NOTES

HENDRICKS-ROBINSON AS CROWBAR: REMOVING THE CERTIFICATION BAR TO DISABILITY-BASED EMPLOYMENT-DISCRIMINATION CLASS ACTIONS

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INTRODUCTION

Compared to their nondisabled counterparts, Americans with disabilities face significant discriminatory hurdles in finding and keeping employment. Today it is estimated that only one-third of Americans with disabilities who are qualified to work can find jobs.[1] Although the employment rate for persons without disabilities fluctuates around 80.5%, the rate is just 20.6% for those who require personal assistance to perform a life activity.[2]

The effects of employment discrimination against Americans with disabilities hardly constitute groundbreaking news. Indeed, prejudice in the workplace was one of the central motivating factors behind Congress's passage of America's two foremost disability rights laws: § 504 of the Rehabilitation Act of 1973 (§ 504)[3] and the Americans with Disabilities Act of 1990 (ADA).[4] The ADA, which was regarded by its promoters as a civil rights bill for disabled persons,[5] dedicated an entire section, Title I, to protecting qualifying Americans from discrimination by their employers.

Despite Congress's ambition to reduce employment discrimination against people with disabilities, certain federal courts have made it extremely difficult for disabled employees to protect their federal rights on a comprehensive scale by refusing to hear ADA and § 504 lawsuits brought as class actions. Fashioned into their contemporary form in 1966, Rule 23[6] class actions were designed in large part with civil rights litigants in mind. By allowing multiple plaintiffs to combine their related claims into one lawsuit, Rule 23 was intended to create an

1. RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION 6 (2d ed. 1998).

2. *Id.*

3. 29 U.S.C. § 701(a)(5) (2005) (expressing congressional concern that "individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment").

4. 42 U.S.C. § 12101 (2005).

5. H.R. REP. NO. 101-485 (III), at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449 ("The Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964. . . . The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.").

6. FED. R. CIV. P. 23.

enhanced means for bringing so-called "private attorney general" lawsuits that enforce civil rights protections and deter wrongdoing.[7] Class actions were also designed to spread litigation costs among numerous litigants with similar claims,[8] an important consideration for Americans with disabilities, a group that has traditionally had limited access to financial resources.[9]

In addition, the class action device offers advantages through the use of individual actions or test cases.[10] Arguably, individual employees offended by discriminatory policies could bring a lawsuit seeking to invalidate the policy on behalf of other employees with disabilities. And since the ADA provides for attorney's fees,[11] such individual suits or test cases would not be prohibitively expensive for a litigant to bring. Nevertheless, individual suits pose two drawbacks as compared to a class action. First, test cases or individual suits can be mooted, resulting in delayed or no relief for other employees. In contrast, many circuits hold that a class action should not be dismissed merely because the case has been mooted out for the named plaintiff.[12] Second, test cases suffer from the inherent possibility that individual issues so predominate the litigation that resolution for the individual does not necessarily bring full relief to other similarly situated employees.[13] A class action, on the other hand, is specifically designed to resolve issues that are common to the class and that

7. 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 1:6 (4th ed. 2002); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.").

8. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980).

9. *See, e.g.*, S. REP. NO. 101-116, at 9 (1989) (stating that during congressional consideration of the ADA, President George H.W. Bush noted that "disabled people are the poorest, least educated and largest minority in America").

10. Test cases may be brought in lieu of a class action when both parties agree to litigate the claims of a sample plaintiff or groups of plaintiffs fully. The expectation is that resolution of the test plaintiffs' claims will give the parties a fair assessment of the merit and value of the remaining claims, enabling the litigants to reach a settlement on other claims or at least come to an agreement with regard to certain issues. *See* Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(C)(4)(A)*, 2002 UTAH L. REV. 249, 303-04.

11. 42 U.S.C. § 12205 (2005).

12. *See, e.g.*, Moss v. Lane Co., 471 F.2d 853, 855-56 (4th Cir. 1973) (holding that the fact that the individual claim of the class representative in a class action became moot after class certification does not render the class action moot when there remains a controversy between the defendant and the members of the class represented by the certified class representative).

13. *See* Rosenstein v. CPC Int'l, Inc., No. CIV.A.90-4970, 1991 WL 1783, at *5 (E.D. Pa. Jan. 8, 1991) (holding that "mini-trials" are not appropriate to prove individual reliance issues).

will aid in resolving all members' claims.[14]

Because of the litigation advantages that Rule 23 confers on civil rights plaintiffs, Alba Conte and Herbert Newberg, leading authorities on class action lawsuits, have observed that "[t]he potential for class-based suits [in disability discrimination cases] is enormous."[15] Since 1993, however, a string of federal cases has prevented disabled litigants from utilizing Rule 23 by holding that the class action is not an appropriate method for resolving disability-based employment discrimination claims. In *Chandler v. City of Dallas*, for example, a § 504 class action challenged a city policy that established physical standards for employees who drove on public roads as a part of their jobs.[16] According to the representative plaintiffs, one of whom had diabetes that required insulin for control and another who had impaired vision in his left eye, the failure to provide a waiver from the standards for disabled employees who could nevertheless drive safely violated their rights.[17]

Instead of conducting a traditional Rule 23 certification analysis, the Fifth Circuit refused to grant class certification on the grounds that only litigants who meet the definitional requirements of § 504 are eligible to bring suit under the law. In the court's opinion, the determination of whether a plaintiff is disabled or "otherwise qualified" under the law's definition is an individualized, case-by-case determination that operates as a threshold for preventing the use of class actions in such a context.[18]

The concept of the "individualized inquiry," upon which the Fifth Circuit based its decision in *Chandler*, was borrowed from the Supreme Court's 1987 case of *School Board of Nassau County v. Arline*.[19] In *Arline*, the Court held that § 504 requires courts to conduct an "individualized inquiry" to determine whether the plaintiff is "otherwise qualified" to perform the essential functions of the job, in spite of her disability.[20] Ironically, the Court had created the individualized inquiry in an attempt to provide *more* protections for employees by ensuring that prejudices about certain disabilities did not mechanically lead judges to conclude that the employer had acted lawfully.[21]

14. Romberg, *supra* note 10, at 304 (noting, in comparison, that "a test case resolves a particular plaintiff's claims, which may not result in findings that can be applied broadly to class members").

15. 8 CONTE & NEWBERG, *supra* note 7, at § 24:6.

16. 2 F.3d 1385, 1388-89 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994).

17. *Id.*

18. *Id.* at 1396.

19. 480 U.S. 273 (1987).

20. *Id.* at 287.

21. *Id.* ("[An individualized inquiry] is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.").

Despite the Fifth Circuit's dubious utilization of the individualized inquiry, its approach in *Chandler* has been mimicked and extended in a handful of § 504 and ADA cases. Courts including the Tenth Circuit Court of Appeals,[22] the Northern District of California,[23] and the Northern District of West Virginia[24] have all since held that cases brought under the ADA or § 504 should not be certified as class actions because the requisite individual inquiry acts as a form of threshold bar.[25] This position was summed up by the Northern District of West Virginia in *Burkett v. United States Postal Service* when it wrote that "[i]n the view of several federal courts, the need for this individualized, fact-driven determination renders Rehabilitation Act and ADA actions ill-suited for class treatment."[26]

Additional courts, perhaps misinterpreting *Chandler*, have treated the individualized inquiry test not as a threshold bar, but instead as a factor to be considered during the Rule 23(a) analysis. District courts for the Middle District of Tennessee[27] and the Northern District of Georgia,[28] for example, have held that disability-based employment-discrimination class actions cannot be maintained because the individual questions involved in determining whether the plaintiffs are disabled or otherwise qualified under the statutes destroy the requisite typicality and commonality. Thus, over time the individualized inquiry has been utilized by federal courts to fashion both a threshold bar to disability class actions and a factor destroying commonality and typicality within disability class actions.

Not all federal courts agree with *Chandler* and its progeny, however, and disability-based class actions have been certified in both employment and other contexts. Most notably in the Central District of Illinois's case *Hendricks-Robinson v. Excel Corp.*[29]—but in several other district court cases as well[30]—

22. Davoll v. Webb, 194 F.3d 1116, 1146 (10th Cir. 1999).

23. Sokol v. New United Motor Mfg., Inc., No. C 97-4211 SI, 1999 U.S. Dist. LEXIS 20215, at *11-13 (N.D. Cal. Sept. 17, 1999).

24. Burkett v. U.S. Postal Serv., 175 F.R.D. 220, 225 (N.D. W. Va. 1997).

25. One commentator regards *Chandler* as standing for the proposition that "the individualized inquiry per se negates the possibility of establishing a class action" and that "[t]he direct result of accepting this analysis is that a class action lawsuit against disability-based employment discrimination can never be brought." Noah D. Lebowitz, Comment, *An Amendment to Rule 23: Encouraging Class Actions in Section 504 and ADA Employment Discrimination Cases*, 30 U.S.F. L. REV. 477, 494 (1996).

26. *Burkett*, 175 F.R.D. at 223.

27. Lintemuth v. Saturn Corp., No. 1:93-0211, 1994 WL 760811 (M.D. Tenn. Aug. 29, 1994).

28. Burdette v. Fed. Express Corp., No. 1:97-cv-2935-TWT, 1998 WL 190275 (N.D. Ga. Feb. 18, 1998).

29. Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667 (C.D. Ill. 1996).

