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Settling the Matter: Does Title I of the ADA Work?

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SETTLING THE MATTER: DOES TITLE I OF THE ADA WORK?

*Sharona Hoffman**

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ABSTRACT

Analysis of cases decided under Title I of the Americans with Disabilities Act (ADA), which addresses employment discrimination, reveals that defendants have consistently prevailed in well over 90% of cases since the ADA's inception. This empirical evidence has led many commentators to conclude that the ADA's Title I has failed to improve workplace conditions for individuals with disabilities.

This Article attempts to assess the efficacy of Title I through a different lens. It focuses on several data sets that have previously received little attention. It examines Equal Employment Opportunity Commission merit resolutions, lawsuit settlement statistics, and reports concerning reasonable accommodation requests processed by private and public sector employers. These statistics reveal that employers are reasonably responsive to Title I claimants outside of the courthouse setting and that the ADA has in fact improved workplace conditions for employees with disabilities.

The more general point made by this Article is that the efficacy and impact of statutory mandates cannot be judged based solely on reported court opinions. Rather, data concerning the behavior of those covered by the statutes and extra-judicial dispute resolution are essential to an assessment of whether a statute has achieved the societal changes that it was designed to effect. Consequently, this article emphasizes the need for more comprehensive empirical studies concerning ADA claim resolutions and outlines a proposal for mandatory reporting of settlement outcomes and the processing of reasonable accommodation requests by employers.

I. INTRODUCTION

Title I of the Americans with Disabilities Act (ADA)¹ prohibits employment discrimination against “qualified individual[s] with . . . disability[ies].”² A plethora of empirical evidence has revealed that plaintiffs fare very poorly in Title I cases that are resolved through judicial determinations.³ This Article attempts to assess ADA outcomes through a different lens. It asks whether Title I has been successful outside the courtroom and judicial chambers. This is a critical question because most cases that are filed are resolved through settlement or unreported opinions,⁴ and it is en-

1. 42 U.S.C. §§ 12111–12117 (2000).

2. *Id.* § 12112.

3. See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1813 (2005) (discussing studies that evince low plaintiff win rates). See *infra* Part II for a detailed discussion of studies that establish low plaintiff win rates.

4. See, e.g., Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 303, 305–06 (2005).

tirely possible that many, if not most, individuals who have an ADA employment discrimination problem do not file a lawsuit in court at all.⁵

The Article examines enforcement statistics from the Equal Employment Opportunity Commission (EEOC), limited data that exists concerning settlement amounts in ADA Title I cases, and a number of reports of disability employment policies and practices in the private and public sectors to determine whether individuals with disabilities have experienced greater success when judges have not resolved their cases. I argue that EEOC resolutions, settlement statistics, and survey responses of human resources personnel all indicate that employers are reasonably responsive to Title I claimants in the relatively informal settings of internal requests for accommodation, EEOC conciliations, and settlement negotiations. Consequently, contrary to the contention of many commentators,⁶ Title I of the ADA cannot be conclusively deemed a failure. Although judges may be resistant to ruling in favor of ADA plaintiffs, the ADA may well have achieved important changes in workplace behavior and made the workplace more hospitable to individuals with disabling physical and mental impairments.

Thus, the larger point made by this Article is that the efficacy and reach of statutory mandates cannot be judged based solely on published court opinions. In order to accurately assess the impact of the ADA's Title I, scholars must obtain settlement information and data concerning institutional grievance procedures and employers' processing of accommodation requests, none of which is readily available to the public. This information would also enable lawyers to litigate more intelligently because it would allow them to determine the value of their cases in light of outcomes in cases with similar facts. The Article urges that further empirical studies be conducted and that reporting mechanisms be established to facilitate access to this currently elusive data.

The remainder of the Article will proceed as follows: Part II discusses a number of studies that have analyzed judicial resolutions of Title I cases in federal court. It also offers a first of its kind study of ADA Title I cases that have been litigated in state court and concludes that state court outcomes closely resemble federal court outcomes. Part III discusses settlement statistics from the EEOC and from limited data sets concerning cases that were settled after being filed in court. Part IV discusses several reports that address employers' processing of reasonable accommodation requests. These provide insight into ADA compliance within the workplace before formal disputes develop and claims reach the EEOC and the courts. Part V offers analysis and recommendations based on the data described above.

5. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 636 (1980-81) ("[O]nly a small fraction of injurious experiences ever mature into disputes.").

6. See Waterstone, *supra* note 3, at 1812 (explaining that scholars who have written about "Title I of the ADA view[] the ADA as disappointing").

