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Allowing Autistic Academics the Freedom to Be Autistic: The ADA and a Neurodiverse Future in Pennsylvania and Beyond

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Allowing Autistic Academics the Freedom to Be Autistic: The ADA and a Neurodiverse Future in Pennsylvania and Beyond

By Brandon Stump*

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I. INTRODUCTION

“In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced.”¹

Given Autism’s various social impediments, outside of any sensory issues at the workplace, it is not surprising that “[a]utistic adults may very well be the most disadvantaged disability group in the American workplace. Only [fourteen] percent of adults with autism held paid jobs in their communities”² Autism is a lifelong, immutable and incurable neurological condition which begins to socially and developmentally present symptoms/differences in the developmental stages of childhood.³ In other words,

it is a neurodevelopmental disorder that affects behavioral, social and cognitive life skills. It is a spectrum disorder, which means that one or all of these areas can be affected in a mild or severe way. For this reason the same diagnosis can easily include people with very different abilities and limitations, being for instance highly intelligent and verbally proficient, but socially and emotionally helpless, or incapable of communicating effectively, and in need of assistance for every daily personal need.⁴

While Ripamonti’s explanation of Autism is satisfactory, readers must fully grasp the spectral nature of Autism. As noted by online

1. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

2. Sarah Carr, *The Tricky Path to Employment Is Trickier When You’re Autistic*, SLATE MAG. (Sept. 22, 2017, 5:50 AM), http://www.slate.com/articles/business/moneybox/2017/09/how_autism_complicates_the_path_to_employment.html.

3. See Lidia Ripamonti, *Disability, Diversity, and Autism: Philosophical Perspectives on Health*, 22 NEW BIOETHICS 56, 58 (2016).

4. *Id.* at 58. While this Author takes issue with Ripamonti’s use of the term “helpless,” as it connotes a lack of autonomy over the social and emotional lives of Autistics, this definition is one of the most comprehensive definitions of a spectrum condition that this Author has ever read. For that reason, I have included it to illustrate to the neuromajority (non-Autistic) the variation and diversity within the Autistic community.

magazine *Verywell Health*: “Confusingly, [one] can also have a combination of mild and severe symptoms. For example, it is possible to be very intelligent and verbal but also have severe symptoms of anxiety and sensory dysfunction.”⁵ These “symptoms” exist on a spectrum from mild to severe and present differently in each Autistic.⁶

What does this spectrum look like? While some Autistics, approximately thirty percent, never speak and, instead, communicate with sign language, visual tools, and technology, others learn to speak very early (the other end of the spectrum).⁷ Some Autistics will meet all developmental milestones without delay and be of quite average intellect.⁸ Like the world at large, Autistics have varying interests, skills, IQs, social abilities, etc. The spectrum is so wide, “no two people with the same diagnosis will present the same profile.”⁹ This Article will narrow the community of Autistics down to the still overly broad concept of “high functioning Autistics,”¹⁰ of

5. Lisa Jo Rudy, *An Overview of Autism*, VERYWELLHEALTH (Feb. 21, 2018), <https://www.verywellhealth.com/autism-4014759>.

6. *Id.* Additionally, I, as an Autistic, employ identity-first language, rather than person-first language because my neurology, my Autism, influences everything about my life from the music I like to the professions I choose. For an excellent discussion on the semantic power of disability identifiers, see *Identity-First Language*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/about-asan/identity-first-language/>.

In the autism community, many self-advocates and their allies prefer terminology such as ‘Autistic,’ ‘Autistic person,’ or ‘Autistic individual’ because we understand autism as an inherent part of an individual’s identity—the same way one refers to ‘Muslims,’ ‘African-Americans,’ ‘Lesbian/Gay/Bisexual/Transgender/Queer,’ ‘Chinese,’ ‘gifted,’ ‘athletic,’ or ‘Jewish.’ On the other hand, many parents of Autistic people and professionals who work with Autistic people prefer terminology such as ‘person with autism,’ ‘people with autism,’ or ‘individual with ASD’ because they do not consider autism to be part of an individual’s identity and do not want their children to be identified or referred to as ‘Autistic.’ They want ‘person-first language,’ that puts ‘person’ before any identifier such as ‘autism,’ in order to emphasize the humanity of their children.

Id.

7. Lisa Jo Rudy, *Overview of Nonverbal Autism*, VERYWELLHEALTH (Jan. 17, 2019), <https://www.verywellhealth.com/what-is-nonverbal-autism-260032>. I also note, as does Rudy, “Late language acquisition is not necessarily an indication of low IQ or poor prognosis.” *Id.* Regarding early speech, see Lynne Soraya, *What Does It Mean to Have Asperger Syndrome?*, PSYCHOL. TODAY (Apr. 13, 2008), <https://www.psychologytoday.com/us/blog/aspergers-diary/200804/what-does-it-mean-have-asperger-syndrome> (noting that some Autistics speak early rather than late).

8. Ripamonti, *supra* note 3, at 58.

9. *Id.* at 57.

10. I do not endorse the concept of ability levels within the Autistic community because I do not believe ability can or should be measured by one’s masking of symptoms, setbacks, or differences, nor do I think that ability level should be based on verbal communication or one’s ability to fit or defy stereotypes. However, for purposes of this Article, high functioning Autistics are those Autistics who have the cognitive ability and IQ to work in higher education. See Jessica Flynn, *Why Autism Functioning Labels Are Harmful—and What to Say Instead*, MIGHTY (July 22, 2018), <https://themighty.com/2018/07/autism-functioning-labels-low->

which I am a member, who are characteristically considered to be of “average, or above average, intelligence, along with very restricted and repetitive behaviors and interests, and lack of delay in language acquisition.”¹¹

This Article focuses on those Autistics who have the ability, in terms of intellect credential, and measurable skill, to enter the workplace. In particular, this Article addresses Autistics who are academics and teach at the collegiate level, specifically in the American legal classroom. I have chosen a narrow subset of a broad community to make a targeted argument for employment protection which can help expand the law for the entire Autistic community. While we are different than neurotypically developed persons, “[m]any with [Autism Spectrum Disorder (ASD)] have a high attention to detail and the ability to sustain intense concentration in their areas of interest.”¹² Thus, we are ideal candidates for jobs in academia.

I am Autistic and an adjunct professor of legal writing at Duquesne University School of Law. Like critical race and feminist scholars before me have used personal narratives to develop records and examples of relationships between race, gender, power, oppression, and the law, I employ both the “I” perspective and the use of personal narrative to develop an understanding of Autism in the legal academy.¹³ When we are represented with narrative, we exist in the minds of the collective. What I write about is not just my journey, which includes both great accomplishment and intellect as well as painful setbacks and roadblocks all stemming from my neurology, but also about the journey of approximately one to two percent of the entire world’s population.¹⁴ Those of us drawn to academia tend to do so because of our lifelong and intense interests in certain subjects, as well as our ability to “work alone with a high degree of autonomy in a clearly defined and intellectually challenging job.”¹⁵ A job in the academy “make[s] good use of [our] logic and

functioning-high-functioning/ (discussing how labeling Autistics as “high functioning” de-means the legitimate struggles of those Autistics and assumes inability level of less neurotypically presenting Autistics).

