In common parlance a “job requirement” can refer to (1) a task or responsibility the employee must perform as part of doing a job; or (2) an ability or credential the employee must have to obtain or keep the job. The Americans with Disabilities Act (“ADA”) and accompanying regulations use the term “essential function” to refer to first type of job requirement and “qualification standard” to refer to the second type. However, the line between these two types of job requirements is often blurry. The ADA does not coherently define the relationship between qualification standards and essential functions and courts frequently conflate the two. This is not just a matter of imprecise terminological blurring, like confusing “waiver” and “estoppel.” Labeling a particular job requirement an “essential function” rather than a “qualification standard” has significant legal consequences that can be case-dispositive when addressing whether an employer must provide reasonable accommodation. Employers and employees have little reliable guidance through this doctrinal quagmire.

STATUTORY FRAMEWORK

The statutory purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). ADA Title I’s general rule against discrimination in employment is as follows: “No covered entity shall discriminate against a qualified individual on the basis of disability 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.” 42 U.S.C. § 12112(a).

The ADA does not protect a disabled person per se from employment discrimination but only someone who is “a qualified individual with a disability.” While courts have imposed a “qualified” requirement as part of the McDonnell
Douglas/Burdine framework for addressing disparate treatment discrimination, being qualified for one’s job is not a statutory coverage prerequisite under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act (“ADEA”). Thus, it is theoretically possible for an unqualified employee to bring a claim of harassment or even disparate treatment under Title VII. But a disabled person who does not meet the ADA definition of “qualified” falls outside the statute altogether. E.g., Cripe v. City of San Jose, 267 F.3d 877, 884-85 (9th Cir. 2001).

A “qualified individual” is “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.” 42 U.S.C. § 12111(8). That section further provides: “For the purposes of this subchapter, 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.” Id.

The ADA goes on to define certain specific activities that will constitute discrimination in violation of the general rule. Discrimination includes “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.” 42 U.S.C. § 12112(b)(6).

There are three other places in Title I where the statute references “qualification standards,” all of which occur within the section entitled “Defenses”:

(a) In general
It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
(b) Qualification standards
The term “qualification standards” may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification standards and tests related to uncorrected vision
Notwithstanding section 12102(4)(E)(ii) of this title, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

42 U.S.C. § 12113.

“Discrimination” under Title I of the ADA also includes

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5).

The ADA does not define “reasonable accommodation” but instead states the term “may include”

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).
EEOC REGULATIONS AND INTERPRETIVE GUIDANCE

The EEOC’s regulations further define the term “qualified” as follows: “The term ‘qualified,’ with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). The EEOC’s Interpretative Guidance provides:

The determination of whether an individual with a disability is “qualified” should be made in two steps. The first step is to determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.

The second step is to determine whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation. The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position.

The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs.

29 C.F.R. Pt. 1630 App., section 1630.2(m) (internal citations omitted).

The regulations provide that “a job function may be considered essential for any of several reasons, including but not limited to the following:”

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
29 C.F.R. § 1630.2(n)(2). The Interpretative Guidance states: “The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position.” 29 C.F.R. Pt. 1630 App., section 1630.2(o). The Guidance also says: “It is important to note that the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards. (See § 1630.10 Qualification Standards, Tests and Other Selection Criteria).” 29 C.F.R. Pt. 1630 App., section 1630.2(n).

Although section 1630.10 largely restates 42 U.S.C. § 12113(a) & (c), the regulations provide an explicit definition of “qualification standards.” The term “means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired. 29 C.F.R. § 1630.2(q). The Interpretative Guidance on “qualification standards” elaborates:

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant’s (or employee’s) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation.
This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. As previously noted, however, it is not the intent of this part to second guess an employer’s business judgment with regard to production standards. See § 1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

29 C.F.R. Pt. 1630 App., section 1630.10(a) (internal citations omitted).

The Interpretative Guidance also deal specifically with the “no direct threat” qualification standard:

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

29 C.F.R. Pt. 1630 App., section 1630.2(r).

In contrast to the statute, the regulations provide a definition of “reasonable accommodation.” It “means” *inter alia* “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2(o).