II. JUDICIAL DETERMINATION

Numerous studies have confirmed that plaintiffs experience extremely low win rates in cases decided under Title I of the ADA.⁷ The American Bar Association's (ABA) Commission on Mental and Physical Disability Law has conducted numerous studies focusing on Title I decisions gathered primarily through Westlaw searches "and [from] various media outlets."⁸ The first study analyzed cases from 1992 to 1997, and the subsequent seven, conducted from 1998 to 2004, are annual surveys of federal court cases.⁹ The surveys consider an employer to have won the case if the plaintiff's complaint is dismissed or the employer prevails on the merits, and an employee to have won if she prevails on the merits.¹⁰ Opinions resolving preliminary matters—such as those denying summary judgment to employers—are considered to render neither party a winner because they lead to no final resolution, and thus they are not included in the surveys' calculations.¹¹

The 2004 study summarizes the results of all prior surveys and concludes that the plaintiff win rates are as follows:

1992-1997: 7.9%

1998: 5.7%

1999: 4.3%

2000: 3.6%

2001: 4.3%

2002: 5.5%

2003: 2%

2004: 3%.¹²

Several academic scholars have published similar studies. Professor Ruth Colker's 1999 survey concluded that defendants prevailed in 94% of cases at the federal district court level and in 84% of cases in which losing

7. 42 U.S.C. §§ 12111–12117.

8. See, e.g., Amy L. Albright, *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513 (2005).

9. *Id.* The cases included in the reports are all federal court cases. See Amy L. Albright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007).

10. Albright, *supra* note 8, at 513.

11. *Id.*

12. *Id.* at 515.

plaintiffs appealed their judgments.¹³ Professor Colker acknowledges that relying on published opinions may have skewed her results.¹⁴ She states that only 42% of appellate court opinions affirming lower court decisions are published¹⁵ and that at the trial court level unreported opinions and verdicts would most likely reveal a win rate that is even lower for plaintiffs than the one evident from reported cases.¹⁶ This is because of the many summary opinions that are not made accessible to the public in which judges often rule in favor of defendants but rarely provide a victory on the merits to plaintiffs.¹⁷

Louis S. Rulli published a study of all reported ADA cases that were litigated in the Eastern District of Pennsylvania during 1996, 1997, and 1998.¹⁸ Rulli found that “employers prevailed in 94.2 percent of [Title I] cases,” experiencing their highest win rate in 1998.¹⁹

These extremely low win rates are not characteristic of plaintiffs filing non-disability employment discrimination cases. For example, according to Professor Colker, plaintiffs litigating cases under Title VII of the Civil Rights Act of 1964 (Title VII)²⁰ obtained reversals in 34% of the cases they appealed, a much higher percentage than the 12% pro-plaintiff reversal rate under the ADA.²¹ A study of sexual harassment cases concluded that plaintiffs prevailed in 54.1 % of cases “decided on pretrial motions,” 45.7 % of bench trials, and 54.% of jury trials.²² At the appellate level, both plaintiffs and defendants who appealed obtained reversals in 27% of the cases.²³ A study of Age Discrimination in Employment Act (ADEA)²⁴ litigation re-

13. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107–08 (1999) [hereinafter Colker, *Windfall*]. In a subsequent study, Colker analyzed appellate cases in greater detail in order to determine which factors might predict ADA appellate outcomes. See Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 239 (2001) [hereinafter, Colker, *Winning and Losing*]. Examining a database of 720 published and unpublished cases available on Westlaw, she found that employers obtained “full reversal in 42% of [the cases that they appealed and had] damages [reduced] in an additional 17.5% of cases.” *Id.* at 239, 244–45, 248. Plaintiffs who appealed pro-employer judgments, however, obtained reversals “in only 12% of cases.” *Id.* at 248.

14. See Colker, *Windfall*, *supra* note 13, at 104–05, 108–09.

15. *Id.* at 105.

16. *Id.* at 109.

17. See *id.*

18. Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 365–66 (2000).

19. *Id.* The author notes that defendants were slightly less successful in ADA Title II and Title III cases, prevailing in 91.7% and 85.7% of cases, respectively. See *id.* at 366 n.149.

20. 42 U.S.C. §§ 2000e to 2000e-17 (2000). Title VII prohibits employment discrimination based on “race, color, religion, sex, or national origin.” See *id.* § 2000e-2.

21. See Colker, *Winning and Losing*, *supra* note 13, at 248, 253. It should be noted that the 12% plaintiff reversal rate reported in Colker’s 2001 article is inconsistent with the 16% plaintiff reversal rate reported in her 1999 article. Compare *id.* with Colker, *Windfall*, *supra* note 13, at 107–08, and *supra* text accompanying note 13.

22. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 570 (2001).