11. Ripamonti, *supra* note 3, at 58.

12. Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HAR. C.R.-C.L. L. REV. 73, 77 (2017).

13. See generally Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997); Harris, *supra* note 1, at 581.

14. *Autism Spectrum Disorder Data and Statistics*, CENTERS FOR DISEASE CONTROL & PREVENTION (Sept. 11, 2018), <https://www.cdc.gov/ncbddd/autism/data.html> (“Studies in Asia, Europe, and North America have identified individuals with ASD with an average prevalence of between 1% and 2%.”).

15. Hensel, *supra* note 12, at 79.

analytical skills, excellent memory for facts, vast knowledge of specialized fields, tolerance of routine, and creative problem solving.”¹⁶ The job of professor, though, does not end with a deep fascination for bodies of work or facts, nor is the struggle to socially acclimate resolved simply by having a routine schedule and obvious objectives.

Autism is not just a lifelong condition; it is a full body experience. Autistics, as a group, are known for being extremely sensitive to “environmental stimuli, including sound, touch, and smell.”¹⁷ A boss who likes to rub employees’ shoulders, fluorescent lighting in the classroom, students’ whispers during class instruction, smells of various microwaved meals in the office kitchen, the inability to control the temperature – either hot or cold, can all make the work-day unbearable for an Autistic. Aside from the surrounding environment, Autistic bodies must interact with other bodies in order to be part of the workforce. “Although each individual is unique, it is common for individuals with autism to lack the ability to interpret social cues or to fully understand the thoughts and feelings of others, leading to misunderstandings about . . . [the] nuances in verbal communication.”¹⁸

Imagine every day when you arrive to work, your colleagues want to engage. However, it takes you hours to acclimate to the change from sleep to consciousness, so the idea of speaking with colleagues and being congenial only hours after waking up can be both painful and debilitating. Add to this that your colleagues only ever want to discuss sports or the newest fad in television. You might only like to talk about the comic books you are currently reading or the Australian melodrama you binge watch at night, and because your interests are so limited, it is very difficult to engage with others. If you do decide to talk about the nuances of a fictional Australian town and the various subplots of your melodrama (no pun intended), you may be doing so “without regard to whether anyone else is interested, thereby annoying [students] and colleagues.”¹⁹

Furthermore, many Autistics can be “very literal and have difficulty understanding the subtext of conversations.”²⁰ Imagine you arrive at a meeting with your supervisor who asks you to stay in his office and explains that he will be “right back.” You are uncertain

16. *Id.*

17. *Id.*

18. *Id.* at 78.

19. *Id.* Notice how the Autistic person is expected to deal with the interests of those around her/him.

20. *Id.*

what “right back” means. He does not return, as he is caught up in something else that happened. Rather than returning to your office to work on your lesson plan, you sit in the supervisor’s office for two hours, afraid that he might be “right back” and you do not want to be in trouble. Or imagine that you infuse your class with comedy, but much of your sense of humor involves seriously and blandly stating absurdities. For example, a student asks if they should print an assignment, which the syllabus clearly states is required, and the Autistic professor responds, “It is always a good idea to not follow the syllabus.” To the Autistic academic, the absurdity of the statement makes it funny. Months later, the professor discovers in course evaluations that students struggled to know when the professor was serious.

Every example here can directly impact one’s ability to remain employed at their respective university, a fact that is even more true for Autistic adjuncts who lack tenure protections. Employment is a concern across the Autism spectrum; in fact, employment is “the single biggest issue or barrier facing” Autistics.²¹ Given the inherent difficulties of navigating a system designed for the neuromajority,²² Autistic academics will inevitably find themselves in difficult social situations with students, faculty, administrative staff, IT personnel, maintenance workers, and others on campus. We will be tasked by being the only, or one of the only, neurodivergent people at our workplaces. Without any ill motive,²³ an Autistic academic can find oneself in disputes that our neurotypical coworkers can

21. *Id.* at 75 (quoting JUDITH BARNARD ET AL., IGNORED OR INELIGIBLE? THE REALITY FOR ADULTS WITH AUTISM SPECTRUM DISORDERS 18 (2001) (study conducted in the United Kingdom)).

22. Throughout this Article, I use “neuro” as a prefix in order to exemplify that the world for an Autistic, whose neurochemistry makes them neurodivergent from the neuromajority, is fundamentally different. For a personal approach to neurodiversity, see Andrew Solender, *Neurodivergence—Celebrating Autism Awareness*, PSYCHOL. TODAY (May 30, 2017), <https://www.psychologytoday.com/us/blog/the-intelligent-divorce/201705/neurodivergence>. Solender, who has Asperger’s, explains his place on the spectrum as follows:

Imagine that everybody’s mind is a bucket, and the more weight in this bucket, the harder it is for them to communicate with others. Each Asperger’s behavior is a rock. When there is one rock in the bucket, it is a little off balance, but the weight is manageable. However, somebody with Asperger’s does not have just one rock, but more likely five or six which heavily restricts their ability to communicate.

Id.

23. I do not mean to imply that Autistics are unable to manifest ill motive; however, for purposes of this Article, I focus on the social/behavioral differences that Autistics encounter which can lead to adverse employment actions that are directly related to their neurotype, alone.

avoid just by having different brain chemistry.²⁴ This Article is intended to help colleges, universities, and Autistic faculty (with a specific emphasis on law schools) to understand what their rights are and should be. First, this Article addresses the discriminatory and illogical impact of requiring Autistic professors to self-disclose their Autism in order to receive employment protections. While the Americans with Disabilities Act (ADA)/Americans with Disabilities Amendments Act (ADAA),²⁵ as well as the Pennsylvania Human Relations Act (PHRA),²⁶ typically require disabled persons to inform their employers of their disability in order to accommodate the disability, I contend that requiring an Autistic professor with social differences to disclose their Autism to specific personnel is antithetical to the nature of Autism. Instead, I contend that given the cluster of behaviors and traits associated with Autism, any Autistic academic will most likely be regarded as having a disability, pursuant to the ADA, and should be able to avoid the hurdles posed by self-disclosure as a person with a qualifying disability. Lastly, this Article addresses the concept of “accommodating” an Autistic personality in the academy. In other words, I examine the idea that an Autistic person might never fathom that their personhood, inseparable from their Autistic neurology, could lead to termination, failure to advance, or the failure to have a contract renewed. Rather than seeking an accommodation for Autistic behaviors and personalities, courts, schools, and litigants should ask a simple question: Do the behaviors of this Autistic professor impact their ability to perform the job, with or without a reasonable accommodation? If the professor’s quirks, actions, reactions, language, etc. do not hinder their ability to perform their job, and a school administration’s decision is based on concepts of congeniality, the Autistic professor—given their immutable characteristics—is ultimately being discriminated against for being Autistic. Courts and college administrations must begin to accept that there is no separation between Autistic behaviors and Autism itself.

