Administrative Remedies and Legal Disputes: Evidence on Key Controversies Underlying Implementation of the Americans with Disabilities Act

Stephen L. Percy†

Almost a decade has passed since the Americans with Disabilities Act was enacted in 1990.1 This landmark law grew out of earlier attempts at the national and state levels to craft statutory foundations to protect the rights and liberties of persons with disabilities.2 With a decade of implementation experience in place, it is an appropriate juncture to assess the progress of the ADA in advancing the rights and opportunities of America’s disabled population. This assessment is all the more relevant given signs of political backlash against the ADA and ongoing questions about the breadth and reach of ADA mandates. This manuscript explores ADA enforcement from the perspective of administrative complaints that have been filed and investigated as well as those resulting in enforcement through legal action. It also examines the legal precedents and understandings of statutory meaning that are emerging from judicial decisions in key court cases arising under the ADA. Together, these perspectives shed light on the impact of the ADA as well as on the challenges encountered in implementation—challenges that must be overcome in order for the nation to move forward in achieving the primary objective of the Americans with Disabilities Act: “To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”3

I. STATUTORY FLEXIBILITY: THE CHALLENGE AND OPPORTUNITY OF THE ADA

It is not surprising that the federal agencies and courts are playing—and will continue to play—a significant role in implementing the Americans with Disabilities Act. While ADA supporters sought to create legislation with strong regulatory mandates to end discrimination and remove barriers to full participation

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in American life, the overall regulatory approach of the ADA embodied two important features: balance and flexibility. Those who read the full text of the ADA will see that the statutory language does not contain a long list of specific declarations about what regulated parties must do or not do to comply with regulatory mandates. Instead, the law requires broadly defined affirmative accommodations to be taken for persons with disabilities and specifies basic operating principles that allow flexibility in attaining compliance while attempting to balance the needs of people with disabilities with the costs incurred by regulated parties.

The principles of balance and flexibility are embodied, for example, in the ADA’s requirement for reasonable accommodation in employing people with disabilities. The ADA’s Title I stipulates that employers covered under the Act must make reasonable accommodations to employ persons with disabilities. Accommodations might include such activities as removing physical barriers or rearranging office layouts, providing specialized equipment, or reorganizing work tasks among employees. This mandate for accommodation is tempered, however, by the stipulation that accommodations are not required when the “covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity.” The ADA provides further flexibility in determining whether and when undue hardship occurs by allowing certain factors to be weighed in this determination—for example, overall financial resources of the entity, number of employees, type of business operation, and the cost of the accommodation—without specifying a cost-based formula to be utilized.

Similar themes of flexibility and balance are found in Title III, which extends the Act to providers of public accommodation (including all but small-sized purveyors of facilities and services available to the general public). Parallel to the approach in Title I, this section requires entities providing services and accommodations to make changes in service delivery and/or modify physical structures so that people with disabilities will not be impeded from access to or enjoyment of services or amenities. Modification in this context could mean removing physical obstacles to entry or ending policies that prevent or limit people with disability from full utilization of facilities or consumption of services. Here, again, the mandate has some balance. Accommodations may not be required if they would “fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”

The point here is that the ADA purposively does not seek to specifically define all mandates or answer all questions about implementation. Instead, the law

6. See id.
7. Id. at § 12111 (9).
8. Id. at §§ 12181-12189.
9. See id. at § 12182(a).
10. Id. at § 12182(b)(2)(A)(ii).
challenges regulated entities and people with disabilities to be creative in finding solutions that can meet individual needs while also considering the cost or disruption experienced by the regulated parties as they perform accommodations. Creativity is therefore the upside to this approach. The downside, particularly in early years prior to establishment of general understandings and administrative and legal precedent, is that case-by-case disputes can be expected to reach enforcement agencies and the federal judiciary—therefore granting administrative agencies and the courts a key role in defining the reach and breadth of disability rights mandates.

It should be noted that the statutory flexibility embodied in the ADA does not imply that the law’s framers intended the ADA to be anything other than comprehensive in scope and application. To the contrary, many key definitions in the Act are left open-ended. The definition of persons covered under the law, for example, is very broad. Rather than stipulating a list of disabling conditions or circumstances that would trigger legal protection under the ADA, the law’s framers, drawing upon policy precedents, utilized a definition which focused on conditions that impair “major life activities”—current, past, or as perceived by others. This definition signals an aggressive approach to triggering protections. Thus, even though some basic operating principles of the law provide flexibility in crafting accommodations so as to balance required accommodations against the costs incurred in achieving compliance, the ADA simultaneously creates an expansive anti-discrimination mandate.

The remainder of this article explores ADA implementation from the perspectives of the administrative agencies that investigate, mediate, and sometimes prosecute complaints of discrimination arising under ADA protection as well as of the legal decisions and precedents that have arisen from key court decisions related to the ADA. Enforcement data and judicial findings yield insight into the types of discrimination that are being challenged through ADA protections, the individuals and entities being charged, and the resolution of discrimination charges—all of which contribute to an understanding of the real impact of the ADA and its potential to eliminate discrimination based on disability.

