

# People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier

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*Over the past two decades, there has been a significant increase in the number of children diagnosed with autism spectrum disorder (ASD). Recent estimates suggest that ASD may affect as many as one out of every 68 children in the United States, an increase of over 78% since 2007. Although some of this increase can be attributed to the enhanced awareness and focus on early intervention resulting from public education campaigns, much of the cause remains unknown.*

*Nearly half of all individuals diagnosed with ASD possess either average or above average intelligence, but only a small percentage are employed, regardless of their level of educational attainment or individual qualifications. One study of adults with high functioning autism identified employment “as the single biggest issue or barrier facing them.”*

*In the next eight years alone, experts predict a 230% increase in the number of young people with ASD transitioning to adulthood. As these numbers grow, there inevitably will be pressure to change the status quo and expand employment opportunities for them. At the same time, as a result of the amendments to the Americans with Disabilities Act, litigants of all disabilities are increasingly successful in establishing coverage under the statute and increasing protection against disability discrimination in employment. Taken together, there is little doubt that increasing numbers of individuals with ASD will enter the labor pool over the next decade.*

*This shift presents a tremendous opportunity both for people with autism to integrate into the workforce and for employers to tap into the talents and abilities of a sizable population of workers. At the same time, it unquestionably will create new legal challenges for employers attempting to accommodate this set of workers, many of whom will have unique needs. This Article explores the legal issues that are likely to arise in the context of the employment of people with ASD. Recognizing that there is a great deal of diversity in functioning among people on the spectrum, its focus is on those who are sufficiently high functioning to be capable of holding mainstream, independent employment.*

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## INTRODUCTION

Over the past two decades, there has been a significant increase in the number of children diagnosed with autism spectrum disorder (ASD or autism).<sup>2</sup> Recent estimates suggest that ASD may affect as many as one out of every 68 children in the United States,<sup>3</sup> an increase of over 78% since 2007.<sup>4</sup> Although some of this increase can be attributed to the enhanced awareness and focus on early intervention resulting from public education campaigns, much of the cause remains unknown.<sup>5</sup>

The impact of these rising numbers has been felt in the special education arena for many years. While the benefits of early intervention services are well documented, so is the considerable expense often associated with such interventions.<sup>6</sup> Parents of children with autism have insisted that public schools provide such services and have demonstrated a greater willingness than other parent groups to file suit when their children are denied them.<sup>7</sup> As a result, a growing number of people with ASD are graduating from high school and entering colleges and universities — institutions that are increasingly developing specific programs to assist this population.<sup>8</sup>

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<sup>2</sup> Deborah L. Christensen et al., *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, MORBIDITY & MORTALITY WKLY. REP. at 1 (Mar. 28, 2014).

<sup>3</sup> *Id.* at 6.

<sup>4</sup> Rebecca A. Johnson, “Pure” Science and “Impure” Influences: The DSM at a Scientific and Social Crossroads, 15 DEPAUL J. HEALTH CARE L. 149, 196 (2013) (citing Centers for Disease Control & Prevention, *Why Are Autism Spectrum Disorders Increasing*, <http://www.cdc.gov/Features/AutismPrevalence/>).

<sup>5</sup> *Id.* at 196–97.

<sup>6</sup> See generally Gregory S. Chanson et al., *Cost Comparison of Early Intensive Behavioral Intervention and Special Education for Children with Autism*, 16 J. CHILD FAM. STUD. 401 (2007) (detailing a variety of treatments and expenses).

<sup>7</sup> See, e.g., Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 519–22 (2010) (discussing autism litigation in education); Perry A. Zirkel, *Autism Litigation Under the IDEA: A New Meaning of “Disproportionality”?*, 24 J. SPECIAL EDUC. LEADERSHIP 92, 93 (2011) (finding that autism cases are disproportionately represented in special education litigation).

<sup>8</sup> See, e.g., *Programs for Students with Asperger Syndromes*, COLLEGE AUTISM SPECTRUM, <http://www.collegeautismspectrum.com/collegeprograms.html>, archived at <https://perma.cc/G3CW-BLMX> (listing colleges with support programs for students with ASD in higher education). Some of these programs specifically reference students with “Asperger Syndrome,” a term for high-functioning individuals with autism that was eliminated in 2013 by the inclusive ASD definition in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). See *infra* Part I.

Despite this significant progress, the employment prospects of people with autism remain bleak. Although nearly half of all individuals diagnosed with ASD possess either average or above average intelligence,<sup>9</sup> only a small percentage are employed, regardless of their educational attainment or individual qualifications.<sup>10</sup> This lack of success is notable especially when compared to people with other types of disabilities, most of whom experience higher employment rates.<sup>11</sup> As a result, one study of adults with high-functioning autism identified employment “as the single biggest issue or barrier facing them.”<sup>12</sup>

In the next eight years alone, experts predict a 230% increase in the number of young people with ASD transitioning to adulthood.<sup>13</sup> As these numbers grow, there inevitably will be more pressure to change the status quo and increase employment opportunities in the same way that educational services have expanded.<sup>14</sup> Notably, this increase is taking place against the backdrop of greater legal protection for those with ASD. As a result of recent amendments,<sup>15</sup> litigants of all disabilities are increasingly successful in establishing coverage under the Americans with Disabilities Act and winning greater protection against disability discrimination in employment.<sup>16</sup> The federal government also recently expanded its list of federal contractor obligations under Section 503 of the Rehabilitation Act to require some federal contractors to attempt to achieve a workforce comprised of at least 7%

<sup>9</sup> Christensen, *supra* note 2, at 6.

<sup>10</sup> RUDY SIMONE, ASPERGER'S ON THE JOB: MUST HAVE ADVICE FOR PEOPLE WITH ASPERGER'S OR HIGH FUNCTIONING AUTISM (2010) (noting that it is likely that “85% of people with ASD . . . are without full time employment”); Dawn Hendricks, *Employment and Adults with Autism Spectrum Disorders: Challenges and Strategies for Success*, 32 J. VOCATIONAL REHAB. 125, 127 (2010) (“Even for those individuals who have postsecondary educational experience, employment difficulties are common.”).

<sup>11</sup> See, e.g., Paul T. Shattuck et al., *Postsecondary Education and Employment Among Youth With Autism Spectrum Disorder*, 129 PEDIATRICS 1042, 1042 (2012) (“Youth with an ASD had the lowest rates of participation in employment and the highest rates of no participation compared with other disability categories.”).

<sup>12</sup> JUDITH BARNARD ET AL., IGNORED OR INELIGIBLE? THE REALITY FOR ADULTS WITH AUTISM SPECTRUM DISORDERS 18 (2001) (study conducted in the United Kingdom).

<sup>13</sup> Michelle Diamant, *As More with Autism Near Adulthood, Clues to Success Emerge*, DISABILITY SCOOP (May 14, 2015), <https://www.disabilityscoop.com/2015/05/14/as-autism-adulthood-clues/20299/>, archived at <https://perma.cc/7X62-T5KY> (quoting Laura Linger of the University of North Carolina, who conducted a study of young adults with autism).

<sup>14</sup> Cf. Hendricks, *supra* note 10, at 126 (noting the increase in ASD adults created a “stark demand to assess what we know currently about their employment needs and understand better what services and supports may help facilitate employment success in the years after high school”).

<sup>15</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>16</sup> See, e.g., Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050 (2013) (finding significantly lower rates of courts granting summary judgment to employers on the disability finding after passage of the ADA Amendments Act). The EEOC's Strategic Enforcement Plan for 2013–2016 identifies the elimination of barriers in recruiting and hiring as a priority for the agency. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016 9 (2012).

of employees with disabilities.<sup>17</sup> These new rules create significant incentives to add individuals with disabilities to the workforce.

Taken together, there is little doubt that increasing numbers of individuals with ASD will enter the labor pool over the next decade. This shift presents a tremendous opportunity both for people with autism to integrate into the workforce and for employers to tap into the talents and abilities of a sizable population of workers.<sup>18</sup> At the same time, it unquestionably will create new challenges for employers attempting to accommodate this set of workers, many of whom will have unique needs. This Article explores the legal issues that are likely to arise in the context of the employment of people with ASD, focusing on those who are sufficiently high functioning to be capable of holding mainstream, independent employment.

Part I explores the autism diagnosis and discusses some of the typical characteristics that may affect the employment relationship. Part II provides an overview of the Rehabilitation Act and the Americans with Disabilities Act (ADA), the ADA's amendments, and the experience of people with ASD and related disorders in establishing coverage under these statutes. Part III then considers pre-employment issues that may be particularly relevant to this population, including disclosure, privacy and personality testing. Part IV explores reasonable accommodations for individuals with ASD, and Part V concludes with a discussion of the challenges presented by workplace discipline and misconduct. The Article concludes that employees with ASD have the potential to thrive and to benefit employers when placed in thoughtful environments that provide education and training, moderate workplace modifications, and a commitment to anti-discrimination for people with disabilities.

## I. PROFILE OF INDIVIDUALS WITH ASD

To fully understand the challenges that employment can pose for individuals with ASD, it is important first to understand the parameters of the diagnosis itself. The significant range of functioning among people with ASD makes it difficult to offer categorical statements in this regard, as reflected in the variants previously recognized by mental health professionals. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), for example, identified several subcategories within the autism diagnosis, including "autistic disorder, Asperger's disorder, childhood disintegrative disorder, [and] the catch-all pervasive developmental disorder not

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<sup>17</sup> See Rehabilitation Act of 1973, 29 U.S.C. §§ 793–94 (2012); 41 C.F.R. §§ 60–741 (2016).

<sup>18</sup> See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N CURB CUTS TO THE MIDDLE CLASS INITIATIVE, RECRUITING, HIRING AND PROMOTING PEOPLE WITH DISABILITIES: A RESOURCE GUIDE FOR EMPLOYERS 6 (2015) (quoting comments from firms employing people with disabilities).

otherwise specified (PDD-NOS).<sup>19</sup> On the high end of the spectrum, Asperger's syndrome has been characterized by "delays in communication and language usage, average or above average intelligence, and obsessive behaviors."<sup>20</sup> With the publication of the DSM-V in 2013, however, this multi-characterization of autism has been captured under the broad, single heading of ASD.<sup>21</sup> The manual describes ASD "as a neurodevelopmental disorder that is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining and understanding relationships."<sup>22</sup> Significantly, ASD "diagnostically . . . comes with no learning disability — which is officially distinguished as having an IQ score significantly below the 'normal' range — and no physical disability in respect of mobility and accessing work premises."<sup>23</sup>

Individuals with ASD that are sufficiently high functioning to work in independent settings bring many strengths to employers. It is common for group members to excel in "visual skills, sciences, mathematics and the arts."<sup>24</sup> Many with ASD have a high attention to detail and the ability to sustain intense concentration in their areas of interest.<sup>25</sup> Within specialized fields, some possess the ability to recall detail, think outside of the box, and persevere in repetitious and routine circumstances in ways that are superior to their "neurotypical" colleagues.<sup>26</sup> ASD employees as a group also tend to be highly reliable and have low absenteeism.<sup>27</sup> As a result, one might expect that many members of this population would readily find employment.