24. Jennifer Malia, *I'm an Autistic Woman, and This Is How I Navigate the Workplace*, GLAMOUR (Sept. 26, 2017), <https://www.glamour.com/story/im-an-autistic-woman-and-this-is-how-i-navigate-the-workplace>. Malia discusses her experiences as an Autistic woman who works as a professor. Malia describes how she can have meltdowns at work: “Usually, the inciting incident that sets a meltdown in motion doesn’t seem significant enough to cause an intense emotional reaction. For example, any unexpected disruption to my routine like a change to my teaching schedule can be the straw that breaks the camel’s back.” *Id.*

25. 42 U.S.C. § 12112 (2009).

26. 43 PA. CONS. STAT. § 955 (1997).

II. TEACHING WHILE AUTISTIC: SELF-ACCOMMODATION AND THE ADA

When I am alone, or in a comfortable setting like my home with my wife and dogs, my life as an Autistic person is both navigable and enjoyable. My wife is fine with minimal and sporadic eye contact and has never asked me to look her in the eye²⁷ in the ten years we have been together. I ensure that I have a hot and cold beverage at all times. I pace the hall and place my face against the glass of my front door, looking out to the street, whenever I need a break or am trying to process my plans for the day. I never go outside of the house if I hear the neighbors about, unless it is absolutely required, so as to eliminate any unexpected social activity. I always sit on the same sides of each couch. I use one living room for television viewing and magazine reading. I use the more formal living room for reading novels and comic books. I have either a fan or access to white noise in each room so I can tune out any extra noise, which interferes with my concentration. In my home, or at a coffee shop that I frequent routinely while wearing noise-cancelling headphones, I can grade and evaluate student papers for hours, giving scrupulous notes and feedback. I also send students e-mails, explaining the key details of the week – the various expectations, any changes in deadlines, specific considerations I would like them to make. Left to my own devices, I do quite well. One does not need the ADA to navigate home life nor the more autonomous parts of academia.

But everything changes for me, and other Autistics similarly situated, when we go to work. In full disclosure, I'm hyper verbal, having learned to speak at six-months old, and I taught myself to read before kindergarten. A math and science Autistic, I am not. I will not be asked to Silicon Valley to add strings of numbers and words together, helping to create the next great advancement in technology. It is sometimes difficult for neurotypicals, who are also the gatekeepers to what legal protections I, as a person with a disability, am entitled, to conceptualize how Autistics like me are in fact Autistic.²⁸ A former student to whom I disclosed my status after our class ended said, "I thought you were eccentric, a person who

27. See Hensel, *supra* note 12, at 78.

28. Consider this: An Autistic person cannot be medically Autistic until a doctor diagnoses them as Autistic. See THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 299.00 (F84.0) [hereinafter DSM-5] (5th ed. 2013). Given the low percentage of Autistics in the world-at-large, the odds are extremely low that an Autistic person would be diagnosed by an Autistic doctor. Furthermore, whether the ADA applies to any given employment matter is a consideration left to neurotypical attorneys and judges. In other words, my very

didn't seem concerned with society at large or how it perceived you." Other students who know I am Autistic have not been surprised, noticing that everything from how I navigate space—often tripping and running into things that most in the class would never bump into, as their spatial reasoning is more acute and better designed for a world where falling over the legs of a chalkboard or tripping over the same student backpack four times in one fifty minute class are strange behaviors.²⁹ Many of my students note that I rarely make eye contact, and they notice that any loud noises or unexpected questions can erase my memory and train-of-thought (what I call "Etch-A-Sketch Brain"—the interruption shaking the previous picture erased). They also remark that my sense of humor is different than theirs, my delivery often dry and serious, less about jokes than societal or interpersonal observations that I find confounding, illogical, or humorous. Because I struggle with interpreting facial expressions and body language, looking out at a classroom of students who all seem to be making different faces and moving their arms and shoulders while sighing or slumping, I frequently ask students if they need anything, if they are confused, or if they are ready to move on. In many ways, I accommodate myself. I hold conferences either on weekends or in our empty classroom after class ends rather than the adjunct office in the busy legal writing center where background noise and conversation are overwhelming to my focus. I turn off half of the fluorescent lights so my eyes do not burn during teaching.

But there is one thing Autistics like myself cannot accommodate on our own, even in environments like colleges and universities where professional autonomy affords us tremendous freedom and latitude to be ourselves – our various personalities and behaviors that are directly related to and influenced by our neurology are not always compatible with specific social expectations.³⁰ This Article will present a revolutionary thought: Most Autistics I know, including myself, desire only the freedom to meet necessary job requirements while being ourselves. In other words, we seek an accommodation to be neurologically other – quirky, overly friendly or cold at

real disability and the protections I am afforded because of it are decided by thousands of people who lack my brain chemistry.

29. Robyn Steward, *Lesser-Known Things About Asperger's Syndrome*, BBC NEWS: OUCH BLOG (Aug. 16, 2014), <https://www.bbc.com/news/blogs-ouch-28746359> (providing examples of typical difficulties for those with Asperger's including "[l]imits to body awareness, for example walking round obstacles or carrying out fine motor tasks").

30. It is difficult to find case law regarding Autistics in white-collar or academic jobs bringing suit under the ADA; however, numerous cases regarding other forms of employment and Autism will be used to construct this argument.

times, uniquely dressed, etc. without the fear of reprimand or termination for existing as Autistic while teaching.

III. THE BURDEN OF DISCLOSING FOR NEURODIVERGENT PERSONS WITH SOCIAL DIFFERENCES

In the workplace, traditional means of protection for disabled persons are governed federally by the ADA/ADAA,³¹ and by the PHRA in Pennsylvania,³² which both provide that one is protected from workplace discrimination/adverse employment actions if the person has a “disability” that “substantially limits” them in a major life function.³³ Updated regulations from the Equal Employment Opportunity Commission (EEOC) provide that Autism is “almost always covered” because “[a]n impairment is a disability . . . if it substantially limits the ability . . . to perform a major life activity as compared to most people in the general population[.]” and Autism is considered to “substantially [limit] brain function.”³⁴ Furthermore, “substantially limits” “shall be construed broadly in favor of expansive coverage” under the ADA and that “major life activities” include “thinking, communicating, interacting with others, and working.”³⁵ As defined by the ADA/ADAA, a “disability” includes, but is not limited to, “(A) a physical or mental impairment that substantially limits one or more major life activities of such individuals” and “(C) being regarded as having such an impairment.”³⁶

In Pennsylvania,³⁷ “in order to make out a prima facie case of disability discrimination under the ADA and PHRA, a plaintiff must establish that s/he (1) has a ‘disability,’ (2) is a ‘qualified individual,’ and (3) has suffered an adverse employment action because of that disability.”³⁸ Additionally,

[t]he jurisprudence regarding disability discrimination can be found in the Americans With Disabilities Act (ADA) and the

31. 42 U.S.C. § 12102(1) (2012).

32. 43 PA. CONS. STAT. § 955 (1997); 43 PA. CONS. STAT. § 954 (p.1)(1)-(3) (1997).

33. 42 U.S.C. § 12102(1); 43 PA. CONS. STAT. § 954 (p.1)(1)-(3).

34. 29 C.F.R. § 1630.2(j)(1)(ii), (3)(iii) (2012).

