court stressed, however, that this did not mean that effects on the mo-

\textsuperscript{208} Id. at 1187-88.
\textsuperscript{209} Id. at 1188.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 1189.
\textsuperscript{212} Id. at 1189-90.
\textsuperscript{213} Id. at 1189.
\textsuperscript{214} Id. at 1189-90. In support of his position, the court noted that the plaintiff cited to Palmore v. Sidoti, 466 U.S. 429, 433 (1984), among other cases. The Supreme Court in Palmore held that a community’s hostility towards mixed-race marriages was not a defense to a policy that put mixed-race couples at a disadvantage in child custody disputes. Id. at 433-34.
\textsuperscript{215} Barth, 2 F.3d at 1190.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
IV. CO-WORKER MORALE AND THE ADA

A. ADA Basics

Title I of the ADA requires covered employers to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability who is either an applicant or an employee. Furthermore, the ADA prohibits an employer from considering the need of an otherwise qualified individual with a disability for a reasonable accommodation in making employment decisions. An otherwise qualified individual with a disability is someone who satisfies the prerequisites for the job, such as possessing appropriate education, training, skills, or licenses and who, with or without reasonable accommodations, can perform the essential functions of the job. The purpose of requiring employers to make reasonable accommodations is to eliminate discrimination against persons with disabilities in all aspects of the employment relationship, including hiring, firing, and promotion.

218. Id.
219. Id.
221. Id. § 12112(b)(5)(B).
222. Id. § 12111(8); 29 C.F.R. § 1630.2(m) (1996). The essential functions of a job are those that are fundamental and not merely marginal. 29 C.F.R. § 1630.2(n)(1) (1996). For example, a function may be considered essential if the reason that the particular job exists is to perform that function or if there are a limited number of employees to whom that function could be assigned. Id. § 1630.2(n)(2). Whether a function is essential is to be determined on a case-by-case basis. Id. app. § 1630.2(n). In evaluating whether a particular function is essential, factors such as the opinion of the employer, written job descriptions, the amount of time spent performing the function, the terms of a collective bargaining agreement, the consequences of not requiring the employee in question to perform the function, and the work experience of persons who previously held the particular job or who currently hold similar jobs are to be considered. Id. § 1630.2(n)(3).
223. H.R. REP. No. 101-485, pt. 2, at 62, 65 (1990) (noting that an employer's obligation to provide reasonable accommodations applies to all employment decisions and explaining that the reasonable accommodation requirement is best understood as a process in which barriers to employment are removed); accord S. REP. No. 101-116, at 31, 34 (1989); see also Jeffrey O. Cooper, Comment, Overcoming Barriers to Employment: The Meaning of Reasonable Accom-
An employer is only relieved of the duty to make a reasonable accommodation if the accommodation would impose an undue hardship on the operation of the employer's business. The concept of undue hardship reflects a balancing of the profit-maximizing goals of businesses and society's goal of permitting individuals with disabilities to work. "Undue hardship" is defined as meaning "an action requiring significant difficulty or expense." It is thus not limited to financial difficulties but includes any accommodation that would be unduly costly, extensive, substantial, or disruptive or that would fundamentally alter the nature or operation of the business. The statute provides a nonexclusive list of factors to consider in assessing whether an accommodation imposes an undue hardship, including the nature and cost of the accommodation, the number of employees, the financial resources of the employer, the type of operations of the employer, and the impact of the accommodation on the employer's operations. Although effect on co-worker morale is not specifically mentioned, each of these factors could be said to be related to co-worker morale in some respect.

modation and Undue Hardship in the Americans with Disabilities Act, 139 U. PA. L. REV. 1423, 1427-30 (1991). Mr. Cooper explains that a law prohibiting discrimination against persons with disabilities that adopted a Title VII approach and merely prohibited the use of standards and criteria that have a disparate impact on persons with disabilities, unless consistent with business necessity, would only partially eliminate the barriers to employment faced by persons with disabilities. Id. at 1428. Because a disability often legitimately affects a person's ability to perform a job, more is needed to eliminate barriers to employment effectively. Id. at 1429. As Mr. Cooper explains, although some disabilities may genuinely render a person unable to perform a particular job, a disability is frequently not as significant an obstacle to job performance as it may seem. Id. In fact, a person with a disability may be perfectly capable of performing a particular job. Id. It may simply be that the disability requires that the job be performed in a manner that appears unconventional. Id. In recognition of this, the ADA, in order to eliminate discrimination against persons with disabilities more effectively, has adopted the concept of requiring employers to make reasonable accommodations to allow a person with a disability to perform his or her job. Id. at 1430.