23. See *id.* at 574.

24. 29 U.S.C. §§ 621–634 (2000).

vealed that overall, defendants prevailed in only 25.8% of cases and plaintiffs won 8.7% of cases, while approximately 58% of cases were resolved through settlement.²⁵ Thus, ADEA plaintiffs obtained favorable decisions in over 20% of cases that did not settle.²⁶

No formal study has been published concerning state court cases that resolved ADA employment discrimination claims.²⁷ My own research identified 110 cases decided between 1994 and 2006 that reached final resolutions on the merits of Title I claims. This research includes published and unpublished cases reported on LEXIS. The cases reveal a slightly but not dramatically better plaintiff win rate than that found in federal court. Employers prevailed in ninety-three or 91.81% of cases,²⁸ while plaintiffs prevailed in nine, or 8.82%,²⁹ of cases.

25. See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 513 (1995). These figures do not add up to 100%, but the author does not explain how the remainder of the cases are resolved. See *id.*; see also THEODORE EISENBERG & STEWART J. SCHWAB, DOUBLE STANDARD ON APPEAL: AN EMPIRICAL ANALYSIS OF EMPLOYMENT DISCRIMINATION CASES IN THE U.S. COURTS OF APPEALS (July 2001), available at http://www.findjustice.com/files/Eisenberg_&_Schwab_Report.pdf. The study found that with respect to employment discrimination cases litigated in federal court, defendants won 43.61% of cases they appealed after a plaintiff's trial victory and 44.74% of cases they appealed after a plaintiff's pretrial victory. See *id.* at 7, 11. Plaintiffs won only 5.8% of cases they appealed after a defendant's trial victory and 11.03% of cases they appealed when a defendant had obtained a pretrial victory. See *id.* at 8, 11. The study did not provide a more specific analysis relating to different categories of claims, such as race, age, and disability. See *id.* at 3 ("The data do not allow one to analyze just title VII cases or just ADA cases.").

26. See Rutherglen, *supra* note 25, at 513.

27. See, e.g., Moss et al., *supra* note 4, at 308 (stating that the author's study "did not include Title I cases . . . decided in . . . state court" and noting that the number of such cases is relatively small).

28. *Cremeens v. Montgomery*, 779 So. 2d 1190, 1201 (Ala. 2000); *Bullion v. JMBL, Inc.*, 657 So. 2d 834, 837 (Ala. 1995); *State Dep't of Pub. Safety v. Sexton*, 748 So. 2d 200, 217-18 (Ala. Civ. App. 1998); *Guo v. Maricopa County Med. Ctr.*, 992 P.2d 11, 19 (Ariz. App. 1999); *Hill v. Los Angeles, No. B160641*, 2003 Cal. App. Unpub. LEXIS 8317, at *31 (Cal. Ct. App. Aug. 28, 2003); *Elrod v. Costco Wholesale Co.*, No. B159303, 2003 Cal. App. Unpub. LEXIS 5511, at *29 (Cal. Ct. App. June 4, 2003); *Arias v. Bank of Am.*, No. B158686, 2003 Cal. App. Unpub. LEXIS 2742, at *25 (Cal. Ct. App. Mar. 20, 2003); *Moreno v. San Joaquin*, No. C035807, 2002 Cal. App. Unpub. LEXIS 4289, at *37 (Cal. Ct. App. Feb. 4, 2002); *Postel v. Vista Paint Corp.*, No. E029782, 2001 Cal. App. Unpub. LEXIS 2516, at *20 (Cal. Ct. App. Oct. 19, 2001); *Diffey v. Riverside County Sheriff's Dep't*, 101 Cal. Rptr. 2d 353, 359 (Cal. Ct. App. 2000), *overruled in part by* *Colemares v. Braemer Country Club*, 29 Cal. Rptr. 2d 662 (Cal. 2003); *Real v. Compton*, 87 Cal. Rptr. 2d 531, 541 (Cal. Ct. App. 1999); *Le Bourgeois v. Fireplace Mfrs.*, 80 Cal. Rptr. 2d 660, 669 (Cal. Ct. App. 1998); *Brundage v. Hahn*, 66 Cal. Rptr. 2d 830, 838 (Cal. Ct. App. 1997); *Archer v. Farmer Bros. Co.*, 90 P.3d 228, 232 (Colo. 2004); *Ezikovich v. Comm'n on Human Rights & Opportunities*, 750 A.2d 494, 500 (Conn. App. Ct. 2000); *Conn. Comm'n on Human Rights & Opportunities v. Wal-Mart Stores, Inc.*, No. CV010507207S, 2002 Conn. Super. LEXIS 55, at *20 (Conn. Super. Ct. Jan. 2, 2002); *Hodge v. U.S. Delivery Sys. - New England, Inc.*, No. CV 970569497S, 2000 Conn. Super. LEXIS 1950, at *7 (Conn. Super. Ct. July 21, 2000); *DeMello v. Conn. Comm'n on Human Rights & Opportunities*, No. CV 980489424S, 2000 Conn. Super. LEXIS 45, at *10 (Conn. Super. Ct. Jan. 10, 2000); *Doe v. Odili Techs., Inc.*, No. CV 970327738S, 1999 Conn. Super. LEXIS 3120, at *21 (Conn. Super. Ct. Nov. 18, 1999); *Katona v. Comm'n on Human Rights & Opportunities*, No. CV 970057035S, 1998 Conn. Super. LEXIS 2020, at *30 (Conn. Super. Ct. July 15, 1998); *Ezikovich v. Comm'n on Human Rights & Opportunities*, No. CV 970567872, 1998 Conn. Super. LEXIS 1329, at *18 (Conn. Super. Ct. May, 11 1998); *Fillies v. Comm'n on Human Rights & Opportunities*, No. CV 960152557, 1997 Conn. Super. LEXIS 2623, at *10-11 (Conn. Super. Ct. Sept. 29, 1997); *Bauman v. Comm'n on Human Rights & Opportunities*, No. CV 94 053 24 74, 1996 Conn. Super. LEXIS 397, at *9 (Conn. Super. Ct. Feb. 13, 1996); *Sann v. Renal Care Ctrs. Corp.*, No. 94A-10-001, 1996 Del. Super. LEXIS 11, at *15 (Del. Super. Ct. Jan. 16, 1996); *Wimberly v. Sec. Tech. Group, Inc.*, 866 So. 2d 146, 148 (Fla. Dist. Ct. App. 2004); *Brooks v. Unemployment Appeals Comm'n*, 695 So. 2d

