1

Introducing a Workplace Reimagined

I INTRODUCTION

Before the COVID-19 global pandemic, employers were often reluctant to allow their employees to work from home. And courts routinely refused to require employers to do so. Their rationales varied but often came down to an inability to imagine how employees could successfully work from home. How could they work in teams? How could they be adequately supervised? How could they interact with clients or customers? Yet when the global pandemic forced millions of employers to close their doors and millions of employees to work from home, the unimaginable became not only imaginable but very successful. In fact, the work-from-home experience during the pandemic has led many employers to adopt policies that will allow employees to work from home permanently.[1] This book is ultimately about just this type of reimagining of the workplace. If we can reimagine *where* work is done, then maybe we can also reimagine *how* and *when* work is done.

At a broader level, this book is primarily about two groups of employees that seemingly have very little in common—employees with disabilities and workers with caregiving responsibilities. Despite the obvious differences between these groups of employees, their common bond is that both are subordinated in the workplace because they often cannot comply with the ideal worker norm of most workplaces.[2] Both often need variations or modifications to either *how* the job is done or *when* and *where* the job is done. This need for modifications creates two types of disadvantages in the workplace. The first are workplace consequences, which might include refusal to hire, refusal to provide the accommodations that are necessary to perform the job (thereby leading to termination), or refusal to promote or advance these workers. But even if employers grant these groups of workers the requested

[1] *See, e.g.*, Katsabian 2021.
[2] Albiston 2010. Professor Joan Williams coined the phrase "ideal workers" to refer to what employers expect (and even demand) from their workforce. Williams, JC 2001.

accommodations so that they can meet the workplace requirements, the second disadvantage that might result is the resentment of coworkers that happens when some employees receive special benefits in the workplace. I refer to both of these disadvantages collectively as "special treatment stigma."[3] I have spent many years thinking about how to eliminate this stigma.

The only solutions that will avoid special treatment stigma are those that accommodate *everyone*—all of our *bodies* and all of our *lives*. If everyone has the right to a reimagined workplace, special treatment stigma should disappear.[4]

But there is another (and perhaps equally compelling) reason to allow everyone access to a reimagined workplace; that is, because everyone, at times, will fail to live up to the ideal worker norm and will need some type of modification to either how the job is done or when and where the job is done.

For instance, older workers and pregnant employees might need modifications to how the job tasks are completed, such as acquiring assistive devices or alternative methods of production to avoid heavy lifting. Child-free workers might have periodic times when they have caregiving obligations that conflict with the rigid time norms of most workplaces, such as caring for an adult loved one or someone else's child for whom they care deeply. And *all* workers occasionally get sick. As COVID-19 has taught us, we want those workers to stay home when they are sick without penalty. For all these reasons, the two reform proposals outlined in Chapters 8 and 9 are universal in nature—accommodating everyone.

The remainder of this chapter provides a brief introduction to some of the concepts and laws I address in subsequent chapters and gives the reader a sense of the rest of the book. But before proceeding, a couple of points about terminology and definitions. First, I most often refer to individuals with disabilities using "people first" language. For example, I might refer to a "person who uses a wheelchair" rather than a "wheelchair user." Most (though not all) people with disabilities find that people-first language properly places the emphasis on who they are as a person rather than defining them primarily through their disability.[5] Sometimes this people-first convention can get overly verbose or awkward, in which case I use phrasing that makes a sentence easier to read.

Second, what do I mean by caregiver? This is a complicated question and it is probably easier to explain what I *don't* mean. I am not referring to someone who gets paid to care for others, whether that's a nanny, day care worker, home health care worker, nursing home staff member, etc. We primarily think of "caregiver" as being synonymous with "parent," and in most instances, I *am* referring to the care work performed by parents. But I don't want to ignore all of the workers who are caring for

[3] Porter 2016b, at 96–105. I first coined the term "special treatment stigma" in Porter 2010a.
[4] Porter 2016b.
[5] Bagenstos 2009. However, a significant counter-trend has emerged, positing that people-first language ignores the identity aspect of disability and also ignores the fact that disability is often socially created. Schur et al. 2013, at 7; Moore 2019.

family members who are not their children—for example, grandparents caring for grandchildren, adult children providing care for their parents, one spouse caring for another spouse, etc.[6]

Moreover, even though much of the discussion in this book related to caregivers' experiences will be focused on women because women continue to perform the vast majority of the caregiving in this country, I recognize that men are also caregivers, sometimes even primary caregivers.[7] Thus, I am including men as caregivers in most of my discussions. The one circumstance in which I am only referring to women is with regard to pregnancy. I include pregnant women in my definition of "caregiver." This makes perfect sense when you think about the fact that pregnant women are, quite literally, caring for the baby growing inside their bodies.