224. See 42 U.S.C. § 12112(b)(5)(A). For a general discussion of the undue hardship requirement under the ADA, see Cooper, supra note 223.


228. 42 U.S.C. § 12111(10)(B). Other factors to be considered are the overall financial resources of the facility in question and of the entity as a whole; the effect of the accommodation on expenses and resources of the facility; the number, type, and locations of facilities; and the geographic separateness, administrative, or fiscal relationship of the facility in question to the entity as a whole. Id.
B. The Position of the EEOC

Examination of the Technical Assistance Manual ("TAM"), which was issued by the EEOC as an aid in interpreting the provisions of Title I of the ADA, reveals several clues as to the EEOC's position on the relationship between co-worker morale and claims of undue hardship. First, the EEOC opines that an accommodation can create an undue hardship if it would be unduly disruptive to co-workers. According to the EEOC, in assessing the level of disruption to co-workers, the impact of the accommodation on the ability of co-workers to perform their jobs is a valid consideration. Disruptions caused by co-workers' fears or prejudices, however, are not valid considerations. In addition, although the EEOC states that the impact of an accommodation on co-workers may create an undue hardship, it also states that "an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees."

Thus, it is clear that the EEOC does not believe that negative effects on morale on their own can rise to the level of causing an undue hardship. However, this does not mean that the EEOC believes that effects on morale are precluded from consideration altogether. In fact, the EEOC may simply be attempting to distinguish between legitimate and illegitimate causes of lowered morale. In other words, in those situations in which the cause of the lowered morale is legitimate, such as when there has been an imposition on the rights or expectations of co-workers, any resulting claim of undue hardship would not be based solely on lowered morale. Such a claim, however, would be based on the imposition of the accommodation on the rights or expectations of co-workers. Thus, a claim of undue hardship could be supported. If, on the other hand, making the accommodation results in lowered morale but there is no evidence of any imposition on the rights or expectations of co-workers, then the cause of the lowered morale would likely be illegitimate, such as fears or prejudices. Any resulting claim of undue hardship could be said to be based solely on lowered morale since the EEOC is explicit that fears and prejudices of

230. Id. § 3.9.
231. Id.
232. Id.
233. Id.
co-workers cannot be considered. Thus, the claim could not be supported.

This analysis is consistent with the Interpretive Guidance issued by the EEOC in connection with the regulations that it promulgated under Title I of the ADA. The EEOC in the Interpretive Guidance states that an employer would not be able to show undue hardship if a disruption to its employees was the result of fears or prejudices toward the individual's disability and not the result of the provision of the accommodation. Thus, if morale was damaged because the accommodation placed a burden on co-workers, the effect on morale would be a valid consideration. If, however, morale was damaged absent any burden being imposed on co-workers, the EEOC would likely argue that the damage to morale was not caused by the accommodation but by animus toward the individual with the disability, and, therefore, it would not be a valid consideration.

This interpretation is further supported by examples given by the EEOC in the TAM as illustrations of the correct application of the ADA. In one example given by the EEOC, an employee objects to working with an individual with a disability because the employee feels uncomfortable around or dislikes being near that individual. In this case, the EEOC notes that the employee's objections are obviously the result of fear or prejudice toward the individual's disability. Thus, the EEOC concludes that the employee's objections do not result in undue hardship. This is in contrast to another example that the EEOC gives in which the accommodation creates a heavier workload for co-workers. The EEOC finds in this situation that there is a possibility of undue hardship.