II.
IMPLEMENTATION OF EMPLOYMENT PROTECTIONS

One picture of ADA enforcement can be drawn through an examination of employment-related complaints that have arisen under Title I of the ADA. The Equal Employment Opportunity Commission (EEOC) has been charged with primary responsibility for enforcing the employment protections for people with

disabilities outlined in Title I of the ADA for private sector entities. 14 Enforcement of employment protections for state and local governments, which is granted to the Department of Justice, is reviewed in a subsequent section of this article. 15 The EEOC issues administrative regulations to guide implementation of Title I protections. These regulations outline the process of filing complaints when it is believed that regulated parties are not complying with the law. 16

From the beginning of ADA enforcement of Title I in July 1992 through the end of fiscal year 1998, 108,939 charges of discrimination were filed with the EEOC. 17 Charges rose to a an annual high of 19,798 in fiscal year 1995. As of 1998, about half of the complaints were resolved with an administrative determination of "no probable cause for discrimination." Another 34% of charges were classified as "administrative closures," cases where investigations were terminated for reasons such as: failure to locate the charging party, charging party failed to respond to EEOC communications, charged party refused to accept full relief, and case mooted due to the outcome of related litigation. 18

The data on charges can also be examined from the perspective of merit resolutions—charges with favorable outcomes for those bringing charges and including settlements, withdrawal of charges upon receipt of benefits, and findings of reasonable cause. Twenty two percent of those charging discrimination received a favorable outcome. The EEOC estimates that the monetary benefits awarded through settlements and conciliation agreements total more than $211 million over the 1992-1998 period. 19

It is difficult to determine the true meaning of these numbers. One analyst has found that only a fifth of those who have filed complaints with the EEOC since the enactment of the ADA have received favorable outcomes. 20 A number of cases, however, are being closed because people with disabilities are not following through (potentially as the result of a disability that makes communication difficult or a lack of confidence that their complaint will lead to a successful conclusion) or because no probable cause is being found (raising questions about whether ambiguity in the law affects the capacity of evaluators to determine if discrimination has taken place and whether the language of the ADA covers the full set of practices that can lead to discrimination based upon handicap).
TABLE 1: DISCRIMINATION CHARGES Filed WITH THE EOC UNDER THE ADA, FY 1992-1998

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>100,000</th>
<th>96,000</th>
<th>92,000</th>
<th>88,000</th>
<th>84,000</th>
<th>80,000</th>
<th>76,000</th>
<th>72,000</th>
<th>68,000</th>
</tr>
</thead>
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<td></td>
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<td>Total</td>
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<tr>
<td>106,969</td>
<td>888</td>
<td>102,272</td>
<td>92,144</td>
<td>84,096</td>
<td>76,997</td>
<td>19,837</td>
<td>13,842</td>
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<tr>
<td>FY 1992</td>
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<td>FY 1994</td>
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<tr>
<td>FY 1996</td>
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<tr>
<td>FY 1997</td>
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<td></td>
<td></td>
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<tr>
<td>FY 1998</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

Further perspective on complaint assessment and resolution by the EEOC is provided in a recent study by Moss, Johnsen and Ullman. The authors have undertaken a detailed analysis of the Title 1 employment discrimination charges filed with EEOC which examines employment discrimination cases by the nature of the type of disability involved in complaints. The study focuses particularly on how people who experience some form of mental disability have fared in the complaint resolution process. People with psychologically-based impairments have had the greatest difficulty overcoming prejudice and discrimination within the workplace—even when they possess the skills and expertise needed to perform necessary work tasks. Until recent decades, the primary strategy of treatment for people with psychological-based disability was heavy medication and/or institutionalization. Even sterilization, shocking as it may seem, was practiced against people with disabilities into the twentieth century.

The empirical study by Moss and her colleagues found that psychiatric-based disabilities were the second most frequently reported type of disability cited in complaints to the EEOC—giving evidence that people with these disabilities understand their protections under federal law and are utilizing the enforcement mechanisms at their disposal. The authors also found only a small difference between the outcomes of complaint charges involving individuals with psychiatric disabilities and those whose complaints derived from physical disability.

Another view on ADA enforcement is provided through an examination of the EEOC’s litigation docket—complaints and charges that have moved to the point of legal action. The EEOC has published a report on its litigation docket, including both active and resolved cases, from 1992 through the end of March 1998. As of March 1998, the EEOC had resolved 180 court cases and was handling 98 active ones. Examination of EEOC litigation data shows that within the 278 court cases, active and resolved, 470 charges of discrimination were outlined (many cases included more than one discriminatory charge).

Table 2 presents a breakdown of the nature of discriminatory charges embodied in the EEOC cases. Discrimination related to hiring and employment status represent almost half (46%) of the charges presented in the cases, with charges about hiring policies and actions and terminations being the most prominent. Legal charges that reasonable accommodations were not provided in employment represented 20% of all cases. Treatment by employers—including

22. See id.
24. See Moss et al., supra note 21, at 81-105.
26. Id.
27. Id.
terms and conditions of employment, retaliation for complaints, harassment and hostile work environments, and violations of confidentiality—together represented another 18% of charges. Unlawful disability-related inquiries about employees and charges about discriminatory effects of disability benefits and health insurance coverage represented 9% and 6% of charges, respectively. Examination of individual cases shows the breadth of employment situations from which discriminatory charges are emanating. The cases show substantial variety in the types of disabling conditions experienced by those bringing charges, including life-threatening conditions (e.g., cancer), congenitally induced disabilities, learning and attention deficit disorders, hearing and vision impairments, loss of limbs due to workplace accidents, depression, back problem or injury, and many others. The charges themselves relate to both physical and psychologically-based impairments. The types of private entities being charged also show substantial variation, ranging from small private concerns to major corporations like American Airlines, General Motors, Bethlehem Steel, Chrysler, and Federal Express.