35. 29 C.F.R. § 1630.2(j)(1)(i), (i)(1)(i).

36. 42 U.S.C. § 12102(1)(A), (C).

37. Because the DUQUESNE LAW REVIEW is located in Pittsburgh, Pennsylvania, I have chosen to discuss relevant case law, whenever possible, from either Pennsylvania or the Third Circuit Court of Appeals. However, outside jurisdictions offer examples for how Pennsylvania and the Third Circuit should proceed.

38. *Becknauld v. Commonwealth Dep’t of Agric.*, No. 678 C.D. 2016, 2017 WL 33732, at *1 (Pa. Commw. Ct. Jan. 4, 2017) (quoting *Buskirk v. Apollo Metals*, 307 F.3d 160, 166 (3d Cir. 2002)). Additionally, the PHRA is interpreted “in line with the ADA.” *Khula v. State Corr. Inst.-Somerset*, 145 A.3d 1209, 1212 (Pa. Commw. Ct. 2016).

Pennsylvania Human Relations Act. Within the context of employment discrimination involving persons with a disability, it is somewhat intuitive that if a person wants and/or needs a reasonable accommodation to successfully perform a job, one must first have a disability, one must then inform the employer of the existence of the disability, and to the extent that one wants/needs a reasonable accommodation related to the disability, one should request a reasonable accommodation.³⁹

It seems intuitive that one who has an Autism diagnosis would have no problem proving she was legally entitled to protection from discrimination; however, the ADA/ADAA and PHRA treat disability not as “identity,” an inherent and critical part of one’s existence, but something which must be acknowledged and “known” by the employer in order for the disabled employee to receive protection.⁴⁰ The EEOC’s Compliance Manual, in fact, stresses that legally cognizable issues of discrimination only come into play “because of the *known* disability of an individual,” and reasonable accommodations under the ADA are only required for “*known* physical or mental limitations of an otherwise qualified individual.”⁴¹

Though not about an Autistic worker, in *Allen v. State Civil Service Commission*, the Commonwealth Court of Pennsylvania reasoned that a woman claiming she was denied a reasonable accommodation was required to show she “informed her employer that she had a [specific/certain] disability” and that “she desired a reasonable accommodation.”⁴² The petitioner in *Allen* “indicated to her instructor and the training coordinator, that she could not do the required [workplace training] scenarios on the day in question because she was sick and she did not feel well.”⁴³ The employer informed the petitioner that she would have to retake the test (complete the “scenarios”) at a later date, and the petitioner responded, “okay.”⁴⁴ However, the petitioner was not agreeable to the accommodation of retesting, despite her previous verbalization of “okay.”⁴⁵ Ultimately, the Commonwealth Court concluded that based on the pleadings, the petitioner only claimed she had “a disability” in general, and provided no facts to substantiate or specifically explain what her disability was and how her specific disability

39. *Allen v. State Civil Serv. Comm’n*, 992 A.2d 924, 931 (Pa. Commw. Ct. 2010).

40. *Id.* at 931-32.

41. 42 U.S.C. § 12112(b)(4) (emphasis added), (5)(A) (2012) (emphasis added).

42. 992 A.2d at 932.

43. *Id.*

44. *Id.*

45. *Id.*

limited her ability to perform the required training.⁴⁶ Thus, the petitioner did not satisfy the ADA's requirement that she had an employer "known" disability.⁴⁷ The *Allen* court also explained that pursuant to 42 U.S.C. § 12112(b)(5)(A), which requires an employer to provide a reasonable accommodation for "known physical or mental limitations,"⁴⁸ the employer must "know of both the disability and desire for an accommodation" in order to be held liable.⁴⁹

At first read, *Allen* seems harmless and innocuous, but for Autistics and other neurodivergent employees, the decision could mean the difference between protection/employment and no protection/unemployment, unless the Autistic employee is "regarded as" Autistic,⁵⁰ discussed *infra*. The petitioner in *Allen*, though her claim failed because she admitted she received an "accommodation" to take her test on a later date, did affirmatively tell her employer she was "sick."⁵¹ While "sick" is admittedly a general term, the petitioner's employer was on notice that she was in need of an accommodation. Also, the *Allen* court cited specific language from the Third Circuit Court of Appeals which explained:

What matters under the ADA are not formalisms about the manner of the request [for reasonable accommodation], but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.⁵²

Unfortunately, the *Allen* court never evaluates where the petitioner's explanation that she did not "feel well" and that she was "sick" fell on a spectrum (pun intended) between failure to establish a known disability and "*enough information . . . under the circumstances.*"⁵³

The answer to this question is especially important to employed Autistics. In order to obtain the protection of a law created for people like us, Autistics must, despite our diagnosed social challenges

46. *Id.* at 933.

47. *Id.*

48. *Id.* at 931 (quoting 42 U.S.C. § 12112(b)(5)(A)).

49. *Id.* at 932 (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)).

50. *See id.* at 933.

51. *Id.* at 932.

52. *Id.* (alteration in original) (quoting *Phoenixville*, 184 F.3d at 313).

53. *Id.* at 931-33 (quoting *Phoenixville*, 184 F.3d at 313).

and differences, “inform the employer of the existence of the disability.”⁵⁴ And pursuant to *Allen*, we must inform them specifically. I contend that such a coming-out moment for Autistic employees might not be as clear-cut as most neurotypical employers/supervisors would imagine. What if the pressure of disclosing a little understood, highly stereotyped neurological difference which impacts socialization—everything from small talk in the office, shared interests with coworkers, and the ability to find the appropriate human resources director to disclose their Autism—is an insurmountable burden for the Autistic professor?⁵⁵ After all, “[b]eing able to successfully navigate the social nuances and relationships that exist within a workplace setting is often more critical to career success and advancement than the mastery of hard skills. Because ASD is primarily a social disorder, it can create serious hurdles to securing and maintaining employment.”⁵⁶ How, then, can the law require specific, acute self-disclosure if the inability for self-disclosure, or the limitations surrounding such disclosure, are manifestations of Autism? In fact, this type of pro-active and self-exposing requirement runs counterintuitive to all evidence we have about what it means to be Autistic.⁵⁷

Basically, *Allen* requires that those with neurodivergent social perception and abilities must navigate a social system in order to obtain protections.⁵⁸ However, the social skills of an Autistic person are so different from those of a neurotypical person that medical experts recommend that young Autistics find a social training partner who helps the young Autistic to learn social cues, appropriate topics of conversation, a conceptualization of theory of mind (the

54. *Id.* at 931; see also ASPERGER SYNDROME: ASSESSING AND TREATING HIGH-FUNCTIONING AUTISM SPECTRUM DISORDERS 376 (James C. McPartland et al. eds., Guildford Press 2d ed. 2014) [hereinafter ASPERGER SYNDROME].

55. Hensel, *supra* note 12, at 90 (“[T]he ADA’s strict confidentiality requirements may impede disclosure in some circumstances. Although the employee has the ability to self-disclose at any time to anyone in the workplace, many employees with ASD may choose to remain silent once the position is secured.”). Additionally, as a point of self-disclosure, in the past my social anxieties have burdened me to such a degree that pursuing human resources personnel has been all but impossible.