A third example is slightly more difficult to interpret. In this example, the EEOC states that if co-workers complain because an individual with a disability is allowed to take extra unpaid leave or to have a flexible work schedule as a reasonable accommodation, such complaints or negative reactions would not constitute undue hardship. However, as previously discussed, a perception that a co-worker is receiving preferential treatment can lead to legitimate feelings of unfair-

235. Id.
236. Id.
237. Id.
238. Id.
239. Id.
240. Id.
241. Id.
ness and injustice.\textsuperscript{242} Thus, any resulting lowered morale would be legitimate and not in conflict with the policies of the ADA—it would be caused by a disruption to expectational rights and interests, not fears or prejudices. However, the example appears to presume that the co-workers have knowledge of the reason for the preferential treatment.\textsuperscript{243} If that is the case, then because employees should expect that their employer will make reasonable accommodations as required by the ADA, the accommodation is not a disruption of their expectational rights or interests. If morale is nonetheless hurt, perhaps the underlying cause is, in fact, fears or prejudices.\textsuperscript{244} Nevertheless, it is unclear whether the EEOC would find a possibility of undue hardship even if it were presumed that co-workers had no knowledge of the reason for the preferential treatment.

It may be that the EEOC believes that there should always be some level of disclosure to co-workers regarding the need for an accommodation as a means of alleviating morale problems associated with perceptions of preferential treatment. Further in the TAM, the EEOC states that employers should address problems of co-worker morale and negative attitudes through appropriate consultations with supervisors and by providing awareness training to managers, supervisors, and co-workers.\textsuperscript{245} The awareness training, the EEOC states, is to help other employees overcome fears and misconceptions about disabilities and to inform them of the employer's obligations under the ADA.\textsuperscript{246} This type of awareness training will obviously only help to eliminate morale problems in those situations in which co-workers are aware that what appears to be preferential treatment is in reality a reasonable accommodation being provided to an individual with a disability in accordance with the requirements of the ADA. If this is the EEOC's sole solution for handling morale problems, then the EEOC may implicitly be sanctioning some limited disclosure whenever an accommodation is required. As will be discussed,\textsuperscript{247} however, this may not be consistent with the confidentiality requirements of the ADA, which place some limits on the types of disclosures that are permitted.

\textsuperscript{242} See supra notes 45-46 and accompanying text.
\textsuperscript{243} But see 29 C.F.R. app. § 1630.15(d). In the Interpretive Guidance, the EEOC states that an employer would be unable to demonstrate undue hardship even by showing that the provision of the accommodation itself has a negative impact on morale if the accommodation does not impact the ability of co-workers to perform their jobs. Id. This appears to preclude the possibility of undue hardship resulting from a legitimate perception of preferential treatment.
\textsuperscript{244} See supra notes 45-46 and accompanying text.
\textsuperscript{245} TAM, supra note 229, § 3.9.
\textsuperscript{246} Id.
\textsuperscript{247} See infra notes 265-71 and accompanying text.
C. Case Law Under the ADA

As of yet, no reported decision under the ADA has explicitly addressed the question of co-worker morale as it relates to undue hardship. One decision, Milton v. Scrivner,\textsuperscript{248} did, however, consider the impact of an accommodation on the working conditions of other employees. Milton involved two warehouse workers who were dismissed from their jobs for failure to meet new production standards, which required workers to accomplish their jobs in a shorter period of time than previously required.\textsuperscript{249} The plaintiffs claimed that their inability to meet the new production standards was due to disabilities, and thus their terminations were in violation of the ADA.\textsuperscript{250} As an accommodation, the plaintiffs requested either that they be held to an altered or reduced production standard or that they be required to move only lighter loads.\textsuperscript{251} The court found that the ADA did not require the employer to do either of these things, although the basis for the court's decision is unclear.\textsuperscript{252} The court mentioned that the proposed accommodations would require the reassignment of essential job duties and are, therefore, not required.\textsuperscript{253} The court further stated, however, that the accommodations are not required because they would result in other employees having to work harder or for longer hours.\textsuperscript{254} Nonetheless, the court did not consider whether any corresponding harm to morale should also be a factor, and thus the decision does not offer much concrete guidance.