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29. EEOC v. Add-Staff, Inc., Civ. A. No. 96-70840 (E.D. Mich.).
TABLE 2
DISCRIMINATORY CHARGES IN ACTIVE AND RESOLVED EMPLOYMENT (TITLE I)
CASES LITIGATED BY EEOC

<table>
<thead>
<tr>
<th>Total Cases</th>
<th>Active</th>
<th>Resolved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>98</td>
<td>180</td>
<td>278</td>
</tr>
</tbody>
</table>

**Hiring and Employment Status**

<table>
<thead>
<tr>
<th></th>
<th>Active</th>
<th>Resolved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>75</td>
<td>144</td>
<td>219</td>
</tr>
<tr>
<td>(47.8%)</td>
<td>(46.0%)</td>
<td>(46.5%)</td>
<td></td>
</tr>
</tbody>
</table>

**Charges Made in Cases by Nature of Discrimination**

<table>
<thead>
<tr>
<th>Nature of Discrimination</th>
<th>Active</th>
<th>Resolved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hiring Action/Policies</td>
<td>28</td>
<td>44</td>
<td>72</td>
</tr>
<tr>
<td>Demotion</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Failure to Promote</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Termination</td>
<td>41</td>
<td>86</td>
<td>127</td>
</tr>
<tr>
<td>Forced to Leave</td>
<td>3</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Discrimination on basis of Association with Person with Disability</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Reasonable Accommodation Not Provided</td>
<td>35</td>
<td>60</td>
<td>95</td>
</tr>
<tr>
<td>(22.2%)</td>
<td>(19.2%)</td>
<td>(20.2%)</td>
<td></td>
</tr>
<tr>
<td>Treatment by Employers</td>
<td>25</td>
<td>61</td>
<td>86</td>
</tr>
<tr>
<td>(15.9%)</td>
<td>(19.5%)</td>
<td>(18.3%)</td>
<td></td>
</tr>
<tr>
<td>Terms and Conditions</td>
<td>9</td>
<td>17</td>
<td>26</td>
</tr>
<tr>
<td>Retaliation</td>
<td>7</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Harassment/Hostile Work Environment</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Limitation, Segregation, Classification</td>
<td>1</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Violation of Confidentiality</td>
<td>1</td>
<td>17</td>
<td>18</td>
</tr>
<tr>
<td>Inappropriate Record Keeping</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Inaccessibility in Workplace</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Disability-Related Inquiries</td>
<td>12</td>
<td>31</td>
<td>43</td>
</tr>
<tr>
<td>(7.6%)</td>
<td>(9.9%)</td>
<td>(9.1%)</td>
<td></td>
</tr>
<tr>
<td>Benefits/Health Insurance Coverage</td>
<td>10</td>
<td>17</td>
<td>27</td>
</tr>
<tr>
<td>(6.4%)</td>
<td>(5.4%)</td>
<td>(5.7%)</td>
<td></td>
</tr>
<tr>
<td>Disability Benefits</td>
<td>8</td>
<td>2</td>
<td>10</td>
</tr>
<tr>
<td>Health Insurance Coverage</td>
<td>2</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>Total Charges Raised in Litigation</td>
<td>157</td>
<td>313</td>
<td>470</td>
</tr>
</tbody>
</table>

33. The number of charges is greater than the number of cases since individual cases can have more than one charge. Source: U.S. Equal Employment Opportunity Commission, *Docket of American with Disabilities Act (ADA) Litigation* (Washington, D.C.: EEOC, 1998). Report available on EEOC website at www.eeoc.gov/...
Of particular interest in these administrative cases is the variation of interpretations given to “reasonable accommodation”—the requirement that employers take action to meet the needs of disabled workers who are “otherwise qualified” to perform relevant job responsibilities. This is one of the most flexible areas of the law, and accordingly has generated controversy between parties as they seek to determine the extent and nature of regulatory compliance mandated by the ADA. A review of the reasonable accommodation issues outlined in EEOC litigation demonstrates substantial variety in accommodations sought and legal settlements reached in these cases. Illustrative of the specific complaints in these cases involving charges of failure to provide reasonable accommodations in employment are the following:

- Employer refused to grant charging party’s request for reassignment to a different job position with less travel after company doctor imposed travel restrictions as the result of HIV/AIDS; charging party terminated. (Settlement agreement provided charging party with $63,500.)

- Employer failed to accommodate charging party’s lumbar disk-syndrome (back problem); charging party terminated. (Consent decree provided $90,000 in compensatory damages to the charging party.)

- Employer refused to accommodate the charging party’s disability (congenitally defective left arm) by forcing her to perform non-essential typing duties. (Consent decree provided $65,000 to charging party.)

- Employer refused to reasonably accommodate (and then terminated) the charging party by allowing her to sit on a stool 5 to 10 minutes each hour when she became fatigued by systemic lupus. (Settlement agreement provided $75,000 in monetary relief to charging party and training for managers and employees responsible for implementing the ADA.)

- Employer refused to reassign the charging party to “yard work” following removal from truck driver position as the result of epileptic seizure. (Favorable jury verdict awarded charging party with more than $5 million; awarded amended by court order to correspond with monetary caps in the ADA.)

- Employer failed to accommodate charging party’s carpal tunnel syndrome by refusing to let him return to work as a bus driver under a revised work schedule. (Consent decree provided charging party with $10,000 in back pay and $10,000 in compensatory damages.)

- Employer failed to hire and consider reasonable accommodations that would enable the charging party to perform the position in question, e.g., assigning the marginal task of answering the phone to another employee. (Consent decree provided

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36. EEOC v. Ameripol Synpol Corp., Civ. A. No. 1-95CV349 (E.D. Tex.).
37. EEOC v. AMS Properties, Inc., Civ. A. No. 95-WY-1585 (D. Colo.).
38. EEOC v. Bloomingdale’s, Inc., Civ. A. No. 4-95-507 (D. Minn.).
40. EEOC v. Greyhound Lines, Civ. A. No. 95-C-652 (E.D. Wis.).
charging party with $25,000.)

These cases give an indication of the variety of disabling conditions experienced by parties making charges of employment discrimination against private enterprises. They also indicate the types of accommodations the parties sought and failed to receive. While some charges of discrimination are dismissed, many, including the limited examples cited above, resulted in settlements or consent decrees providing payments to those alleging discrimination.