56. *Id.* at 78.

57. It bears repeating: “[F]irst, . . . all people on the spectrum have issues with social interactions. They do so due to the atypical neurological wiring of their brains relative to the average person, which leads to an impoverished ability to intuitively read between the lines and comprehend nonverbal communication.” Ugo Uche, *Why Is ASD Often Associated with Social Anxiety?*, PSYCHOL. TODAY (June 29, 2017), <https://www.psychologytoday.com/us/blog/promoting-empathy-your-teen/201706/why-is-asd-often-associated-social-anxiety>. In turn, these limitations and differences often lead to social anxieties which compound Autism’s symptoms. See *id.*

58. ASPERGER SYNDROME, *supra* note 54, at 19.

idea that other people have thoughts different from the Autistic person), etc.⁵⁹ In fact, “[w]hen an individual has difficulty predicting the actions of social partners, the development of social communication and emotional regulation can be compromised.”⁶⁰ Nonetheless, in order to be legally protected from workplace discrimination on the basis of disability or to be accommodated at the workplace, Autistics have to do something that at times can be nearly impossible for an Autistic to accomplish—no matter how socially adept the outside world might judge them.

However, there is some hope for Autistic academics if they have reported their various *limitations* to their employers. In *Lazer Spot, Inc. v. Human Relations Commission*, the Commonwealth Court of Pennsylvania examined Matthew Harrison’s claim that PTSD interfered with his major life activities of sleeping and working.⁶¹ The parties did not dispute Harrison’s PTSD diagnosis; in fact, “the record reveal[ed] that Harrison presented extensive evidence concerning the effect of his PTSD on his sleeping. However, Harrison did not offer any evidence to prove that [his employer] was aware of [his] limitations [with regard to sleeping.]”⁶² While there was substantial evidence that Harrison’s PTSD impacted his sleep, the court held that “it is important to distinguish between an employer’s knowledge of an employee’s disability versus an employer’s knowledge of any limitations experienced by the employee as a result of that disability.”⁶³ Relying on regulations from the EEOC, the court quoted, “The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the individual.”⁶⁴

While *Lazer Spot* is unpublished, and thus nonbinding, the decision reflects the Commonwealth Court of Pennsylvania’s impetus to move away from *Allen*’s rigid requirement of specific disclosure toward a fairer reading of the ADA—one that does not unintentionally disenfranchise its intended plaintiffs.⁶⁵ The *Lazer Spot* court even cited the *Allen* “known disability” requirement while reaching its more liberal conclusion.⁶⁶ Thus, it seems that in Pennsylvania

59. *Id.* at 180.

60. *Id.* at 181.

61. *Lazer Spot, Inc. v. Human Relations Comm’n.*, No. 459 C.D. 2017, 2018 WL 670621, at *3 (Pa. Commw. Ct. Feb. 2, 2018).

62. *Id.* at *5.

63. *Id.* (quoting *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 164 (5th Cir. 1996)).

64. *Id.* (quoting 29 C.F.R. § 1630.2(j) (1995)).

65. *See id.*

66. *Id.* at *9.

an Autistic professor could establish that her employer regarded her as Autistic if she can prove that the employer was aware of her limitations and social differences, rather than relying on the specific incantation spoken or written to the correct human resources personnel: “I am Autistic.”

IV. ACCEPTING US FOR WHO WE ARE: THE LINK BETWEEN AUTISTIC BEHAVIORS AND “REGARDED AS” PROTECTION

Instead of requiring self-disclosure, I contend that Autistics, because of Autistic behavior, should always be protected by the ADA, even when they never overtly claimed their status or professed various limitations to their employer. This is especially important for Autistic professors who are evaluated by both colleagues and students, both of whom could be ignorant to the professor’s limitations or diagnosis because the professor never fathomed she would need any type of protection for simply being herself. For neurotypicals reading this article, ask yourselves if you have ever had to disclose all of your various personality traits to your employers and coworkers. Until one is shown or told that she is different, she has little reason to believe that she must disclose her various differences, quirks, and aberrations from the neuromajority, to her supervisors and classroom of students—just to be protected by the ADA. I contend that if a professor behaves in such a manner that her humor, bluntness, or all-around quirks inform any hiring, firing, or non-renewal of contracts, that professor should be entitled to ADA protections based on the theory that she was either “regarded as” or should have been regarded as Autistic.

Both Pennsylvania’s PHRC and the ADA/ADAA provide guidance on this issue. Section 44.4(ii)(D) of the PHRC’s regulations provides that “regarded as having an impairment” means:

ha[ving] a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or has none of the impairments defined in subparagraph (i)(A) but is treated by an employer or owner, operator or provider of a public accommodation as having an impairment.⁶⁷

67. 16 PA. CODE § 44.4(ii)(D) (2018).

Additionally, 42 U.S.C. § 12102(3)(A) of the ADA provides:

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Lastly, the court in *Lazer Spot* explained:

An individual rejected from a job because of the “myths, fears and stereotypes” associated with disabilities would be covered under this part of the definition of disability, whether or not the employer’s or other covered entity’s perception were shared by others in the field and whether or not the individual’s actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers’ compensation costs, and acceptance by coworkers and customers.⁶⁸

In *Lazer Spot*, the instructional decision discussed *supra*, Harrison told his employer that he had PTSD and was afraid he would be triggered if he had to drive a truck outside of the yard.⁶⁹ Harrison’s employer, a big-rig truck company, interpreted Harrison’s admission of his PTSD diagnosis to mean that Harrison could not drive an 18-wheeler anywhere, as he was a safety risk to the company.⁷⁰ Applying all of these regulations, the court in *Lazer Spot* concluded that because the employer regarded Harrison as disabled and made a decision to terminate his employment as a truck driver within the yard based on the stereotypes and myths of PTSD, Harrison could bring a “regarded as” claim.⁷¹

Accordingly, the holding in *Lazer Spot* will help any Autistic professor who mentions his neurodivergence and is, in turn, viewed by administration and colleagues as disabled. But what if the Autistic

68. *Lazer Spot*, 2018 WL 670621, at *7 (quoting *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1132 (10th Cir. 2003)).

69. *Id.* at *9.

70. *Id.*

71. *Id.*

professor never mentions his Autism? What if his behaviors, mannerisms, way of being in the world speak for themselves? Though Pennsylvania does not have any cases directly on point, the Eleventh Circuit Court of Appeals and the United States District Court for the Southern District of New York have addressed circumstances where Autistic people, even without ever declaring their Autism, presented issues of fact because the ADA/ADAA protects against discrimination for “odd”⁷² behaviors that either did or should have informed the employer of the employee’s Autism.