V. A Proposal

Based on the foregoing analysis of the law under Title VII, the Rehabilitation Act, and the ADA, it is clear that, under some circumstances, the impact of accommodating an individual with a disability on co-worker morale should be a factor in assessing whether the accommodation would impose an undue hardship on the employer. The circumstances under which such a consideration is appropriate, however, should depend on the cause of the lowered morale. In Part I of this Article, the causes of lowered morale were broken down into

\textsuperscript{248} 53 F.3d 1118 (10th Cir. 1995).
\textsuperscript{249} Id. at 1120.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 1124.
\textsuperscript{252} See id. at 1124-25.
\textsuperscript{253} Id. at 1124.
\textsuperscript{254} Id. (citing to 29 C.F.R. § 1630.2(p)(2)(v) (1996), which provides that the impact on the ability of other employees to perform their duties is a factor in assessing undue hardship). The court also noted that assigning lighter work loads to the plaintiffs would violate the employees' collective bargaining agreement. Id.
three broad categories: (1) co-workers' animus, negative stereotypes, or unfounded fears toward the individual with the disability; (2) a perception by co-workers that the individual with the disability is receiving preferential treatment; and (3) a direct imposition on the rights or working conditions of co-workers. Each of these causes will be considered in turn.

The situation in which co-worker morale is damaged as the result of animus, negative stereotypes, or unfounded fears on the part of co-workers will be considered first. In the event that there is no evidence of the damage to morale being caused by a perception of preferential treatment or a burden being imposed upon co-workers, it should be presumed that the cause is animus, negative stereotypes, or unfounded fears. There are two reasons why any damage to morale under these circumstances should not be a factor in assessing whether an accommodation imposes an undue hardship.

First, it is not the accommodation that is causing the damage to morale. Even if the individual with the disability did not require an accommodation, co-workers would probably be disgruntled. In fact, it is co-workers' animus and lack of understanding, and nothing else, that is damaging morale.

Second, animus, prejudice, and lack of understanding towards individuals with disabilities are exactly the types of attitudes the ADA was designed to combat. Although employment of an individual with a disability may cause some harm to the employer through loss of mo-

255. See supra notes 26-48 and accompanying text.
256. See supra notes 45-46 and accompanying text.
257. This is consistent with the trend noted under Title VII in connection with the religious discrimination cases and with the decision in Wallace v. Veterans Administration, 683 F. Supp. 758 (D. Kan. 1988), decided under the Rehabilitation Act.
258. This distinction was recognized by the D.C. Circuit in Barth v. Gelb, 2 F.3d 1180, 1190 (D.C. Cir. 1993). See supra notes 200-18 and accompanying text.
259. See H.R. Rep. No. 101-485, pt. 2, at 28-30 (1990); S. Rep. No. 101-116, at 5-7 (1989) (finding a need for legislation prohibiting discrimination against persons with disabilities based on examples of adverse actions taken against persons with disabilities that arose out of false presumptions, generalizations, misperceptions, ignorance, and irrational fears); see also School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). In Arline, the Supreme Court held that the determination of whether a teacher with tuberculosis was qualified for his job must be based on objective medical evidence. Id. at 287-89. In reaching this conclusion, the Court emphasized that the goal of the Rehabilitation Act is to protect individuals from deprivations based upon prejudice, stereotypes, and unfounded fears. Id. at 287; accord Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682 (N.J. 1988). Jansen involved a question of discrimination under a provision of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-4.1 (West Supp. 1996), a state statute that is very similar to the ADA. In finding that an employer had violated the statute when it fired a meat cutter because of his epilepsy, the New Jersey Supreme Court recognized that "unreasonable and unfounded fears of coemployees is not an exception to an employer's obligation not to discriminate against a handicapped person." Jansen, 541 A.2d at
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Rationale, the root of the harm is based in hostile, negative, or uninformed attitudes. To permit the loss of morale to be considered in determining the employer's obligations under the ADA under these circumstances would be to condone these attitudes implicitly. Such a result would be nonsensical.260

Morale can also be hurt because an employee is receiving an accommodation that is perceived by co-workers as preferential treatment.261 Although there is not a direct impact or actual hardship imposed on co-workers in this second situation, their expectational interests and rights have been disrupted. It appears to co-workers that the employee with the disability is being rewarded despite not meeting established criteria or in a manner that is contrary to established policy. Under these circumstances, co-worker morale is not damaged because of prejudice toward or lack of understanding about the individual with the disability. Instead, co-worker morale is damaged because of a perception of unfairness or injustice. That perception is based on available information and has been directly caused by the accommodation. Thus, in this situation, consideration of any resulting harm to morale in assessing whether the accommodation imposes an undue hardship would not conflict with the underlying policies of the ADA and should be permitted.262 However, there is little, if any, support under the ADA, the Rehabilitation Act, or Title VII for allowing such consideration.

