



NICOLE BUONOCORE PORTER

THE WORKPLACE REIMAGINED

ACCOMMODATING OUR BODIES
AND OUR LIVES



THE WORKPLACE REIMAGINED

In the wake of the pandemic, many employers continue to allow their employees to work from home, but much of the workplace remains governed by strict structural norms such as shifts, schedules, attendance, and leave-of-absence policies that determine when and where work is performed. In *The Workplace Reimagined*, Nicole Buonocore Porter explores how these workplace norms marginalize people with disabilities and workers with caregiving responsibilities. Using COVID-19 as a lens to illustrate how entrenched workplace norms are often not inevitable or necessary, Porter theoretically and practically reconceptualizes the workplace to end the stigmatization of these employees and helps readers understand the value of accommodating all workers. This book is timely, eye-opening, and will help us realize a workplace in which we account for the reality, precarity, and diversity of all our lives and bodies.

NICOLE BUONOCORE PORTER is Professor of Law and Director of the Martin H. Malin Institute for Law and the Workplace at Chicago-Kent College of Law, Illinois Institute of Technology. As an expert in employment discrimination and disability law, Porter has authored or coauthored five books and more than 45 law review articles and essays.

The Workplace Reimagined

ACCOMMODATING OUR BODIES AND OUR LIVES

NICOLE BUONOCORE PORTER

Chicago-Kent College of Law, Illinois Institute of Technology



CAMBRIDGE
UNIVERSITY PRESS



CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781009347426

DOI: [10.1017/9781009347440](https://doi.org/10.1017/9781009347440)

© Nicole Buonocore Porter 2023

This publication is in copyright. Subject to statutory exception and to the provisions
of relevant collective licensing agreements, no reproduction of any part may take
place without the written permission of Cambridge University Press & Assessment.

First published 2023

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-009-34742-6 Hardback

ISBN 978-1-009-34746-4 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence
or accuracy of URLs for external or third-party internet websites referred to in this
publication and does not guarantee that any content on such websites is, or will
remain, accurate or appropriate.

This book is for my family, for their unwavering support and encouragement. And it's also for all workers everywhere who struggle to balance their jobs with the rest of their lives.

Contents

<i>Preface</i>	<i>page</i> xiii	
<i>Acknowledgments</i>	xv	
1	Introducing a Workplace Reimagined	1
	I Introduction	1
	II Allies in Workplace Disadvantages	3
	A Inability to Meet the “Ideal Worker” Norm	3
	1 Physical Functions of the Job	4
	2 Structural Norms of the Workplace	4
	B Special Treatment Stigma	6
	1 Workplace Consequences	6
	2 Coworkers’ Resentment	7
	III Applicable Laws	8
	A The Americans with Disabilities Act	9
	B Caregiver Protections: FMLA, Title VII, PDA	9
	IV The Solution: Reimagining the Workplace	11
	A Changing Minds	11
	B Changing Workplaces	12
	V The Structure of the Book	14
2	The Caregiver Conundrum	15
	I Introduction	15
	II History of Women in the (Paid) Workforce	16
	III Caregiver Conundrum Described	18
	A Not Enough Time and/or Flexibility	18
	B Not Enough Money/Advancement	23
	C Stereotypes about Working Mothers	24

IV	Lackluster Laws	25
	A Title VII Only Protects “Ideal Workers”	25
	B The PDA’s Narrow Protection	27
	C FMLA and Its Flaws	28
	D “Real” Workers are Not Protected	29
V	Men, Too	31
3	People with Disabilities in the Workplace	33
	I Introduction	33
	II History of Disability Discrimination	34
	A Early Days	34
	B The Rehabilitation Act	34
	C The ADA	35
	D Snapshot: Employment of People with Disabilities	36
	III Defining and Conceptualizing Disability	37
	A Conceptualizing Disability	37
	B Defining Disability on the Spectrum: Narrow to Broad	41
	C Rollercoaster Ride of the ADA Definition of Disability	43
	1 The Courts’ Narrowed Definition	43
	2 The ADA Amendments Act of 2008	45
	3 The Post-ADAAA Case Law	46
	IV Reasonable Accommodation Obligation	47
	A Conceptualizing and Defining the Accommodation Obligation	47
	B Accommodations under the ADA	52
	1 The Qualified Inquiry	52
	2 The (Relatively) Easy Questions	53
	3 Unanswered Questions	54
	4 Undue Hardship Defense	55
	C The Special Case of Pregnancy Accommodations	56
	1 Pregnancy Discrimination Act	57
	2 Pregnancy as a Disability	58
4	Intersections	60
	I Introduction	60
	II Race	61
	A Race and Gender	61
	B Race and Disability	63
	III Class	65
	A Class and Motherhood	66
	B Class and Disability	67
	IV LGBTQ+	67