A. Awkward and Earnest Socialization in the Eleventh Circuit

In *Taylor v. Food World, Inc.*, Gary, an Autistic man (diagnosed with Asperger’s) who engaged in repetitive and loud speech, as well as making “inappropriate comments” and asking “personal questions of strangers,” worked as a clerk at a grocery store.⁷³ His primary duties included bagging groceries and delivering customers’ groceries to their vehicles.⁷⁴ Three customers complained to management regarding Gary’s behaviors.⁷⁵ Gary was terminated by his grocery store employer “based on customer complaints that Gary was loud, overly friendly, and overly talkative.”⁷⁶ Gary admitted “that he inquired as to whether couples were married and as to the ages and names of customers’ children. He testified that he once told a customer that she needed to buy more groceries because she was too skinny and that he asked a customer if there was anything wrong with his toilet [based on their purchases].”⁷⁷

Gary sued the grocery store for firing him based on his Autism, and the grocery store did not contest that Gary had a “disability” under the ADA.⁷⁸ However, the grocery store did argue that Gary was not qualified for the job without a reasonable accommodation; thus, he could lawfully be terminated.⁷⁹ The district court ruled that Gary was not “an otherwise qualified individual” because “as a matter of law, Gary’s on-the-job behavior rendered him unqualified for the position of utility clerk.”⁸⁰

72. As an Autistic, I do not believe my behaviors, mannerisms, or socialization are odd, but I do acknowledge that my entire personhood is different from the neuromajoritarian presentation of behavior and socialization.

73. 133 F.3d 1419, 1421 (11th Cir. 1998).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1424.

78. *Id.* at 1422.

79. *Id.* at 1423.

80. *Id.*

The Eleventh Circuit Court of Appeals found that Gary's verbosity, invasive questions, and loud speech were undisputed facts.⁸¹ However, the court also concluded that Gary was, arguably, able to perform the duties of a utility clerk.⁸² The grocery store contended that because utility clerks were required to have customer contact, "interacting appropriately with customers" was an "essential job function."⁸³ Ultimately, even before the more favorable 2008 amendments to the ADA, the Eleventh Circuit held that Gary's case presented questions of fact as to whether Gary could perform the job without offending others and whether any of his behavior or commentary was actually "offensive."⁸⁴

B. Personal Space Issues and Stereotypical Meltdown Behavior in the Southern District of New York

Additionally, in *Glaser v. Gap Inc.*, the United States District Court for the Southern District of New York examined an ADA claim of William Glaser, a man who worked in a Gap distribution center and was terminated after exhibiting stereotypical, Autistic meltdown behaviors.⁸⁵ Shortly before his termination, Glaser met with his supervisor to apologize for a misunderstanding; however, his supervisor began yelling at him.⁸⁶ While his supervisor was yelling, Glaser "was waving his hands and continually moving," blocking his supervisor's means of egress.⁸⁷ Other coworkers said Glaser clenched his fists and released his hands repeatedly.⁸⁸ Throughout his employment at Gap, Glaser also made some coworkers feel uncomfortable "by getting upset if [a coworker] was too busy to speak with him when he stopped by to see her and by talking about her to other people in too familiar a manner."⁸⁹ Concepts of personal space plagued Glaser's employment, and he was advised that he needed to stand farther away from people when talking and that he could not put his arm around his supervisor's shoulders.⁹⁰ One of the questions in Glaser's case was whether Gap

81. *Id.* at 1423-24. The record also revealed that many customers believed Gary was drunk. *Id.* at 1424.

82. *Id.* at 1423-24.

83. *Id.* at 1424.

84. *Id.*

85. *Glaser v. Gap Inc.*, 994 F. Supp. 2d 569, 571 (S.D.N.Y. 2014).

86. *Id.* at 571.

87. *Id.*

88. *Id.*

89. *Id.* at 575.

90. *Id.*

had notice of his disability.⁹¹ A trainer with Gap testified that when Glaser “would get upset, he would turn red, tense up, clenching his fists against his chest, and tremble.”⁹² The district court reasoned that:

[f]rom the outset, Gap personnel apparently understood that Glaser is impaired. While serving as Glaser’s trainer, and having observed that Glaser was ‘different’ and probably suffered from ‘a mental disability,’ [a Gap trainer testified that it was common knowledge] to ‘[m]ake sure nobody bothered him.’ When Glaser got upset, [a Gap trainer] was asked by supervisors to talk to him and ‘calm him down.’ [The trainer] mentioned to at least three Gap supervisors that Glaser would fixate on and not be able to solve a problem, and he spoke with at least one Gap manager about Glaser’s tendency to follow people around and get too close.⁹³

Based on this evidence and other testimony, the district court held:

Under the ADA, an employer need not know the exact diagnosis to be liable for discrimination on the basis of a disability; liability may be premised on the employer’s perception, regardless of whether it is accurate, if the employer relies on such perception to engage in a prohibited act.⁹⁴

C. Conclusion: Takeaways from *Taylor* and *Glaser*

Both *Glaser* and *Taylor* show that simply by being Autistic in a neuromajoritarian environment, Autistic employees revealed themselves to be “societally other” by failing to conform to social rules and modes of being. Because of this, in both cases, rather than trying to establish a qualifying disability, the courts either found that the Autistic behaviors made the employer aware of the disability⁹⁵ or the employer did not challenge the Autism as a qualifying disability.⁹⁶ Either way, because the employee was regarded as Autistic, juries were permitted to hear the more important question for Autistic plaintiffs: Were the employees qualified to perform the job?

91. *Id.* at 576.

92. *Id.*

93. *Id.* at 577 (citations omitted).

94. *Id.* at 578.

95. *Id.*

96. *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998).

Now, consider this in terms of the classroom for an Autistic professor. Every day the professor has an audience who will witness his hand gestures, his failure to make eye contact, his awkward humor, and his questioning of student motives when he cannot read facial expressions. Perhaps he will inappropriately laugh and smile at times when others are stressed and upset. All of these behaviors and actions are not choices, but manifestations of neurology. Professor Melanie Yergeau beautifully describes the interplay between intention and invention in terms of Autistic behavior:

Embodied communicative forms—including the echo, the tic, the stim, the rocking body, the twirl—represent linguistic and cultural motions that pose possibility for autistics . . . Importantly, while invention has often been framed in relation to meaning or the beginnings of some grander future meaning, invention is also about scraps—items we’ve discarded, the embodied reeling that accompanies failure, the unintentional effects and affective responses.⁹⁷

Yergeau’s description shows that the Autistic body and mind’s otherness, their deviations from the norm, are the unintentional effects of a body and mind that work in different ways than our neurotypical colleagues or students. I implore practitioners to pursue equal treatment for Autistics in higher education by articulating that our various records of differences at work create an Autistic composite and that any actions taken by our employers based on our neurology which the employer contends are “personality traits” prove that the employer regarded us as Autistic because our actions, reactions, and personalities are the branches that extend from the tree that is our core – Autism.

V. WE’RE HERE, WE’RE NEUROQUEER,⁹⁸ GET USED TO IT!

The claim of disability rights makes a distinction between the individual model of disability, which locates the problems and

97. MELANIE YERGEAU, *AUTHORING AUTISM: ON RHETORIC AND NEUROLOGICAL QUEERNESS* 181-82 (Duke University Press 2018).

98. Discussing the concept of neuroqueerness, Prof. Melanie Yergeau, a self-described neuroqueer and Autistic, writes:

The autistic subject, queer in motion and action and being, has been clinically crafted as a subject in need of disciplining and normalization. What autism provides is a back-door pathologization of queerness, one in which clinicians and lay publics alike seek out deviant behaviors and affectations and attempt to straighten them, to recover whatever neurotypical residuals might lie within the brain, to surface the logics and rhetorics of normalcy by means of early intensive behavioral intervention.