879, 881 (Fla. Dist. Ct. App. 1997); Hensley v. Punta Gorda, 686 So. 2d 724, 728 (Fla. Dist. Ct. App. 1997); Ball v. Fulton-Dekalb Hosp. Auth., 576 S.E.2d 1, 2 (Ga. Ct. App. 2002); Bitney v. Honolulu Police Dep't, 30 P.3d 257, 269 (Haw. 2001); Levinger v. Mercy Med. Ctr., 75 P.3d 1202, 1209 (Idaho 2003); Raedlein v. Boise Cascade Corp., 931 P.2d 621, 625 (Idaho 1996); Ziegler v. State, 55 Ill. Ct. Cl. 405, 410 (Ill. Ct. Cl. 2002); Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002); Hansen v. Seabee Corp., 688 N.W.2d 234, 244 (Iowa 2004); Schlitzer v. Univ. of Iowa Hosps. & Clinics, 641 N.W.2d 525, 532 (Iowa 2002); Howell v. Merritt Co., 585 N.W.2d 278, 281 (Iowa 1998); Bearshield v. John Morrell & Co., 570 N.W.2d 915, 924 (Iowa 1997); Cole v. Staff Temps, 554 N.W.2d 699, 707 (Iowa 1996); Schall v. Wichita State Univ., 7 P.3d 1144, 1163 (Kan. 2000); Noel v. Elk Brand Mfg. Co., 53 S.W.3d 95, 106 (Ky. Ct. App. 2000); Muhammad v. New Orleans Police Dep't, 791 So. 2d 788, 792 (La. Ct. App. 2001); Antoine v. Dep't of Pub. Safety & Corr., 681 So. 2d 1282, 1286-87 (La. Ct. App. 1996); Nerenberg v. RICA of S. Md., 750 A.2d 655, 686 (Md. Ct. Spec. App. 2000); Dart v. Browning-Ferris Indus., 691 N.E.2d 526, 537 (Mass. 1998); Wooster v. Abdow Corp., 709 N.E.2d 71, 78 (Mass. App. Ct. 1999); Curtis v. Fitchburg, No. 97-1375A, 2003 Mass. Super. LEXIS 170, at *36 (Mass. Super. Ct. Apr. 2, 2003); White v. Boston, No. 95-6483-F, 1997 Mass. Super. LEXIS 358, at *20 (Mass. Super. Ct. July 22, 1997); Dolan v. Bay Constr. Group Co., No. 92-4947, 1994 Mass. Super. LEXIS 417, at *16 (Mass. Super. Ct. Nov. 9, 1994); Peden v. Detroit, 680 N.W.2d 857, 873 (Mich. 2004); Jackson v. Lorence, No. 222798, 2001 Mich. App. LEXIS 1984, at *18 (Mich. Ct. App. Oct. 9, 2001); Collins v. Blue Cross Blue Shield of Mich., 579 N.W.2d 435, 441 (Mich. Ct. App. 1998); Martin v. Dep't of Corr., No. 182046, 1996 Mich. App. LEXIS 2092, at *4 (Mich. Ct. App. Oct. 4, 1996); Scheiderich v. Minneapolis, No. C8-00-185, 2000 Minn. App. LEXIS 808, at *11 (Minn. Ct. App. Aug. 1, 2000); Ross v. New Brighton, No. C3-98-1095, 1998 Minn. App. LEXIS 1215, at *6 (Minn. Ct. App. Nov. 3, 1998); Bouta *ex rel.* Bouta v. Comm'r of Human Servs., No. C3-95-2250, 1996 Minn. App. LEXIS 447, at *7 (Minn. Ct. App. Apr. 16, 1996); Hauglid v. Denn, No. C4-95-1589, 1996 Minn. App. LEXIS 282, at *6 (Minn. Ct. App. Mar. 12, 1996); McNally v. Mora Med. Ctr., Ltd., No. C3-95-1938, 1996 Minn. App. LEXIS 120, at *9 (Minn. Ct. App. Jan. 30, 1996); Botto v. Bosley, 995 S.W.2d 544, 544 (Mo. Ct. App. 1999); McGinnis v. City of East Helena, 63 P.3d 512 (Mont. 2002) (unpublished table decision); Walker v. Mont. Power Co., 924 P.2d 1339, 1344 (Mont. 1996); Ferraro v. Long Branch, 714 A.2d 945, 957-58 (N.J. Super. Ct. App. Div. 1998); Katcher v. Johnson Controls World Servs., Inc., 75 P.3d 877, 882 (N.M. Ct. App. 2003); Fallon