Success in a work environment, however, requires more than competence in the skills and tasks one is employed to perform. As experts have recognized, "[t]he workplace is a social environment above all else . . . [and] can be a minefield of unspoken rules and changing allegiances."<sup>28</sup>

<sup>19</sup> AM. PSYCHIATRIC ASS'N, AUTISM SPECTRUM DISORDER 1 (2013).

<sup>20</sup> Johnson, *supra* note 4, at 197.

<sup>21</sup> Notably, the public continues to use terms like "high-functioning autism" and "Asperger's Syndrome." See, e.g., Johnson, *supra* note 4, at 203–04 (discussing resistance to the collapsed ASD category in the DSM-V).

<sup>22</sup> JOB ACCOMMODATIONS NETWORK, EMPLOYEES WITH AUTISM SPECTRUM DISORDER 3 (2013) (describing the DSM-V, 2013).

<sup>23</sup> SARAH HENDRICKX, ASPERGER SYNDROME AND EMPLOYMENT 9 (2009); see also BARBARA BISSONNETTE, THE EMPLOYERS GUIDE TO ASPERGER'S SYNDROME 2 (2013) ("Many . . . enter the workforce with advanced or multiple college degrees.")

<sup>24</sup> Jeffrey A. Cohen, Thomas A. Dickerson & Joanne Matthews Forbes, *A Legal Review of Autism, A Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 ALB. L. REV. 389, 392 (2014).

<sup>25</sup> Bissonnette, *supra* note 23, at 6.

<sup>26</sup> *Id.* at 5; Scott Michael Robertson, *Neurodiversity, Quality of Life, and Autistic Adults: Shifting Research and Professional Focuses onto Real-Life Challenges*, 30 DISABILITY STUD. Q. (2009), <http://dsq-sds.org/article/view/1069/1234>, archived at <https://perma.cc/W3GS-V3K6>.

<sup>27</sup> Hendricks, *supra* note 10, at 126.

<sup>28</sup> Hendrickx, *supra* note 23, at 41.

Being able to successfully navigate the social nuances and relationships that exist within a workplace setting is often more critical to career success and advancement than the mastery of hard skills. Because ASD is primarily a social disorder, it can create serious hurdles to securing and maintaining employment.<sup>29</sup>

Although each individual is unique, it is common for individuals with autism to lack the ability to interpret social cues or to fully understand the thoughts and feelings of others, leading to misunderstandings about work assignments and nuances in verbal communication.<sup>30</sup> They may fixate on certain topics and discuss them without regard to whether anyone else is interested, thereby annoying clients and colleagues. Because they are often unaware of the “unwritten” social rules of the workplace, such as standing too close or asking overly personal questions, individuals with ASD can easily violate these rules unknowingly.

Many in this population also have difficulty with expressive communication and language. Individuals with ASD tend to be very literal and have difficulty understanding the subtext of conversations. They often struggle to maintain eye contact and to understand the subtleties of nonverbal signals and body language.<sup>31</sup> As one expert explained, while an ASD individual’s intention may be “to be friendly and helpful . . . they do not understand the social nuances that most people learn intuitively in childhood.”<sup>32</sup> This can create negative perceptions and discomfort among coworkers.<sup>33</sup>

Another major area of common difficulty is rigidity in behavior and ritualistic thinking.<sup>34</sup> Individuals with autism often have preferred routines and find deviation from any aspect of that routine to be stressful and anxiety-producing.<sup>35</sup> They have a difficult time understanding ambiguity and tend toward black-and-white thinking.<sup>36</sup> Moreover, their focus is disproportionately on the specific details of their tasks in the workplace rather than on a “big picture,” which may require integrating knowledge, directions, and

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<sup>29</sup> Kristen K. Higgins et al., *School-to-Work Transition and Asperger Syndrome*, 31 *WORK* 291, 293 (2008).

<sup>30</sup> See Hendrickx, *supra* note 23, at 14; Bissonnette, *supra* note 23, at 1.

<sup>31</sup> Hendrickx, *supra* note 23, at 17; Sophie Nesbitt, *Why and Why Not? Factors Influencing Employment for Individuals with Asperger Syndrome*, 4 *AUTISM* 347, 358 (2000).

<sup>32</sup> Bissonnette, *supra* note 23, at 7. The author explains that this may result in the employee forgetting to greet people appropriately, speaking “to the CEO of the company . . . in the same informal manner as a peer” or answering questions “too honestly” or literally, *id.*

<sup>33</sup> Higgins, *supra* note 29, at 294.

<sup>34</sup> Hendrickx, *supra* note 23, at 19; Aileen Patterson & Andrea Rafferty, *Making It Work: Towards Employment for the Young Adult with Autism*, 36 *INT’L J. LANGUAGE COMM. DISORDER* 475, 465 (2001).

<sup>35</sup> Hendrickx, *supra* note 23, at 19.

<sup>36</sup> See, e.g., Temple Grandin, *How People with Autism Think*, in *LEARNING AND COGNITION IN AUTISM* 137, 138 (Eric Schopler & Gary B. Mesibov eds., 1995).

other people's motives or desires — skills people with ASD often lack.<sup>37</sup> Multi-tasking can be highly challenging.<sup>38</sup>

Finally, many with ASD are highly sensitive to environmental stimuli, including sound, touch, and smell.<sup>39</sup> For some individuals, it can be very difficult to function in noisy or distracting environments. For this reason among others, traveling to and from work — particularly during heavy travel periods — can be extremely difficult.<sup>40</sup>

Based on these characteristics, some experts have concluded that individuals with ASD will do best in environments where they can work alone with a high degree of autonomy in a clearly defined and intellectually challenging job.<sup>41</sup> For example, “[c]areers in computer programming, technical documentation, academic and scientific research, engineering, and academia are among the choices that make good use of their logic and analytical skills, excellent memory for facts, vast knowledge of specialized fields, tolerance of routine, and creative problem solving.”<sup>42</sup> In contrast, work settings that are variable from day-to-day and require significant teamwork and interaction with colleagues typically are the most challenging to secure or maintain for individuals with ASD.<sup>43</sup>

Promisingly for employers, there is at least some evidence that once individuals with ASD become employees, they are more satisfied with their placements and less likely to quit than other individuals with disabilities or more typical employees. In a 2009 study, only 22.5% of those with autism surveyed had voluntarily left employment in the eight years after leaving high school.<sup>44</sup> The front-end investment that employers place in these employees thus has a high potential to pay off over the long term.<sup>45</sup>

## II. LEGAL PROTECTION OF INDIVIDUALS WITH ASD

The two major federal statutes that protect individuals with disabilities in employment are the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, as amended by the Americans with Disabilities Amendments Act of 2008. The basic parameters of these statutes, as well as

<sup>37</sup> Bissonnette, *supra* note 23, at 9.

<sup>38</sup> Robertson, *supra* note 26.

<sup>39</sup> Bissonnette, *supra* note 23, at 3; *see also* Hendrickx, *supra* note 23, at 22.

<sup>40</sup> Hendrickx, *supra* note 23, at 38.

<sup>41</sup> *Id.* at 62–63.

<sup>42</sup> Bissonnette, *supra* note 23, at 4.

<sup>43</sup> Hendrickx, *supra* note 23, at 61.

<sup>44</sup> U.S. DEP'T OF EDUC., THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 8 YEARS AFTER HIGH SCHOOL 93 (2011) [hereinafter USDOE] (Wave 5 parent interview and youth interview/survey).

<sup>45</sup> *See, e.g.*, Donna M. Owens, *Hiring Employees With Autism*, HR MAGAZINE (Jun. 1, 2010), <http://www.shrm.org/publications/hrmagazine/editorialcontent/2010/0610/pages/0610owens.aspx>, archived at <https://perma.cc/EP89-3QP5> (noting rates of retention above the national average for “Ken’s Kids” program for adults with ASD). This assumes, of course, that the ASD employee is able to secure the position in the first place and is not discharged involuntarily by her employer.

case law relating to individuals with ASD decided thereunder, are explored below. This section concludes with a brief review of recently expanded federal contracting requirements that encourage the hiring of people with disabilities.

A. *The Americans with Disabilities Act of 1990 and Rehabilitation Act of 1973*

The Rehabilitation Act of 1973 bans discrimination against qualified individuals with disabilities by federal agencies, federal contractors, and those receiving federal financial assistance.<sup>46</sup> The Americans with Disabilities Act in 1990 expanded this anti-discrimination mandate to all areas of life, including private employment, transportation, public entities, and public accommodations.<sup>47</sup> The two statutes are generally interpreted and applied consistently with one another.<sup>48</sup>

The ADA was initially hailed as groundbreaking, raising high expectations among people with disabilities.<sup>49</sup> Nevertheless, it soon became apparent that most courts, including the Supreme Court, were skeptical of its vision, particularly as applied to the employment context. To establish a disability, the statute requires individuals to prove that they possess an impairment that substantially limits a major life activity.<sup>50</sup> Over time, courts interpreted “substantially limited” to mean “severely restricted” in the ability to perform a major life function as compared to the average person in the general population.<sup>51</sup> Any mitigating measure taken by the plaintiff — whether medication, prosthetics, or internal compensatory measures — were considered when evaluating the extent of limitation.<sup>52</sup> Ultimately, this exacting standard resulted in courts concluding that individuals with missing limbs, cancer, diabetes, epilepsy, bipolar disorder, and developmental disabilities were insufficiently restricted to qualify as disabled.<sup>53</sup> Only those with the most severe disorders, who correspondingly were the least likely to be employed, were able to establish the requisite severity.

Equally problematic, once plaintiffs established a protected disability, they next had to demonstrate that they were sufficiently functional to be “qualified” for the position in question, the second requirement of coverage

<sup>46</sup> 29 U.S.C. § 794(a) (2012).

<sup>47</sup> 42 U.S.C. § 12101 (2012). Employers with more than fifteen employees are covered by the ADA, 42 U.S.C. § 12111(5)(A) (2012).

<sup>48</sup> 42 U.S.C. § 12117(b) (2012); 29 U.S.C. § 793(d) (2012). *See, e.g.*, *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) (noting that Congress intended courts to interpret the two statutes consistently).