30. *See, e.g.*, Delise v. Fed. Express Corp., No. 99 C 4526, 2001 WL 321081 (N.D. Ill. Mar. 30, 2001); Wilson v. Pa. State Police Dep't, No. CIV.A.94-CV-6547, 1995 WL 422750 (E.D. Pa. July 17, 1995).

courts have rejected *Chandler*'s approach, certifying class actions in disability-based employment-discrimination cases. In *Delise v. Federal Express Corp.*, for example, defendants relied on *Chandler* for the proposition that an "ADA claim cannot be maintained as a class action and thus should be dismissed as a matter of law," an argument the district court flatly rejected, agreeing instead with the plaintiff that "ADA class actions are not prohibited as a matter of law."[31] Moreover, defendants invoking *Chandler* in ADA cases dealing with government-related services (Title II) or public accommodations (Title III) have routinely been rebuffed, suggesting that its applicability outside the employment context is limited.[32]

The ideological split among courts over how to treat disability-based employment-discrimination class actions carries broad implications for the future of disability-rights litigation. Should the principles of *Chandler* and its progeny prevail, employers could perpetuate a policy of discrimination against a class of persons with disabilities, whereas that class of employees would be barred from challenging such conduct on a class-wide basis. Disabled litigants would be required to bring claims on a case-by-case basis, with all of the related financial and procedural burdens of that approach.[33]

During the 1970s and early 1980s, federal courts faced a similar debate over securities class actions, and the courts' treatment of those cases offers guidance on how to resolve the current conflict over class certification in disability-based employment actions. One of the elements required to sustain most securities fraud claims is proof that the plaintiff subjectively relied on misstatements by the defendant, thereby causing his damages. As the Supreme Court recognized, requiring proof of individualized reliance from each member of the proposed plaintiff class would effectively prevent investors from proceeding with a class action, since individual issues would overwhelm the common ones.[34] But the vast majority of courts now hold that although the requirement of reliance must theoretically be proved for each individual, certification of securities class actions should not be prohibited, "since to rule otherwise would preclude class actions in securities fraud cases and hamper enforcement of the federal securities laws."[35]

Given the judicial system's analogous interest in enforcing America's civil rights laws through private actions, the Supreme Court ought to overrule *Chandler* and end the use of the individualized inquiry as a threshold bar to disability-based employment-discrimination class actions. As with securities class actions, plaintiffs should still need to meet the requirements of Rule 23(a),

31. *Delise*, 2001 WL 321081, at *1.
32. *See infra* Part IV.C.
33. *See* Lebowitz, *supra* note 25, at 499.
34. Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988).
35. 7 CONTE & NEWBERG, *supra* note 7, § 22:60.

including typicality and commonality. But instead of simply rejecting class certification, courts concerned with the individualized inquiry should bifurcate the trial into class-wide liability and individual phases for issues such as damages and defenses. This approach would capture the efficiency and equitable benefits of the class action device while preserving an individual inquiry into the eligibility of each plaintiff.

This Note progresses by first reviewing the individualized inquiry requirement in America's two foremost federal disability rights laws—§ 504 of the Rehabilitation Act and the Americans with Disabilities Act. In Part II, Rule 23's prerequisites for class certification are examined. Parts III and IV explore the divergent approaches utilized by federal courts in certifying disability-based employment-discrimination classes, with Part V reserved for an ultimately unsuccessful attempt at harmonizing the conflicting approaches. Finally, Part VI explains why the Supreme Court ought to resolve the ideological split by overruling *Chandler*.

I. THE "INDIVIDUALIZED INQUIRY" IN DISABILITY RIGHTS STATUTES

A. *Rehabilitation Act of 1973*

In 1973, Congress passed § 504 of the Rehabilitation Act, America's first attempt to combat discrimination against people with disabilities. The law outlawed discrimination by entities receiving federal funds[36] and was motivated by two general purposes: first, "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and integration into society";[37] and second, "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities."[38]

The law's protections against employment discrimination, however, only apply to those who can meet the statutory definition of "disabled." Thus, litigants hoping to take advantage of § 504's protections must be able to show that they either: (1) have "a physical or mental impairment that substantially limits one or more . . . major life activities"; (2) have "a record of such an impairment"; or (3) are "regarded as having such an impairment."[39] In

36. Rehabilitation Act, § 504(a), 29 U.S.C. § 794(a) (2005) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

37. § 701(b)(1).

38. § 701(b)(2).

39. § 705(20)(B).

addition, a litigant who is discriminated against at work must be able to show that, despite her disability, she is an "otherwise qualified"[40] person "who, with reasonable accommodation, can perform the essential functions of the job in question."[41]

In *School Board of Nassau County v. Arline*, the Supreme Court reviewed a suit brought by a teacher who was terminated from her position because she suffered from recurrent tuberculosis.[42] In maintaining that the plaintiff could sustain a suit under § 504 because she was covered by the statute, the Court ruled that § 504 mandates the use of an individualized inquiry to determine if a plaintiff is otherwise qualified for the position.[43]

The principal purpose of the individualized inquiry was to benefit the plaintiff, because requiring the employer to determine whether the disabled employee was "otherwise qualified" to perform the job despite the disability would protect against the "pernicious danger of stereotyping behavior."[44] Thus, the individualized inquiry principle was created with the intention of protecting disabled employees, and legitimate application of the principle presumably ought to retain its original purpose of protecting employees with disabilities from unjustifiable bias by employers.

B. *Americans with Disabilities Act*

When Congress drafted the Americans with Disabilities Act seventeen years after the passage of § 504, it was troubled by the continuing discrimination against people with disabilities and believed that additional protections were in order.[45] Passage of the ADA was motivated by data finding that, on the whole, "persons with disabilities are much poorer, have far less education, have less social and community life, participate much less often in

40. § 794(a).

41. 34 C.F.R. § 104.3(*l*)(1) (2005).

42. 480 U.S. 273 (1987).

43. *Id.* at 287.

44. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 25 (1994); *see* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). The *Arline* Court explained:

> The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

Id. at 287.

45. *See* Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2005) (stating that the ADA was designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

social activities that other Americans regularly enjoy, and express less satisfaction with life."[46]

Despite the failings of § 504, Congress transplanted significant provisions of § 504 into the ADA. In particular, the ADA provides protection only to those who qualify as "disabled,"[47] which is again defined in accordance with the three prongs of: (1) having an actual disability that substantially limits a major life activity; (2) having a record of such disability; or (3) being regarded as having such disability.[48]

Unlike § 504, however, the ADA was divided into three parts to address discrimination in areas that Congress believed needed special attention: employment (Title I);[49] discrimination by public entities, including state and local governments (Title II);[50] and discrimination in public accommodations, including hotels, restaurants, and movie theaters (Title III).[51]

Title I, the ADA's employment discrimination provision, prohibits a covered entity from discriminating against a qualified individual because of a disability in regard to most aspects of the employment relationship.[52] A "qualified individual" under Title I, and a person therefore covered by the protections of the statute, is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[53] Borrowing from the *Arline* Court's reading of § 504, regulations interpreting Title I require an individualized inquiry into the litigant's condition before he is allowed to bring suit. Thus, determinations such as whether the individual is disabled or whether the litigant is qualified to perform the essential functions of the job ought to be made on a case-by-case basis.[54] As in *Arline*, the ADA's

46. H.R. REP. NO. 101-485 (III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447.

47. COLKER & TUCKER, *supra* note 1, at 25.

48. 42 U.S.C. § 12102(2); *cf.* 29 U.S.C. § 705(20)(B) (providing the virtually identical definition of "disabled" under § 504).

49. 42 U.S.C. §§ 12111-12117.

50. §§ 12131-12165; *see also* Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (2005) ("The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.").

51. 42 U.S.C. §§ 12182-12189 (2005).

52. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

53. § 12111(8).

54. 29 C.F.R. app. § 1630; *see also* Michael D. Carlis & Scott A. McCabe, Comment, *Are There No Per Se Disabilities Under the Americans with Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 563 (1998) ("It would seem, therefore, that

individualized inquiry requirement has been justified on the grounds that it protects disabled employees, as the "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs."[55]

Title II's protections against discrimination by state and local governments are similarly structured to those in Title I.[56] Like Title I, Title II only affords its protections to individuals who fit the three-pronged definition of "disabled."[57] And like Title I, Title II only applies to "qualified individuals," which Title II defines as

> individual[s] with . . . disabilit[ies] who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[58]

Title III likewise only affords its protections against discrimination in the public accommodations context to individuals who can meet the ADA's definition of disabled.[59]

Unlike their readings of Title I, however, courts have so far refused to use the individualized inquiry as a threshold bar prohibiting class actions targeting discrimination by state and local governments or in public accommodations. Despite the structural similarities between all three titles of the ADA, the class action device is less accessible to disabled Americans discriminated against by their bosses than those discriminated against by a public official or maître d'.

II. RULE 23 CLASS ACTIONS AND DISABILITY RIGHTS LITIGATION

Federal Rule of Civil Procedure 23 was first approved in 1966 as a procedural device for dealing with a proliferation of cases involving multiple

every plaintiff's condition must be individually analyzed to determine her 'disability' status.").

55. 29 C.F.R. app. § 1630.

56. Title II, unlike either Title I or Title III, does not limit protections to "qualified individuals." Although litigants must be "disabled" according to the ADA's definition, Title II arguably requires less of an individualized inquiry since a finding that the litigant is "qualified" is not required. 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

57. § 12102(2).

58. Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.104 (2005)

59. 42 U.S.C. § 12182.

plaintiffs injured by the same defendant. By allowing multiple parties to combine individual claims into the same lawsuit, class actions are intended to benefit all involved parties. For the courts, class actions preserve judicial economy and promote efficiency.[60] For defendants, class actions protect against the possibility of inconsistent obligations.[61] For plaintiffs, class actions protect the interests of absentees, provide improved access to judicial relief for claimants with small damages, and offer an enhanced means for private attorney general suits to enforce civil rights laws and deter wrongdoing.[62]

To certify a class under Rule 23(a), plaintiffs are required to meet four prerequisites: numerosity, commonality, typicality, and adequacy of representation.[63] In addition, plaintiffs must prove that they meet the requirements of Rule 23(b): in civil rights or discrimination lawsuits, plaintiffs usually must either show that the defendant "acted or refused to act on grounds generally applicable to the class" or that the questions of law or fact common to all class members predominate over individual questions.[64]

The individualized inquiry has been cited by some courts as a factor weighing heavily against class certification because it destroys typicality[65] and commonality.[66] To further understand how the individualized inquiry and Rule 23(a) interact, Parts III.A and III.B detail what the commonality and typicality requirements generally entail for civil rights litigants. Part III.C describes how a number of courts faced with disability-based employment-discrimination claims have shifted their focus away from an underlying pattern of discrimination and onto the individual nature of the plaintiffs' alleged disabilities to conclude that Rule 23 requirements cannot be satisfied.