A different conclusion should obviously be reached if co-workers are aware that the individual who was perceived as being given preferential treatment had a disability and that what was perceived as preferential treatment was actually an accommodation to that disability. In this case, the expectational interests and rights of co-workers should not be disrupted because employees should expect that their employer will make reasonable accommodations as required by the ADA. If co-worker morale is hurt despite knowledge of the reason for the differing treatment, then it is likely that the underlying cause is


260. This is consistent with the EEOC's position as spelled out in the TAM and the Interpretive Guidance. See supra notes 232 and 235 and accompanying text.

261. See supra notes 33-34 and accompanying text.

262. But see Michael A. Faillace, Title I of the Americans with Disabilities Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Case Law Under the ADA and 1973 Rehabilitation Act and Practical Recommendations, in 25TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 159, 262 (PLI Litig. & Admin. Practice Course Handbook Series No. 548, 1996) (arguing that although preferences given to persons with disabilities may seem unfair or arbitrary by co-workers, this does not eliminate the need to provide the accommodation or constitute an undue hardship).
in fact animus or lack of understanding. Assuming that this is the case, the situation would fall within the first category, and costs to the employer resulting from loss of co-worker morale should not be a factor in determining whether the accommodation imposes an undue hardship.

This raises the question of whether the ADA permits some limited disclosure to co-workers. Prior to enactment of the ADA, an employer was under no obligation to keep confidential information received regarding the medical condition of an employee. Thus, if such an obligation exists, it must be found within the statute itself. No provision of the ADA generally prohibits disclosure of information concerning the existence of a disability or the need for an accommodation. Section 12112(d), however, permits employers to conduct medical examinations and make inquiries regarding a disability only if the employer agrees to treat any information obtained regarding the medical condition and history of the employee as confidential. Employers are permitted to make disclosures to supervisors and managers regarding any restrictions on the work or duties of an employee with a disability or any other accommodations that may be necessary. The statute does not explicitly allow disclosure to other affected employees, however.

263. See Bonnie Poitras Tucker & Joseph F. Smith, Jr., Accommodating Law Faculty with Disabilities, 46 J. Legal Educ. 157, 185-86 (1996). This article presents a hypothetical situation in which an employee with a disability is permitted, as an accommodation, to work on a flexible time schedule and suggests that if morale deteriorates it must stem from the co-workers' "inability to understand the need for reasonable accommodations." Id. Although the authors do not indicate whether the co-workers had knowledge of the reason behind the "preferential" treatment, this must be presumed from their conclusion.

264. Accord Jenks v. Avco Corp., 490 A.2d 912, 917 (Pa. Super. Ct. 1985). In Jenks, the plaintiff, who was partially paralyzed below his waist, filed a suit alleging violation of the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 1991 & Supp. 1996), a state statute with requirements substantially similar to the ADA, when an employer refused to accommodate his disability by providing him with a hydraulic cart. 490 A.2d at 914. The court rejected the employer's argument that providing the plaintiff with a hydraulic cart would impose an undue hardship on it because other employees would demand the same treatment. Id. at 917. In this case, no disclosure of the fact of the disability or the need for an accommodation was required because it was physically apparent. Therefore, any resulting hardship would necessarily arise from either a lack of understanding or actual animus. Although the court did not discuss these issues, its holding is consistent with the idea that it would be inconsistent with the purposes of an antidiscrimination statute to excuse the employer's behavior under these circumstances.