<sup>49</sup> *See* Wendy F. Hensel, *Rights Resurgence: The Impact of ADA Amendments Act on Schools and Universities*, 25 GA. ST. U. L. REV. 641, 642 (2009).

<sup>50</sup> 42 U.S.C. § 12102(1) (2012).

<sup>51</sup> *See* *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–97 (2002) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976)).

<sup>52</sup> *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 487 (1999).

<sup>53</sup> *See* Hensel, *supra* note 49, at 650.



under the statute. The ADA defines “qualified” as capable of performing the essential functions of the position in question either with or without reasonable accommodation.<sup>54</sup> Few individuals were simultaneously able to show that they were severely restricted and yet still functional in the workplace.<sup>55</sup> As a result, 93% of all ADA plaintiffs lost at the summary judgment stage,<sup>56</sup> and the ADA was widely considered to be a failure in protecting individuals with disabilities in the workplace.<sup>57</sup>

For these same reasons, individuals with ASD often struggled to establish class membership under the original statute. Because ASD often manifests itself in interpersonal contexts, some plaintiffs argued they were substantially limited in the major life activity of interacting with others.<sup>58</sup> Many courts were unreceptive to this argument for two reasons. First, several circuits rejected the premise that interacting with others was even a legitimate major life activity because it was “too elastic” and “different in kind from breathing or walking” as used in EEOC regulations.<sup>59</sup> Second, to the extent this activity was recognized, the majority of courts required evidence of near incapacitation in order to establish a substantial limitation.<sup>60</sup> The Second Circuit, for example, reasoned that a substantial limitation in interacting with others “is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful.”<sup>61</sup> Instead, courts required a showing that “relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.”<sup>62</sup>

Any evidence of the ability to interact in society was typically sufficient for courts to find that these plaintiffs were not disabled. In one case, for example, a court found that an employee with ASD who submitted expert

<sup>54</sup> 42 U.S.C. § 12111(8) (2012).

<sup>55</sup> See, e.g., Wendy F. Hensel and Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 66 (2005) (finding that mentally-impaired plaintiffs most often lose under the original ADA because of the inability to establish that they were qualified).

<sup>56</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100 (1999).

<sup>57</sup> See, e.g., Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 36 (2000) (“If the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA’s employment title has been nothing less than a betrayal of the ADA’s promise.”).

<sup>58</sup> See, e.g., *Jakubowski v. Christ Hosp.*, No. 1:08-CV-00141, 2009 WL 2407766, at \*7 (S.D. Ohio Aug. 3, 2009); *Ziehm v. Radioshack*, No. 09–69–P–S, 2010 WL 2079550, at \*24 (D. Me. May 22, 2010).

<sup>59</sup> See, e.g., *Soileau v. Guilford of Me., Inc.* 105 F.3d 12, 15 (1st Cir. 1997); *Ziehm*, 2010 WL 2079550, at \*24; see also Wendy F. Hensel, *Interacting with Others: A Major Life Activity Under the ADA?* 2002 WIS. L. REV. 1139, 1158–59 (2002) (detailing case law).

<sup>60</sup> See, e.g., *Ziehm*, 2010 WL 2079550, at \*24–25; see also Hensel, *supra* note 59, at 1178.

<sup>61</sup> *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004).

<sup>62</sup> *McAlindin v. Cty. of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (quoting EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITY ACT AND PSYCHIATRIC DISABILITIES 5 (1997)).

testimony that she experienced “virtually complete social isolation” and lacked “the skills requisite to enjoying . . . relationships with others, at work, at home, with a spouse, with friends,” was nevertheless not substantially limited in social interaction because she was able to maintain employment and had identified one individual at work with whom she “had a good working relationship.”<sup>63</sup> The court, while acknowledging that the plaintiff’s “autism directly affects her ability to form and maintain ordinary social relationships,” nevertheless found it significant that she worked successfully for years despite her condition.<sup>64</sup> The court characterized the plaintiff’s interpersonal difficulties with her supervisor, which ultimately led to her termination, as merely a “personality conflict” that was insufficient to establish a disability.<sup>65</sup> Using similar reasoning, courts have denied class membership based on claims that ASD plaintiffs were substantially limited in the major life activity of working, concluding that plaintiffs were not precluded from a class or broad range of jobs simply because they had interpersonal issues with a few people.<sup>66</sup>

For those plaintiffs with ASD who were able to present sufficiently limiting conditions to establish a disability, the courts nevertheless rejected class membership under the ADA because the plaintiffs were not “qualified.” Ironically, many of the same courts that rejected interacting with others as a major life activity concluded that “getting along with others” was an essential function of nearly every job.<sup>67</sup> Courts also found the ability to handle stressful situations without upsetting others to be a critical and universal job function.<sup>68</sup> Because individuals with ASD often could not perform these functions consistently due to their social and communication

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<sup>63</sup> *Comber v. Prologue*, No. CIV.JFM-99-2637, 2000 WL 1481300, at \*6 (D. Md. Sept. 28, 2000); *see also Ziehm*, 2010 WL 2079550, at \*14, \*25 (concluding employee with Asperger’s Syndrome could not show “pervasive communication difficulties” despite claims that he lacked “tact, self-discipline, and awareness of a conversation”).

<sup>64</sup> *Comber*, 2000 WL 1481300, at \*3.

<sup>65</sup> *Id.* *But see Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1060-61 (9th Cir. 2005) (finding a substantial limitation in interacting with others where plaintiff with depression and bipolar disorder “avoids crowds, stores, large family gatherings, and even doctor’s appointments” most of the time).

<sup>66</sup> *See, e.g., Comber*, 2000 WL 1481300, at \*3 (concluding that plaintiff’s restriction to “a workplace that can provide her with few visual and auditory distractions, no fluorescent lights and one that is free of gases, fumes, pesticides, and other benign odors such as perfumes, colognes, and deodorants” did not establish a substantial limitation in major life activity of working); *Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004) (finding autism may be a disability but that plaintiff was not qualified); *Krasner v. City of New York*, No. 11 Civ.2048 (PGG), 2013 WL 533855848, at \*11 (S.D.N.Y. Sept. 23, 2013) (finding plaintiff with Asperger’s Syndrome to be disabled but not qualified); *Jakubowski v. Christ Hosp.*, No. 1:08-CV-00141, 2009 WL 2407766, at \*9 (S.D. Ohio Aug. 3, 2009) (same).

<sup>67</sup> *See, e.g., Taylor v. Food World, Inc.*, 133 F.3d 1419, 1424 (11th Cir. 1998); *Jakubowski*, 2009 WL 2407766, at \*9 (finding resident physician’s Asperger’s Disorder to be a disability but denying class coverage because plaintiff was not qualified); *cf. Comber*, 2000 WL 1481300, at \*7 (“inherent in the job of rehabilitation specialist at a mental health care provider is the ability to carry out the tasks of the job without . . . chair kicking and altercations”).

<sup>68</sup> *See, e.g., Calef v. Gillette Co.*, 322 F.3d 75, 86 (1st Cir. 2003) (finding employee with ADHD who engaged in outbursts during stressful time unqualified).

challenges, they were deemed unqualified by courts. In some cases, this also led to the additional conclusion that the individual was potentially a direct threat to others.<sup>69</sup>

### B. *The ADA Amendments Act of 2008*

In 2008, Congress stepped in to restore the initial vision of the ADA through passage of the ADA Amendments Act (ADAAA).<sup>70</sup> Congress retained the statute's original definition of disability to require an impairment that substantially limits a major life activity.<sup>71</sup> However, it also made clear to courts that the determination of disability "should not demand extensive analysis"<sup>72</sup> and "shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of this Act."<sup>73</sup>

The Amendments also added a statutory list of exemplary activities that constitute major life activities,<sup>74</sup> including concentrating, thinking, and communicating, all of which some courts had previously refused to recognize.<sup>75</sup> The EEOC added interacting with others to its regulatory list,<sup>76</sup> and courts have given this interpretation deference.<sup>77</sup> The agency also made clear that an impairment "need not prevent, or significantly or severely restrict, the individual from performing a major life activity . . . to be considered substantially limiting."<sup>78</sup> Instead, the inquiry is whether the impairment substantially limits the ability of an individual to perform a major life activity as compared to most people.<sup>79</sup> The statute precludes considering the effects of "mitigating measures," such as corrective devices, behavior modifications, or medication, when making the disability determination.<sup>80</sup>

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<sup>69</sup> See, e.g., *Jakubowski*, 2009 WL 2407766, at \*9 (finding resident with Asperger's syndrome unqualified because "[t]he very nature of the medical profession requires solid communication skills with patients; fundamental problems with such communication make likely the potential of harm to the health or safety of others").

<sup>70</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325 (2008).

<sup>71</sup> 42 U.S.C. § 12102(1) (2012).

<sup>72</sup> Pub. L. No. 110-325, § 2(b)(5).

<sup>73</sup> *Id.* at § 4(a)(4)(A).

<sup>74</sup> 42 U.S.C. § 12102 (2)(A) (2012); 29 C.F.R. § 1630.2(i) (2016).

<sup>75</sup> See, e.g., *Humbles v. Principi*, No. 04-1218, 2005 WL 1581257, at \*3 (10th Cir. July 7, 2005) (finding that "interactions with others and concentration have not been deemed major life activities by this circuit"); *Boerst v. Gen. Mills Operations, Inc.*, No. 00-3281, 2002 WL 59637, at \*3 (6th Cir. Jan. 15, 2002) (asserting that concentrating is not a major life activity). See Curtis D. Edmonds, *Snakes and Ladders: Expanding the Definition of "Major Life Activity" in the Americans with Disabilities Act*, 33 TEX. TECH L. REV. 321, 325 (2002), for a general discussion of earlier cases interpreting the major life activity requirement.

<sup>76</sup> 29 C.F.R. § 1630.2(i)(1)(i) (2016).

<sup>77</sup> See *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015) (applying deference according to *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

<sup>78</sup> 29 C.F.R. § 1630.2(j)(1)(ii) (2016).

<sup>79</sup> *Id.*

<sup>80</sup> 42 U.S.C. § 12102(4)(E)(i)-(iii) (2012).

Of particular significance, the EEOC in the wake of the Amendments stated that ASD is “almost always covered” as a disability because it “substantially limits brain function.”<sup>81</sup> As a result, in many cases involving autism, the parties no longer contest whether the employee has a disability.<sup>82</sup> In those cases challenging whether autism qualifies as a disability, employees generally have experienced greater success post-Amendments,<sup>83</sup> even when supported primarily by personal testimony rather than extensive medical evidence.<sup>84</sup> Courts have found plaintiffs to be substantially limited in social communication despite evidence showing their capability to function in some circumstances.