A. *Commonality in Discrimination-Based Class Actions*

Although Rule 23(a)(2) requires that there be "questions of law or fact common to the class,"[67] it does not require that *all* questions of law or fact raised in the litigation be common.[68] Conte and Newberg explain, "The test or standard for meeting the Rule 23(a)(2) [commonality] prerequisite is qualitative

60. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 151 n.3 (1982); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980); *see also* 1 CONTE & NEWBERG, *supra* note 7, § 1:1.

61. *Geraghty*, 445 U.S. at 402-03; *see also* 1 CONTE & NEWBERG, *supra* note 7, § 1:6.

62. 1 CONTE & NEWBERG, *supra* note 7, § 1:6.

63. FED. R. CIV. P. 23(a).

64. FED. R. CIV. P. 23(b).

65. Lintemuth v. Saturn Corp., No. 1:93-0211, 1994 WL 760811, at *4 (M.D. Tenn. Aug. 29, 1994).

66. Burdette v. Fed. Express Corp., No. 1:97-cv-2935-TWT, 1998 WL 190275 (N.D. Ga. Feb. 18, 1998).

67. FED. R. CIV. P. 23(a)(2).

68. *See, e.g.*, Stewart v. Abraham, 275 F.3d 220, 227 (3d Cir. 2001).

rather than quantitative; that is, there need be only a single issue common to all members of the class."[69]

In cases involving alleged racial or sexual discrimination by the defendant, commonality may typically be satisfied by the presence of a discriminatory rule or practice or a general policy of discrimination.[70] Similarly, in cases involving employment discrimination, commonality may be established by a pattern or practice of discrimination.[71] Thus, class challenges to discriminatory employment practices are generally permitted when there is a showing that the employment decisions affecting different positions or facilities stem from a centralized personnel policy of discrimination.[72]

Certain employment-discrimination decisions have focused on the individual facts surrounding the claims of class members and have thereby denied certification for failure to meet the commonality requirement. For example, in *Ward v. Luttrell*, plaintiffs brought an action on behalf of all female workers in the state, challenging state labor laws prescribing maximum hours for women and thereby preventing them from earning overtime.[73] The court refused to grant class certification on the ground that class members did not share common questions of fact, even though it recognized that the question of statutory validity was common to the class.[74] According to Conte and Newberg, authors of the leading treatise on class actions, *Ward* and similar decisions are contrary to the clear language of Rule 23, which requires a common question either of fact *or* law but nowhere requires that all questions of law and fact be common to the class.[75]

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69. 1 CONTE & NEWBERG, *supra* note 7, § 3:10.

70. *See, e.g.*, Reeb v. Ohio Dep't of Rehab., 203 F.R.D. 315, 321-22 (S.D. Ohio 2001).

71. Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1120-21 (E.D. Ark. 2000).

72. *See, e.g.*, Holsey v. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984) (probing for "proof of a pattern and practice of discrimination"); *see also* 8 CONTE & NEWBERG, *supra* note 7, § 24:20.

73. 292 F. Supp. 165, 165-66 (E.D. La. 1968).

74. *Id.* at 168.

75. 1 CONTE & NEWBERG, *supra* note 7, § 3:11; *see also* Marisol A. v. Giuliani, 126 F.3d 372, 376-77 (2d Cir. 1997) (certifying a class of children who allegedly suffered severe abuse and neglect in an action against state and city child-welfare officials despite contentions that the approximately 100,000 children presented predominantly individual questions because there was a common question of law as to whether each child had a legal entitlement to the department's services); Upper Valley Ass'n for Handicapped Citizens v. Mills, 168 F.R.D. 167, 170 (D. Vt. 1996) (certifying class of children with disabilities suing the commissioner of the Vermont Department of Education for violations of the Individuals with Disabilities Education Act (IDEA), despite different factual issues relating to each child, because the defendants' efforts to develop and implement procedures under the IDEA were common to all class participants); Keyser v. Commonwealth Nat'l Fin. Corp., 121 F.R.D. 642, 649 (M.D. Pa. 1988) (holding that "individual questions of reliance do not defeat class certification for pendant common law securities claims" because defendant's liability was common to the class).

Finally, Conte and Newberg explain that most courts have held that the fact that class members must individually demonstrate their right to recover[76] or the fact that class members may have different levels of harm "will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs."[77]

B. *Typicality in Discrimination-Based Class Actions*

Rule 23(a)(3)'s requirement of typicality focuses on the desired characteristics of the class representative. It is intended to ensure that there exists a relationship between the named plaintiff's claims and the claims alleged on behalf of the class such that in pursuing his own self-interest in the litigation, the named plaintiff will advance the interests of the class members as well.[78]

A plaintiff's claims are typical if they arise from the same "course of conduct that gives rise to the claims of other class members," and if his "claims are based on the same legal theory."[79] Thus, the focus of the test is on the plaintiff's claims, not the fact patterns underlying the individual claims, and "factual differences will not render a claim atypical if the claim arises from the same . . . course of conduct that gives rise to the claims of the [absent] class members."[80]

Most courts will not entertain the argument that differences in the amount of damages claimed will make a plaintiff's claim atypical.[81] If defendants were permitted to disqualify class actions based on differences in the amounts of individual damages, "a class action for damages would never be possible," since "variations in amount of damages among class members are inevitable unless they happen to be factually identical, which is not required under Rule 23."[82]

76. *See, e.g.*, Jennings Oil Co. v. Mobil Oil Corp., 80 F.R.D. 124, 129 n.8 (S.D.N.Y. 1978) ("The fact that individual proof may be required to make out a tying claim does not negate the soundness of permitting the suit to proceed as a class action.").

77. 1 CONTE & NEWBERG, *supra* note 7, § 3:12 (footnotes omitted).

78. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982); *In re* Telectronics Pacing Sys., 168 F.R.D. 203, 214 (S.D. Ohio 1996); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 387 n.120 (1967).

79. 1 CONTE & NEWBERG, *supra* note 7, § 3:13.

80. Stewart v. Abraham, 275 F.3d 220, 227-28 (3d Cir. 2001) (quoting Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992)).

81. *See, e.g.*, DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174-75 (8th Cir. 1995).

82. 1 CONTE & NEWBERG, *supra* note 7, § 3:16.

C. *Procedural Obstacles to Class Litigation: Focus on the Plaintiff's Disability*

In 1989, a year before the ADA was passed, Judge Robert L. Carter of the Southern District of New York identified a trend in federal courts of judges rejecting class actions in civil rights suits despite the liberal conditions of class certification.[83] Recognizing that victims of civil rights violations depend acutely on the class action device as a method for protecting rights,[84] Judge Carter bemoaned that "otherwise legitimate efficiency-based arguments are being pressed into the service of a political agenda hostile to the substantive rights of certain classes of federal litigants. This is a development that cannot be reconciled with the founding purposes of the [Federal] Rules [of Civil Procedure] . . . ."[85]

The "procedural obstacles to class litigation"[86] that Judge Carter identified in other types of civil rights litigation have now permeated disability-based employment-discrimination claims. Although class certification in other contexts has traditionally focused on the underlying policy or pattern of abuse, beginning with the Fifth Circuit's 1993 decision in *Chandler*, a number of courts faced with disability-based employment-discrimination claims have instead focused on the individual nature of the plaintiffs' alleged disabilities to conclude that the typicality or commonality requirements have not been satisfied or, worse yet, to fashion a threshold bar against all such claims. Such decisions are explored in the following Part.

III. *CHANDLER* AND ITS PROGENY: MANIPULATION OF THE INDIVIDUALIZED INQUIRY TO DENY CLASS CERTIFICATION

In the 1993 case of *Chandler v. City of Dallas*, the Fifth Circuit became the first court to disallow a § 504 class action due to the individualized inquiry requirement.[87] Two city officials, one who had insulin-dependent diabetes and another who had impaired vision in his left eye, filed a class action after the

83. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181-82 (1989).

84. *Id.* at 2184-85.

85. *Id.* at 2181.

86. *Id.* at 2186.

87. 2 F.3d 1385, 1396 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). The Ninth Circuit arguably made this move first, but only in dicta. After denying class certification in a § 504 case brought by an epileptic applicant to the United States Postal Service for lack of numerosity, the Ninth Circuit wrote:

> In addition, determining the propriety of relief in cases of this nature underscores the importance of case-by-case adjudication. Whether a particular individual is a "qualified handicapped individual" under the law will necessitate an inquiry into the individual's medical and work history as well as an inquiry into other factors bearing on the person's fitness for a given position.

Mantolete v. Bolger, 767 F.2d 1416, 1425 (9th Cir. 1985).

city adopted a driver-safety program establishing physical standards for city employees who drove on public roads as an intrinsic part of their job.[88] The employees alleged that the policy violated § 504 because it disqualified drivers who did not meet the physical standards from consideration for "primary driver" jobs but did not include a waiver for otherwise qualified employees.[89] Similar policies have often been found to be unlawfully discriminatory when they fail to provide a waiver, since employees with disabilities are supposed to get individualized assessments from their employer to determine whether they are capable of performing the essential job functions despite the disability.[90]

Although the district court approved class certification, the Fifth Circuit found certification inappropriate on the grounds that § 504 only prohibits discrimination against otherwise qualified individuals with disabilities.[91] To determine whether plaintiffs meet this definition, the Fifth Circuit believed that district courts would be required "to make an individualized inquiry and [make] appropriate findings of fact,"[92] and that "the determinations of whether an individual is handicapped or 'otherwise qualified' are necessarily individualized inquiries."[93] As the Supreme Court did in *Arline*, the Fifth Circuit purported to justify its decision as essential for protecting employees from discrimination.[94] Unlike *Arline*, however, the court's decision squarely

88. *Chandler*, 2 F.3d at 1388.