III. IMPLEMENTATION OF OTHER ADA MANDATES

Examination of the cases filed by the U.S. Department of Justice (DOJ) offers another view of ADA implementation and enforcement. Under the Act, the DOJ is responsible for enforcing two areas: (1) Title II—programs, services, and activities of state and local government and (2) Title III—public accommodations and commercial facilities. The DOJ maintains a website that reports information on settlements reached as the result of legal action brought by the DOJ against public and private sector entities under the ADA. These settlements give an indication of the types of complaints that are being filed and prosecuted under the ADA, the relative frequency of charges arising under the different titles of the Act, and the types of entities being charged.

Table 3 presents data on the distribution of legal actions that were filed in federal court and later settled. These actions are organized by the nature of the discrimination charge. Settlements arising from charges under Title II, requiring state and local governments to provide programs and services that accommodate the needs of persons with disabilities, accounted for 47% of all charges. Title III, which requires accommodation by private entities, is in second place with 44% of all charges. Finally, nine percent of settlements involved Title I-related charges of employment discrimination by state or local government units.

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41. EEOC v. Pomeroy Investments, Inc., d/b/a Marie Callender’s, Civ. A. No. 97-2556 (C.D. Cal.).
43. Id. at § 12186(b).
45. See id.
Table 3

Settlements in ADA Cases Initiated by the Department of Justice

<table>
<thead>
<tr>
<th>Enforcement Area</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title I: Employment Practices of State and Local</td>
<td>14</td>
<td>9%</td>
</tr>
<tr>
<td>Government</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Title II: Programs, Services and Activities of State</td>
<td>72</td>
<td>47%</td>
</tr>
<tr>
<td>and Local Governments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Title III: Public Accommodations and Commercial</td>
<td>67</td>
<td>44%</td>
</tr>
<tr>
<td>Facilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>153</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Data on settlements provided through the Freedom of Information Act report section of the U.S. Department of Justice website located at: <http://www.usdoj.gov/crt/foia>.

Table 4 provides a breakdown of Title II-related settlements. Of the 72 settlements reported by the U.S. Department of Justice, 35% involved a complaint about the failure of state or local government to provide an interpreter, auxiliary service, or captioning to accommodate the needs of individuals with hearing impairments. About another third of settlements focused on charges related to inaccessibility to public buildings and facilities; a quarter involved 911 emergency telephone systems that were not equipped to receive TDD communication; and 8% involved failure to provide other service-related accommodations (e.g., higher air transit fees for handicapped persons, treatment of persons with HIV in a hospital emergency room). The defendants in these cases represent a wide array of cities, counties, and local governing boards across the entire nation.

Table 4

Title II-Based Settlements in ADA Cases Initiated by Department of Justice by Type of Charge Brought in Cases

<table>
<thead>
<tr>
<th>Nature of Discrimination Charge</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to provide interpreters, auxiliary services</td>
<td>25</td>
<td>35%</td>
</tr>
<tr>
<td>for hearing impaired, captioning services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inaccessibility, architectural barriers prohibiting</td>
<td>23</td>
<td>32%</td>
</tr>
<tr>
<td>access to public facilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to make 911 emergency telephone systems</td>
<td>18</td>
<td>25%</td>
</tr>
<tr>
<td>accessible through TDD communications</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other failures to accommodation disability-related</td>
<td>6</td>
<td>8%</td>
</tr>
<tr>
<td>needs in provision of services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>72</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Data on settlements provided through the Freedom of Information Act report section of the U.S. Department of Justice website located at: <http://www.usdoj.gov/crt/foia>.
The DOJ's Title III-related settlements show a pattern roughly analogous to those filed under Title II. (see Table 5). Fifty-three percent of the Title III settlements reached between 1992-1998 involved restaurants, movie theaters, hotels, recreational facilities, and retail outlets which were inaccessible to persons with mobility impairments. Fifteen percent involved charges of discrimination related to failures to accommodate hearing impairments, 13% focused on the failure to accommodate service needs of disabled individuals (e.g. special hand controls in rental cars, refusal to allow entry to wheelchairs or motor scooters), and 7% involved private entities prohibiting people with disabilities from bringing their service animals (e.g. seeing-eye-dogs) into their establishment. Twelve percent of the cases focused on discrimination by private vendors against individuals with HIV or AIDS, including failure to admit children with HIV to day care programs. The range of private institutions named in the Title III settlements runs the gamut from small family-owned concerns to several prominent national companies including Day's Inn, Comfort Inn, Dollar Rent A Car, Budget Rent A Car, Friendly's Ice Cream, Shoney's Restaurants, and Walt Disney World.


47. Settlement Agreement between the United States and Comfort Inn (Sep. 12, 1996), DOJ Settlements, supra note 46.


51. Settlement Agreement between the United States and Shoney's Restaurants (June 11, 1997), DOJ Settlements, DOJ Settlements, supra note 46.

Table 5
TITLE II-BASED SETTLEMENTS IN ADA CASES INITIATED BY DEPARTMENT OF JUSTICE BY TYPE OF CHARGE BROUGHT IN CASES

<table>
<thead>
<tr>
<th>Nature of Discrimination Charge</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inaccessibility, architectural barriers prohibiting access to public facilities</td>
<td>35</td>
<td>52%</td>
</tr>
<tr>
<td>Failure to provide interpreters, auxiliary services for hearing impaired, captioning services</td>
<td>10</td>
<td>15%</td>
</tr>
<tr>
<td>Failures to accommodation disability-related needs in provision of services</td>
<td>9</td>
<td>13%</td>
</tr>
<tr>
<td>Failure to accommodate or service people with HIV or AIDS</td>
<td>12%</td>
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</tr>
<tr>
<td>Failure to allow service animals access to public facilities</td>
<td>5</td>
<td>7%</td>
</tr>
<tr>
<td>Total</td>
<td>67</td>
<td>100%</td>
</tr>
</tbody>
</table>

Source: Data on settlements provided through the Freedom of Information Act report section of the U.S. Department of Justice website located at: <http://www.usdoj.gov/crt/foia>.