265. Buchanan v. San Antonio, 85 F.3d 196, 199 (5th Cir. 1996); see also EEOC Guidance on Preemployment Inquiries and Medical Examinations, Accommodating Disabilities (CCH) ¶ 140,175, at 140,065-66 (Oct. 10, 1995) [hereinafter EEOC Guidance] (opining that an employer is not required to remove from personnel files medical information obtained before the effective date of the ADA).


267. Id. § 12112(d)(3)(B)(i).
It is arguable that section 12112(d) does not prohibit general disclosures regarding the existence of a disability and the need for accommodation as long as the specific nature of the disability is not disclosed. The strength of this argument depends on whether disclosure of nothing more than the fact that an individual has a disability is considered disclosure of a medical condition. Unfortunately, there is currently no guidance on this. Absent some indication to the contrary, it would be risky for an employer to assume that such disclosure is permitted.

It is also arguable that information obtained from an employee regarding a disability, other than through a medical examination or inquiry initiated by the employer, is not subject to the confidentiality requirements. The language of the statute supports this argument. The confidentiality requirements are imposed specifically as a condition for allowing employers to conduct medical examinations and inquiries and are applicable only to information obtained from such examinations and inquiries. Thus, if an employer obtained information regarding a disability from any other source, including a voluntary disclosure by the individual with the disability, the confidentiality requirements should be inapplicable. The EEOC has indicated, however, that it believes the confidentiality requirements extend even to information that an employee voluntarily discloses to an employer. So again, it would be risky for an employer to assume that such disclosure is permitted.

There is an obvious tension that needs resolution. On the one hand, there is virtually no legal authority to support an employer’s claim of undue hardship if it is based solely on damage to morale caused by a perception on the part of employees that a co-worker is receiving preferential treatment. Yet, this damage to morale is legitimate and can result in real costs to the employer. On the other hand, it is far from clear that an employer would be permitted to alleviate such a morale problem by disclosing to co-workers the reason for the “preferential” treatment. As between the two, allowing limited dis-

268. Hodges, supra note 47, at 613.
269. Id. at 613-14.
271. EEOC Guidance, supra note 265, at 140,065.
272. See Frierson, supra note 45 (noting that the employers are put in a difficult position because of the interaction between the reasonable accommodation requirements and the confidentiality requirements and offering some possible solutions).
273. See id. at 312 (advising against disclosure as a remedy to morale problems because of uncertainty of its legality). One practical solution is to obtain the consent of the individual with the disability to the disclosure. Id. at 311. This is obviously only a partial solution, however.
closure may be more closely aligned with the purposes of the ADA.\footnote{274}{See Rose A. Daly-Rooney, Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act, 8 J.L. & HEALTH 89, 90 (1993-94) (suggesting that the ADA’s confidentiality requirements “may actually impair the employer’s ability to effectively and efficiently integrate applicants and employees with disabilities in the workplace”); Hodges, supra note 47, at 611-12 (indicating that limited disclosure may in fact be advantageous to the employee with the disability and noting studies that have shown that co-workers do not resent accommodations and often volunteer to assist an employee with a disability when they are made aware of the circumstances).} While mindful of privacy concerns, we cannot expect co-workers to be more tolerant and understanding of individuals with disabilities if we shroud the existence of the disability and the need for accommodation in shameful secrecy. The alternative of nondisclosure merely promotes resentment and negative attitudes.

Finally, the third situation which can cause damage to morale is when an accommodation has a direct impact on the rights or working conditions of co-workers. Because of the imposition on innocent third-parties, the first step should be to determine whether another reasonable accommodation can be made that is less intrusive. If such an alternative exists, the employer should be allowed to opt for the accommodation that is the least intrusive upon co-workers.\footnote{275}{See 29 C.F.R. app. § 1630.9 (noting that the accommodation provided “does not have to be the ‘best’ accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated”).} For example, assume an employee has poor night vision and is unable to drive after dusk. The employee requests permanent assignment to the day shift. All other employees are required to rotate shifts. Under this proposal, because assigning the employee with the disability permanently to the day shift would impact the working conditions of co-workers (by requiring them to work more afternoon and night shifts), the employer could choose instead to arrange transportation for the employee.