89. *Id.*

90. *See, e.g.*, McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999) ("[Plaintiff] is correct in noting that '100% healed' policies are *per se* violations of the ADA. A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation."); Bates v. United Parcel Serv., Inc., No. C99-2216 TEH, 2004 WL 2370633, at *23-24 (N.D. Cal. Oct. 21, 2004) (holding that plaintiffs made out prima facie case of discrimination because a per se bar of deaf drivers would inherently screen out individuals who could perform the essential functions of the job); Hutchinson v. United Parcel Serv., 883 F. Supp. 379, 396-97 (N.D. Iowa 1995) (holding that a "100% healed" policy is a violation of the ADA because it fails to make an individualized assessment of a person's "ability to perform the essential functions of the person's job with or without accommodation following injury and resulting permanent disability, but substitutes for this inquiry simply a determination of whether the person is '100% healed' from the injury"); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 341-42 (W.D. Okla. 1994) (holding that blanket exclusion of drivers with insulin-dependent diabetes violates Title I's case-by-case assessment requirement); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1216-21 (N.D. Ohio 1993) (holding that blanket exclusion of candidates with insulin-dependent diabetes from police officer positions violates the ADA's case-by-case assessment requirement).

91. *Chandler*, 2 F.3d at 1389, 1397.

92. *Id.* at 1396.

93. *Id.*

94. *Id.* ("Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudices, stereotypes, or unfounded

opposed the interests of the two employees in protecting their rights, forcing them to bear the burden of individually bringing each suit contesting the city's policy.

Although the Fifth Circuit did not explicitly suggest that it viewed the individualized inquiry as a threshold bar or per se barrier to disability-based employment-discrimination suits, the decision is difficult to read any other way. The court did not conduct any inquiry into the fulfillment of Rule 23(a) requirements and struck down certification before even reaching those factors. The court's reasoning leaves little room for a hypothetical disability-based employment-discrimination claim that *would* be allowed to proceed as a class action.

In 1995, a district court in Colorado applied *Chandler*'s reasoning to an ADA claim brought under Title I. In *Davoll v. Webb*, former police officers who had sustained work-related injuries that rendered them unable to make forceful arrests sued the Denver Police Department for allegedly failing to provide them permanent light-duty positions or reassign them to city nonpolice jobs.[95] Noting that "only those persons with a 'disability' as defined in the ADA may state a claim under the act," the court rejected the idea that each plaintiff qualified under that definition.[96] The court wrote, "The mere fact that each Plaintiff sustained work-related injuries resulting in physical impairments . . . would not mean he or she had a 'disability' as defined in the ADA."[97] Citing *Chandler*, the court held that an individualized inquiry would have to be made into whether each plaintiff met the definitional requirements, a determination best made on a case-by-case basis.[98]

Reviewing the rejection of class certification under an "abuse of discretion" standard, the Tenth Circuit upheld the district court's decision.[99] Sympathetic to plaintiffs' concerns that the *Davoll* decision would establish a bar to disability-based employment-discrimination cases in the Tenth Circuit, the court perplexingly suggested in dicta that other district courts could continue to certify classes in such cases but that the *Chandler* approach was also appropriate.[100] Although it would logically seem that class actions either

fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.").

95. 160 F.R.D. 142, 143 (D. Colo. 1995), *aff'd*, 194 F.3d 1116 (10th Cir. 1999).

96. *Id.* at 145.

97. *Id.* at 146.

98. *Id.*

99. Davoll v. Webb, 194 F.3d 1116, 1131, 1135 (10th Cir. 1999).

100. *Id.* at 1147 n.20. The court stated:

> We understand plaintiffs' concern that by denying their class certification motion and upholding the United States pattern and practice action, this decision may be interpreted as holding that only the government can bring a class-wide ADA employment suit. Such an interpretation would be unfounded. Given the deferential standard by which we review class certification, it is possible the district court could have certified the class in its discretion, or

are or are not proscribed because of the individualized inquiry, the Tenth Circuit apparently felt uncomfortable committing to one approach, and the issue remains open today.

Since *Chandler* and *Davoll*, federal courts (and even state courts[101]) have continued to use the individualized inquiry as a threshold bar precluding class actions in disability-based employment-discrimination cases. In *Sokol v. New United Motor Manufacturing, Inc.*, for example, the Northern District of California held that certification was inappropriate for a Title I claim alleging systematic failure by a company to provide reasonable accommodations to employees suffering from work-related injuries to their wrists or shoulders.[102] Referring to both *Chandler* and *Davoll*, the court noted that "[o]ther courts have expressed similar reservations in denying class certification of disability discrimination claims"[103] and identified itself as merely one in a line of courts that "have been cautious to certify disability discrimination claims as class actions due to the individualized determinations required by such claims."[104]

In *Burkett v. United States Postal Service*, a district court in West Virginia rejected a certification claim brought by aspiring U.S. Postal Service employees who were not hired because of medical conditions such as deep-vein thrombosis.[105] Because class members would have to show that they were disabled within the meaning of § 504 as a prerequisite to bringing suit, the class was denied certification on the grounds that "[r]esolution of the question of whether a plaintiff is in fact disabled requires an individualized, case-by-case inquiry."[106] Although the court went on to assert that its decision did not mean that "actions brought under [§ 504] and the ADA are per se inappropriate for class certification,"[107] the court declined to explain under what circumstances the *Chandler* threshold would allow a class action to proceed.

> could have modified the proposed definition so that it was sufficiently definite. Of course, we do not decide those questions as our holding here is limited to the issue directly before us.

Id.

101. For an example of a state court influenced by *Chandler*, see *McCullah v. Southern California Gas Co.*, 98 Cal. Rptr. 2d 208, 212-13 (Ct. App. 2000). In *McCullah*, the California state appellate court rejected certification in a class action challenging a gas utility's bidding system for vacant positions. The court believed that the principles in *Chandler* were on point, writing: "In race and gender discrimination cases, the identification of class members is straightforward. Where the discrimination claim is based on an employee's physical or mental disability, it is difficult to identify and certify the class. The question of whether the employer must provide reasonable accommodation involves a case-by-case inquiry." *Id.* at 213 (internal citation omitted).

102. No. C 97-4211 SI, 1999 U.S. Dist. LEXIS 20215, at *3-4, 16-19 (N.D. Cal. Sept. 17, 1999).

103. *Id.* at *11-12.

104. *Id*. at *11.

105. 175 F.R.D. 220, 221, 224-25 (N.D. W. Va. 1997).

106. *Id.* at 223.

107. *Id.* at 224 n.10.

Perhaps due to misunderstanding the threshold nature of the *Chandler* decision, a handful of district courts have also relied on the decision to reject class certification on the grounds that the individualized inquiry destroys the Rule 23(a) requirements of typicality or commonality. Unlike *Chandler*, these courts actually engaged in the Rule 23 analysis, suggesting that the individualized inquiry acts more like an influential factor weighing against class certification rather than an absolute hurdle.

One year after *Chandler*, a district court in Tennessee was faced with a Title I class action brought by employees of an auto manufacturer that allegedly failed to reasonably accommodate the employees' known medical restrictions.[108] In *Lintemuth v. Saturn Corp.*, the plaintiffs claimed that the carmaker systematically segregated injured employees into work units that were not given the same opportunities to earn overtime as employees without medical restrictions.[109] As in *Chandler*, the district court suggested that it was required to conduct an individualized inquiry for the benefit of the disabled workers[110] but then addressed the individualized inquiry dilemma in a discussion of the named plaintiffs' typicality.[111] According to the court, "[t]he variance in the named plaintiffs' personal characteristics, coupled with the individualized, case-by-case analysis required by the ADA," destroyed typicality.[112]

Similarly, two courts have used the individualized inquiry to reject class certification on the grounds that the individualized inquiry spoils commonality. In *Burdette v. Federal Express Corp.*, the Northern District of Georgia refused to certify an ADA Title I class on the ground that "any common questions of fact or law would be greatly outweighed by the need for individualized determination as to whether members of the purported class were qualified individuals with a disability."[113] And in *Rodriguez v. United States Department of Treasury*, the District Court for the District of Columbia rejected certification of a class of asthmatics both because of a lack of numerosity and because the burden of proving that every plaintiff met the definitional requirements of § 504 "presents a situation in which the potential for common adjudication fades and individual circumstance comes to the fore."[114]

Thus, since *Chandler* in 1993, federal courts have used the individualized inquiry as a justification for rejecting class certification in two distinct ways. First, cases mimicking *Chandler*, such as *Davoll* and *Sokol*, have used the

108. Lintemuth v. Saturn Corp., No. 1:93-0211, 1994 WL 760811, at *1 (M.D. Tenn. Aug. 29, 1994).

109. *Id.* at *1-2.

110. *Id.* at *3.

111. *Id.* at *4.

112. *Id.*

113. No. 1:97-cv-2935-TWT, 1998 WL 190275 (N.D. Ga. Feb. 18, 1998).

114. 131 F.R.D. 1, 8 (D.D.C. 1990).

individualized inquiry as the *Chandler* court originally did—as a threshold bar to certification of class actions in disability-based employment-discrimination suits. According to this approach, it is difficult to perceive how any disability-based employment-discrimination suit could proceed as a class action, since such suits will always require an individualized inquiry of some sort, if only into whether the plaintiffs are indeed "disabled."