While these data on settlements do not answer all questions about ADA enforcement, they do provide one snapshot of enforcement efforts. Across the 153 settlement agreements examined here, we see legal action taken against and settlement agreements reached with cities and counties, large and small, on several causes of discrimination against people with disabilities. We see a similar pattern of legal action and settlement by private sector entities of all sizes and located across the nation. Thus far, the focus of discrimination charges has tended toward removal of architectural barriers and increased accessibility as well as toward provision of services and equipment to allow greater for people with hearing impairments. Many of these settlements involved discrimination that is easily recognized and for which the remedy, such as provision of specialized services or barrier removal, is relatively easy to understand.

A smaller number of the settlement cases have focused on practices or policies of service delivery that unintentionally discriminate and reduce the opportunities of people with disabilities. One interesting example involved an individual who claimed discrimination with regard to identification procedures for check cashing. In this cases a private check-cashing company exercised a policy requiring customers to use state driver’s licenses as proof of identification. The company did not allow other forms of identification. Given that medical conditions prevent some persons with disabilities from obtaining driver’s licenses, the check cashing

53. See Settlement Agreement between United States and Marquis Video, DOJ Settlements, supra note 46.
54. See id.
practice was found to be discriminatory. In this case, the settlement agreement stipulated that the company allow alternative means of identification in order to eliminate the discriminatory impact of the driver’s license-only policy. Eliminating the discriminatory effects of policies related to routine operations remains an important objective of disability rights policy and its enforcement.

IV.
LEGAL PRECEDENTS EMERGING IN ADA CASES

Several key court cases concerning the meaning and application of the Americans with Disabilities Act have arisen since the Act was enacted in 1990. The holdings in these cases have created precedent that clarifies the statutory meaning and application of ADA mandates in both the public and private sectors. The underlying issues focus mainly upon eligibility to ADA protections, provision of reasonable accommodations, and the relationship of the ADA to disability benefit programs. The legal arguments invoked, as well as the public reaction to these decisions, highlight contemporary disputes about ADA enforcement.

A. The ADA and HIV/AIDS

Controversy over who is and who is not covered by disability rights protections has raged since the first legislative protections were put in place for people with disabilities. Section 504 of the Rehabilitation Act of 1973—the pre-ADA legislation that was the touchstone of disability rights and immediate antecedent to the ADA—provides no guidance as to definition. When the Rehabilitation Act was amended in 1974, the new version specified a definition that was ultimately included in the administrative regulations issued by the Department of Health, Education and Welfare (HEW). According to this definition, a covered person with disability is anyone who experiences a mental or physical handicap that limits one or more of life’s major functions, has a record of such a handicap, or is perceived as having such a handicap. Major life functions were defined as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

Throughout the rulemaking process, staff in HEW’s Office of Civil Rights

55. See id.
56. See Pub. L. No. 93-112, § 504, 87 Stat. 355, 3394 (1973) (codified as amended at 29 U.S.C. § 705 (defining “handicapped” person as someone with “a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment”).
58. 42 C.F.R § 84.3.
59. Id.
debated the question of whether various groups, including alcoholics and drug addicts, homosexuals, and elderly persons, were entitled to protections under section 504. It was decided not to include homosexuals or elderly individuals simply on the basis of sexual preference or age. Drug abuse and alcoholism were stickier issues since most health care professions characterized these conditions as mental and/or physical disorders. Concerns expressed during the administrative rulemaking process showed that public and private commentators were very concerned about legal protections for alcoholics and illegal drug users. During rulemaking, HEW requested an interpretation from the attorney general’s office on the issue of whether individuals with alcohol or drug abuse problems would be entitled to protections. The Attorney General replied affirmatively, causing HEW to note in an appendix to the final regulations that the “secretary therefore believes that he is without authority to exclude these conditions from the definitions.”

Given the nature of these disputes, it is not surprising that one of the first prominent ADA cases to move through the federal courts focused on AIDS. In 1994, Sidney Abbott visited her dentist and found that she had a cavity that needed filling. Upon disclosing that she had tested positive for the HIV virus, the dentist refused to fill the cavity in the office. Instead, he recommended performing the necessary dental work at a nearby hospital where safety procedures would be enhanced, with the requirement that Abbott pay for the hospital costs. Abbott sued the dentist in federal court, contending that his requirement violated her rights under the ADA.

The case moved through the federal court system and was eventually heard by the U.S. Supreme Court. The High Court ruled in a 5-4 decision that HIV was an impairment that limited an individual’s ability to engage in a major life function, the eligibility definition provided in the ADA. This ruling was based upon the Court’s reasoning that even though HIV itself, absent outbreak of AIDS, does not interfere with all major functions, it does interfere with the ability to procreate—a major life function—thereby activating ADA protections.

The Court went further to consider whether the dentist had acted improperly in his determination that filling the cavity in an office procedure represented an

60. 42 Fed. Reg. § 22686.
61. See id.
62. See id.
63. See id.
65. 524 U.S. 624. For additional discussion about the Bragdon litigation, see George J. Annas, Protecting Patients from Discrimination—The Americans with Disabilities Act and HIV Infection, NEW ENG. J. MED., 1255-59 (Oct. 1998).
66. 524 U.S. at 641.
67. Id.
undue risk to his health and safety. Lower court decisions had looked to professional guidelines such as those of the Center for Disease Control and the American Dental Association—guidelines that indicate that it is safe to treat persons with HIV if appropriate infection controls are utilized—in order to assess the dentist’s judgement that office treatment was dangerous to his health. The Supreme Court disagreed with the lower court decisions, contending that statistical likelihood, not professional guidelines, should be used to assess the appropriateness of professional treatment decisions. The Court remanded the case to the appellate court to determine whether its decision on the risk to the dentist would have changed if it considered more than professional guidelines. Here, we see an effort to balance the rights of the patient with the safety needs of the physician and the search for the appropriate information on which this decision should be made.