If no other accommodation is possible, then the scenario is similar to that in the second situation where there is a perception of a preference. However, because the accommodation directly impacts the rights or working conditions of co-workers, it presents an even stronger case that any resulting loss of morale should be a factor in the undue hardship equation. In this third situation, even if co-workers are aware of the reason for the accommodation, morale may nonetheless be damaged and the reason may have nothing to do with animus,
prejudice, unfounded fears, or lack of understanding. The accommoda-
dation has had a negative impact on what co-workers are required to
do at their job on a day-to-day basis or to what privileges they are
titled, and this is what can lead to a loss of morale. Lack of knowl-
edge regarding the reason for their treatment would undoubtedly ex-
cerbate the situation.\footnote{276} However, disclosure may not have the
effect, as it would in the second situation discussed above, of alleviat-
ing all legitimate causes of the lowered morale. Thus, in this situation,
damage to morale may be unavoidable, and if so, it should therefore
be factored into the assessment of whether the accommodation im-
poses an undue hardship.\footnote{277} It must be remembered, however, that
the ADA is a remedial statute and that to show undue hardship an
employer must demonstrate significant difficulty or expense. It will be
an unusual situation in which damage to morale on its own will cause
the degree of disruption needed to satisfy the undue hardship
threshold.

**VI. Conclusion**

As has been demonstrated, making an accommodation to an em-
ployee with a disability, particularly when coupled with an inability to
disclose the reason behind the accommodation, can lead to percep-
tions of unfair or preferential treatment on the part of co-workers,
which, in turn, can lead to lowered morale. Because damage to em-
ployee morale can result in significant costs to an employer, employ-
ers have a legitimate interest in maintaining good morale and not
taking actions that would damage morale. This Article has addressed
the question of whether an employer's interest in maintaining good
employee morale and the costs created by lowered morale should be
considered in determining the extent of an employer's obligations
under the ADA.

In determining the proper role of morale under the ADA, two im-
portant concepts need to be kept in mind. First, the ADA's purpose is

\footnote{276} See Hodges, supra note 47, at 605. In discussing conflicts that may arise between a provi-
sion in a collective bargaining agreement and an accommodation, Hodges notes that the union is
placed in a difficult position because, if it agrees to the accommodation, an employee disadvan-
taged by the accommodation may then file a grievance with the union. \textit{Id.} She recognized that
this problem is exacerbated if the confidentiality requirements of the ADA prevent the union from
disclosing its actions. \textit{Id.}

\footnote{277} This result is supported by case law under Title VII, case law under the Rehabilitation
Act, and the EEOC's interpretation of the ADA. See Murphy, supra note 48, at 1632 (sug-
uggesting that imposition on co-workers caused by reassignment of unpleasant job tasks and result-
ing feelings of unfairness should be considered by courts in determining whether
accommodation imposes an undue hardship).
to eliminate animus, prejudice, and lack of understanding with respect to individuals with disabilities. Second, Title I of the ADA attempts to attain a delicate balance between the right of individuals with disabilities to be employed and the right of employers not to be burdened with substantial costs. Thus, Title I requires that employers make reasonable accommodations to permit an individual with a disability to perform the essential functions of a job but relieves an employer of this obligation if the accommodations would cause an undue hardship.

The proper role of morale under the ADA should, therefore, be one that does not frustrate the purposes of the ADA, yet, at the same time, one that respects the rights of employers as well as individuals with disabilities. The proposal offered in Part V of this Article accomplishes this goal. In those situations in which lowered co-worker morale is the result of animus, prejudice, or lack of understanding, the proposal is that the lowered morale should never be a consideration, regardless of the harm it may cause to the employer. To permit lowered morale to be a consideration under these facts would be to sanction implicitly the very attitudes the ADA is designed to abolish. In all other situations, the suggestions provided by the proposal represent a balancing of the rights of individuals with disabilities and the rights of employers. The proposal, therefore, furthers the purposes of the ADA while, at the same time, bringing clarity and certainty to an area that is at the moment fraught with obscurity. It is thus incumbent on the EEOC to take whatever actions are necessary to incorporate provisions consistent with the proposal into its regulations and guidelines.