v. Triborough Bridge & Tunnel Auth., 687 N.Y.S.2d 123, 123 (N.Y. App. Div. 1999); Wilkins v. Guilford County, 582 S.E.2d 74, 79 (N.C. Ct. App. 2003); Baddour v. Rehab. Servs. Comm'n, No. 04AP-1090, 2005 Ohio App. LEXIS 5123, at *21 (Ohio Ct. App. Oct. 27, 2005); Cox v. Kettering Med. Ctr., No. 20614, 2005 Ohio App. LEXIS 4526, at *13 (Ohio Ct. App. Sept. 23, 2005); Baird v. S. Ohio Med. Ctr., No. 04CA2939, 2004 Ohio App. LEXIS 5339, at *21 (Ohio Ct. App. Oct. 27, 2004); House v. Kirtland Capital Partners, 814 N.E.2d 65, 75 (Ohio Ct. App. 2004); Tripp v. Beverly Enters.-Ohio, Inc., No. 21506, 2003 Ohio App. LEXIS 6158, at *41 (Ohio Ct. App. Dec. 17, 2003); Huberty v. Esber Beverage Co., No. 2001-CA-00202, 2001 Ohio App. LEXIS 6034, at *18 (Ohio Ct. App. Dec. 31, 2001); Detzel v. Brush Wellman, Inc. 751 N.E.2d 1067, 1077 (Ohio Ct. App. 2001); Corr. Corp. of Am. v. Human Relations Comm'n, 742 N.E.2d 1177, 1181 (Ohio Ct. App. 2000); Scott v. Univ. of Toledo, 739 N.E.2d 351, 355 (Ohio Ct. App. 2000); Sadinsky v. EBCO Mfg. Co., 730 N.E.2d 395, 400 (Ohio Ct. App. 1999); Pfof v. Ohio State Att'y Gen., No. 98AP-690, 1999 Ohio App. LEXIS 1792, at *14 (Ohio Ct. App. Apr. 20, 1999); Hodge v. Civil Serv. Comm'n, No. 97APE10-1390, 1998 Ohio App. LEXIS 3321, at *12 (Ohio Ct. App. July 14, 1998); Geary v. Lorain Metro. Hous. Auth., No. 96CA006514, 1997 Ohio App. LEXIS 3058, at *14 (Ohio Ct. App. July 9, 1997); Pflieger v. BP Am., Inc., No. 68874, 1996 Ohio App. LEXIS 2708, at *22 (Ohio Ct. App. June 27, 1996); Maloney v. Barberton Citizens Hosp., 672 N.E.2d 223, 227 (Ohio Ct. App. 1996); Gibson v. Simonds Indus., No. 95 AP 060040, 1996 Ohio App. LEXIS 725, at *11 (Ohio Ct. App. Jan. 2, 1996); Lillback v. Metro. Life Ins. Co., 640 N.E.2d 250, 260 (Ohio Ct. App. 1994); Walser v. Ohio Univ., No. 2003-03680, 2004 Ohio Misc. LEXIS 482, at *19 (Ohio Ct. Cl. Sept. 2, 2004); Howard v. Ohio Dep't of Transp., 91 Ohio Misc. 2d 48, 53 (Ohio Ct. Cl. 1997); Forcum v. Via Christi Health Sys., Inc., 137 P.3d 1250, 1253 (Okla. Civ. App. 2006); Imler v. Hollidaysburg Am. Ambulance Serv., 731 A.2d 169, 175 (Pa. Super. Ct. 1999); Anderson v. Ajax Turner Co., No. 01-A-01-9807-CH-00396, 1999 Tenn. App. LEXIS 728, at *10 (Tenn. Ct. App. Oct. 28, 1999); Austin v. Shelby County Gov't, 3 S.W.3d 474, 481 (Tenn. Ct. App. 1999); Pruett v. Wal-Mart Stores, Inc., No. W1999-01026-COA-R3-CV, 2000 Tenn. App. LEXIS 557, at *4 (Tex. App. Aug. 17, 2000); Collop v. Cont'l Parts Co., No. 05-97-01199-CV, 2000 Tex. App. LEXIS 2174, at *10 (Tex. App. Apr. 4, 2000); Hartis v. Mason & Hanger Corp., 7 S.W.3d 700, 705 (Tex. App. 1999); Smith v. Mary Kay, Inc., No. 05-97-00095-CV, 1999 Tex. App. LEXIS 6927, at *24 (Tex. App. Sept. 13, 1999); Alonzo v. Mr. Gatti's Pizza, Inc., 933 S.W.2d 294, 298 (Tex. App. 1996); McLean v. Tacoma, No. 23377-1-II, 1999 Wash. App. LEXIS 1721, at *10 (Wash. Ct. App. Sept. 24, 1999).