**An Employer’s Duty of Reasonable Accommodation Regarding Qualification Standards.**

The ADA refers to general qualification standard discrimination in sections 12112(b)(6) and 12113(a). Unfortunately, the language of the two sections doesn’t match up. Section 12112(b)(6) defines “discrimination” to include use of qualification standards that “screen out or tend to screen out an individual with a disability or a class of
individuals with disabilities.” Section 12113(a) provides a defense to claim of discrimination but by its terms covers only qualification standards “that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability.” The latter section omits any reference to qualification standards that affect “a class of individuals with a disability.” But it includes “or otherwise deny a job or benefit to an individual with a disability” which doesn’t appear in section 12112(b)(6).

Section 12112(b)(6) provides that use of a qualification standard will not constituted discrimination if “the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.” Section 12113(a) similarly provides that it is a defense to a claim that an application of qualification standard is discriminatory if it “has been shown to be job-related and consistent with business necessity . . . .” But section 12113(a) adds the following language: and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.”

It isn’t grammatically obvious what the antecedent of “such performance” is. It could refer to the “job” denied the individual because of the qualification standard, but that is unlikely because the statute refers to a “job or benefit denied,” and an employee doesn’t perform a “benefit.” The only other possibility is that “such performance” refers to the allegedly discriminatory “qualification standards, tests, or selection criteria.” People perform “tests” (or perform on tests) but they don’t generally perform “qualification standards” or “selection criteria.” However, “such performance” must refer to something and “qualification standards, tests, or selection criteria” is the only antecedent that makes even the slightest sense. If that is correct, then the ADA by its terms requires an employer to provide reasonable accommodation with respect to qualification standards that screen out or tend to screen out persons with disabilities.

In *Albertson’s Inc., v. Kirkingburg*, 527 U.S. 555, 571 (1999), the U.S. Supreme Court implied this was a correct reading of the statute. The case involved a Department of Transportation regulation that mandated certain vision standards. The plaintiff could
not meet the standard because he had monocular vision. The wrinkle in the case was that the regulations allowed an individual to apply for a waiver of the standard. Kirkingburg applied for a waiver, which the DOT ultimately granted. Albertson’s fired him while his waiver application was pending because he couldn’t meet the DOT standard. The Ninth Circuit ruled 2-1 that given the waiver program Albertson’s could not simply rely on Kirkingburg’s failure to meet the DOT standard. See 571 U.S. at 561-62.

The Supreme Court unanimously reversed on the basis that the waiver program was not an integral and equal part of the same regulatory regime as the qualification standard. 527 U.S. at 571. Justice Souter conceded that this circumstance “was not immediately apparent . . . . One would reasonably presume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, so that the content of any general regulation would as a matter of law be deemed modified by the terms of any waiver standard thus applied to it.” Id. “On this reading, an individualized determination under a different substantive safety rule was an element of the regulatory regime, which would easily fit with any requirement of 42 U.S.C. §§ 12113(a) and (b) to consider reasonable accommodation.” Id. The Supreme Court didn’t quite say in Kirkingburg the duty of reasonable accommodation applies to qualification standards, but it came pretty close.

The Supreme Court also endorsed this reading of the duty of accommodation under section 12113(a) in Chevron U.S.A., Inc., v. Echazabal, 536 U.S. 73 (2003). Echazabal considered whether the EEOC exceeded its regulatory authority by expanding the statutory no “direct threat to others” qualification standard to include no direct threat to the employee himself. Reversing the Ninth Circuit, the Supreme Court unanimously upheld the regulation. Justice Souter described the statutory framework thus:

The statutory definition of “discriminat[ion]” covers a number of things an employer might do to block a disabled person from advancing in the workplace, such as “using qualification standards . . . that screen out or tend to screen out an individual with a disability.” § 12112(b)(6). By that same definition, ibid., as well as by separate provision, § 12113(a), the Act creates an affirmative defense for action under a qualification standard
“shown to be job-related for the position in question and . . . consistent with business necessity.” Such a standard may include “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,” § 12113(b), if the individual cannot perform the job safely with reasonable accommodation, § 12113(a).