V	Age	69
VI	Mothers with Disabilities	71
5	The Entrenchment of Structural Norms	73
I	Introduction	73
II	History and Description of Structural Norms	74
A	Hours	74
B	Shifts	77
C	Attendance Policies	78
D	Leaves of Absence	80
III	Entrenchment of Structural Norms	80
A	Employees' Perceptions of Default Time Norms	81
B	Employers' Control over Structural Norms	86
C	Courts Perpetuate This Entrenchment	88
D	How This Entrenchment Harms Workers	89
IV	COVID-19 and Working from Home	90
6	Special Treatment Stigma	93
I	Introduction	93
II	Employers' Reluctance or Refusal to Accommodate	94
III	Consequences of Special Treatment Stigma	96
A	Workplace Consequences	96
B	Resentment of Coworkers	97
C	Stigmatic Effect of Identifying as Belonging to a Protected Class	101
7	Theoretical and Practical Justifications for the Reimagined Workplace	103
I	Introduction	103
II	Justifying Accommodations for Caregivers and Employees with Disabilities	103
A	The Theoretical Justification	103
1	Other Theories	104
2	Communitarian Theory	108
B	The Practical Justification	110
1	Benefits of Accommodating People with Disabilities	111
2	Benefits of Accommodating Caregivers	112
3	The Business Case for Accommodations	113
III	Justifications for Protecting Everyone	114
A	Eliminating Special Treatment Stigma	114
B	Avoiding Problems with Proving Protected Class	115
C	Providing Balance to Everyone	116

D Dismantling Structural Norms	116
E Benefits to Employers	118
IV Conclusion	119
8 The Workplace Reimagined, Part I: Tackling Time Off	120
I Introduction: Exploring the Alternatives	120
A Litigation	121
B Collective Action	123
C Legislation to Change Structural Norms Directly	124
D Individual Accommodation Mandate	127
E The Perfect Solution: A Combination of Two Solutions	129
II Importance of Leave for People with Disabilities, Caregivers, and Everyone Else	129
A Long-Term Leave	129
B Short-Term Leave	130
III The Current State of the FMLA	131
A Background of the FMLA	131
B Advantages of the FMLA	133
C Disadvantages of the FMLA	134
1 Problems for Employees	134
2 Problems for Employers	135
IV Tackling Time Off	138
A Extended Leaves of Absence under the FMLA	138
B New Statute: Short-Term Absences Act	139
C Addressing the Logistics and Criticisms	141
1 Logistics	141
2 Anticipated Criticisms	142
V Conclusion	143
9 The Workplace Reimagined, Part II: Accommodating Our Bodies and Our Lives	144
I Introduction	144
II Accommodating Our Bodies and Our Lives	144
A Accommodating Everyone	145
B Two-Tiered Undue Hardship Defense	146
1 Necessary Accommodations	147
a Accommodations That Allow an Employee to Perform the Job	147
b Unavoidable Caregiving Obligations	149
2 Accommodations for Everything Else	154
C Logistics	158
1 Coverage	158

2	Interactive Process	159
3	Determining Essential Functions	161
4	Defining “Reasonable”	163
5	Proving Undue Hardship	165
6	Retaliation Protection	166
III	Addressing the Criticisms	168
A	Employers’ Concerns	168
B	Employees’ Concerns	171
1	Dilution of Rights	171
2	All Accommodations Should Be Treated Equally	173
3	Changing Gender Norms	174
4	Not Enough Help for Lower-Income Workers	175
IV	Conclusion	176
	<i>Bibliography</i>	177
	<i>Index</i>	189