Second, courts modifying *Chandler* have transformed the individualized inquiry test into a factor that weighs heavily against class certification in the court's Rule 23(a) analysis. Theoretically, decisions such as *Lintemuth* and *Burdette* leave open the possibility of disability-based employment-discrimination class actions, but only ones in which the commonality of the plaintiff class and typicality of the named plaintiff are so strong as to outweigh the substantial conflicting factor of the individualized inquiry. Given these courts' focus on the plaintiffs' individual circumstances, as opposed to the defendant's pattern of discrimination, such a burden may be extremely challenging to overcome, but hypothetically possible.

IV. SUCCESSFUL CLASS CERTIFICATIONS UNDER THE ADA AND § 504: FOCUS ON DEFENDANT'S PATTERN OR POLICY

A third approach to class certification in disability-based employment-discrimination cases exists: one allowing class certification in spite of the problems posed by the individualized inquiry. These cases suggest a fundamental disagreement among the federal courts over how to deal with certification in such contexts and present an alternative approach that weighs more heavily in favor of promoting the goals of both America's disability rights laws and the class action device.

A. Hendricks-Robinson *and Permitted Disability-Based Employment-Discrimination Class Actions*

Not all federal courts agree with *Chandler*'s approach, and disability-based employment-discrimination class actions have been certified by district courts in both the Third and Seventh Circuits. The first set of cases comes from the Seventh Circuit. Standing in direct contrast to *Chandler* is the Central District of Illinois's case of *Hendricks-Robinson v. Excel Corp*. Brought by former employees of a meatpacking plant, the suit alleged that the defendant employer had engaged in a pattern of terminating employees because of their disabilities in violation of the ADA's Title I.[115]

The defendant recommended that the district court adopt a *Chandler*-like approach, a suggestion the court rebuffed. The court wrote: "It appears that

115. 154 F.3d 685 (7th Cir. 1998).

Excel does not believe that a class action is an appropriate manner to litigate claims under the ADA. The Court, of course, disagrees. We see no reason why a case which challenges a *policy* cannot proceed as a class action under the ADA."[116] The district court deemed that a class approach was justified since the focus of the lawsuit was properly on defendant's pattern of conduct, not the individual plaintiffs' circumstances: "Plaintiffs are putting Excel's medical layoff policy on trial and not their individual cases."[117] The Seventh Circuit did not disapprove of the district court's approach to class certification and instead focused on the ADA inquiry, stating, "The central issue in this case is whether Excel's medical layoff policy violates the ADA because it fails to provide reasonable accommodation to its permanently restricted employees."[118]

In 2001, another district court within the Seventh Circuit categorically rejected the defendant's request to dismiss an ADA Title I class action. In *Delise v. Federal Express Corp.*, employees of Federal Express alleged a series of violations involving company policies on "leave[s] of absence, return to work, job bidding and transferring and medical record maintenance."[119] Federal Express invoked the holding of *Chandler*, which it interpreted to mean that "the ADA claim cannot be maintained as a class action and thus should be dismissed as a matter of law" due to the requisite individualized determination of whether the individual plaintiffs were disabled or otherwise qualified under the law.[120] The district court rejected this argument, relying instead on *Hendricks-Robinson* for the proposition that "ADA class actions are not prohibited as a matter of law and indeed have been certified where plaintiff alleges a discriminatory policy that is challenged as a per se violation of the ADA *or as commonly applied to the members of the class*."[121] Thus, in the *Delise* court's opinion, when a pattern or policy of disability discrimination is alleged, the class action device is just as appropriate as if the suit involved a racial or sexual discrimination claim.

District courts within the Third Circuit have similarly focused on the pattern or policy of the defendant in certifying disability-based employment-discrimination class actions.[122] In *Wilson v. Pennsylvania State Police*

116. Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667, 670 (C.D. Ill. 1996).

117. *Id.* at 671.

118. *Hendricks-Robinson*, 154 F.3d at 688.

119. No. 99 C 4526, 2001 WL 321081, at *2 (N.D. Ill. Mar. 30, 2001).

120. *Id.* at *1.

121. *Id.* (emphasis added).

122. In addition to *Wilson v. Pennsylvania State Police Department*, the district court for the Eastern District of Pennsylvania certified a class in an ADA Title I suit before *Chandler* was decided, holding that applicants to the Philadelphia police department could challenge vision requirements for employment. *Wilson* relied heavily on *Kimble* for its approach. Kimble v. Hayes, No. CIV.A.89-2644, 1990 WL 20208, at *1-2 (E.D. Pa. Mar. 1, 1990).

Department, an ADA Title I and § 504 lawsuit was brought by rejected police department applicants who failed to meet the job's vision requirements.[123] The court found both commonality and typicality due to the underlying question of whether the police department's unwillingness to accommodate otherwise qualified applicants violated the law, in spite of differences in the fact patterns underlying the individual claims.[124] The Pennsylvania district court felt that attempts by the defendant to focus on plaintiffs' underlying circumstances illegitimately went to the merits of the case, not the propriety of class certification.[125]

B. *Comparison to Securities Fraud Class Actions*

Decisions like *Hendricks-Robinson*, and their divergence from the approach used by *Chandler* and its progeny, are reminiscent of another disagreement between federal courts that arose in the 1970s and 1980s. During that time, plaintiffs began aggregating securities fraud claims into class actions.[126] Plaintiffs in class actions brought under the Securities Exchange Act of 1934 must prove that the alleged violations caused them damage in order to recover.[127] Under the traditional tort law of fraudulent misrepresentation, each plaintiff must show that he subjectively relied on alleged misstatements, which would be impossible in a class action where class members are not actively involved in the litigation.

Although the element of reliance must theoretically be proved individually, Conte and Newberg explain that most courts have refused to prohibit certification of securities fraud class actions on this ground, "since to rule otherwise would preclude class actions in securities fraud cases and hamper enforcement of the federal securities laws."[128] Instead of eliminating the availability of securities class actions, courts have consistently held that it

123. No. CIV.A.94-CV-6547, 1995 WL 422750 (E.D. Pa. July 17, 1995). In *Wilson*, the plaintiff sought to represent applicants who were denied employment due to a visual impairment, despite being able to achieve, "through corrective lenses, surgery, or otherwise, either 20/20 binocular vision or 20/20 vision in one eye." *Id.* at *1.

124. *Id.* at *2-3 (citing *Kimble*, 1990 WL 20208, at *1) ("While the class members may suffer from different types of sight afflictions, the legal stance of all members of the class proposed by the Plaintiff is effectively identical.").

125. *Id.* at *3.

126. For additional examples, see *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 665-67 (D. Minn. 1991), in which the court broadened the application of the hostile environment sexual harassment theory by rejecting the notion that such claims are inherently individual in nature and certified a class of female mining-company employees charging sexual harassment and other types of employment discrimination, thus opening the door for more sexual harassment cases to enjoy the benefits of class status.

127. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389 (1970).

128. 7 CONTE & NEWBERG, *supra* note 7, § 22:60.

would be more efficient to order separate trials, if necessary, limited to the issue of reliance.[129] In light of the broad remedial objectives of the securities laws and the difficulties inherent in proving subjective reliance in a class action involving thousands of stockholders, the Supreme Court permits lower courts to presume that plaintiffs relied on the alleged misstatements or omissions so long as they were "material."[130] Today, most federal courts agree that peculiarities surrounding the underlying law of securities fraud should not be manipulated to preclude the use of class actions if doing so would undercut the goals of securities law.

The evolution of securities fraud over the latter part of the twentieth century represents a change in *substantive* law, not an amendment or rereading of Rule 23.[131] The analogy therefore suggests that no amendment to Rule 23 is needed with respect to § 504 and the ADA and that courts maintain the power to allow disability-based class actions so long as they believe that the underlying goals of the ADA and § 504 supersede concerns about the manageability of class actions that involve individualized elements.

C. *Rejection of* Chandler *in ADA Title II and Title III Class Actions*

In addition to those cases approving class certification in ADA Title I and § 504 employment cases, federal courts have categorically rejected attempts to transplant *Chandler*'s approach to cases based on the ADA's Title II or Title III provisions. *Guckenberger v. Boston University* provides an example of a

129. Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985) (holding that "the presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate over questions affecting individual [class] members as required by Rule 23(b)(3) or that that the [class] representative's claims are not typical"); *see also* Green v. Wolf Corp., 406 F.2d 291, 293, 300-01 (2d Cir. 1968) (holding that plaintiff could bring class action for an alleged violation of the Securities Exchange Act even if proof of individual reliance by each purchaser of shares was required because the court "s[aw] no sound reason why the trial court . . . cannot order separate trials on that particular issue"); *In re* Ramtek Sec. Litig., No. C 88 20195 RPA, 1990 WL 157391, at *3-4 (N.D. Cal. Sept. 7, 1990) (holding that differences in the question of reliance go to the right to recover and will not bar class actions); Sheftelman v. Jones, 667 F. Supp. 859, 868 (N.D. Ga. 1987) (rejecting the argument that individual reliance predominated over common questions in a Rule 10(b)(5) action when reliance was the only issue identified by defendants as not common to the class); McMahon Books, Inc. v. Willow Grove Assocs., 108 F.R.D. 32, 37-38 (E.D. Pa. 1985) (holding that the possibility that class members would have to prove reliance individually did not preclude class certification); Ramsey v. Arata, 406 F. Supp. 435, 441 (N.D. Tex. 1975) ("To hold that the individual issues just discussed necessarily prohibit class treatment in a securities case would do violence to the remedial nature of the securities acts.").

130. *Mills*, 396 U.S. at 385.