In *Glaser v. Gap Inc.*, for example, the employer argued that a seven-year employee with autism did not have a disability because he was able to maintain employment and interact with co-workers.<sup>85</sup> Relying on the ADA’s emphasis on broad coverage and EEOC regulations, the court denied the employer’s motion for summary judgment.<sup>86</sup> The court reasoned that the feedback the employee had received based on negative interactions with coworkers and frequent coaching regarding his behavior<sup>87</sup> created a genuine issue of material fact in this regard.<sup>88</sup> In another case, the Fourth

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<sup>81</sup> 29 C.F.R. § 1630.2(j)(3)(iii) (2016).

<sup>82</sup> See, e.g., *Kinghorn v. Gen. Hosp. Corp.*, No. 11–12078–DPW, 2014 WL 3058291, at \*10 (D. Mass. Jul. 1, 2014) (finding there was no dispute that bioinformatics specialist with Asperger syndrome had disability under ADA).

<sup>83</sup> See, e.g., *Huge v. Boeing Co.*, No. C14–857–RSM, 2015 WL 6626568, at \*9 (W.D. Wash. Oct. 30, 2015) (finding plaintiff with Asperger’s syndrome to have a disability); *Bellerose v. SAU* No. 39, No. 13–cv–404–PB, 2014 WL 7384105, at \*10 (D. N.H. Dec. 29, 2014) (finding a genuine issue of fact whether plaintiff’s Asperger’s Disorder was a disability under the ADA). But see *Morse v. Midwest Indep. Transmission Sys. Operator, Inc.*, No. 13–CV–0150 (PJS/SER), 2013 WL 6502173, at \*2 (D. Minn. Dec. 11, 2013) (finding employee with Asperger’s Disorder not disabled where there was no evidence he was limited in a major life activity and employee “testified that he did not regard his condition as severe.”).

<sup>84</sup> See, e.g., *Mercer v. Arbor E & T, LLC*, No. 11–cv–3600, 2013 WL 164107, at \*13–14 (S.D. Tex. Jan. 15, 2013) (finding plaintiff’s testimony sufficient to raise a genuine issue of material fact that her anxiety disorder was a disability). But see *Gesegnet v. J.B. Hunt Transp., Inc.*, No. 3:09–CV–828–H, 2011 WL 2119248, at \*6 (W.D. Ken. May 26, 2011) (finding plaintiff had not established a disability based on bipolar disorder and anxiety because plaintiff offered “no medical evidence which precisely defines that extent of Plaintiff’s disease and medical limitations due to it”).

<sup>85</sup> 994 F.Supp. 2d 569, 573–74 (S.D.N.Y. 2014).

<sup>86</sup> *Id.* at 575.

<sup>87</sup> For example, plaintiff received specific instructions about not putting his arm around his supervisor, how far back to stand while conversing, and not distracting employees who were working. *Id.* at 575.

<sup>88</sup> *Id.* at 575–76. But cf. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1113–14 (9th Cir. 2014) (finding, over a strongly worded dissent, that employee with ADHD was not substantially limited in interacting with others despite interpersonal difficulties because he continued to work and leave the house, and his general “ill-temper” was limited to co-workers rather than supervisors); *McElwee v. Cty. of Orange*, No. 10–Civ.–00138 (KTD), 2011 WL 4576123, at \*7 (S.D.N.Y. Sept. 30, 2011) (finding individual with PDD-NOS not substantially limited in interacting with others).

Circuit similarly reasoned that “[a] person need not live as a hermit in order to be ‘substantially limited’ in interacting with others.”<sup>89</sup>

Nevertheless, some employees with ASD and related conditions continue to struggle to show that they are qualified for employment.<sup>90</sup> Courts continue to assert that the ability to communicate appropriately with customers and coworkers is an essential function of the jobs in question.<sup>91</sup> Particularly in cases dealing with employees who have contact with the public or collaborative interaction with colleagues, communication challenges typical for those with autism have been sufficient to derail class coverage.<sup>92</sup> This may prove to be a significant hurdle in litigation for employees with ASD in the future.

### C. Section 503 of the Rehabilitation Act of 1973

The Office of Federal Contract Compliance Programs, a division within the Department of Labor, has established a list of federal contractor obligations under Section 503 of the Rehabilitation Act.<sup>93</sup> This list underwent significant regulatory expansion in 2014,<sup>94</sup> in part to address the high unemployment rates of individuals with disabilities.<sup>95</sup> Taken together, the statute and regulations preclude companies that are signatories to a federal contract or subcontract in excess of \$10,000 from discriminating against qualified individuals with disabilities.<sup>96</sup> In addition, those with 50 or more employees and a contract in excess of \$50,000 are required to develop and maintain an affirmative action plan subject to varying conditions.<sup>97</sup> The plan must include the following: (a) a 7% utilization goal, which essentially requires contractors to make efforts to achieve a workforce comprised of em-

<sup>89</sup> *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 573 (4th Cir. 2015) (finding plaintiff with anxiety disorder substantially limited in interacting with others despite the fact that she worked at a front counter, socialized with co-workers outside of the office, and used Facebook).

<sup>90</sup> *See, e.g., Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1311 (11th Cir. 2013) (“employee’s ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position.”) (quoting *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th Cir. 2002)).

<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g., McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012) (finding employee with PDD-NOS not qualified because he could not perform the essential function of being “emotionally able to conduct himself in an appropriate manner when dealing with residents, supervisors and other staff”); *Stebbins v. Reliable Heat & Air, LLC*, No. 10–3305–CV–S–RED, 2011 WL 4729816, at \*3–5 (W.D. Mo. Oct. 7, 2011) (finding customer service representative with Asperger syndrome was not qualified because he offended customers); *Kinghorn v. Gen. Hosp. Corp.*, No. 11–12078–DPW, 2014 WL 3058291, at \*6–8 (D. Mass. Jul. 1, 2014).

<sup>93</sup> 29 U.S.C. § 793 *et seq.* (2012).

<sup>94</sup> 41 C.F.R. §§ 60–741.5 (2016). The regulations became effective on March 24, 2014.

<sup>95</sup> *See Kara Heikkila, A Sea-Change Year for Federal Contractor Employers: Revised Regulations and New Executive Order Obligations*, 58 THE ADVOCATE 35, 36 (2015).

<sup>96</sup> 41 C.F.R. § 60–741.4 (2016).

<sup>97</sup> *Id.* at § 60–741.40.

ployees with disabilities; (b) data retention on applicants and new hires with disabilities to allow contractors to annually assess their efforts relating to individuals with disabilities; and (c) opportunities for self-disclosure of employees and applicants with disabilities, both pre- and post-offer.<sup>98</sup> OFCCP has significant investigative authority pursuant to the regulations to ensure that all eligible contractors comply with these provisions.<sup>99</sup> Employers in this category thus have meaningful incentives to add people with disabilities to their workforces.

### III. THE HIRING PROCESS

The ADA provides protections to applicants with disabilities throughout the hiring process. Employers are limited in the questions they may ask and the tests they may use to evaluate an applicant's potential. The following section explores the legal issues that may arise relating to applicants with ASD during this period, including concerns with privacy, disclosure, and personality testing and screening.

#### A. *An Overview of the ADA*

The ADA precludes employers from asking job applicants questions that are “likely to elicit information about a disability.”<sup>100</sup> Likewise, employers may not require any medical examination prior to extending an offer.<sup>101</sup> These broad prohibitions extend to every step of the hiring process, including written job applications, employment interviews, and — increasingly significant in the digital age — any background investigation conducted by the employer directly or indirectly.<sup>102</sup> The law requires that hiring decisions be based on ability rather than explicit or implicit bias towards impairment, particularly visible ones.<sup>103</sup> Individuals with disabilities may not be forced to disclose their status in any respect.

In practice, however, the line of demarcation between permissible and impermissible inquiries can be difficult to identify. An employer cannot ask general questions about whether an applicant has any medical restriction that would affect job performance or whether he or she needs a reasonable ac-

<sup>98</sup> See *id.* at § 60–741.42; § 60–741.44(k); § 60–741.45.

<sup>99</sup> *Id.* at § 60–741.60 *et seq.*

<sup>100</sup> EEOC, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMS 4 (2000). See also 42 U.S.C. § 12112(d)(2) (2012); 29 C.F.R. § 1630.13(a) (2016).

<sup>101</sup> See 42 U.S.C. § 12112(d)(3) (2012); 29 C.F.R. § 1630(b) (2016).

<sup>102</sup> See Teresa L. Clark, *A Map for the Labyrinth: How to Conduct Job Interviews and Obtain Medical Information Without Violating the Americans with Disabilities Act*, 13 LAB. LAW. 121, 123 (1997) (discussing the law's applicability to investigative agencies and inquiries directed to former employees and government agencies). It is an increasingly common employment practice for hiring personnel to review an applicant's footprint on the web, including Facebook, Instagram, and Twitter.

<sup>103</sup> 42 U.S.C. § 12112(a) (2012).

commodation. However, the employer may identify specific job-related functions and ask the applicant to describe or demonstrate how she is able to perform them with or without reasonable accommodation where all applicants in the job class are asked to do so.<sup>104</sup> In addition, a disability that is either obvious to the observer or voluntarily disclosed by the applicant gives the employer more latitude. Employers can request that the applicant perform a job-related function even if no one else is asked, provided it is apparent the disability may interfere with that function.<sup>105</sup> The employer also may engage the applicant in an interactive dialogue to explore whether the applicant needs a reasonable accommodation, and if so, the nature of the accommodation desired.<sup>106</sup> Even then, however, an employer may not inquire into the severity of the disability, its origin, or its predicted duration without running afoul of the ADA.<sup>107</sup>

Once a conditional offer is extended, employers have wide discretion to ask disability-related questions and administer any medical exams they choose.<sup>108</sup> This discretion is limited, however, in that employers are precluded from withdrawing the offer based on the results of this inquiry unless the rejection is for a reason that is demonstrably job-related and consistent with business necessity.<sup>109</sup> Moreover, all medical information obtained during this process must be kept confidentially and separate from personnel files.<sup>110</sup> If additional medical examinations or disability inquiries take place during the course of employment, such inquiries are restricted to those that are necessary and job-related.<sup>111</sup>

### B. *The Problem of Disclosure and Confidentiality*

Because of the continuing disability bias present in American society, it is typically to an applicant's benefit to refrain from voluntarily disclosing information about a disability until, at a minimum, an offer is extended — and perhaps not even then.<sup>112</sup> This is particularly true for individuals with mental impairments, given the strong history of stigma against this group.<sup>113</sup>

<sup>104</sup> 42 U.S.C. § 12112(d)(3) (2012); 29 C.F.R. § 1630.14(a) (2016); ADA ENFORCEMENT GUIDANCE, *supra* note 100, at 3.