III. SETTLEMENT STATISTICS

It must be noted that the above statistics are based on cases that are available through published reporters or electronic search engines. The vast majority of cases, however, do not produce publicly available opinions either because they are settled or because the judges choose not to publish their rulings.³⁰ According to one source, only 10% to 20% of employment discrimination cases filed in federal court generate a published decision,³¹ including those appearing in LEXIS but not in reporters.³² The study found that 40% to 60% of cases are resolved through settlement, and 20% to 50% disappear from public view with no available record.³³ A second study estimated that 61% of Title I cases that are filed in federal courts are resolved through settlements.³⁴

Thus, it is abundantly clear that the cases that form the basis of studies such as the ABA's and Professor Colker's constitute only a small percentage of ADA claims and are not necessarily representative of all lawsuits filed. Moreover, they do not include Title I employment discrimination claims that are filed at the administrative enforcement stage with the Equal Employment Opportunity Commission (EEOC) or a similar state agency but are not later pursued through litigation.³⁵ According to one study, between 1993 and 2001 an estimated "27,724 . . . lawsuits were filed [nationally] out

29. *Davila v. Merit Sys. Council*, 15 P.3d 781, 782 (Colo. Ct. App. 2000); *Fail v. Cmty. Hosp.*, 946 P.2d 573, 583 (Colo. Ct. App. 1997), *aff'd* 969 P.2d 667 (Colo. 1998); *Int'l Data Operations, Inc. v. Comm'n on Human Rights & Opportunities*, No. CV000503421, 2001 Conn. Super. LEXIS 2061, at *25 (Conn. Super. Ct. July 20, 2001); *Infante v. Thomas*, No. CV970395925S, 2001 Conn. Super. LEXIS 1726, at *10 (Conn. Super. Ct. June 20, 2001); *Sterling Casino Lines, L.P. v. Chestnut*, 825 So. 2d 484, 484 (Fla. Dist. Ct. App. 2002) (per curiam); *Handy v. New Orleans Dep't of Civil Serv.*, 857 So. 2d 1071, 1075 (La. Ct. App. 2003); *Bazert v. State*, 768 So. 2d 279, 284 (La. Ct. App. 2000); *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 222 (Minn. Ct. App. 2002); *Krotzer v. N. Country Bus. Prods., Inc.*, No. C0-98-1538, 1999 Minn. App. LEXIS 170, at *6 (Minn. Ct. App. Feb. 23, 1999). These do not include cases in which an employee defeated an employer's motion for summary judgment but there is no record of the ultimate outcome of the case.

30. See Moss et al., *supra* note 4, at 303 (explaining that "[p]ublished court decisions are not necessarily representative of overall litigation outcomes" because they account for only a small fraction of Title I claims); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1145-47 (1990) (discussing the process that generates published opinions).

31. Siegelman & Donohue, *supra* note 30, at 1146-47.

32. *Id.* at 1138, 1146.