Id. at 26.

challenges of a disabled person in their physical or cognitive dysfunctions, and the social model of disability, which argues that disability is primarily a social condition caused or highlighted by the structure of society, the physical and social barriers, and the lack of appropriate environmental and community organization to support the social inclusion of disabled people⁹⁹

Assuming an Autistic professor can successfully establish a “regarded as” claim, the question becomes whether an Autistic professor who is odd/different can be fired for being disabled? The decisions and supporting facts in both *Glaser* and *Taylor* exemplify that societal forces of neuromajoritarianism judge patterns and groupings of behaviors and reactions as insubordinate and aberrant.¹⁰⁰ These particular behaviors, in *Glaser*—social inappropriateness regarding personal space and repeated hand/arm movements during a meltdown,¹⁰¹ and in *Taylor*—speaking loudly and asking questions that bothered some customers, arguably put employers on notice of the employee’s neurodivergence.¹⁰² The questions I ask are: Do we as a society want to punish and fire Autistics whose social and behavioral differences violate, at most, cultural norms? Should the occasional discomfort of the neuromajority influence whether an otherwise capable Autistic should be employed? I contend that any considered adverse employment action against a self-disclosed or regarded-as Autistic professor at the university/college level should be evaluated very carefully by school administration, and the EEOC’s commentary and guidelines support this argument.

I am not asking for unequal treatment for Autistics. In fact, it is important to note that employers are legally permitted to discipline employees with qualifying disabilities when the employee’s behavior violates “a conduct standard.”¹⁰³ As long as the “employee’s disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees.”¹⁰⁴ The EEOC guidelines provide an example where a blind employee takes extra breaks to smoke cigarettes and also

99. Ripamonti, *supra* note 3, at 60.

100. See *Taylor*, 133 F.3d at 419; *Glaser*, 994 F. Supp. 2d at 569.

101. *Glaser*, 994 F. Supp. 2d at 571.

102. *Taylor*, 133 F.3d at 1423-24.

103. *The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities*, EQUAL EMP. OPPORTUNITY COMMISSION (EEOC), <https://www.eeoc.gov/facts/performance-conduct.html#basic>.

104. *Id.*

taunts her supervisor, violating standards of conduct at the workplace that “are unrelated to her disability and the employer may discipline her for insubordination.”¹⁰⁵ The guidelines also permit employers to take disciplinary action against disabled employees if the conduct which created the workplace violation was caused by the employee’s disability.¹⁰⁶ However, the conduct rule must be “consistent with business necessity” and the employee with a disability must be held to the same standard as other employees.¹⁰⁷ The guidelines provide that employers have wide latitude to develop conduct rules involving profanity, yelling, pornography, lewd gestures, etc.¹⁰⁸ One of the crucial factors in examining whether the rule is “job-related and consistent with business necessity” includes “the working environment.”¹⁰⁹

The EEOC guidelines also provide an example of a bank teller with Tourette Syndrome, a neurological condition like Autism, which can create involuntary and repeated verbal and physical tics.¹¹⁰ The question raised in the example is whether a bank teller who curses and occasionally shouts at work, behaviors extending from her Tourette Syndrome, can be fired for violating conduct rules about cursing and disruption.¹¹¹ The EEOC provides that “termination is permissible because it is job-related and consistent with business necessity” because the behaviors interfere with serving customers in an appropriate manner.¹¹² As a disabled person, I experience great sadness by knowing that, legally, my body and my behaviors are judged by a society who does not understand me and who believes my natural modes and state of being are a choice. For those neurotypical readers, ask yourself how you would feel if your normal behaviors and tics were considered so unbecoming that you could be fired for simply being yourself—unrelated to the quality of your work.

If my behaviors and my disability are intertwined, how is terminating me for my behavior not an act of disability discrimination? While not reflective of the majority rule, which provides latitude to

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* However, I fundamentally disagree with the EEOC’s guidance on this issue involving Tourette Syndrome in the workplace and believe that it allows non-disabled persons to exclude people with disabilities from gainful employment and deny us a place in society. Such a discussion regarding customer service and neurological conditions will be the subject of another article.

employers to fire employees for behavior that violate customs or standards within the workplace *even if the behavior was directly related to a disability*,¹¹³ the Ninth Circuit Court of Appeals provides a way forward that will allow disabled bodies to justifiably remain in employment when they breach employer rules because of their disabilities.¹¹⁴

A. The Ninth Circuit's "Causal Link" Between Disability and Behavior

In *Gambini v. Total Rental Care, Inc.*, a contracts clerk at a dialysis center was bipolar and told her co-workers she “was experiencing mood swings, which she was addressing with medications, and asked that they not be personally offended if she was irritable or short with them.”¹¹⁵ The clerk’s supervisor called her into a meeting, without offering any explanation for the meeting, and failed to inform her that her former supervisor would be in attendance.¹¹⁶ The supervisors informed the clerk that her “attitude and general disposition [were] no longer acceptable” in her department.¹¹⁷ The clerk began to cry and read a performance plan.¹¹⁸ Her bipolar associated symptoms escalated as she grew hot and experienced chest tightness.¹¹⁹ The clerk threw the performance plan and “in a flourish of several profanities expressed her opinion that it was both unfair and unwarranted.”¹²⁰ Before the clerk slammed the door on her way out of the office, she “hurled several choice profanities” at her supervisor and then threw things at and kicked her cubicle.¹²¹ The clerk was ultimately terminated for her behavior during the meeting.¹²²

At trial, the court failed to read a jury instruction that explained, “conduct resulting from a disability is part of the disability and not a separate basis for termination.”¹²³ The Ninth Circuit Court of Appeals determined that “where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was

113. Hensel, *supra* note 12, at 80.

114. *Gambini v. Total Rental Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

115. *Id.* at 1091.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1091-92.

122. *Id.* at 1092.

123. *Id.* at 1093.

terminated on the impermissible basis of her disability.”¹²⁴ Ultimately, the court found that “if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only.”¹²⁵

Because the Ninth Circuit fully grasps that one’s disability is inseparable from one’s conduct where the conduct is a direct byproduct of the disability, the Ninth Circuit’s conceptualization of disability law is the only just outcome which will allow Autistics to be part of the academy, rather than a misunderstood group of eccentrics who violate social norms, like the Tourette Syndrome example from the EEOC, who remain hidden from the larger working community.

B. The Eccentric Academic And The Academic Job-Related Function/Business Necessity of Inclusion

The circumstances in *Glaser* and *Taylor* simply present “dilemmas” the neurotypical world faces when confronted with Autistics existing while working.¹²⁶ Consider this hypothetical: Assume an Autistic professor without tenure protections carries himself in such a manner that a student questions the professor’s “professionalism.” In part, the unorthodox, Autistic professor uses a comorbid Autistic form of expression, echolalia. Echolalia, which is “the immediate or delayed repetition of the speech of another, is associated with autism . . . is usually described as a non-functional self-stimulatory or stereotypical behavior . . . and is considered to be a positive intervention” for Autistics.¹²⁷ Perhaps the professor became fascinated with the title of Sheryl Sandberg’s *Lean In*,¹²⁸ and employed the phrase in multiple contexts several times per class session to encourage students to try and “lean in to that idea,” or in response to a question about wordcount the professor responds, “You can meet the 1,200 word count. Lean in!”¹²⁹ Over the course of the semester, this may begin to annoy students who do not neurologically crave repetition of sounds like an Autistic person does. Additionally, perhaps the professor curses in bursts from time-to-time,

124. *Id.*

125. *Id.* at 1095.