536 U.S. at 78. On first blush it might seem that Justice Souter’s description of the duty of accommodation under section 12113(a) in Echazabal differs from his description in Kirkingburg because Echazabal links it to the performance of the job safely. But the “qualification standard” at issue in Echazabal was the ability to perform the job without posing a direct safety threat. Therefore, Echazabal like Kirkingburg supports the conclusion that an employer must provide reasonable accommodation to an employee in order to meet a qualification standard.

In Bates v. UPS, 511 F.3d 974 (9th Cir. 2007) (en banc), the Ninth Circuit expressly held there is a duty of reasonable accommodation with respect to qualification standards. Bates involved a challenge to UPS’s policy of excluding hearing-impaired individuals from driving small package trucks. The employees argued that they were qualified individuals under ADA in that they could perform all of the essential functions of the position. Id. at 990. UPS argued the employees were not qualified because they could not drive safely due to their hearing impairments. The Ninth Circuit ruled that UPS’s argument confused essential functions and qualification standards. “This point illustrates the critical difference between a job’s essential functions—‘effective communication’ or ‘safe driving’—versus a qualification standard based on ‘personal or professional attributes,’ such as hearing at a certain level.” Id. at 992.

The court went on to hold “when an employer asserts a blanket safety-based qualification standard—beyond the essential job function—that is not mandated by law and that qualification standard screens out or tends to screen out an individual with a disability, the employer—not the employee—bears the burden of showing that the higher qualification standard is job-related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation.” Id. at 992-93. Although Bates concerned a safety-based standing, the court’s holding put safety-based
qualification standards on the same footing as any other. Judge McKeown, however, should have described a “qualification standard” as something “opposed to” an essential function rather than “beyond” an essential function. The difference between the two, while not always obvious, is one of kind and not degree.

The court’s subsequent description of the duty of reasonable accommodation the ADA requires shows the duty extends to qualification standards. The court cited to section 1630.10 of the EEOC’s Interpretive Guidelines, which as noted above, states that there is a duty of reasonable accommodation with respect to qualification standards. 511 F.3d at 997. The en banc court was unanimous on this point: UPS “must allow hearing impaired applicants to take the same initial driving test, benefit from the same training program, and be subject to the same final test as all other applicants, all with reasonable accommodations if necessary.” Id. at 1002-1003 (Berzon and Reinhardt concurring in part and dissenting in part).

In Johnson v. Board of Trustees of Boundary County School District No. 101, 666 F.3d 561 (9th Cir. 2011), the Ninth Circuit seemingly held 2-1 that an employer has no duty of accommodation with respect to qualification standards that are not facially discriminatory and only facially discriminatory standards can violate the ADA. Johnson involved a teacher who suffered from bi-polar disorder and depression. She needed to renew her state teaching certificate in order to teach for the next academic year. Doing so required her to take certain courses. She couldn’t finish the courses in time due to a flare up of her depression. A process existed by which her school district could apply to the state for permission to hire teachers to teach without a certificate for one year. The school district refused to assist her. The school district then fired her for not maintaining her certification. The employee claimed her failure to do so was caused by her disablility. The district court granted summary judgment to the school.

The Ninth Circuit affirmed. Relying on the EEOC regulation defining “qualified,” Judge O’Scannlain reasoned for the majority that the plaintiff was not a qualified individual with a disability who could claim protection under the ADA because
she did not possess the required teaching certificate. 666 F.3d at 564. Judge O’Scaennlain found it very significant that the regulation mentions “reasonable accommodation” only with respect to “essential functions” and not “qualification standards.” Id. at 565. The majority then noted that the EEOC Interpretative Guidance with respect to the “qualified” regulation also does not say anything about “reasonable accommodation.”