Preface

My early scholarly work addressed two separate workplace law issues—disability discrimination and discrimination against women with caregiving responsibilities. After several years, I began seeing the similarities between these groups of employees; specifically, both groups of employees are subordinated because they cannot comply with the rigid workplace norms regarding *how* the job is performed or *when* and *where* the job is performed. If they seek modifications to these stringent workplace norms, they are stigmatized for doing so—what I call “special treatment stigma.” Their employers might refuse to provide accommodations, but even if they do, they might look at these employees less favorably, and that will often have workplace consequences such as lower pay, derailed or denied promotions, and sometimes even termination. Moreover, accommodated employees are often resented by their coworkers, either because the coworkers believe the accommodations place unfair burdens on them, or because the coworkers wish they had the same accommodations.

Over the years, I’ve explored many solutions for ending the subordination that these groups of workers experience. But in doing so, I’ve come to realize that the only solutions that can work to end this subordination are solutions that protect all workers. If we accommodate everyone, special treatment stigma should disappear. Accommodations will no longer be seen as preferential treatment; instead, they will simply be seen as doing the work in a different way.

Furthermore, accommodating everyone recognizes the reality that all employees, at times, will need some form of workplace accommodations. Older workers and pregnant workers (in addition to people with disabilities) might need modifications to how the job tasks are completed (such as heavy lifting). Most workers will have periodic needs for short leaves of absence or flexible schedules for a variety of reasons. And of course, all workers get sick. As COVID-19 has taught us, we want those workers to stay home without penalty.

Accordingly, this book explores how we might reimagine the workplace in a way that accommodates all of our bodies and all of our lives.

Acknowledgments

I would like to thank my husband, Bryan Lammon, for his support throughout the long journey of writing this book. I would also like to thank my former law school, University of Toledo College of Law, for their financial support while I began writing the book. And I want to thank my current law school, Chicago-Kent College of Law, for their summer research support that allowed me to complete the book.

Several colleagues and friends have supported my work during my career, and countless conversations with these scholars helped me to think through the concepts and ideas this book addresses. At the risk of leaving someone out (and in no particular order), I want to thank Rebecca Zietlow, Joseph Slater, Rachel Arnow-Richman, Doron Dorfman, Ann McGinley, Michelle Travis, Brad Areheart, Stephen Befort, Laura Kessler, and Deborah Widiss. Finally, I want to thank all of the scholars whose work has inspired me and helped to create this book.

Introducing a Workplace Reimagined

I INTRODUCTION

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

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

¹ See, e.g., Katsabian 2021.

² Albiston 2010. Professor Joan Williams coined the phrase “ideal workers” to refer to what employers expect (and even demand) from their workforce. Williams, JC 2001.

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

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

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

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

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

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

³ Porter [2016b](#), at 96–105. I first coined the term “special treatment stigma” in Porter [2010a](#).

⁴ Porter [2016b](#).

⁵ Bagenstos [2009](#). However, a significant counter-trend has emerged, positing that people-first language ignores the identity aspect of disability and also ignores the fact that disability is often socially created. Schur et al. [2013](#), at 7; Moore [2019](#).

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

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

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

II ALLIES IN WORKPLACE DISADVANTAGES

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

A Inability to Meet the "Ideal Worker" Norm

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

⁶ Albiston & O'Connor 2016; Clarke 2011; Jacobs & Gerson 2004; Kessler 2001; Widiss 2021b.

⁷ See generally Williams, JC 2010.

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

1 Physical Functions of the Job

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

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

2 Structural Norms of the Workplace

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

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

⁸ Porter 2014c.

⁹ Porter 2020a.

¹⁰ Cox 2012, at 454.

¹¹ Bornstein 2020.

¹² Porter 2020a; Porter 2016a, at 250.

¹³ Albiston 2010.