33. *Id.* at 1146-47; see also Scott Burris et al., *Disputing Under the Americans with Disabilities Act: Empirical Answers, and Some Questions*, 9 TEMP. POL. & CIV. RTS. L. REV. 237, 251 (2000) (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1980-98 6 tbl.5 (2000) (noting that in 1998, 35.2% of federal civil rights cases were resolved through settlement, 12.5% were voluntarily dismissed, and approximately an additional 23% were resolved by means "other than a judgment on the merits").

34. Moss et al., *supra* note 4, at 305.

35. The ADA requires that claimants exhaust their administrative remedies by filing charges of discrimination with the EEOC or a state Fair Employment Practice Agency prior to filing suit in court. See 42 U.S.C. § 12117(a) (2000) (adopting the enforcement procedures set out in Title VII for purposes of ADA enforcement); *id.* § 2000e-5 (discussing the filing of charges with the EEOC and state agencies and the charging party's subsequent right to sue in court under Title VII).

of 201,371 eligible administrative charges” alleging discrimination that violates Title I of the ADA.³⁶

Although precise results vary among different studies, all the research findings reveal that plaintiffs win a startlingly small percentage of cases that produce a reported litigation outcome. Furthermore, one study identified pretrial motions as the root cause of the low plaintiff win rate, finding that plaintiffs who survive to trial, like plaintiffs filing other types of civil rights cases, win almost 33% of verdicts.³⁷ Another study reinforces these results, finding that of thirty-five ADA cases tried before judges in the U.S. District Courts in 1998-2001, plaintiffs won 34.29%, and of 189 ADA cases tried before federal court juries during that time, plaintiffs won 41.27%.³⁸ What remains largely unavailable and unexplored is information about the outcomes achieved by plaintiffs in the non-recorded decisions, settlements, and informal negotiation processes that resolve the vast majority of ADA claims.³⁹

Because settlement amounts are generally not recorded in publicly available court documents, little information is available concerning ADA settlements in particular and employment discrimination settlements in general.⁴⁰ Some settlements include a confidentiality provision that prohibits disclosure of their details.⁴¹ In addition, attorneys may have little incentive to respond to questions concerning the settlement amounts of their employment discrimination cases even if the settlements are not confidential. Defense attorneys may fear that the information will be used to encourage em-

36. Moss et al., *supra* note 4, at 304–05.

37. *Id.* at 305. This conclusion is based on a review of the docket files “[o]f . . . 3,624 closed cases with identifiable outcomes” from “a representative sample in 16 federal district courts.” *Id.*; see also Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 561–63, 573 (2000) (finding that potential jurors are sensitive to the needs and abilities of individuals with disabilities and do not decide ADA cases based on negative stereotypes).

38. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 445 (2004). The data was obtained from the Administrative Office of the United States Courts. See *id.* at 430.

39. See Burris et al., *supra* note 33, at 251 (“Without proper data, we do not know whether ADA plaintiffs in federal court are doing horribly or brilliantly.”).

40. See *id.* (stating that interpretation of “court decision data . . . is complicated by the mass of missing cases”); Moss et al., *supra* note 4, at 308 (explaining that the authors could not verify settlement amounts); Martha Neil, *Confidential Settlements Scrutinized, Recent Events Bolster Proponents of Limiting Secret Case Resolutions*, A.B.A. J., July 2002, at 20 (“Confidential settlements are a mainstay of civil litigation in the United States.”) (emphasis removed); see also Rulli, *supra* note 18, at 372. Professor Rulli reports that his study of the Eastern District of Pennsylvania revealed that in that district, “between 47.1 percent and 62.6 percent of all Title I cases settled.” *Id.* By way of further explanation, he details that “[i]n 49.5% of . . . cases, the parties reached an . . . agreement and [asked] the court to dismiss the [case] pursuant to Federal Rule of Civil Procedure 41.1(b).” *Id.* at 372 n.173. Further, “[i]n another 13.3% of the cases, the action was dismissed [by] stipulation of the parties, without any reference to Rule 41.1(b),” and it is unknown what benefits, if any, the plaintiff obtained. *Id.* Professor Rulli suggests that ADA cases may settle less frequently than other types of cases for a variety of reasons, including the ADA’s complexity, plaintiffs’ moral convictions, and defendants’ desire to create disincentives for future litigation. See *id.* at 372.