The majority recognized that the EEOC’s Interpretative Guidance on its “qualification standard” regulation states there is a duty of reasonable accommodation with respect to qualification standards. Id. at 566. Judge O’Scaennlain implied the ADA statutory and regulatory prohibitions on using qualification standards that have the “effect” of screening out individuals with a disability apply only to facially discriminatory qualification standards. Id. at 566 & 567 n.7. The majority then held that because the plaintiff did not allege or prove the teaching certificate requirement was discriminatory in effect, the EEOC Guidance on accommodation with respect to qualification standards was “inapposite” (despite an EEOC amicus brief asserting that Guidance was applicable). Id. at 567.

Judge Paez concurred in the judgment on the ground that there was no reasonable accommodation violation. He reasoned that school district could only request the state waive the certification requirement; the school district could not grant the provisional authorization to teach without a certificate. Id. at 568. He framed the provisional authorization program as an accommodation of the school district not an individual teacher. Id. at 568-69. Judge Paez disagreed with the majority that an employer has no duty to provide reasonable accommodation with respect to a qualification standard that is not facially discriminatory. Judge Paez reasoned that there was nothing in the statute, regulations or Ninth Circuit precedent limiting the prohibitions on using discriminatory qualification standards to standards that are facially discriminatory. Id. at 571. Judge Paez would have deferred to the EEOC’s interpretation of the statute that an employer has a duty of reasonable accommodation with respect to facially neutral qualifications that are discriminatory in effect. Id.
In fact, the Ninth Circuit had previously held that an employer has a duty of reasonable accommodation with respect to qualification standards that were not facially discriminatory, in a case where Judge Paez was a member of the panel. Rohr v. Salt River Project Agricultural Improvement & Power District, 555 F.3d 850 (9th 2009), involved a metallurgy specialist with diabetes. The employer required its employees to pass an annual respirator certification test in order to obtain or renew an OSHA required respirator certification. The employer eventually refused to give the plaintiff the test because of his diabetes-related high blood pressure. Id. at 855. The employer offered no alternative test to obtain the OSHA required respirator certification.

Reversing summary judgment for the employer, the Ninth Circuit panel unanimously held that the respirator certification test was a qualification standard within the meaning of 42 U.S.C. § 12112(b)(6). Id. at 862. The court determined that it was “undisputed that the respirator certification ‘screen[ed] out’ Rohr due this his high blood pressure.” Id. The court then held that there was “a genuine issue of fact whether Salt River could have provided reasonable accommodation to enable Rohr to complete the test.” Id. at 863 (citing Bates, 511 F.3d at 996).

The Johnson majority claimed that the qualification standards at issue in Bates and Rohr were facially discriminatory. 666 F.3d at 567 n. 7. This was true in Bates but untrue in Rohr. The respirator certification test at issue in Rohr was no more facially discriminatory than the teaching certificate requirement at issue in Johnson. In both cases the employee didn’t meet the qualification standard because of his/her disability. The qualification standard at issue in Johnson “screened out” the plaintiff in exactly the same manner as the qualification standard in Rohr. To be sure, in Rohr the employer forbade the employee from taking the respirator certification test because of his disability while in Johnson the employee’s disability prevented her from taking the courses necessary to obtain the teaching certificate. But those factual differences do not make the qualification standard at issue facially discriminatory in Rohr and facially neutral in Johnson.
Rohr holds that employers have a duty to accommodate an employee to meet a qualification standard that is not facially discriminatory but the Johnson majority suggests the opposite. Rohr has the better of the argument. The ADA twice prohibits qualification standards that “tend to screen out” disabled individuals (subject to the employer’s proof of the affirmative defense). Congress’s inclusion of the “tend to screen out” language defeats any suggestion that the statute covers only facially discriminatory qualification standards. The direct threat qualification standard at issue Echazabal was not facially discriminatory. The Supreme Court nevertheless stated the ADA imposes a duty of reasonable accommodation with respect to meeting that standard. In Dark v. Curry County, 451 F.3d 1078, 1091 (9th Cir. 2006). Judge O’Scanlanin himself recognized an employer’s duty of accommodation with respect to the facially neutral no direct threat qualification standard. His subsequent attempt in Johnson to distinguish Bates, Rohr, and the EEOC’s Interpretive Guidance on the basis they all involved facially discriminatory qualification standards is unsustainable.