<sup>105</sup> ADA ENFORCEMENT GUIDANCE, *supra* note 100, at 3.

<sup>106</sup> *Id.*

<sup>107</sup> 29 C.F.R. § 1630.13(a) (2016).

<sup>108</sup> 29 C.F.R. § 1630.14(b) (2016).

<sup>109</sup> 42 U.S.C. § 12112(d)(3) (2012); 29 C.F.R. § 1630.14(b)(3) (2016).

<sup>110</sup> 42 U.S.C. § 12112(d)(3)(B) (2012); 29 C.F.R. § 1630.14(c)(1) (2016).

<sup>111</sup> 42 U.S.C. § 12112(d)(4) (2012); 29 C.F.R. § 1630.14(c) (2016).

<sup>112</sup> *See, e.g.*, ADA ENFORCEMENT GUIDANCE, *supra* note 100, at 1 (explaining that historically, information about disability was limited in use by employers “to ensure that [they did] not exclude applicants or discriminate against employees on the basis of a disability.”). *See also* James T.R. Jones, “High Functioning” Successful Professionals with Severe Mental Illness, 7 DUKE F. FOR L. & SOC. CHANGE 1, 9 (2015) (noting that many professionals choose not to disclose and “stay in the shadows due to fear of stigma”).

<sup>113</sup> *See, e.g.*, sources cited *supra* note 112; Hensel and Jones, *supra* note 55, at 70–78 (describing mental illness stigma in ADA outcomes).

Nevertheless, for at least some individuals with autism in the workplace, the calculus of disclosure may be quite different. The low numbers of employed individuals with autism suggest that many, if not most, have been unable to get beyond the initial employment interview.<sup>114</sup> A hallmark of the disorder is difficulty with social interaction, where challenges include maintaining conversational focus, eye contact, and appropriate body language. Deficits in such “soft skills” may be difficult, if not impossible, to conceal in an interview setting.<sup>115</sup> Although disclosure of diagnosis admittedly may expose the applicant to disability bias, the interviewer is likely to have already formed a negative impression based on perceived deficits in the interview. Some studies have shown that organizations that did not employ individuals with ASD “focused on the ability of the individual to behave in certain ways rather than the ability of the individual to do the job.”<sup>116</sup> Absent an explanation, communication difficulties in the interview may almost certainly derail the candidacy.

Disclosure may make sense even for those who can successfully navigate a short interview. The evidence suggests that it is typical for at least some individuals with ASD to present “a patchwork quilt for a resume” because they have “an inordinate number of jobs, gaps between jobs, or a long history of self-employment.”<sup>117</sup> Once again, absent a clear explanation, such gaps can derail a candidacy because employers are understandably wary of individuals who jump from position to position, particularly when the job involves up-front training and investment on the part of an employer. Disclosure has the potential to create a more favorable perception of the candidate because it offers a plausible and more benign explanation for the absence of consistent employment. Several experts conclude that “honesty is the best policy” with employers because it assists them to “prepare for and facilitate the individual.”<sup>118</sup> Once explained, weak interpersonal skills or a lackluster job history — either of which could automatically disqualify a typical candidate — may become secondary to the candidate’s ability to perform the hard skills of the position in question. The groundwork for accommodation has been set, and the odds of securing employment are likely to increase.

Therefore, employers should expect a high degree of disclosure of disability up front as people with autism enter the workforce. What little data

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<sup>114</sup> Notably, in one discrimination case involving an employee with autism, evidence suggested the employer believed “in-person interviews are essential to screen for ‘weirdness.’” *Kinghorn v. General Hosp. Corp.*, No. 11-12078-DPW, 2014 WL 3058291, at \*2 (D. Mass. Jul. 1, 2014).

<sup>115</sup> See, e.g., Higgins et al., *supra* note 29, at 293-94 (noting that interviews “can be challenging tasks for the individual with AS” because he or she may lack “the needed non-verbal and verbal social communication skills to interview appropriately for a job”).

<sup>116</sup> Nesbitt, *supra* note 31, at 362.

<sup>117</sup> Simone, *supra* note 10, at xviii.

<sup>118</sup> Patterson and Rafferty, *supra* note 34, at 477 (citing P. HOWLIN, *AUTISM: PREPARING FOR ADULTHOOD* (London: Routledge 1997)).



there is on this issue seems to support this conclusion. In 2009, the Department of Education and others conducted a study of young people with disabilities between the ages of 21 and 25.<sup>119</sup> Of those who were employed, individuals with autism had among the highest reporting rates of awareness by the employer of the individual's disability: 73.1%.<sup>120</sup> Individuals with ASD were second only to individuals who are deaf or blind in receiving accommodations from their employers.<sup>121</sup>

Early disclosure poses both benefits and challenges for employers. Employers' early knowledge of disability, particularly one linked to interpersonal deficits, strengthens the ability of the applicant to qualify for class membership under the "regarded as" prong of the ADA should litigation ensue. An individual establishes class coverage under this prong when she demonstrates that an employer took any adverse employment action because of her impairment.<sup>122</sup> Although this raises the liability stakes in the event of conflict, the extent of additional risk is questionable. First, as noted above, courts have increasingly concluded that individuals with ASD are protected under the actual disability prong of the ADA.<sup>123</sup> Second, even where there is no disclosure or request for accommodation, some courts have found that an employee's "odd" behavior was sufficient to give notice of an individual's disability and need for accommodation.<sup>124</sup> This may be a particularly persuasive argument in cases in which the employee's disorder affects her ability to engage in meaningful communication.<sup>125</sup>

In *Glaser*, for example, the federal district court for the Southern District of New York quickly rejected Gap's argument that it could not have discriminated against its employee with ASD because he had never revealed that he had ASD.<sup>126</sup> The court reasoned that "[f]rom the outset, Gap personnel apparently understood that Glaser is impaired," citing employees who

<sup>119</sup> USDOE *supra* note 44, at Table 39.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* 37.2% of individuals with autism received accommodations on the job, versus 50.4% of those who identified as deaf or blind. In part, this may be a reflection of the fact that a large number of individuals with autism secure employment opportunities through employment agencies rather than individually or through referrals, which may have less applicability to independent employment. *Id.* at Table 49 (reporting 25.5% using employment agencies).

<sup>122</sup> 42 U.S.C. § 12102(3) (2012).

<sup>123</sup> *See supra* Part II.

<sup>124</sup> *See, e.g.,* Jones v. Nationwide Life Ins. Co., 696 F.3d 78, 89 (1st Cir. 2012) (recognizing that courts may find a duty to accommodate in the absence of a specific request when an employer is aware that an accommodation is needed). *But see* Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899 (7th Cir. 2000) (cataloguing cases establishing "[t]he standard rule . . . that plaintiff must normally request an accommodation before liability under the ADA . . . attaches"); Bellerose v. SAU No. 39, No. 13-cv-404-PB, 2014 WL 7384105, at \*5 (D.N.H. Dec. 29, 2014) (finding for employer where employee did not specifically make a request for accommodation, despite the employer's knowledge of his Asperger's disorder). It is troubling that such cases seem to penalize the plaintiffs for inadequate communication, which is known to be a part of the diagnosis for many with ASD.

<sup>125</sup> *See* Barfield v. Donahoe, No. 13-C-1518, 2014 WL 4638635, at \*4 (N.D. Ill. Sept. 17, 2014).

<sup>126</sup> *Glaser v. Gap Inc.*, 994 F.Supp.2d 569, 577 (S.D.N.Y. 2014).

observed he was “different,” had “difficulty communicating and socializing,” and would “fixate on and not be able to solve a problem.”<sup>127</sup> The court made clear that “[u]nder the ADA, an employer need not know the exact diagnosis to be liable for discrimination on the basis of a disability; liability may be premised on the employer’s perception, regardless of whether it is accurate, if the employer relies on such perception to engage in a prohibited act.”<sup>128</sup>

In light of this reality, employers in many respects are better off if the employee discloses upfront. With disclosure, the focus more quickly moves from an emphasis on disability to one of ability.<sup>129</sup> Employers acting in good faith can assess at the beginning of the relationship whether elevated interpersonal skills are in fact essential functions of the job or merely desirable in an interview setting. An individual hired in accounting who has little client contact, for example, may not need to have the strong interpersonal skills that may be an essential function of an account manager. Because the anti-discrimination protections of the ADA have been formally invoked, the employer’s legal obligations, and corresponding legal liability, are more likely to be actively considered by the decision-maker. This is ideal both for the applicant, who may have improved chances of employment, and the employer, who is more likely to formally consider the law’s requirements rather than act on unconscious bias.

Equally important, those operating at the hiring level have the opportunity to develop accommodations up front and coach the behavior of subordinates who may not be as tolerant of the individual’s quirks or as familiar with the law’s protections. As discussed below in Part IV, there are a number of changes in the work environment, many of minimal cost, that can enhance the chances of success for an employee with ASD. Implementing these modifications at the beginning of the work relationship, rather than when problems develop, both limits the potential for liability and demonstrates good faith should problems arise.<sup>130</sup>

At the same time, the ADA’s strict confidentiality requirements may impede disclosure in some circumstances. Although the employee has the ability to self-disclose at any time to anyone in the workplace, many employees with ASD may choose to remain silent once the position is secured. The absence of disclosure coupled with the need to implement accommoda-

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 578.

<sup>129</sup> See, e.g., 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, 102 (1993/1994).

<sup>130</sup> See, e.g., *Connolly, III v. Entex Info. Servs., Inc.*, 27 F.3d.Appx. 876, 878 (9th Cir. 2001) (finding employer acted in good faith with employee with autism by offering various accommodations); *Kinghorn v. Gen. Hosp. Corp.*, No. 11–12078–DPW, 2014 WL 3058291, at \*8–9 (D. Mass. Jul. 1 2014) (crediting arrangements made by employer for employee with autism in concluding there was no violation of the reasonable accommodation requirement).

tions can present challenges for employers. In some cases, it may restrict the employer's ability to integrate individuals with ASD into the workplace.<sup>131</sup>

The ADA makes clear that an employer can only share information relating to an employee's disability with supervisors and managers to the extent necessary to communicate restrictions on the employee's work or reasonable accommodations that are in place.<sup>132</sup> Co-workers may not receive this information even if such information would explain why an obvious accommodation is being provided.<sup>133</sup> This is particularly problematic for a disability like ASD that manifests in interpersonal difficulties. The success of the accommodations put into place may depend on the extent to which co-workers are willing to engage in alternative forms of communication. Once again, the deficit of soft skills may be evident, leading co-workers' "imagination [to] roam, and the conclusions may be highly inaccurate and based on stereotypes."<sup>134</sup>

One way to overcome the confidentiality problem is to provide targeted training that promotes awareness of the needs of employees with disabilities generally, and autism specifically. A variety of resources already exist to facilitate such training, such as online training. In this way, the workplace may become more tolerant and accommodating without targeting the individual personally and violating confidentiality.