131. *See* Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329, 348 (1999) (noting that the so-called "fraud on the market" theory represents a change to substantive securities law).

federal court rejecting *Chandler* in a Title III public accommodations case.[132] Various students and organizations at Boston University sued the private school over new school policies for students with learning disabilities. Although the class plaintiffs suffered from various disabilities, all were required to provide specific forms of medical documentation to remain eligible for test-taking accommodations.[133] The university invoked *Chandler* and argued that "[s]everal courts have analyzed ADA and Rehabilitation Act claims on a case-by-case basis and have refused to confer class action status for actions involving the denial of reasonable accommodations."[134] But the court rejected application of *Chandler*, noting that students were challenging a blanket accommodations policy, which affected all students with learning disabilities, and therefore class certification was justified.[135] No court considering a class certification motion, before *Guckenberger* or since, has found the *Chandler* analysis a persuasive justification for rejecting certification of an ADA Title III class action.

The same can be said of federal courts considering class certification for ADA Title II claims involving discrimination by public entities. The Eleventh Circuit rebuffed the defendant's appeal to *Chandler* in the 2001 case of *Murray v. Auslander*, a Title II suit brought by developmentally disabled Medicaid participants challenging attempts by Florida state officials to cut the costs of a community-based care program.[136] Defendants argued that individual hearings were required to determine whether plaintiffs could validly bring suit, but the court found that the plaintiffs' substantial factual differences were outweighed by the strong similarity of legal theories and refused to categorically bar

132. 957 F. Supp. 306 (D. Mass. 1997); *see also* Moeller v. Taco Bell Corp., 220 F.R.D. 604, 609 (N.D. Cal. 2004) (quoting Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 444 (N.D. Cal. 1994)) (holding that the requirement that there be commonality is met by the "alleged existence of discriminatory practices"); Ass'n for Disabled Americans v. Amoco Oil Co., 211 F.R.D. 457, 461 (S.D. Fla. 2002) ("Courts repeatedly have held that class actions brought pursuant to Title III of the Americans with Disabilities Act satisfy all prerequisites for certification under Fed. R. Civ. P. 23(a), and 23(b)(2)."); Access Now, Inc. v. Ambulatory Surgery Ctr. Group, 197 F.R.D. 522 (S.D. Fla. 2000); Leiken v. Squaw Valley Ski Corp., 1994 WL 494298 (E.D. Cal. June 28, 1994) ("The conduct challenged by this action is directed not at particular individuals but at a class of persons, and inflicts its injuries on the basis of class-wide defining characteristics. Squaw Valley's no-wheelchair policy applies equally to all wheelchair users. The architectural barriers deny access to a broad category of disabled persons. Examination of Rule 23's requirements for certification illustrates the suitability of this case for class action status."); Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 449 (N.D. Cal. 1994) ("The state of [inadequate wheelchair accommodations] at defendant's various theaters, and the legal adequacy of those accommodations, are issues of fact and law common to all of those disabled persons affected by them.").

133. *Guckenberger*, 957 F. Supp. at 312.

134. *Id.* at 325-26.

135. *Id.* at 326.

136. 244 F.3d 807 (11th Cir. 2001).

certification.[137]

District courts have even refused to apply *Chandler* in Title II cases within the Fifth Circuit, in which *Chandler* was decided. When bus riders filed Title II and § 504 claims against a metropolitan transit authority for failing to provide an appropriate public transportation system accessible to eligible disabled individuals, the Texas district court refused to shift its focus away from the discriminatory policy to the status of the plaintiffs.[138] The court declined to consider the individuals' disability status, asserting:

> Because this case involves a challenge to those facilities, policies, practices and procedures which are said to have failed to provide accessible public transportation in more integrated settings for individuals with disabilities eligible for transportation by VIA rather than a redetermination of each class member's individual claim, any factual difference concerning the specific manner in which different class members may have been injured is of no consequence. Nor is the fact that class members may suffer from different forms of disabling infirmities.[139]

Thus, unlike courts considering Title I or § 504 employment-discrimination claims, federal courts faced with Title II and Title III suits have systematically refused to allow individualized inquiry to shift their attention away from the underlying pattern or practice that makes the suit amenable to class certification.[140] By now, courts faced with Title II or Title III claims are rejecting attempts to transplant the *Chandler* analysis solely because so many other courts have refused to do so. In *Duprey v. Connecticut Department of*

137. *Id.* at 811-12.

138. Neff v. Via Metro. Transit Auth., 179 F.R.D. 185 (W.D. Tex. 1998).

139. *Id.* at 194.

140. For Title II decisions permitting class certification, see, for example, *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("[I]ndividual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality. Certainly, the differences that exist here do not justify requiring groups of persons with different disabilities, all of whom suffer similar harm from the Board's failure to accommodate their disabilities, to prosecute separate actions.") (citation omitted); *Raymond v. Rowland*, 220 F.R.D. 173, 181 (D. Conn. 2004) ("[T]he class certified in this order is certified on the basis of the broad, system-wide policies at DSS . . . ."); *Thrope v. State*, 173 F.R.D. 483, 490 (S.D. Ohio 1997) ("[T]he common issues involving the interpretation of the ADA and the Ohio statutory scheme predominate over any individual issues."); *Civic Ass'n of the Deaf of New York City v. Giuliani*, 915 F. Supp. 622, 633 (S.D.N.Y. 1996) ("The class claims against Defendants in this action arise out of a single set of operative facts and are based on the same legal theories. The Court finds there to be questions of law and fact which predominate over individual questions. The Plaintiffs describe a common course of conduct by the Defendants . . . ."); *McKay v. County Election Commissioner*, 158 F.R.D. 620, 625 (E.D. Ark. 1994) ("[C]ounty election commissions throughout Arkansas failed to provide reasonable assistance to disabled voters thereby depriving them of the opportunity to cast personal and secret ballots as well as reasonable access to voting facilities. These deficiencies affect these voters in a general manner, thereby creating class issues as opposed to individual issues.").

Motor Vehicles, for example, litigants challenged the State of Connecticut's imposition of a five-dollar fee for the issuance of removable handicapped windshield parking placards. The State of Connecticut appealed to *Chandler* and asked for decertification of the class because of the need for "an individualized, case-by-case determination."[141] The district court rejected the defendant's argument on the ground that it could point to seven similar Title II parking placard cases in which classes were certified, including cases "where there were far greater differences among the claims of the class members."[142]

Given the structural similarities between the ADA's various titles, it is difficult to make sense of why the *Chandler* approach would only be suitable in the employment context. No matter whether the discrimination resulted from the actions of an employer, a public official, or someone in a public accommodation, the ADA only protects those who can meet the three-pronged definition of "disabled."[143] Further, both Title I, which governs discrimination in the workplace, and Title II, which applies to governmental entities, limit their protections to "qualified individual[s]."[144] Although the term "qualified individual" is defined somewhat differently in Title II than in Title I,[145] the difference does not explain why the *Arline* Court's individualized inquiry would apply exclusively to discrimination in the workplace. Presumably, the risk of stereotyping by public officials necessitates the individualized inquiry in Title II cases in the same way that stereotyping by employers motivated the *Arline* Court to require individualized inquiries in the employment context. The refusal of courts to apply the *Chandler* approach to Title II and Title III cases seems therefore to be based more on happenstance than legal consistency. Courts dealing with ADA and § 504 class actions outside the employment-discrimination context have simply found the *Chandler* approach unpersuasive or unnecessary, and enough case law has developed so that it seems unlikely courts will now apply *Chandler* of their own accord. Although their refusal to

141. 191 F.R.D. 329, 333 (D. Conn. 2000).

142. *Id.* at 334.

143. Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2005); *see supra* note 48 and accompanying text.

144. 42 U.S.C. § 12112(a) (Title I); *id.* § 12132 (Title II).

145. *Compare* § 12131(2) (Title II) (defining "qualified individual" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity"), *with id.* § 12111(8) (Title I) (defining "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). Section 12111(8) further states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

import *Chandler* into Title II and Title III cases seems to undermine the Fifth Circuit's argument in *Chandler* that the structures of the ADA and § 504 necessitate an individual, case-by-case approach, perhaps the refusal of some courts to apply the *Chandler* approach in employment cases can still be explained in such a way as to avoid the conclusion that federal courts are simply split on the question of whether class actions are appropriate in ADA Title I and § 504 employment lawsuits.

Part V of this Note therefore turns to the question of whether the seemingly incongruous outcomes of *Chandler* and its progeny can be brought into accordance with cases like *Hendricks-Robinson* in an effort to make sense of the current class certification landscape in ADA and § 504 employment-discrimination cases.

V. FEDERAL COURTS' IDEOLOGICAL APPROACHES IN DIRECT CONFLICT

Despite the seemingly contradictory results of cases like *Chandler* and *Hendricks-Robinson*, proponents of *Chandler* have attempted to justify the different approaches as the natural consequence of different fact patterns and not contradictory results. In 1999, the Northern District of California utilized the *Chandler* approach in *Sokol v. New United Motor Manufacturing, Inc.*[146] The case was brought by employees who were allegedly discriminated against by a discriminatory reassignment process after returning from work-related injuries.[147] Because the case was brought after both *Chandler* and *Hendricks-Robinson* had been decided, the defendant unsurprisingly argued for a threshold bar under *Chandler*, while the plaintiff class asked for certification in accordance with the *Hendricks-Robinson* approach. The district court acknowledged that some ADA and § 504 employment-discrimination class actions had been allowed to proceed, but only "where the challenged conduct is a specific policy that allegedly discriminates in a broad-based manner against class members."[148] Because the alleged discrimination in *Sokol* was not the result of the kind of "discrete policies with broad application" found in *Hendricks-Robinson* or *Wilson*, the court believed that *Chandler* was more applicable and therefore class certification was inappropriate.[149]

If accurate, the *Sokol* court's dichotomy between cases involving discrete policies and those involving disparate acts of discrimination offers a logical rationale for the discrepancy between those cases in which class certification has been barred and those in which certification has been approved. And since the plaintiffs in *Sokol* alleged that the company had failed to provide reasonable

146. No. C 97-4211 SI, 1999 U.S. Dist. LEXIS 20215 (N.D. Cal. Sept. 17, 1999).
147. *Id.* at *3-7.
148. *Id.* at *12.
149. *Id.* at *14-15.

accommodations to injured employees upon their return to work, the discrimination was indeed not the result of a comprehensive, written policy, but rather the consequence of isolated acts by a company administrator. Therefore, the court's rationale, if legitimate, would explain why class certification was inappropriate.