126. *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1421 (11th Cir. 1998); *Glaser v. Gap Inc.*, 994 F. Supp. 2d 569 (S.D.N.Y. 2014).

127. Jacqueline M.A. Roberts, *Echolalia and Language Development in Children with Autism*, in *TRENDS IN LANGUAGE ACQUISITION RESEARCH II: COMMUNICATION IN AUTISM* 55 (Joanne Arciuli & Jon Brock eds., John Benjamins Publishing Co. 2014).

128. Sheryl Sandberg, *LEAN IN—WOMEN, WORK, AND THE WILL TO LEAD* (Alfred A. Knopf New York 2013).

129. *Id.*

stringing expletives¹³⁰ together to describe social injustices or when explaining the importance of reading an assignment closely. On the Autistic professor's student evaluations, some students remark that the professor's use of expletives was offensive, and others remark that the professor was "intense."

Even if a university or college has rules against cursing, for example, if the Autistic professor can show that cursing is directly related to his Autism—an echolalial stimulatory behavior and alternative use of sound and language to which neurotypical society does not understand, the professor should be protected under the ADA. Litigators and appellate attorneys should work together until courts adopt the Ninth Circuit's approach to disability and behavior.¹³¹ But for the sake of argument, assume that the law does not change as quickly as Autistic academics will need it to in order to protect them. Are Autistic academics in Pennsylvania strangers to the ADA—a law designed for people just like them?

I propose that colleges and universities should be able to create codes of conduct, but those codes should be narrowly tailored as to not include conduct that is irrelevant to the job-function. Ideas offend students in every classroom. Certain types of behaviors, such as sexist, racist, nationalist, homophobic, and ableist behaviors, should be fireable offenses whether the professor is neurotypical or Autistic. However, a fundamental difference exists between being off-putting, intense, unique, and quirky, versus perpetuating harmful stereotypes and judgments. One is a disability; the other is a societal cancer. One must be embraced (disability); the other must be drowned out by goodness and critical thinking in the marketplace of ideas.

Unlike certain cases discussed *supra*, a professor's job-function, dissimilar to someone in customer service, is to help diversify the classroom by presenting multiple perspectives and ability models to enrich the educational experience. An Autistic professor will already be sensory overloaded, and the idea that he will be able to regulate all the various components of his existence, which neurotypicals take for granted, is such an impossibility that Autistic professors like myself will always either come up short or be so focussed on neuromajoritarian concepts of conduct and professionalism that not only will we suffer, but our students will suffer because they will receive a competent product that was linguistically, socially,

130. Echolalia is interrelated with cursing. Emma Nicholson, *I Taught My Son with Autism How to Swear*, HUFFINGTON POST (Jan. 9, 2014, 11:24 AM), https://www.huffingtonpost.com/emma-nicholson/i-taught-my-son-with-autism-how-to-swear_b_4464885.html.

131. See generally *Gambini v. Total Rental Care, Inc.*, 486 F.3d 1087 (9th Cir. 2007).

and behaviorally stunted for the sake of congeniality. This is especially true for Autistic law professors who do not lecture but actively engage in the back-and-forth of classroom discussion in the Socratic method.

While I want to live in a world that accepts the Ninth Circuit's approach to disability,¹³² I also know that such a departure from social norms will likely feel burdensome to the judiciary and employers. Practitioners should seek test cases from academia, arguably a group with more employment freedom than any other, to challenge existing approaches to our current legal system. Although I desire systemic change, and I hope that disability activists across the country will take the arguments in this Article and begin to construct a neurodiverse and neuroinclusive future, I want to note that colleges and universities can pave the way without any litigation. If human resources departments and university/college administrators begin looking at Autistics as whole persons who process the world so differently that their entire mode of being will be different than their peers and students, schools can stop any problems with social norms before they begin by discussing a professor's diagnosis with them after they have witnessed and heard report of enough Autistic behaviors to regard the employee as Autistic. The EEOC permits this if the employer believes the disabled person's behaviors and conduct, based on objective evidence, are related to a disability that inhibits the employee from performing an essential function.¹³³

VI. CONCLUSION

Ultimately, I envision a future where Autistic professors and other neurodivergent academics assist in changing the scope and application of disability law so that Autistics, and all of our differences and quirks, are integrated into the workplace so we do not worry that just being ourselves will lead to joblessness. Few studies regarding Autistics and employment exist, but anecdotally and personally, Autistic people have explained that the social awkwardness and quiriness associated with Autism have stopped them from being hired. For example, Leigh, a 39-year-old Autistic, holds a master's degree in library science, relevant work experience, and a 145 IQ. After Leigh was laid off, he tried to find work, but the combination of unfiltered candor and the interview process of a neurotypical world denied him entry to employment:

132. See generally *id.*

133. *The Americans With Disabilities Act*, *supra* note 103.

[I]n interviews, he invariably presents as quirky, which can be off-putting for those less familiar with ‘folks on the spectrum.’ When asked last year during one library interview how well he would do managing a small team of volunteers, Leigh replied, ‘Not very well. I can be tyrannical.’ He did not get the job.

‘I’m at a precipice,’ Leigh says. ‘I’m so high-functioning that I don’t really register as disabled, but I’m not high-functioning enough that I can easily utilize anything social.’¹³⁴

I argue that Leigh’s Autism, no matter how high functioning he presents, inhibited his ability to work. Most employers, I believe, suspect that an employee who uses unfettered candor in an interview must either be rich or disabled, as those are two of the only logical reasons for disclosing “tyrant tendencies.”¹³⁵

Autistic academics, and Autistics across the spectrum, deserve the right to full personhood, and in a society where employment, capital, and medical care determine outcomes for all people, but especially disabled persons, our right to full personhood is connected to our ability to survive financially. Is it so bad if a professor wanders around the classroom while talking and utters curse words when he discusses a hot-topic that exemplifies the injustices in society? Is telling a coworker that one needs more personal space or helping to set ground rules really so debilitating for non-disabled persons that they would rather fire us than work with us?

While I am lucky to have an employer in the Duquesne University School of Law who knows and celebrates me, my teaching, and my Autism, most Autistics are not as lucky. The arguments presented herein are for them, based on my research and experiences as an Autistic living in a neurotypical world. My hope is that the day will come when we no longer have to explain ourselves away and will be protected against the way the neuromajority views us, even when we never thought to inform our workplaces of our Autism, as all we intended to do was be ourselves.

134. Carr, *supra* note 2.

135. If you find yourself giggling at this definition I’ve just proven that Autistics have a sense of humor. Still, I stand by the statement.