The ruling in this case also shows how answers to one question about statutory meaning can raise new, different questions that require the courts to continue their interpretive role. Advocates on behalf of people experiencing infertility saw Abbott as granting the people they represent—individuals who may need to undergo treatments that are exhaustive and debilitating—greater protections under the law. While infertility was not the issue in Abbott, designating reproduction as a major life function that triggered ADA protections opened the door to expanded understanding of the reach of law.

B. ADA Protections for Prisoners

Another area of dispute concerning enforcement of the Americans with Disabilities Act has been whether individuals incarcerated in prison are entitled to protections under the Act. In a 1997 California case, federal judges heard a class action suit by disabled prisoners charging the prison with inadequate emergency escape procedures, an inaccessible vocational education process, and work opportunities that prevented them from earning sentence reduction credits. In a case the following year, the Supreme Court was asked to consider whether an individual convicted and about to be confined by the state has the same right to choice of incarceration regardless of physical disability. Because of hypertension, the plaintiff was ruled ineligible for a boot camp program that would have resulted in a significantly shortened period of incarceration. These cases reveal a view among the federal courts that the limitations on prisoners’ rights and opportunities within the penal system do not establish a legal basis for excluding incarcerated

68. Id. at 648-55.
69. Id. at 650-51.
70. Id. at 646-50.
71. Id. at 649-54.
73. Armstrong v. Wilson, 124 F.3d 1019 (9th Cir., 1997).
75. Id.
individuals from ADA protections.\footnote{Id at 1956.}

\section*{C. The ADA and Disability Benefits}

Some very recent cases arising under the ADA concern how the Act relates to statutes governing health insurance and disability benefits. One of these cases, \textit{Cleveland v. Policy Management Systems}, focused on the relationship between the ADA and Social Security disability benefits.\footnote{Cleveland v. Policy Management Sys., 526 U.S. 795 (1999).} The question in this case was whether receipt of disability benefits under Social Security creates a presumption that the employee is not able to work and is therefore not covered by the ADA. The case followed from a lawsuit brought by a woman who received disability benefits following a stroke and was subsequently dismissed by her employer.\footnote{Id. at 972-73.} She sued the employer arguing that her termination represented discrimination under the ADA.\footnote{Id.} At the time of her suit, federal courts had reached mixed rulings in similar cases, with some holding that receipt of disability benefits represents a determination that a recipient is not a “qualified individual with a disability” entitled to coverage under the ADA.\footnote{Id. at 973.}

The Supreme Court held in \textit{Cleveland} held that despite what could be seen as a conflict in the plaintiff simultaneously receiving SSDI benefits and seeking protection under the ADA, the two claims are not inherently in conflict. Instead, the Court held that it would be possible in some circumstances for an SSDI claim and an ADA claim to “comfortably exist side by side.”\footnote{Id. at 975.} Nevertheless, in some cases the two claims may be in conflict, meaning that the condition triggering receipt of SSDI benefits may prevent an individual from being able to perform the job in question, even with reasonable accommodation. In such a case the ADA would afford no protection. For the Court, then, the question of an inherent conflict in receiving disability benefits, SSDI, and pursuit of ADA protections is a matter for investigation and potential legal action by either side. Receipt of SSDI, however, does not prevent the beneficiary from pursuing an ADA claim.

\section*{D. The ADA and Damages Under Title II}

Critics of the ADA reserved some of their strongest words and actions for the clauses of the law that provided for award of damages and remedies. Critics worried that awards for damages would break the banks of private firms and deplete the treasuries of state and local governments. The issue of damages was directly addressed in a case heard before the Ninth Circuit Court of Appeals concerning the requirement that state and local governments make programs and

\begin{footnotes}
\item 76. Id at 1956.
\item 78. Id. at 972-73.
\item 79. Id.
\item 80. Id. at 973.
\item 81. Id. at 975.
\end{footnotes}
services accessible. In Ferguson v. City of Phoenix, the plaintiff had difficulty communicating with the City of Phoenix's 911 emergency telephone system. The particular 911 system used at the time did not recognize the signal from Ferguson's TDD, causing the report of a theft in progress to get a low priority for police response. The plaintiff charged that the city's ineffective 911 system resulted in the theft of his truck, entitling him to compensatory damages from the city. The Ninth Circuit determined that there was no evidence to suggest that the city acted with deliberate indifference or lack of appropriate training, and therefore, the city was not required to pay damages. The decision, hailed as a "victory for municipalities," upheld the decision of the lower court and signaled that damages are not available under Title II of the ADA without proof of discriminatory intent.

E. Corrective Disabilities and the ADA

Another question addressed during the Supreme Court's 1998-99 term concerned whether the ADA provides protections to individuals who have "correctable" disabilities. These cases concerned: (1) pilots who were denied employment by an airline because of near-sightedness even though their vision was corrected with contact lens, (2) a truck mechanic who lost his job because of high blood pressure that was controllable through medication, and (3) a one-eyed truck driver terminated by his employer. In all three cases the Court's holdings limited the reach of the ADA and narrowed the class of individuals eligible for protection under this civil rights legislation. In effect, the Court largely eliminated protections for individuals whose disabilities are correctable through medicate or corrective devices.