### C. *The Problem of Personality Tests*

An increasing number of employers require job applicants to take personality tests, purportedly to provide insight into an applicant's fit with an employer and aptitude for a particular job.<sup>135</sup> Approximately 76% of all companies with more than 100 employees are using these tests, and this number is expected to grow.<sup>136</sup> Notably, testing often occurs early in the hiring process to cull through a large number of job applicants, largely the result of an increasing number of electronic applications. Those who score poorly based on a testing algorithm are unlikely to receive an interview.<sup>137</sup> Although test-takers are told that there are no right or wrong answers, these tests have the potential to screen out individuals with autism in ways that are very likely to violate the ADA.

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<sup>131</sup> See, e.g., Daly-Rooney, *supra* note 129, at 90.

<sup>132</sup> 42 U.S.C. § 12112(d)(3)(B)(i) (2012). See also EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: JOB APPLICANTS AND THE AMERICANS WITH DISABILITIES ACT Question 14 (2005).

<sup>133</sup> *Id.*

<sup>134</sup> Daly-Rooney, *supra* note 129, at 101.

<sup>135</sup> Simone, *supra* note 10, at 104–05.

<sup>136</sup> Tomas Chamorro-Premuzic, *Ace the Assessment*, HARVARD BUSINESS REVIEW (Jul. 2015), <https://hbr.org/2015/07/ace-the-assessment>, archived at <https://perma.cc/BJM2-DRPF>.

<sup>137</sup> Lauren Weber and Elizabeth Dwoskin, *Are Workplace Personality Tests Fair?*, THE WALL STREET JOURNAL (Sept. 29, 2014), <http://www.wsj.com/articles/are-workplace-personality-tests-fair-1412044257>, archived at <https://perma.cc/5SY7-ABCN>.

Testing is primarily directed at measuring “three critical elements of success on the job: competence, work ethic, and emotional intelligence.”<sup>138</sup> The latter is intended to uncover evidence of interpersonal skills, “emotional literacy and social insight.”<sup>139</sup> One commonly used test for this purpose asks the applicant to look at pictures of other people’s eyes and expressions to identify what they are feeling.<sup>140</sup> It is highly significant that this test is modeled on questions developed by a leading researcher in the field of autism to study the degree to which individuals on the spectrum possess “social sensitivity.”<sup>141</sup> In light of the test’s origins, adults with ASD unsurprisingly “performed significantly worse” than other test takers, including those with other disabilities like Tourette’s syndrome.<sup>142</sup> Another commonly used screening device, the Minnesota Multiphasic Personality Inventory (MMPI), is a psychological test designed in part to identify mental impairments like ASD, and is quite successful at doing so.<sup>143</sup>

The origin and original purpose of these tests raise significant legal concerns with their use. Tests administered before an employer extends a conditional offer may violate the ADA’s prohibition against using medical exams at the pre-offer stage. Whether or not such tests qualify as “medical exams” is open to some debate. In making this determination, the EEOC considers (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) the purpose of the test; (4) whether the test is invasive (i.e. drawing blood); (5) what the test measures (e.g., physiological responses or task performance); (6) whether the test is normally given in a medical facility; and (7) whether medical equipment is used.<sup>144</sup> The agency has concluded that psychological exams satisfy this definition if they are administered to evaluate whether an individual has a mental disorder or impairment, but not when used to discover personality traits, such as “honesty, preferences and habits.”<sup>145</sup> The intentions of the employer are not dispositive.<sup>146</sup>

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<sup>138</sup> Chamorro-Premuzic, *supra* note 136. See also Simon Baron-Cohen et al., *The “Reading the Mind in the Eyes” Test Revised Version: A Study with Normal Adults, and Adults with Asperger Syndrome or High-functioning Autism*, 42 J. CHILD PSYCHOLOGY 241, 241 (2001) (describing the origins of the test).

<sup>139</sup> Chamorro-Premuzic, *supra* note 136.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Baron-Cohen, *supra* note 138, at 241.

<sup>142</sup> Baron-Cohen, *supra* note 138, at 241–42.

<sup>143</sup> See generally Sally Ozonoff et al., *MMPI Personality Profiles of High-Functioning Adults with Autism Spectrum Disorders*, 12 ASSESSMENT 86 (2005) (study concluding a significant portion of individuals with ASD scored in the “clinical range” on several scales identified on MMPI); Maureen E. Mulvihill, *Karraker v. Rent-A-Center: Testing the Limits of the ADA, Personality Tests, and Employer Preemployment Screening*, 37 LOY. U. CHI. L. J. 865, 878 (2006) (describing origins of the MMPI).

<sup>144</sup> EEOC, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES 4 (2000), archived at <https://perma.cc/ZH68-XPFJ>.

<sup>145</sup> *Id.* at 6.

<sup>146</sup> *Id.* See also *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 817 (6th Cir. 2012) (“when an employer’s purported intentions mismatch the predominant purpose and design of a

Some courts have found personality tests to be impermissible medical exams when challenged under the ADA. In *Karraker v. Rent-A-Center*, for example, the employer required all employees to complete the MMPI in order to be promoted.<sup>147</sup> The plaintiffs were denied advancement because of their scores and brought a class action under the ADA, claiming the exam was a medical test that screened out individuals with disabilities.<sup>148</sup> The Seventh Circuit agreed that the MMPI was medical exam because it was designed “at least in part, to reveal mental illness and ha[d] the effect of hurting the employment prospects of one with a disability.”<sup>149</sup> The court did not find it relevant that the test was not interpreted by a psychologist because the practical effect of the test was the same as if it had been.<sup>150</sup> As such, the employer could not legally administer the test before extending a conditional offer of employment.

An employer that waits to administer such tests until the post-offer stage still may face significant liability. The ADA prohibits employers from acting on information that screens out either an individual with ASD or a class of individuals with ASD unless the employer can establish that the tests are job-related and consistent with business necessity.<sup>151</sup> Thus, an employer who withdraws an offer because of testing results will have the burden of establishing that the test in question is valid and accurately measures the minimum qualifications for successful job performance.<sup>152</sup> In light of current scientific evidence, employers may struggle to meet this burden. Many industrial psychologists believe that personality tests are not valid predictors of employee success.<sup>153</sup> In fact, one study concluded that the correlation between personality and job success was “close to zero.”<sup>154</sup> It is also highly questionable whether the broad administration of these tests is closely connected to the essential functions of any particular job in question. While social skills proficiency and personal qualities may be relevant to some jobs, in others, they are incidental at best. For example, the validity of testing for jobs that require extensive interaction with the public, such as

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particular test or assessment, which is to uncover mental-health defects or disabilities, those intentions are accorded less weight and significance in the analysis.”)

<sup>147</sup> 411 F.3d 831, 833 (7th Cir. 2005), on remand 2005 WL 2001511 (2005).

<sup>148</sup> *Id.* at 834–35.

<sup>149</sup> *Id.* at 837. See also *Barnes v. Cochran*, 944 F. Supp. 897, 905 (S.D. Fla. 1996) (finding that MMPI administered as part of psychological testing constituted a medical exam).

<sup>150</sup> *Karraker*, 411 F.3d at 836.

<sup>151</sup> 42 U.S.C. § 12112(b)(6) (2012).

<sup>152</sup> 29 C.F.R. § 1607.14 (2016).

<sup>153</sup> See, e.g., Wesley A. Scroggins, Steven L. Thomas, and Jerry A. Morris, *Psychological Testing in Personnel Selection, Part I: A Century of Psychological Testing*, 38 PUBLIC PERSONNEL MANAGEMENT 99, 105 (2008) (“the prevailing view of personality testing in personnel selection is that it lacks validity, that the tests are easily faked, and that the tests are generally unsuitable for preemployment screening”).

<sup>154</sup> Frederick P. Morgeson, et al., *Are We Getting Fooled Again? Coming to Terms with Limitations in the Use of Personality Tests for Personnel Selection*, 60 PERSONNEL PSYCHOLOGY 1029, 1033 (2007).

salespersons, may be quite different than for those seeking entry-level work, like data entry.

Absent strong evidence that a test is a valid and meaningful measure of successful job performance, employers' continued use of such measures may give rise to significant ADA liability.<sup>155</sup> In August of 2015, for example, the EEOC reached a settlement with Target Corporation for \$2.8 million as a result of claims that its personality tests discriminated against employees on the basis of race, sex, and disability.<sup>156</sup> Because several of the tests commonly used by employers have specifically been found to identify markers of ASD and were even developed for this purpose, employers are well advised to carefully consider whether their continued use as screening mechanisms violates the ADA.

#### IV. PROVIDING REASONABLE ACCOMMODATIONS

The ADA requires employers to provide reasonable accommodations for qualified applicants and employees with disabilities unless doing so would impose an undue hardship on the business.<sup>157</sup> A qualified individual is one who is capable of performing the essential functions of a job, defined as the fundamental job duties of the employment position.<sup>158</sup> Reasonable accommodations vary by position, but include any modification to the job application process or work environment that enables the employee to perform the essential functions of his or her position. Congress has identified "job-restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; [and] appropriate adjustment . . . of examinations, training materials or policies" as examples of modifications that may be reasonable in some circumstances.<sup>159</sup> In contrast, it is never reasonable to eliminate an essential function or ask another employee to perform that function.<sup>160</sup>

Some individuals with ASD will not need any accommodation to be successful in the workplace environment. For those who do, however, the critical inquiry upon hire becomes what modifications are necessary to support the employee. An employer's obligation to provide reasonable accommodations most obviously arises when the employee requests assistance in

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<sup>155</sup> Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding that employer's use of general intelligence test to determine promotions violated Title VII because the test was not significantly correlated to work performance).

<sup>156</sup> Weber and Dwoskin, *supra* note 137. See also *Target Corporation to Pay \$2.8 Million to Resolve EEOC Discrimination Filing*, EEOC (Aug. 24, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm>, archived at <https://perma.cc/3J3D-CER4>.

<sup>157</sup> 42 U.S.C. § 12112(5)(A) (2012).

<sup>158</sup> 42 U.S.C. § 12111(8) (2012).