Other circuits have held there is a duty of reasonable accommodation with respect to qualification standards without making the distinction between those that are facially discriminatory and those that are facially neutral. Allmond v. Akal Security Inc., 558 1312 (11th Cir. 2009), presented the lawfulness of the U.S. Marshals Service’s requirement that federal court security officers (“CSOs”) meet a particular hearing standard without using a hearing aid. The panel properly analyzed the requirement as a qualification standard that the employer would have to justify on the basis of business necessity and job relatedness. The court then stated: “Once an employer demonstrates that the pertinent qualification standard is job-related and consistent with business necessity, the burden shifts to the plaintiff to offer a reasonable accommodation that would allow him to satisfy that standard.” Id. at 1317.

The Eleventh Circuit found that the requirement that a CSO’s hearing be tested without a hearing aid was justified by both business necessity and job-relatedness because hearing aids can malfunction or become dislodged on the job. The court rejected the employee’s proposed accommodation of removing the hearing-aid ban qualification
standard entirely. “That proposal is not reasonable: it destroys the very standard we have just upheld as a legitimate business necessity. Id. at 1318. The Marshals Service later changed its policy to allow CSOs to take the hearing test with hearing aids. See Fraterrigo v. Akal Security Inc., 376 Fed. Appx. 40, 42 (2nd Cir. 2010). The Second Circuit nevertheless ruled that the elimination of the no hearing aid during the test requirement “tell us nothing whether the former policy was a business necessity at the time it was adopted and at the time plaintiff was terminated.” Id. Really?

ESSENTIAL FUNCTION OR QUALIFICATION STANDARD?

ADA Title I, the EEOC regulations, and the EEOC’s Interpretive Guidance all distinguish between essential functions and qualification standards. The employee’s and employer’s burdens of proof with respect to essential functions on the one hand and qualification standards on the other differ substantially. A court’s determination as to whether a particular job requirement constitutes an “essential function” or a “qualification standard” may have significant, even dispositive, ramifications for the case. For example, the ADA mandates deference to the employer’s judgment about whether a job function is essential. 42 U.S.C. § 12111(8). There is no statutorily required deference to an employer’s claims about business necessity or job-relatedness.

Courts routinely confuse essential functions and qualification standards. Samper v. Providence St. Vincent Medical Center, 675 F.3d 1233 (9th Cir. 2012), improperly analyzed whether “being at work” was an essential function of a neo-natal emergency room nurse. The plaintiff suffered from fibromyalgia, a condition that limits sleep and causes chronic pain. Over the entire period of her employment, Nurse Samper worked part time, but regularly exceeded the allowed absences for even full time nurses. She received several performance appraisals that reflected her poor attendance, and was placed on work plans to resolve the attendance issues. Eventually, Providence agreed to modify its already generous attendance policy and allow Samper to move her shift to another day without finding a replacement. That still didn’t solve the problems and she was eventually terminated.
The Ninth Circuit held that on-site regular attendance is an essential job function for a neo-natal nurse. “As a NICU nurse, Samper’s job unites the trinity of requirements that make regular on-site presence necessary for regular performance: teamwork, face-to-face interaction with patients and their families, and working with medical equipment.” Id. at 1238. “[M]edical needs and emergencies - many potentially life-threatening - do not mind the clock, let alone staff-nurse convenience . . . . The 24-hour hospital unit setting thus affords a particularly compelling context in which to defer to rational staffing judgments by hospital employers based on the genuine necessities of the hospital business.” Id. at 1238-39.