Finally, someone suggested to me that I should not use the word "accommodation" because there is so much baggage associated with that word. The person who made this suggestion is not wrong, but the main purpose of this book is to take away the stigma associated with accommodations. Accordingly, although I will sometimes use "modifications" or other words that are synonymous with accommodation, I will continue to use and embrace the word "accommodation." I hope to demonstrate why the stigma surrounding this word is both wrong and unnecessary, and I can therefore reclaim the word accommodation, and take away its pejorative meaning.

II ALLIES IN WORKPLACE DISADVANTAGES

Workers with disabilities and employees with caregiving responsibilities face similar workplace disadvantages in two respects. The first is these groups' inability to consistently meet their employers' workplace expectations and norms. The second is the attendant "special treatment stigma" that follows from that inability or difficulty.

A *Inability to Meet the "Ideal Worker" Norm*

Both employees with disabilities and workers with caregiving responsibilities will occasionally have difficulty performing all of their assigned workplace tasks and/or meeting all of their employers' expectations. Some of the difficulty stems from not being able to perform some of the physical functions of the job or needing a variation in how the job tasks are performed. But more often, the difficulty results from the inability to consistently meet an employer's expectations regarding when and where work is performed. I call these latter expectations the "structural norms" of the workplace. Structural norms include employers' required hours, schedules,

[6] Albiston & O'Connor 2016; Clarke 2011; Jacobs & Gerson 2004; Kessler 2001; Widiss 2021b.
[7] *See generally* Williams, JC 2010.

shifts, attendance requirements, and policies related to leaves of absence and working from home.[8]

1 Physical Functions of the Job

The inability to consistently perform a job's required physical functions is more common for individuals with disabilities than for caregivers. But, as noted, given that my definition of "caregiver" includes pregnant women, and because some pregnant women will have difficulty performing some of the physical tasks of some jobs, this problem relates to both groups of employees. For instance, one difficulty that both individuals with disabilities and pregnant women sometimes have is lifting heavy objects.[9] Many occupations, especially those in the manufacturing or service industries, require employees to be able to lift large amounts of weight. Disabilities that might make heavy lifting difficult or impossible include back impairments, other musculoskeletal impairments, and impairments that directly affect strength or cause weakness. And one of the most frequent restrictions doctors place on pregnant women is to avoid heavy lifting.[10]

Another workplace requirement that both pregnant women and individuals with disabilities might struggle with is standing for an entire shift. Obviously, some jobs can only be performed while standing, but there are many jobs for which employers require standing when the job could be performed competently while sitting. For instance, a cashier at a grocery store could likely perform most of the job while sitting on a stool, and yet many grocery store employers require all employees to stand for an entire shift.[11] This means that individuals with disabilities and pregnant women who are unable to stand for an entire shift would be unable to perform the grocery store cashier position.[12]

2 Structural Norms of the Workplace

Even when an employee can perform the physical functions of the job despite a disability or pregnancy, it might be difficult for that employee to consistently meet their employers' expectations regarding the structural norms of the workplace.[13] As noted in Section II.A, structural norms refer to when and where work is performed, rather than the actual tasks of the jobs.

For example, some employees have difficulty working an assigned shift. Imagine an individual who has kidney failure and cannot work the assigned rotating shifts

[8] Porter 2014c.
[9] Porter 2020a.
[10] Cox 2012, at 454.
[11] Bornstein 2020.
[12] Porter 2020a; Porter 2016a, at 250.
[13] Albiston 2010.

because of his dialysis schedule. Or consider a single mother who cannot work the midnight shift because she has no one at home to care for her children.[14]

For some employees, the obstacle is strict attendance policies. For instance, an employee who has cancer might be fatigued or nauseous from the chemotherapy treatment she receives, which might cause her to occasionally miss work. Or imagine a mother whose husband frequently travels for work, forcing the mother to miss work when her small children are sick and cannot attend day care or need to be taken to the doctor.