However, the *Sokol* court's rationalization does not withstand focused scrutiny. Certainly some of the cases that adopted *Chandler* involved disparate acts of discrimination like those in *Sokol*. For example, *Davoll v. Webb* similarly involved employees injured on the job who complained that the Denver police department failed to provide them with permanent light-duty positions or reassign them to city nonpolice jobs.[150] Like the plaintiffs in *Sokol*, the injured policemen in *Davoll* were arguably discriminated against not as the result of a discrete policy, but simply because city administrators failed, over a series of isolated incidents, to provide reasonable accommodations. But the theory fails to account for the result of *Chandler* itself.

Unlike *Sokol* and *Davoll*, the plaintiffs in *Chandler did* claim that the defendant's discrimination resulted from a discrete policy with broad application. The policy at issue in *Chandler* established physical standards for city employees driving on public roads, and it disallowed certification of employees with certain disabilities regardless of whether they were otherwise qualified to drive.[151] Similarly, class certification was barred in *Burkett v. United States Postal Service*, even though the plaintiffs objected to a U.S. Postal Service policy that disqualified applicants from employment if they failed to meet certain medical suitability requirements.[152] Thus, the *Sokol* court may be correct in asserting that cases not involving discrete policies broadly applied are not suitable for class certification, since such cases do not present a common question of law or fact.[153] But the court's theory fails to explain why federal courts have refused to certify classes when plaintiffs *have* alleged an underlying policy of discrimination.

The divergent approaches of *Chandler* and *Hendricks-Robinson* also cannot be explained by distinguishing between the fact patterns of cases treated under one standard or the other. There is no reason to believe, for example, that

150. 160 F.R.D. 142, 143 (D. Colo. 1995), *aff'd*, 194 F.3d 1116 (10th Cir. 1999).

151. Chandler v. City of Dallas, 2 F.3d 1385, 1388 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994).

152. 175 F.R.D. 220 (N.D. W. Va. 1997).

153. Indeed, in light of Rule 23 jurisprudence generally, plaintiffs merely alleging an unconnected series of failures to reasonably accommodate would not have a valid class action. To meet the Rule 23(a)(2) commonality requirement, plaintiffs would have to allege a common question of law or fact, such as a common policy underlying the discrimination. *Cf.* Daggett v. Blind Enters. of Or., No. CV-95-421-ST, 1996 U.S. Dist. LEXIS 22465, at *33-48 (D. Or. Apr. 18, 1996) (certifying claims such as discriminatory pay practices based on a common policy and refusing to certify a class based on claims dealing with failure to accommodate since there was no underlying common pattern).

classes have been certified when plaintiffs attempt to maintain a more manageable class by restricting membership to employees affected by the same or similar disabilities. Notably, classes have been certified where the plaintiffs fail to restrict the class to any specific disabilities. The plaintiffs in *Hendricks-Robinson*, for example, certified a class including "*[a]ll* . . . employees . . . whom [defendant] perceives to have permanent medical restrictions and who were placed on medical layoff pursuant to [defendant's] medical layoff policy . . . ."[154] Similarly, the class representatives in *Delise v. Federal Express Corp.* purported to represent "*all* persons who are otherwise qualified individuals with a disability within the meaning . . . of the ADA and who are employed by Federal Express who have been and continue to be, or might be adversely affected by the practices complained of herein which violate the ADA . . . ."[155] Surely these classes were less manageable than the subclasses that plaintiffs in *Chandler* attempted to certify, which were narrowly restricted to employees with either substandard vision or insulin-dependent diabetes.[156] Thus, the divergent approaches represented by *Chandler* and *Hendricks-Robinson* cannot be explained by the scope of the class under review for certification.

Although a defensible explanation for the divergent *Chandler* and *Hendricks-Robinson* approaches would be welcome, the real answer is simply that the two approaches contradict each other and cannot be harmonized. Taken to its logical extension, *Chandler* stands for the proposition that "the individualized inquiry per se negates the possibility of establishing a class action."[157] Conversely, courts following the precedent of *Hendricks-Robinson* believe that "ADA class actions are *not* prohibited as a matter of law."[158] Thus, federal courts appear to be split over the question of whether ADA and § 504 employment-discrimination claims can or cannot proceed as class actions.

By this point enough case law has developed to allow district courts to justify their decision whether or not to certify a disability-based employment-discrimination class by simply referring to precedent supporting their positions. A court that does not want to grant certification can observe that "[i]n the view of several federal courts, the need for [an] individualized, fact-driven determination renders Rehabilitation Act and ADA actions ill-suited for class treatment."[159] Conversely, a court that favors comprehensive resolution of disability-based employment-discrimination claims can argue that certification

154. Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667, 669 (C.D. Ill. 1996) (emphasis added).

155. No. 99 C 4526, 2001 WL 321081, at *2 (N.D. Ill. Mar. 30, 2001) (emphasis added).

156. *Chandler*, 2 F.3d at 1388.

157. Lebowitz, *supra* note 25, at 494.

158. *Delise*, 2001 WL 321081, at *1 (emphasis added).

159. Burkett v. U.S. Postal Serv., 175 F.R.D. 220, 223 (N.D. W. Va. 1997).

is appropriate since class actions "have been certified where plaintiff alleges a discriminatory policy that is challenged as a per se violation of the ADA or as commonly applied to the members of the class."[160]

In 1994, the Supreme Court denied certiorari to *Chandler* and therefore never determined whether threshold bars to disability-based employment-discrimination class actions were appropriate.[161] Now that federal courts have developed contradictory approaches to certification, it would be judicious for the Supreme Court to take a closer look.

If the Supreme Court were to resolve the conflicting approaches, the Court should follow *Hendricks-Robinson* in holding that a threshold bar is unnecessary, since Rule 23 does an adequate job of disqualifying suits in which individual claims are so predominant as to make a class action inappropriate. Although other solutions have been proposed, Part VI examines why these proposals have been amiss and why the Supreme Court would have sufficient justification to overturn *Chandler*'s approach.

VI. REJECTION OF THE *CHANDLER* THRESHOLD BAR IN LIGHT OF THE MOTIVATING PURPOSES BEHIND DISABILITY RIGHTS LAWS AND RULE 23

Commentators who disagree with the unconditional nature of *Chandler* have offered two proposals that would allow plaintiffs alleging disability-based employment discrimination to bring class actions in certain contexts. In addition, it appears that plaintiffs' counsel have attempted to devise a third method of getting around the decision in *Chandler*. Unfortunately, all three efforts are inadequate because they fail to address the problematic core of *Chandler*—namely that the *Chandler* approach undermines both the goals of Rule 23 and America's disability rights laws, dubiously doing so in the name of protecting the interests of disabled employees.

A. *Proposed Amendment to Rule 23*

First, one commentator has proposed adding an amendment to Rule 23, tailored specifically to liberalize the traditional prerequisites to maintaining a class action. The proposed amendment would add a fifth factor to Rule 23(a): "[R]equirements (1)-(4) of this subsection shall be liberally construed to effectuate justice for persons with disabilities with regard to actions filed pursuant to the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990."[162] Apart from the understandable precedential concerns that the

160. *Delise*, 2001 WL 321081, at *1.

161. Chandler v. City of Dallas, 2 F.3d 1385, 1388 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994).

162. Lebowitz, *supra* note 25, at 506.

Rules Advisory Committee would have in carving out exceptions to the carefully crafted requirements of Rule 23, even if such an amendment were passed, it would not help plaintiffs in getting around *Chandler*. After all, *Chandler* did not reject class certification because the court rigorously applied Rule 23(a) and arrived at the conclusion that the class could not meet its requirements. The Fifth Circuit in *Chandler* never attempted a Rule 23(a) analysis at all.

Although cases like *Lintemuth v. Saturn Corp.* and *Burdette v. Federal Express Corp.* transformed the holding in *Chandler* by conducting a Rule 23(a) analysis,[163] *Chandler* itself established a prima facie bar to class actions in the disability-based employment-discrimination context. The lesson of *Chandler* is that courts reviewing these motions for class certification should not even get to the question of whether the class meets the typicality or commonality requirements. Therefore, amending Rule 23 to liberalize its prerequisites would only help in cases in which the court already disagreed with *Chandler*'s fundamental principle.

B. *Proposed Restriction of Class Actions to Plaintiffs with the Same Disability*

In another commentator's opinion, "class actions are appropriate under Title I of the ADA,"[164] but courts should respect the impetus behind *Chandler* by restricting certification to cases in which "the employer's policy addresses a single disability or a very narrowly defined range of disabilities and where all putative class members allegedly have the same disability or fall within the defined range."[165] These kinds of class actions should be certified because "[u]nder these limitations, a class action would not violate the spirit of the ADA's case-by-case inquiry."[166]

Again, however, this recommendation does not seem to comport with the motivation behind *Chandler*. If courts agree with *Chandler* that the individualized inquiry acts as a threshold bar to class actions, it should make no difference whether plaintiffs allegedly suffer from one or one hundred different disabilities. An individualized inquiry would still be necessary to determine whether each specific plaintiff met the definition of "disabled" and "qualified individual" under the ADA and § 504. Such an exercise would be necessary because, if ten hypothetical plaintiffs alleged to have the same disability, some

163. *See supra* Part IV.

164. David T. Wiley, *If You Can't Fight 'Em, Join 'Em: Class Actions Under Title I of the Americans with Disabilities Act*, 13 LAB. LAW. 197, 201 (1997).