Samper relied on prior circuit precedent that holding that “[e]xcept in the unusual case where an employee can effectively perform all work-related duties at home, an employee ‘who does not come to work cannot perform any of his job functions, essential or otherwise.’” Id. at 1239. The unusual case was Humphrey v. Memorial Hospital Ass’n, 239 F.3d 1128, 1135 n. 11 (9th Cir.2001), where the court had stated that “regular and predictable attendance is not per se an essential function of all jobs.” Humphrey should have said that regular and predictable attendance is not for all jobs per se an ongoing qualification standard that is job related and supported by business necessity.

Stamper also reached the right result for the wrong reasons. “On-site regular attendance” is not a job function. A job requirement of “on site regular attendance” is an on-going qualification standard. But such a standard tends to screen out persons with disabilities. An employer’s generalized claim that “on-site regular attendance” is a job requirement should be held up to the requirements of “business necessity” and “job relatedness.” Indeed, at times Judge McKeown appeared to analyze the case under that framework. The hospital would have met its burden of proof under section 12113(a). If so, Ms. Stamper could not have prevailed by requesting elimination of the qualification standard itself as a reasonable accommodation. She had already received reasonable accommodation to help her satisfy the attendance standard, but she could not meet it.
Robert v. Board of County Commissioners of Brown County, 691 F.3d 1211 (10th Cir. 2012), correctly analyzed “meeting with clients in person” as an essential function of the job of supervisor of released adult offenders. Meeting with clients is what a supervisor of released adult offenders does. An employer could legitimately decide that meeting with the clients in person was essential to the proper performance of the job itself. The “in person” requirement for the position at issue in Robert is an example of the EEOC Interpretive Guidance’s explanation that “a function may be essential because the reason the position exists is to perform that function.” It is akin to a requirement that a neonatal nurse be in the operating room during a delivery. Being in the delivery room is an essential part of doing the job of neonatal nurse as opposing to an arguably necessary qualification standard for keeping the job, like “regular on-site attendance.”

Kallail v. Alliant Energy Corp. Services, 691 F.3d 925 (8th Cir. 2012), incorrectly analyzed “working rotating shifts” as an essential function of the job of resource coordinator at the Distributions Dispatch Center. The plaintiff had requested working straight day shifts as an accommodation of her diabetes. The Eighth Circuit found the plaintiff was not “a qualified individual with a disability” due to her inability to perform an essential job function. Once the court defined “working rotating shifts” as an essential job function, the employee’s proposed accommodation was by definition unreasonable.

The Kallail court’s reasoning short-circuited the analysis it should have undertaken in evaluating the plaintiff’s claims. Working rotating shifts is not what a resource coordinator does. The job of a resource coordinator deals with such things as power outages. An employer’s requirement that an employee be able to work rotating shifts or any other type of shift constitutes a “qualification standard” for the position. The “able to work rotating shifts” qualification standard is what screened the plaintiff out of the job in question. The ADA requires an employer demonstrate such a qualification standard is both job-related and justified by business necessity. Perhaps the employer in Kallail could have met that burden. Perhaps not. But the Eighth Circuit shouldn’t have reached the reasonable accommodation question before considering the issues of job-relatedness and business necessity.
In *Davis v. Microsoft*, the plaintiff was a systems engineer for Microsoft who worked 80 hours per week. He was diagnosed with hepatitis. Microsoft denied him a schedule accommodation that would have reduced his hours to 40 per week. He sued and won a $2.3 million verdict. The jury found that cutting his hours from 80 to 40 would not remove an essential function of the job. On appeal, Microsoft argued that working 80 hours was an essential function of the job *as a matter of law*. Both the court of appeals and the Washington Supreme Court agreed. 149 Wn.2d 521, 70 P.3d 126 (2003). The majority held that “[b]ecause Davis’ disability limited him to a structured workweek of no more than 40 hours per week and 8 hours per day, he was unable to continue providing the job presence and service essential to the systems engineer position.” *Id.* at 536-37. The concurring Justice reasoned more persuasively:

Instead of focusing on job presence, as the majority does, I would find that flexibility in responding to customers and frequent travel were “essential functions” of the position and that long hours and job presence were a by-product of these functions. Davis's limitation to an 8–hour workday and a 40–hour workweek made it impossible for him to perform the frequent travel and have the flexibility to respond to customers' needs. These grounds alone are sufficient and it is not necessary to include job presence or overtime as essential functions in and of themselves.

*Davis*, 149 Wn. 2d at 541 (Madsen, J., concurring).

The three dissenting Justices would have held that

An employer's “culture” of requiring long hours of employment, standing alone, is never an essential element of a job. The long hours must be related to specific requirement of the work performed, not the other way around. For example, snowplow operators and emergency rescue team members may have to work very long hours during snowstorms and emergencies. Plowing snow and responding to emergencies are essential functions of these jobs. It would not be an essential function of these jobs to require snowplow operators and emergency rescue workers to work 60 to 80 hours per week when there was no snow and no emergency.

*Davis*, 149 Wn.2d at 551 (Chambers, J., dissenting). The dissenters rightly noted that the EEOC’s regulations on essential functions “are not especially helpful, as they are generally couched toward determining if a task, duty, or discrete work condition is an
essential function, not whether a structural requirement, like a regular workweek of 60 to 80 hours, is an essential function.” *Id.* at 553. The reason for this lack of fit was the majority’s and dissent’s mistaken attempt to analyze working 80 hours per week as an essential function rather than a qualification standard. Doing so is the jurisprudential equivalent of trying to fit a square peg into a round hole.

Lifting requirements have caused courts analytical difficulties. Employers frequently claim, and courts sometimes characterize, the ability to lift a certain number of pounds as essential function of a particular position. *E.g.*, *Molina v. DSI Rental, Inc.*, 840 F. Supp. 2d 984, 996-999 (W.D. Tex. 2012). In that case, the job at issue was certified medical assistant. The court found there was a genuine dispute as to whether lifting 20 pounds was an essential function of the position and denied the employer’s motion for summary judgment. The EEOC Guidance gives lifting requirements as an example of a qualification standard. 29 C.F.R. Pt. 1630 App., section 1630.10(a). Generally that should be the proper analysis and the court got it wrong in *Molina*. On the other hand, if your *job* is to lift 50 pound weights and you can lift only 25 pound weights, then you are not qualified to perform the essential functions of the job of 50 pound weight lifter.

**CONCLUSION**

It is unfortunate the ADA does not more clearly set forth the duty on the part of employers to provide reasonable accommodation to employees and applicants to meet qualification standards. The omission of this duty from the EEOC regulations regarding “qualified” and “qualification standards” compounds the problem. The Interpretive Guidance’s treatment of the duty of reasonable accommodation with respect to qualification standards is helpful but not sufficient. The regulations and Interpretive Guidance regarding “qualified” should include an explicit discussion of the obligation of reasonable accommodation regarding qualification standards.

The Ninth Circuit’s decision in *Johnson* notwithstanding, both section 12113(a) of the ADA and Supreme Court precedent leave little doubt that employers have a duty to
provide reasonable accommodation so that an employee or applicant can meet a qualification standard that would otherwise screen her out of particular job based on a disability, a duty that is not limited to facially discriminatory qualification standards.

The federal courts’ misinterpretation of the definition of “disability” under the pre-ADAAA ADA all but gutted the promise and potential of the statute for almost 20 years. A mechanistic construction of the requirement that the plaintiff prove he or she is a “qualified individual with a disability” in order to be covered by the statute could severely limit an employer’s obligation to provide reasonable accommodation. While the proper differentiation between essential functions and qualification standards is not a panacea, it would at least have courts asking the right questions. Whether they reach the right answers only time will tell.