The Court's reasoning in these cases is best illustrated in the majority opinion in Sutton v. United Airlines, written by Justice Sandra Day O'Connor. Justice O'Connor noted three provisions of the ADA that supported the Court's conclusion that individuals with remedial conditions are not disabled under the meaning of the law, and therefore are not entitled to ADA protections. First, she noted that the law's definition of disability—a condition that "substantially limits one or more of the major life activities"—is expressed in the "present indicative verb form." Thus, she reasoned that the law was intended to protect persons with a present

82. Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998).
83. Id. at 671.
84. Id.
85. Id.
87. 157 F.3d at 674.
91. Sutton, 119 S. Ct. at 2143.
92. Id. at 2146 (citing 42 U.S.C. § 12102(2)(A) (1994)).
93. Id.
substantial limitation and not those with a potential or hypothetical limitation; thus, a limitation that is corrected is no longer "presently" a disability.\textsuperscript{94} Second, the law requires that people be assessed on their individual circumstances and not as members of a group that is affected in a particular way. Evaluating an individual's condition in its uncorrected form as opposed to its actual status, in the Court's view, would create a system where the individual would often be treated as a member of a group having similar impairments—rather than as a person whose situation should be assessed on an individualized basis.\textsuperscript{95} And, third, in the preamble findings to the ADA, Congress noted that some 43 million Americans have one or more disabilities.\textsuperscript{96} While the source of this assertion was not documented, Justice O'Connor noted that the number of individuals who wear glasses or who have some other correctable problem would be closer to 160 million.\textsuperscript{97} For O'Connor, this difference in numbers indicated that Congress did not intend for the ADA to provide coverage to individuals whose impairments are easily correctable through medication or devices.\textsuperscript{98}

The rulings in \textit{Sutton}, \textit{Murphy}, and \textit{Albertson's Inc.}—and their underlying legal rationale—is quite disturbing to the drafters of the ADA and to those who seek expansive, rather than limited, coverage and protection for people with disabilities. Professor Chai Feldblum of Georgetown Law School—a drafter of original ADA language—responded to the Court's rulings by stating that these decisions "create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing."\textsuperscript{99} Despite the fact that in each case the disabling condition did represent a limitation of a major life function (sight, blood circulation), and that the conditions, even when corrected, led to job termination, the Court did not see ADA protections as warranted.

\textbf{F. The ADA and Learning Disabilities}

Discussion about learning disabilities has been a hot topic in the education field as schools become increasingly involved in assessing the learning capacities and disabilities of school-aged children. This issue has entered the ADA arena through several cases involving athletes with learning disabilities who were denied eligibility to compete in NCAA sports.\textsuperscript{100} In one case a University of Washington football player was denied eligibility to play football by NCAA rules concerning core academic requirements.\textsuperscript{101} The NCAA rules state that remedial or special education cores taught below the school's regular instructional level (regardless of

course level) do not satisfy the core education requirements. In a victory for the athlete, a Washington district court issued a preliminary injunction in 1996, reinstating the player. Other cases remain active and the federal courts have yet to address the key questions of whether the NCAA is covered by the public accommodations requirements of Title III and whether the education core requirements, by failing to accommodate educational programs for people with learning disabilities, constitute discrimination against athletes who experience learning disabilities.

V. ADA IMPLEMENTATION AND BACKLASH

Public reactions to these wide-ranging court decisions provide a final perspective on ADA implementation. These mostly negative reactions demonstrate a range of perspectives on the breadth of the law, concerns (and sometimes misconceptions) about ambiguity and potential liabilities associated with the ADA, and worries that reasonable accommodations will break the bank. Sidney Abbott’s challenge to her dentist’s policy for treating her as the result of her HIV status—and the Supreme Court’s affirmation of her discrimination claim—generated substantial public reaction. Many people and organizations, most notably advocates for people with disabilities, applauded the decision by the nation’s highest court, a decision they credited with establishing the breadth of ADA coverage. One writer saw Abbott as a victory and wake-up call for all parties covered by the ADA:

Employers, landlords and public officials in the country take note: The Americans with Disabilities Act is a significant civil rights statute. Our highest court has sent a signal to those who admit to their discriminatory behavior while arguing that their offensive acts are rational. Treating people differently because of their disabilities leaves one on shaky ground, and the courts will be applying the Americans with Disabilities Act expansively to eliminate offensive acts and penalize the offenders.

The medical community, the profession most directly involved in the Abbott case, has also voiced support for the Court’s opinion. Writing in the New England Journal of Medicine, George J. Annas averred that the “application of the law to HIV infection, in the context of continuing stigmatization and discrimination in the health care setting, has now been properly affirmed by the Supreme Court. This decision comports with the ethical principles of the medical and dental professionals and with the use of universal precautions.” Similarly, a legal analysis of the Supreme Court decision held that “baseless fears or beliefs, even those of healthcare professionals, will not be sufficient to justify discriminatory

102. Id. at 6.
103. See, e.g., Annas, supra note 64.
treatment. Nor will good faith protect those who rely on poor science, from liability under the ADA.”

Other reactions to Abbott have been more critical. Some commentators see the decision as well as the ADA itself as embodying yet another instance of expansive regulatory mandates on the private sector emanating from the federal government. These criticisms parallel those made about other federal regulatory programs such as environmental protection, affirmative action, and occupational safety programs. Typical of this critical perspective is an article in The Economist that cited Abbott and other Supreme Court decisions in the 1997-98 term as “greatly extending the scope of anti-discrimination laws in a way that will not only increase the burdens on employers, but could well turn the American workplace into the most highly regulated in the world.” Similar concerns about anti-discrimination measures harming the competitiveness of American business can be traced as far back as to rulemaking efforts for section 504 of the Rehabilitation Act and the legislative debates on the ADA in 1989 and 1990.