<sup>159</sup> 42 U.S.C. § 12111(9)(B) (2012). See also 29 C.F.R. 1630.2(o)(2)(ii) (2016).

<sup>160</sup> See, e.g., *Shannon v. N.Y.C. Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003) ("[a] reasonable accommodation can never involve the elimination of an essential function of a job.").

meeting the essential functions of the job.<sup>161</sup> Some courts have concluded, however, that no formal request is required.<sup>162</sup> The statute speaks of making accommodations for “known disabilities” rather than when an employee requests assistance.<sup>163</sup> If an employer reasonably should know that a disability is interfering with work performance, the law may require the employer to commence an interactive process with the employee to determine if an accommodation is available.<sup>164</sup>

Ideally, the search for an appropriate accommodation begins with the employee herself. Although employers are entitled to choose among effective accommodations, the individual will often be in the best position to identify what modifications are necessary and how they may be accomplished.<sup>165</sup> It is also permissible to require further explanation from a physician about the need for a particular accommodation, since such an inquiry would be job-related and necessary.<sup>166</sup>

The problem with identifying effective accommodations for employees with ASD stems from the reality that their primary difficulties often center on social interaction and communication in the workplace. Lacking skills in social nuance, individuals with autism may engage in behavior that is interpreted poorly by coworkers and supervisors, potentially subjecting them to harassment or negative feedback.<sup>167</sup> The intangible nature of such challenges is more difficult to address than modifications of the physical environment. In the past, most courts have avoided the difficult question of what accommodations are required by concluding that interpersonal relations are an essential function of the job, and an individual with ASD is not qualified for employment.<sup>168</sup> Unable to establish class membership, the individual is not legally entitled to reasonable accommodation from the employer.

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<sup>161</sup> See, e.g., *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (“In general . . . it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed.”) (citing 29 C.F.R. § 1630.9, App. (1995)).

<sup>162</sup> See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313–14 (3d Cir. 1999); *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008).

<sup>163</sup> *Brady*, 531 F.3d at 135.

<sup>164</sup> See, e.g., *id.*

<sup>165</sup> See, e.g., 29 C.F.R. § 1630.2(o)(3) (2016) (discussing interactive process between employee and employer to identify reasonable accommodations).

<sup>166</sup> 42 U.S.C. § 12113(d)(4) (2012).

<sup>167</sup> There is some conflicting evidence about the degree to which people with autism experience harassment and discrimination in the workplace. One 2012 study by Bancroft et al. on behalf of the National Autistic Society in the U.K. found that around one-third of individuals with autism had experienced bullying in the workplace. KATHERINE BANCROFT ET AL., *THE WAY WE ARE: AUTISM IN 2012* 27 (2012). However, in a 2009 study, more than 88% of young adults with autism who were employed reported being treated “pretty well” by others at work. See USDOE, *supra* note 44, at Table 43.

<sup>168</sup> See, e.g., *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th Cir. 2002) (“An employee’s ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position.”).

Nevertheless, this restrictive categorical approach is simply inconsistent with the ADA's requirement of an individualized inquiry.<sup>169</sup> Contrary to conventional wisdom, many jobs exist which do not require refined social skills, even if they may be desirable. As one autism advocate has stated, "[y]ou do not run a popularity contest; you run a business."<sup>170</sup> A careful review of the actual day-to-day tasks performed by employees in the position, the amount of time spent performing the function, and the consequences of not requiring it all provide insight into whether social skills at a high level are genuinely essential to any particular job.<sup>171</sup> To the extent that limitations exist in important areas, there are many concrete accommodations that can assist to diminish these challenges for employees with ASD. The remainder of this section identifies only a few.

One potential accommodation for social skill deficits is to appoint either a coach or a mentor who can be a resource for the employee on handling social issues in the office.<sup>172</sup> Describing the consequences of social choices logically, rather than emotionally, can be an effective approach for individuals with ASD.<sup>173</sup> In addition, supervisors can provide "concrete examples of accepted behaviors and consequences" or use training videos to demystify written and unwritten workplace rules in a way that is literal and easily accessible.<sup>174</sup> Supervisors could also permit and even encourage communication with others through text, email, and written notes where appropriate to minimize unnecessary personal conversation and to ensure clarity of directions and consequences.<sup>175</sup>

Addressing sensory overstimulation that can challenge people with ASD may be easier because small changes in the physical environment may successfully ease such difficulties. Open-office plans can create an inhospitable work environment where concentration is extremely difficult. Providing a private or quiet office space, even if other individuals in the work classification are not so entitled, may be reasonable in some circum-

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<sup>169</sup> See, e.g., *Kapche v. City of San Antonio*, 304 F.3d 493, 497–98 (5th Cir. 2002) ("whether a person has a disability under the ADA is an individualized inquiry").

<sup>170</sup> Simone, *supra* note 10, at 18.

<sup>171</sup> 29 C.F.R. 1630.2(n)(2) (listing reasons a job function may be considered "essential").

<sup>172</sup> See, e.g., Bissonnette, *supra* note 23, at 14 (concluding a coach "can prove highly effective for improving social and communication skills as well as organizational abilities" for people with ASD in the workplace); Nesbitt, *supra* note 31, at 359 (concluding that support in the first few weeks and during periods of change at work is "crucial").

<sup>173</sup> Cf. Simone, *supra* note 10, at 29 (recommending a discussion akin to exploring "future chess moves").

<sup>174</sup> See JOB ACCOMMODATIONS NETWORK, *supra* note 22, at 8.

<sup>175</sup> *Id.* at 9; Simone, *supra* note 10, at 57. Notably, some employers are resistant to such requests because "the speed of business requirements and productivity issues" makes it unreasonable to provide a high level of detail. *Huge v. Boeing Co.*, No. C14–857–RSM, 2015 WL 6626568, at \*10 (W.D. Wash. Oct. 30, 2015) (denying summary judgment to employer on issue of whether plaintiff's request for written instructions and a job coach could be reasonable).



stances.<sup>176</sup> It may even be reasonable to allow employees to work from home for a part or all of the workweek. Such arrangements are increasingly common in American workplaces, and if some employees are permitted to do so, then employers must consider whether the accommodation is reasonable for an employee with ASD.<sup>177</sup> This type of accommodation would insulate such employees from environmental distractions, as well as the need for constant socialization in the office.

Where working from home is not possible, flexible start times and part-time arrangements can be quite successful.<sup>178</sup> These alternatives allow employees with ASD to avoid commuting under crowded conditions and to choose to work at times when fewer employees are in the office. While in the office, small, inexpensive adjustments can make a significant difference. For example, allowing an individual to wear headphones can help block out the environmental noise, and providing a desk lamp diminishes the noise and visual distractions created by fluorescent lights.<sup>179</sup>

In addition to making accommodations directed at an individual with ASD, employers should seriously consider implementing a training program that promotes tolerance and diversity among all employees, and managers in particular. Some studies have concluded that the challenges faced by adults with ASD “resulted directly from lack of acceptance and understanding of their differences by other persons with whom they worked and interacted on a regular basis.”<sup>180</sup> Perhaps recognizing this, some courts have concluded that sensitivity training may be a reasonable accommodation for employees with ASD.<sup>181</sup> Experts have endorsed programs that involve “group activities

<sup>176</sup> Notably, however, some courts have been skeptical of such requests. *See* McKane v. UBS Fin. Servs., Inc., 363 F. Appx. 679, 682 (11th Cir. 2010) (finding request to relocate the office of plaintiff with interpersonal difficulties unreasonable because he would still be required to have some contact with others).

<sup>177</sup> *See, e.g.*, Humphrey v. Mem’l Hosps. Ass’n, 239 F.3d 1128, 1136–37 (9th Cir. 2001) (work at home may be a reasonable accommodation where “essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer”).

<sup>178</sup> *See, e.g.*, Solomon v. Vilsack, 763 F.3d 1, 10–11 (D.C. Cir. 2014) (concluding that the ability to work a regular and predictable schedule is not an essential function of every position); McMillan v. City of New York, 711 F.3d 120, 127 (2d Cir. 2013) (concluding that timely arrival, although often an essential function, is not universally required by every job); Hendrickx, *supra* note 23, at 38–39; Terrell v. U.S. Air, 132 F.3d 621, 626 (11th Cir. 1998) (reasoning that part-time schedule may be a reasonable accommodation when part-time positions are available).

<sup>179</sup> Hendrickx, *supra* note 23, at 44.

<sup>180</sup> Robertson, *supra* note 26.

<sup>181</sup> *See, e.g.*, Bacon, Jr., v. T-Mobile USA, Inc., No. C09–5608RJB, 2010 WL 3340517, at \*10 (W.D. Wash. Aug. 23, 2010) (finding expert’s testimony that training other employees would assist the employee with autism by developing “more tolerance and understanding” and lead co-workers to be less likely to conclude the employee is “being intentionally . . . rude or obnoxious”). Courts may be more receptive to accommodation requests for training programs, which are concrete, than requests for “more patience” or “tolerance” from coworkers. *See, e.g.*, McElwee v. Cty. of Orange, 700 F.3d 635, 645 (2d Cir. 2012) (rejecting request to educate others about employee’s PDD-NOS as unreasonable because it did not “address[] [his] inappropriate behavior; instead it simply demands that others be more tolerant. Requiring

and role-playing to allow managers to investigate their own prejudices and how those fears and misperceptions may influence their decisions.”<sup>182</sup> In addition, many diversity training programs provide employees with an enhanced awareness of civil rights laws and what they require in the workplace.<sup>183</sup> Sexual harassment training arguably has made strides in this area for women,<sup>184</sup> and training relating to employees with autism has the potential to do the same.

## V. SPECIAL CONSIDERATIONS OF DISCIPLINE

At times, even if accommodations are provided, an employee with ASD may commit an infraction in the workplace that would usually result in discipline or termination. Importantly, disciplinary issues typically will not arise as a result of intentional misbehavior by individuals with ASD. As experts have cautioned, what “usually . . . looks like a behavior or attitude problem [in reality] is a communication problem.”<sup>185</sup> The protection afforded by the ADA to misconduct that is causally related to a disability thus may be critical to the success of some employees with ASD.<sup>186</sup>

The EEOC has taken the position that an employer is entitled to maintain whatever job-related requirements or qualification standards it wishes, including conduct standards.<sup>187</sup> When an employee is unable to meet a requirement or standard because of a disability, however, the employer must demonstrate that the requirement is “job-related and consistent with business necessity.”<sup>188</sup> If the employer cannot do so, the employer “cannot use the

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others to tolerate misconduct . . . is not the kind of accommodation contemplated by the ADA”); *Esberger v. Williamson County Gov.*, No. 3:13-cv-0744, 2015 WL 3929689, at \*6 (M.D. Tenn. Jun. 2, 2015) (rejecting request for patience, without more, as a reasonable accommodation).