Real-life cases of employees not meeting their employers' norms surrounding hours, shifts, and schedules are plentiful—I will discuss just a few. In the caregiving context, one woman with caregiving responsibilities was fired for refusing to work overtime. In *Upton v. JWP Businessland*, the plaintiff was a divorced single mother who was fired when she requested to work more manageable hours than the 14-hour, six-day-a-week schedule that her employer demanded.[15]

Other workers face termination for having too many absences because of pregnancy or because of their caregiving responsibilities. Some of the most troubling work–family conflict stories involve a caregiver having to make the impossibly unfair decision between leaving a child alone or losing her job. For instance, one woman's employment was terminated because her child was in a car accident and had to be taken to the hospital.[16] Another mother left her one-year-old and nine-year-old children home alone because the babysitter did not arrive on time and her employer had threatened termination if she did not report to work. While she was gone, the children died in a fire.[17] These are just a few of the negative (and even tragic) consequences that can occur when caregivers try to meet the ideal worker norm.

Examples in the disability context include one employee who had multiple sclerosis (MS) and asked if she could limit her overtime because her MS symptoms were exacerbated by working more than 40 hours per week; the employer refused and terminated her.[18] In a similar case, the plaintiff was a systems engineer working 60–80 hours per week. After he was diagnosed with hepatitis C, he requested an accommodation that would allow him to reduce his hours to 40 per week so he could get adequate rest and reduce his stress level. Although the employer accommodated him temporarily, the employer refused to accommodate him permanently, arguing that the accommodation was not reasonable. The court agreed, and the plaintiff lost his disability discrimination claim.[19]

[14] Albiston 2010.
[15] 682 N.E.2d 1357, 1358 (Mass. 1997).
[16] 9to5, Nat'l Ass'n of Working Women, 10 Things That Could Happen to You if You Didn't Have Paid Sick Days: And the Best Way to Make Sure They Never Happen to Anyone, http://1000voicesarchive.org/resource/228/10things.pdf.
[17] Bernstein 2003.
[18] EEOC v. AT&T Mobility Servs., LLC, No. 10-13889, 2011 6309449, at *1, *13 (E.D. Mich. Dec. 15, 2011).
[19] Davis v. Microsoft Corp., 37 P.3d 333, 335, 337 (Wash Ct. App. 2002).

What all of these employees have in common is their inability to meet the ideal worker norm. Although the reasons for their failures are different—disability for some and caregiving responsibilities for others—they all must deal with the consequences of their failure to conform to the ideal worker norm.

B *Special Treatment Stigma*

Because these groups of employees often have difficulty meeting their employers' ideal worker norm, they sometimes seek workplace modifications. These might be formal requests for an accommodation because of a disability pursuant to the Americans with Disabilities Act (ADA) (which mandates such accommodations). Or employees might ask for schedule modifications for their caregiving obligations even when they have no legal right to those modifications. These requests for changes to how or when work is performed leads to "special treatment stigma." This stigma manifests itself in two distinct but related ways. First, having to provide accommodations to individuals in the workplace makes an employer assume it is more expensive or burdensome to employ such individuals than it is to employ workers who do not require accommodations. This belief, in turn, causes an employer to be reluctant to hire and promote these individuals. The second way special treatment stigma manifests itself in the workplace is by causing coworkers to resent accommodated employees. This resentment occurs for two possible reasons: (1) coworkers believe that the accommodation will require them to work harder or longer; or (2) the accommodation is something everyone wants, so coworkers resent the fact that others can receive a benefit they also covet.

1 Workplace Consequences

Many employers are reluctant to provide accommodations to employees who request them. Employers often see requests for accommodations as evidence that those employees just "can't cut it" in the workplace.[20] Even if the employer has a legal obligation to provide accommodations, this does not always lead to employers eagerly granting these requests. In fact, employers are often willing to provide informal accommodations to an employee until and unless the employee formally requests an accommodation, thereby signaling a possible legal obligation.[21]

For instance, in *Serendnyj v. Beverly Healthcare*, in attempting to prove that the employer was discriminating against her because of her pregnancy, the plaintiff pointed to the fact that before her pregnancy, other employees assisted her in performing more strenuous job duties, but after she became pregnant and asked for the same assistance, the employer refused. The court stated that there was a

[20] Williams, JC 2010, at 49.
[21] *See, e.g.*, Bagenstos 2009, at 56.

material difference between requesting and receiving assistance from other employees and forcing those employees to give assistance as an accommodation. The former, the court said, was completely voluntary and was given in a spirit of teamwork, but if the employer granted the plaintiff's request, the assistance by the coworkers would be mandatory and maybe against their wishes.[22]