A second line of criticism focuses on skepticism about the breadth of ADA protections and a concern that minor impairments with little adverse impact will generate an overload of mandated accommodations. In this vein, an article appeared shortly after Bragdon in U.S. News and World Report about a firefighter named Jeffrey Ola who challenged the decision his county’s fire department not to hire him as a paramedic on the basis of his hearing impairment. According to the article, Ola never considered himself disabled and was able, despite his hearing loss, to study for and successfully beat out 65 other applicants for the position. His only obstacle was a strict departmental policy that normal hearing was required for the paramedic’s job. The article concluded that “it turns out that the clearest beneficiaries [of the ADA] have not been the severely disabled but a much larger group of people who, like Ola, have relatively minor impairments. For better or for worse, the ADA has greatly expanded the definition of disability to include chronic and hidden problems . . .” This is an interesting example, for while the author uses a critical tone in the case of Jeffrey Ola whose “minor impairment” nonetheless triggered ADA protections, advocates see the case as an important victory. For if Ola was successful in beating out others and was otherwise capable


108. See id. at 21.


111. See Shapiro, supra note 109, at 41.
or performing the paramedics job, then his only obstacle to employment was a hearing policy that was not appropriately related to job performance. The case thus pointed out how existing policies can work to discriminate.

*Abbott*’s critics often claim that the case “opened the door” to expanded protections to people with disabilities and to new, likely excessive burdens on regulated parties, especially private sector entities. The chief counsel for the U.S. Chamber of Commerce, for example, argued that the case “just throws the door wide open.” The director of the Cato Institute’s Center for Constitutional Studies contended that “[w]e like the doors to be opened by consent, not by the force of law.” The greatest fear of opening the door is that enforcement will entail expansive complaints and massive accommodation costs.

The compliance cost issue is relevant not only to the ADA but to companion disability rights laws such as the Individuals with Disabilities Education Act (IDEA) that guarantees a “free and appropriate public education” to students with disabilities. A Supreme Court decision in March 1999 held that the IDEA required the Cedar Rapids Community School District to provide a trained aid to monitor the needs of a quadriplegic boy who was dependent on a respirator. Students who need special care during the school day, therefore, are entitled to that care at public expense. The cost issue was evident in this case in the dissenting opinion filed by Justice Clarence Thomas and joined by Anthony M. Kennedy, that argued that the interpretation of the majority opinion in the case “blindsides unwary states with fiscal obligations that they could not have anticipated.”

A third dimension of public reaction to *Abbott* and the ADA relates to the prejudicial views and misunderstandings that still surround HIV and AIDS. While a Washington Post staff writer saw *Abbott* as positive evidence of progress in dealing with the deadly disease, intoning that “the ruling signified just how far the country has come in the past decade in coping with the worst epidemic of modern times,” other reporters and writers saw danger in the decision. An article in Human Events, for example, argued that “[I]n the historic battle between the deadly AIDS virus and American doctors, the Supreme Court of the United States has taken the side of the virus. . . . All bloods, according to the court, are equal—regardless of what deadly diseases they may or may not carry.” Social and political controversy surrounds the AIDS crisis, even if prejudice has abated somewhat over the past decade. The reaction to *Abbott*, coupled with the EEOC and DOJ litigation, suggests that AIDS-relate disputes will continue as a significant issue in ADA enforcement.

113. Id.
116. Id. at 1003.
VI.

ASSESSMENT AND CHALLENGES

The empirical evidence presented in this article paints a limited picture of ADA enforcement. This evidence suggests that a wide variety of people with disabilities who experience a diverse array of disabling conditions have utilized the protections of ADA to fight discrimination. Individuals whose charges of discrimination have been upheld have received damages or have had their complaint otherwise addressed. Yet despite this evidence, our picture of ADA enforcement and accomplishments remains substantially incomplete. We have no measure or understanding yet of such key issues as how many individuals with disabilities experience discrimination, how many know of ADA protections, and how many are unwilling or incapable of using the ADA to redress the discrimination they encounter. Until we can better answer these questions—vast questions given the number of people experiencing mental or physical disability and the number of private and public sector entities regulated by the ADA—we will not be able to answer, with any confidence, the fundamental question of how effective the ADA is in eliminating discrimination based on disability.

The evidence examined in this article suggests that complaints and enforcement in the area of employment will remain active for some time to come. Controversies about the extent of coverage for different disabilities will undoubtedly be manifest as will disagreements about the extent and nature of reasonable accommodations in employment that are mandated by the ADA. Some question of whether the national government’s failure to provide funding to assist in the provision of employment accommodations or to target relief to subgroups with the most substantial difficulties impairs the overall effectiveness of the law. The following assessment of the effectiveness of ADA protections in protecting the employment opportunities of people with disabilities sums up well the current situation:

It may be the case that both sides have overestimated the potential impact of the ADA. Employers have overestimated the costs and difficulties of complying with the law, and people with disabilities have overestimated the ability of a civil rights act to significantly alter employment rates and circumstances.

In the context of requirements for reasonable accommodation to the services and facilities offered by state and local governments, as well as by private enterprises, the challenge is getting the word out that people with disabilities have the rights to accommodations that provide them with the capacity to consume and enjoy services and programs. There are thousands upon thousands of governments and businesses regulated by Titles II and III of the ADA, and hundreds of complaints have already been made under these titles. It will likely be some time, however, before these regulated entities, particularly the full array of businesses

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120. Mudrick, supra note 20, at 70.
will understand their need to achieve compliance in order to avoid discrimination based upon disability.

Finally, evidence of political backlash against the ADA is not unexpected. Controversy has surrounded all civil rights legislation. Discrimination based upon disability is grounded in many factors including misperceptions about the origins, impacts, and accommodation needs of different forms of disability as well as fear of the unknown, stereotypes about the capabilities of people with disabilities, and ideological perspectives that see a limited role for government in addressing discrimination and mandating accommodations to ensure civil rights. Overcoming these factors takes time, willingness to bring complaints and charges when discrimination is encountered, and efforts to educate the general public toward a more realistic understanding of disability and the importance of civil rights enforcement for the large segment of the American population that experiences temporary or permanent disability. These remain significant challenges, not insurmountable, to moving the nation forward to the objective of full rights and opportunities for people with disability in America.