<sup>182</sup> Nadia Younes, *Getting Corporations Ready to Recruit Workers with Disabilities*, 16 J. OF VOC. REHAB. 16, 89–91 (2001).

<sup>183</sup> Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. OF LABOR & EMP. L. 1, 16 (2001).

<sup>184</sup> See, e.g., Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 42–49 (2005) (discussing a variety of studies finding that sexual harassment training can have a positive impact in the workplace). Grossman nevertheless questions whether such training is as effective as some studies suggest. *Id.* at 48–49.

<sup>185</sup> Bissonnette, *supra* note 23, at 13. See also Michael E. Bloom, *Asperger's Disorder, High-Functioning Autism, and Guardianship in Ohio*, 42 AKRON L. REV. 955, 967 (2009) (“The uneven profile of linguistic functioning . . . can mislead an observer to under-appreciate the extent of the impairment and instead interpret the failure to respond appropriately as uncooperative or rude.”).

<sup>186</sup> Cf. Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187, 189 (2005).

<sup>187</sup> EEOC, ENFORCEMENT GUIDANCE: THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES, Part I (2011), <https://www.eeoc.gov/facts/performance-conduct.html>, archived at <https://perma.cc/Y4M7-8HXT>.

<sup>188</sup> 42 U.S.C. 12112(b)(6) (2012), 12113(a) (2012); 29 C.F.R. 1630.10 (2011), 1630.15 (2016).

standard to take an adverse action against an individual with a disability.”<sup>189</sup> Moreover, if a reasonable accommodation would enable the employee to meet the standard, the accommodation must be provided.<sup>190</sup>

This restriction, however, is tempered by the number of justifications that the EEOC has recognized will “always” qualify as job-related and necessary, including conduct rules that “prohibit insubordination towards supervisors and managers,” require employees to “show respect for, and deal appropriately with, clients and customers,” and “prohibit inappropriate behavior between coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other at work).”<sup>191</sup> Employees who commit such infractions may be disciplined without regard to whether a disability caused their conduct because, in the eyes of the EEOC, the discipline is not “because of” a disability.

Most courts likewise have concluded that misconduct is simply not protected by the ADA.<sup>192</sup> In *Comber v. Prologue*, for example, the plaintiff, an employee with ASD, worked with a supervisor who openly expressed disbelief that the plaintiff was impaired or required the accommodations she had been granted.<sup>193</sup> Although her employer transferred her to work under a different supervisor, she ultimately was terminated for an incident involving the original supervisor. The two engaged in an altercation where the employee kicked a plastic chair and walked around saying, “Oh God! I hate that girl.”<sup>194</sup> The court concluded that even if the employee’s ASD caused the misconduct, the encounter was more correctly characterized as a “personality conflict” that was not protected under law.<sup>195</sup>

A few courts, primarily in the Second and Ninth Circuits, have taken a broader approach, concluding that the ADA applies to misconduct that is causally related to a disability. They reason that Congress must have in-

<sup>189</sup> EEOC, *supra* note 187, Part II.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g.*, *Krasner v. City of New York*, 580 Fed.Appx. 1, 3 (2d Cir. 2014) (concluding it was “immaterial” whether misconduct that led to termination of employee with Asperger’s syndrome was caused by disability because “workplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability.”) (citing *McElwee v. City of Orange*, 700 F.3d 635, 645 (2d Cir. 2012)); *Schwarz v. Loyola Univ. Med. Center*, No. 08–C–5019, 2012 WL 2115478, at \*8 (N.D. Ill. Jun. 11, 2012) (finding it irrelevant whether plaintiff’s ADHD caused his conduct issues “because the ADA provides no bar to discipline for misconduct”). *Cf. Merrill v. Burke E. Porter Machinery Co.*, 159 Fed.Appx. 676, 679 (2005) (6th Cir. 2005) (concluding supervisor’s reference to plaintiff’s inability to maintain eye contact, that he was “stupid” and made “funny faces at him” was insufficient to establish direct evidence that termination was because his Asperger’s syndrome).

<sup>193</sup> No. CIV.JFM–99–2637, 2000 WL 1481300 \*1 (D. Md. Sept. 28, 2000). In addition to ASD, Comber claimed that she also had asthma with multiple chemical sensitivities, scotopic sensitivity syndrome, learning disabilities, anxiety disorder, and depression. *Id.* at \*2.

<sup>194</sup> *Id.* at \*1.

<sup>195</sup> *Id.* at \*3.

tended to cover such behavior<sup>196</sup> because “if the law fails to protect the manifestations of . . . disability, there is no real protection in the law[.]”<sup>197</sup> Even in these circuits, however, it is difficult for employees with ASD to maintain employment after an incident involving misconduct. Although the ADA applies, the question remains whether the individual is otherwise qualified in light of the behavioral manifestations of his or her disability.<sup>198</sup> Once again, courts cite the need to interact with customers and colleagues, as well as handle stressful situations, as essential job functions of many positions.<sup>199</sup> Most conclude that any disruptive or threatening behavior by the employee automatically renders the individual unqualified and unprotected by law.<sup>200</sup>

Nevertheless, it may be significant that the EEOC has left some room for protection from ambiguous conduct rules, such as a prohibition of “disruptive behavior.”<sup>201</sup> The EEOC has opined that if such behavior is caused by a disability, then the employer’s legitimate application of conduct rules to employees would depend on several factors, including “the frequency of occurrences, the nature of the job, the specific conduct at issues, and the working environment.”<sup>202</sup> It uses as an example an employee who talks to himself in the office, which makes others uncomfortable. The EEOC cautions that so long as the behavior does not interfere with customers or co-workers’ ability to perform their work, the employer must permit such behavior.<sup>203</sup> This suggests that the level of ADA protection afforded to an individual with ASD may depend on whether a court characterizes an incident as “misconduct” or merely disruptive behavior.<sup>204</sup>

In *Taylor v. Food World, Inc.*, for example, the plaintiff, a teenager with Asperger’s Syndrome, worked as a utility clerk.<sup>205</sup> Although the plaintiff was capable of performing the physical tasks of the job — including bagging, cleaning, and assisting customers to their cars with groceries — Food

<sup>196</sup> Timmons, *supra* note 186, at 216–22 (cataloguing cases taking the minority approach). *See, e.g.*, *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (“[c]onduct resulting from a disability is part of the disability and not a separate basis for termination.”); *Teahan v. Metro-North Commuter Railroad*, 951 F.2d 511, 517 (2d Cir. 1991); *Bacon, Jr. v. T-Mobile USA, Inc.*, No. C09–5608RJB, 2010 WL 3340517, at \*7 (W.D. Wash. Aug. 23, 2010) (finding employer who terminated employee with Asperger’s because of conduct issues was acting “resulting from his disability”). *See also* *Huge v. Boeing Co.*, No. C14–857–RSM, 2015 WL 6626568, at \*8 (W.D. Wa. Oct. 30, 2015) (denying summary judgment because “a reasonable fact-finder can view [plaintiff’s] alleged disruptive behavior as conduct resulting from a disability”).

<sup>197</sup> *Gambini*, 486 F.3d at 1094–95; *Assaturian v. Hertz Corp.*, No. 13–00299–DKW–KSC, 2014 WL 4374430, at \*7 (D. Haw. Sept. 2, 2014) (denying summary judgment where there was a question whether plaintiff’s outbursts were caused by his disabilities).

<sup>198</sup> *See supra* Part II.

<sup>199</sup> *See, e.g.*, *McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012); *Calef v. Gillette Co.*, 322 F.3d 75, 86–87 (1st Cir. 2003).

<sup>200</sup> *See, e.g.*, *Calef*, 322 F.3d at 87.

<sup>201</sup> EEOC, *supra* note 187, at Question 9.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Timmons, *supra* note 186, at 226.

<sup>205</sup> 133 F.3d 1419, 1421 (11th Cir. 1998).

World terminated him because it claimed he acted inappropriately with customers. The evidence reflected that he spoke loudly, was overly friendly, and overly talkative resulting in three customer complaints — two claiming he appeared to be drunk, and one unhappy with his comment.<sup>206</sup> The Eleventh Circuit agreed with the store that “interacting appropriately with customers” was an essential function of the plaintiff’s job.<sup>207</sup> It nevertheless denied summary judgment on the issue of whether the employee was able to meet that standard.<sup>208</sup> The court noted testimony that management received complaints about other employees “all the time,” and there was a question of fact whether the questions “were offensive or inappropriate.”<sup>209</sup> This case suggests that behavior that is arguably not insubordinate, but only socially insensitive, may be treated more flexibly by courts, and thus by employers considering discipline in the workplace.

### CONCLUSION

There is no question that the next decade will see increasing numbers of individuals with ASD applying for jobs and working in the labor force. Whether or not they experience success will be highly dependent on the actions of employers and their compliance with federal anti-discrimination laws. Employers must structure the hiring and interview process to eliminate unnecessary barriers to people with autism that are unrelated to the position in question. The law requires employers to engage in an interactive process and provide the reasonable accommodations that are necessary to enable these workers to succeed. Employers also must carefully consider how to structure the workplace environment to enable employees with autism to meet conduct rules and expectations. In light of the more expansive definition of disability under the ADAAA, employers who ignore such mandates will be exposed to legal liability in the future.

It is critical to recognize that employers’ legal compliance in this regard has the potential to benefit both employees with ASD and their employers. Individuals with ASD bring very real strengths to the table and have the potential to be significant assets to employers who invest in their training and development. Federal contractors who tap into this population will more easily meet the obligations established by OFCCP.<sup>210</sup> Hiring this population may also lead to increased business and goodwill from consumers. One

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1424.

<sup>209</sup> *Id.* Taylor asked questions about the names of individuals and their marital status. On one occasion, he suggested a customer buy more groceries because she was too thin, and on another asked a customer “if there was anything wrong with his toilet.” *Id.*

<sup>210</sup> 41 C.F.R. 60-741.4(b)(3)(iii)(B) (2016).

study found that almost all consumers would “prefer to give their business to companies that employ people with disabilities.”<sup>211</sup>

It is conventional wisdom that the easiest kind of value to see is the kind you are used to seeing. By taking a broader perspective and recognizing the value in employees who think and approach problem solving differently, employers will simultaneously benefit themselves and people with ASD.

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<sup>211</sup> Gary Siperstein, et al., *A National Survey of Consumer Attitudes Toward Companies that Hire People with Disabilities*, 24 J. OF VOC. REHAB. 3, 6 (2006).