Further evidence that employers dislike having to provide accommodations is the fact that the ADA has not noticeably improved the employment rates of individuals with disabilities. Scholars have argued that the reason for this is because employers are resistant to having to provide accommodations to individuals with disabilities, so they simply do not hire them in the first place. As most lawyers know, it is far easier for an employer to defend a failure-to-hire claim than it is to defend a termination claim. Therefore, anything that arguably increases the costs of employing an individual or makes it more difficult for the employer to fire an employee might incentivize the employer to not hire the individual in the first place.[23]

2 Coworkers' Resentment

The second way in which accommodated employees experience special treatment stigma is because of coworker resentment. Coworkers are often resentful when individuals with disabilities or workers with caregiving responsibilities are given deviations from workplace rules or any other kind of "special treatment" in the workplace. One reason for this resentment is that these coworkers might be required to bear some of the burden of their coworkers' accommodations. They might be required to work harder or longer or to vary their working hours in order to accommodate schedule changes for individuals with disabilities and workers with caregiving responsibilities. For instance, consider some common accommodations given to employees with disabilities: job restructuring, providing part-time or modified work schedules, providing leaves of absence, and reassigning individuals with disabilities to vacant positions. In all of these cases, the accommodation would have *some* effect on other employees. Job restructuring, for example, might require other employees to perform tasks that the disabled employee cannot perform, and these tasks might be physically arduous, such as heavy lifting. Part-time or modified work schedules and leaves of absence could cause other employees to have to work longer or different hours to make up for the absences of the disabled or caregiving coworker.[24]

Even when accommodations do not directly burden non-disabled coworkers, those coworkers might nevertheless resent the accommodated employees because those employees are receiving the types of workplace benefits that many

[22] 656 F.3d 540, 549 (7th Cir. 2011).
[23] *See, e.g.*, Bagenstos 2009, at 117, 134; Porter 2010a at 379.
[24] *See generally* Chapter 6, *infra*.

coworkers covet, such as schedule flexibility, reduced hours, or work-from-home arrangements.[25]

In the disability context, the resentment is greater if the coworkers think that the accommodated employee does not have a "true" disability under the ADA. This has become a more significant problem after the ADA Amendments Act was passed in 2008. It greatly expanded the protected class under the ADA. Thus, if coworkers see someone obtaining a coveted accommodation and the coworkers do not think that the employee is "truly disabled" or deserving of the accommodation, the resentment might be worse.[26]

Similarly in the caregiving context, accommodating caregivers is likely to create tension between those caregivers and their coworkers. Coworkers argue that accommodating caregivers unduly privileges those who become parents while requiring non-parents to work longer hours to pick up the slack for their caregiving coworkers. Many studies indicate that employees without primary caregiving responsibilities would often prefer to work fewer hours and therefore resent the fact that only parents are allowed to work less.[27]

To sum up, the inability of employees with disabilities and workers with caregiving responsibilities to consistently meet their employers' expectations, and the stigma that follows from that inability, is the problem explored in this book. As for solutions, before we can explore where the law should go, we need to understand where the law is right now. The next section explains the current protections in the United States for employees with disabilities and workers with caregiving responsibilities.

III APPLICABLE LAWS

Despite some of the similar experiences shared by employees with disabilities and workers with caregiving responsibilities, the applicable laws offer quite different protections. Individuals with disabilities are covered by the ADA.[28] Discrimination based on caregiving responsibilities is covered (if at all) by Title VII's[29] prohibition on sex discrimination, the Pregnancy Discrimination Act (PDA),[30] and the Family and Medical Leave Act (FMLA).[31] As is discussed in the next section and in later chapters, despite these statutory protections, patterns of discrimination "among work, disability, and gender persist."[32]

[25] Porter 2016a.
[26] Porter 2016a.
[27] Arnow-Richman 2003, at 392.
[28] 42 U.S.C. § 12101 *et seq*. *see also* Albiston 2010, at 103 (noting that the ADA appears to have more promise than Title VII because it requires reasonable accommodations).
[29] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.
[30] 42 U.S.C. § 2000e(k).
[31] 29 U.S.C. §§ 2601-2654.
[32] Albiston 2010, at 79.