165. *Id.*

166. *Id.*; *see also id.* at 221 ("If the asserted class is confined to individuals with the same impairment or a very narrowly restricted set of impairments, class certification would not seem to undermine the essential purposes of the Acts as expressed by the courts in *Lintemuth* and *Davoll*.").

might meet the definition of disabled and some might not. For example, even if all ten plaintiffs had impaired vision, some plaintiffs might not actually meet the definition of "disabled" under the ADA or § 504 because mitigating measures, such as glasses, prevent the disability from "substantially limiting" the plaintiff's major life activities, as the ADA and § 504 require.[167] One court that followed *Chandler* made this same observation, noting that even if "the parameters of the class were narrowed to include only those individuals with disabilities similar to the representative plaintiffs," the fact that one of the representative plaintiffs "is able to prove the elements of discrimination under the ADA does not mean that the elements have been satisfied with respect to all members of the class with similar types of disabilities."[168]

There are other reasons to be wary of an approach that requires plaintiffs to limit lawsuits to classes including members who have identical disabilities. The ADA and § 504 deliberately refrained from limiting their protections to a defined set of particular disabilities. The fact that the ADA and § 504 "do not attempt a 'laundry list' of impairments that are 'disabilities'"[169] is reflective of the fact that Congress intended these laws to provide broad coverage "so that discrimination on the basis of disability could be addressed comprehensively . . . ."[170] Congress recognized that the ADA and § 504, intended as civil rights bills for the disability community, would not be able to "guarantee comprehensiveness by providing a list of specific disabilities,"[171] and that by affording their protections to anyone who meets the definition of disabled, these laws attempt to thwart *all* forms of bias against disabled employees. By only allowing the class action device to be utilized by plaintiffs with the same disability, this proposal would preclude disabled employees from stamping out the root causes of discrimination, which often affect employees with various disabilities in similar ways.[172] Thus, the proposal fails both

167. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

168. Lintemuth v. Saturn Corp., No. 1:93-0211, 1994 WL 760811, at *4 (M.D. Tenn. Aug. 29, 1994).

169. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (2005).

170. NAT'L COUNCIL ON DISABILITY, NEGATIVE MEDIA PORTRAYALS OF THE ADA (2003), http://www.ncd.gov/newsroom/publications/2003/negativemedia.htm (last visited Oct. 25, 2005).

171. H.R. REP. NO. 101-485, pt. 3, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450.

172. The ADA was motivated by the congressional finding that people with disabilities, even different kinds of disabilities, are often faced with common and consistent patterns of discrimination. *See* U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 22-23 (1983) ("Although no two persons' attitudes are exactly alike, the professional literature discloses some common strains and consistent patterns regarding prejudice based on handicap."); *see also* Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (2005) ("[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of

because it does not address the root concern of *Chandler* and because it would undermine one of the fundamental goals of America's disability rights laws.

C. *Class Definitions Limited to Plaintiffs Who Meet the Definition of "Disabled"*

Finally, plaintiffs' counsel have apparently responded to *Chandler* with a third attempt to get around its restrictive result. In numerous class actions filed since *Chandler*, counsel have ex ante constrained their class definition to those employees who can meet the definition of "disabled" under the ADA or § 504. For example, counsel in *Delise v. Federal Express Corp.* restricted their class to employees who were allegedly discriminated against and "who are otherwise qualified individuals with a disability within the meaning . . . of the ADA."[173]

In this way, plaintiffs' counsel are attempting to represent classes that, as a preliminary condition, are limited to those who meet the statutory definitions of disabled and qualified individual. If the class is already restricted to those who meet the definitions in the ADA and § 504, the individualized inquiry requirement theoretically ought not preclude class certification.

However, the defective and circular logic of this attempt around *Chandler* is obvious: the court will still need to conduct an individualized inquiry at some point, if only to determine which employees actually meet the definitions and are entitled to recover. Limiting the class to those who meet the definitions of disabled and qualified individual only pushes the individualized inquiry to the end of the case, hardly a result that the *Chandler* court would find satisfying.

D. *Justifications for Overturning* Chandler

All three of these flawed attempts to circumvent *Chandler* fall short of calling for its reversal. But now that the Central District of Illinois has offered an alternate vision in *Hendricks-Robinson*, one found convincing by other district courts and one not overturned by the Seventh Circuit on appeal, the Supreme Court has an opportunity to rely on solid precedent in overturning the notion that disability-based employment-discrimination class actions ought to

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purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.").

173. Delise v. Fed. Express Corp., No. 99 C 4526, 2001 WL 321081, at *2 (N.D. Ill. Mar. 30, 2001); *see also* Sokol v. New United Motor Mfg. Inc., No. C 97-4211 SI, 1999 U.S. Dist. LEXIS 20215, at *1 (N.D. Cal. Sept. 17, 1999) (including in the class "[a]ll current and past employees with disabilities who since November 1, 1996, have been placed by Defendant NUMMI on the 'ADA List' *and who have disabilities within the meaning of the Americans with Disabilities Act*") (emphasis added).

be precluded as a matter of law.

Rejecting the *Chandler* approach in favor of allowing class actions in the disability-based employment-discrimination context would appropriately safeguard Congress's intentions in passing the ADA and § 504, since both laws were explicitly intended to provide disabled employees with a statutory hook for enforcing their substantive right to be free from baseless discrimination in the workplace.[174] By refusing to certify class actions, the *Chandler* approach greatly undermines these goals by preventing employees from challenging broad-based discrimination in a similarly comprehensive fashion.[175]

Rejecting the *Chandler* approach would also ensure that disabled employees are able to protect their substantive rights through the procedural tool of class actions in the same way as employees discriminated against on the basis of race, sex, or other unlawful classifications—no more, no less. Just like plaintiffs alleging racial or sexual discrimination, employees with disabilities hoping to take advantage of Rule 23 would still be required to provide evidence that the employer had engaged in a common pattern or practice of discrimination.[176] If disabled employees could not allege a common pattern or practice, but merely an unconnected series of failures by the employer to reasonably accommodate, such claims would not be allowed to proceed as a class action.[177]

But like other types of employment-discrimination plaintiffs, disabled employees alleging a pattern or practice of discrimination ought to be able to obtain class certification so long as they allege that the employment decisions creating the discriminatory effects stemmed from a centralized personnel policy[178] and that the representative plaintiff suffered discrimination stemming from the same course of conduct that gives rise to the claims of the other class

174. Rehabilitation Act, 29 U.S.C. § 701(b)(1)-(2) (2005) (asserting that the twofold purpose of § 504 is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society" and "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living"); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630 (2005) ("The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.").

175. *See* Lebowitz, *supra* note 25, at 499.

176. *See* 8 CONTE & NEWBERG, *supra* note 7, § 24:21.

177. *See* Daggett v. Blind Enters. of Or., No. CV-95-421-ST, 1996 U.S. Dist. LEXIS 22465, at *33-48 (D. Or. Apr. 18, 1996) (certifying claims dealing with an alleged policy of discriminating in the payment of blind workers but refusing to certify a class alleging failure to reasonably accommodate when there was no underlying common policy intended to frustrate accommodation).

178. Holsey v. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984).

members.[179] Allowing disabled employees to take advantage of class actions would promote one of the fundamental goals of Rule 23: providing an enhanced means for private attorney general suits to enforce civil rights laws and deter wrongdoing.[180]

CONCLUSION

The normative justification for allowing disability-based employment-discrimination suits to proceed as class actions is clear: doing so would promote the underlying goals of both America's disability rights laws and Rule 23. As the Supreme Court found in securities class actions, overturning *Chandler* would endorse the sensible notion that peculiarities surrounding the underlying law of disability discrimination should not be manipulated to preclude the use of class actions and to thereby undermine the goals of § 504 and the ADA. After all, it would be odd indeed to assert that America's court system has a greater interest in preventing "violence to the remedial nature of the securities acts"[181] than preventing violence to the remedial nature of a fundamental civil rights statute.

In promoting these essential legal objectives, the Supreme Court can also take heart in knowing that it would not be opening the floodgate to a rash of frivolous lawsuits. Courts presiding over Title II and Title III lawsuits have never felt the necessity to resort to a prima facie bar on such lawsuits in order to protect defendants from inappropriate claims. The fact that *Chandler* has never enjoyed any traction in ADA Title II or Title III class actions suggests that Rule 23 can adequately manage the job of filtering out disability-based class actions when individual issues predominate.

The Court can also be assured that there already exist procedural techniques other than a threshold bar which could lessen the problems posed by the individualized inquiry. Most notably, courts have the discretion to bifurcate class action proceedings into separate liability and individual damages and defenses stages. With the use of bifurcation, courts can comprehensively address liability by determining whether the defendant's policy or course of conduct violated the ADA or § 504, thereby ensuring that broad-based discrimination is addressed in a proportional fashion. In the damages and defenses phase, the court could engage in the individualized inquiry on a case-by-case basis to determine whether each class member meets the statutory definitions of disabled and qualified individual, whether the defendant enjoys viable defenses, and whether monetary relief is proper and to what extent.

Undeniably, the defenses and damages phase would still require that the

179. 1 CONTE & NEWBERG, *supra* note 7, § 3:13.

180. *Id.* § 1:6.

181. Ramsey v. Arata, 406 F. Supp. 435, 441 (N.D. Tex. 1975).

court address individual issues, and this individualized inquiry could be a relatively time-consuming process. But so long as the common question of liability predominates, this approach would provide a better solution than a threshold bar, and a solution that courts are familiar with from other types of class actions such as mass torts.

If federal courts are committed to safeguarding the right of disabled employees to be free from bias and damaging stereotypes, the threshold bar approach propounded by *Chandler* and its progeny should be overturned, and the substantive and procedural rights of disabled litigants to bring class actions in the disability-based employment-discrimination context should be reaffirmed.