A *The Americans with Disabilities Act*

Individuals with disabilities are entitled to reasonable accommodations if needed to perform the essential functions of their positions. Although scholars and courts dispute the breadth of the accommodation mandate, at least in theory, the accommodation obligation can be very broad. For instance, employers could be required to eliminate non-essential or marginal functions of a job if the employee with a disability cannot perform those functions. Or the employer might be required to allow an employee to work different hours or a different schedule. Employers might also be required to modify the physical aspects of the job or provide assistive devices that would allow the employee to perform the essential functions of the position.[33] The statutory limit on providing accommodations is that the accommodation cannot cause an "undue hardship" on the employer, which is defined as "significant difficulty or expense."[34]

Despite these legal obligations, many employers refuse to accommodate their employees' disabilities, and if the disabled workers sue, they often lose. In the first eighteen years after the ADA was passed, employees often lost their ADA claims because courts determined they did not fall into the ADA's protected class. The Supreme Court and lower federal courts had interpreted the ADA's definition of disability very narrowly, leading to plaintiffs having their ADA claims dismissed in over 90 percent of cases.[35] Even after the ADA was amended in 2008 to dramatically expand the definition of disability, there are signs indicating that employees are not faring much better on the merits of their cases, especially when the accommodation sought is a change to the employer's structural norms.[36] In other words, even though employers are technically obligated to accommodate their disabled employees, they often don't and courts rarely force them to.

B *Caregiver Protections: FMLA, Title VII, PDA*

Workers with caregiving responsibilities are not entitled to accommodations in the workplace. In fact, they are entitled to very few benefits. In certain circumstances, workers with caregiving responsibilities are entitled to leaves of absence under the FMLA; however, this entitlement is fairly limited. The FMLA's caregiving provisions only cover absences to care for an employee's spouse, child, or parent who has a serious health condition. The statute does nothing to address the routine caregiving obligations most parents have, such as when babysitters or nannies are sick, schools are closed, a parent's presence is needed at school, or children have routine

[33] 42 U.S.C. §§ 12111(9)(A)-(B), 12112(b)(5)(A).
[34] 42 U.S.C. § 12111(10)(A).
[35] Colker 2005, at 79.
[36] Albiston 2010; Porter 2014b, at 70–81.

medical appointments. Furthermore, the coverage of the FMLA is limited. It only covers employers who have 50 or more employees and only applies to employees who have worked for their employer for one year and who have worked at least 1,250 hours in the prior year. Finally, the FMLA only requires the employer to provide unpaid leave, making it difficult (if not impossible) for many caregivers to take advantage of their right to leave.[37]

Other than this limited entitlement to leave under the FMLA, there is no protection for workers with caregiving responsibilities. Although Title VII protects against sex discrimination (in addition to discrimination based on race, color, religion, and national origin), it only prevents employers from discriminating based on sex or sex plus another characteristic, such as the fact that a woman is a parent. Thus, if an employer refused to hire a woman because she was the mother of young children and the employer assumed (with no evidence) that her status as a mother meant she would not be committed to her job, she should have an actionable claim. However, Title VII does not impose upon employers an affirmative obligation to provide accommodations that would help caregivers balance their work lives and home lives. In other words, Title VII protects only caregivers who are able to perform as "ideal workers" (often because they can afford full-time nanny care or have a stay-at-home spouse).[38] It does nothing to protect what I call "real workers"—those caregiving employees who work hard and are good at their jobs but still occasionally need variations of the default structural norms of the workplace in order to attend to all the routine obligations that arise when caring for children or other family members who are ill, injured, or disabled.[39]

Finally, there is limited protection for pregnant employees under the PDA. The PDA was an amendment to the definition section of Title VII. It simply states that the terms used in Title VII—"because of sex" or "on the basis of sex"—include:

> because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[40]

Thus, the PDA only protects women who are pregnant or recovering from childbirth and leaves women (and caregiving men) without coverage for the rest of the child's life. Moreover, the PDA only requires an employer to treat pregnant employees as the employer would treat other employees who are similar in their inability to work. Thus, if a small employer not covered by the FMLA does not provide leaves of absence for short-term illnesses or injuries, it would not have to

[37] 29 U.S.C. §§ 2611(4)(A), 2611(2)(A), 2612(a)(1)(C); 2612(c); 2614(a)(1).
[38] Albiston 2009, at 1154.
[39] Porter 2010a, at 370–80; *see also* Kessler 2001, at 407.
[40] 42 U.S.C. § 2000e(k).