41. See Emily Fiftal, Note, *Respecting Litigants’ Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements*, 54 CASE W. RES. L. REV. 503, 504 (2003).

ployees to file cases against their clients in the hope of receiving settlements even for weak claims. Plaintiffs' attorneys may fear that the data will be used by plaintiffs to shop around for other lawyers who have obtained larger dollar recoveries for their clients. In addition, digging through files and collecting information concerning settlements could constitute time-consuming, unpaid work that lawyers or their assistants are likely to find unappealing. The dearth of settlement information, however, can be detrimental to all litigants who wish to settle their cases since it impedes negotiation that is based on research and verifiable data.⁴²

Nevertheless, a few sources suggest that ADA claimants frequently achieve positive outcomes outside of the judges' chambers.⁴³ I will now proceed to examine data from EEOC conciliations and litigation settlements.

A. EEOC Resolutions

Statistics compiled by the EEOC provide the most extensive source of information concerning ADA complaints that are resolved prior to a court opinion or judgment. The EEOC is the administrative agency that enforces the federal statutes that prohibit employment discrimination.⁴⁴ Title VII, the ADEA, and the ADA require aggrieved individuals to exhaust their administrative remedies before turning to the federal courts.⁴⁵ Aggrieved individuals must file a charge of discrimination with the EEOC or an equivalent state or local agency and await the agency's determination on the merits or a right to sue letter.⁴⁶ If the EEOC determines that the charge of discrimination is meritorious, it is required to attempt to resolve the charge through conciliation efforts.⁴⁷

The EEOC reports several categories of resolutions that are relevant for my purposes. The agency defines its terms as follows:

Settlements (Negotiated)

Charges settled with benefits to the charging party as warranted by evidence of record. In such cases, EEOC . . . is a party to the

42. See Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 970 (2004) (asserting that the unavailability of settlement statistics is detrimental to litigants because "it is important that we have sufficient information about settlement patterns to enable litigants to make rational judgments and to have some assurance that a particular settlement has a reasonable relation to other, similar ones").

43. See, e.g., Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1024-25 (1996).

44. See The U.S. Equal Employment Opportunity Commission, The Commission, <http://www.eeoc.gov/abouteeoc/commission.html> (last visited Nov. 5, 2007).

45. See Title VII, 42 U.S.C. § 2000e-5 (2000); ADEA, 29 U.S.C. § 626; ADA, 42 U.S.C. § 12117(a) (adopting the enforcement procedures set out in Title VII for purposes of ADA enforcement).

46. See sources cited *supra* note 45.

47. See 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(b); 42 U.S.C. § 12117(a).

settlement agreement between the charging party and the respondent (an employer, union, or other entity covered by EEOC-enforced statutes).

Successful Conciliation

Charge with reasonable cause determination closed after successful conciliation. Successful conciliations result in substantial relief to the charging party and all others adversely affected by the discrimination.

. . . .

Withdrawal with Benefits

Charge is withdrawn by charging party upon receipt of desired benefits. The withdrawal may take place after a settlement or after the respondent grants the appropriate benefit to the charging party.⁴⁸

In light of these definitions, it is difficult to determine the extent to which the “Withdrawal with Benefits” category overlaps with the “Settlements” category, because some charges may be withdrawn pursuant to a settlement agreement and some may be withdrawn without a formal settlement.

According to the EEOC’s website, in fiscal year (FY) 2005, 11% of ADA charges (1,685) were resolved through settlements, 5.5% of charges (846) were resolved through withdrawals with benefits, and 2.2% (338) were resolved through successful conciliation.⁴⁹ In FY 2006, the numbers were quite similar. The EEOC indicates that 12% of charges (1,812) were resolved through settlements, 5.8% of charges (866) were resolved through withdrawals with benefits, and 2.2% (330) were resolved through successful conciliation.⁵⁰

In terms of monetary benefits, the EEOC reports that it obtained \$44.8 million in monetary benefits for ADA charging parties in FY 2005 and \$48.8 million in FY 2006.⁵¹ Based on the data described above, the average amount of relief obtained by each charging party was \$15,615 in 2005 and \$16,223 in FY 2006.

48. The U.S. Equal Employment Opportunity Commission, Definitions of Terms, <http://www.eeoc.gov/stats/define.html> (last visited Nov. 5, 2007).

49. The U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges: FY 1997–FY 2006, <http://www.eeoc.gov/stats/ada-charges.html> (last visited Nov. 5, 2007).

50. *Id.*

51. *Id.*

By comparison, in FY 2005, the EEOC achieved 2,259 resolutions in the three relevant categories in ADEA cases and obtained \$77.7 million in monetary relief, with an average award of \$34,396, while in FY 2006, it achieved 2,361 resolutions in these categories for a total amount of \$51.5 million averaging \$21,813 in recovery for each successful charging party.⁵² Under Title VII, in FY 2005 the EEOC had 8,184 relevant resolutions and recovered \$146 million with an average award of \$17,839 per individual.⁵³ In FY 2006, there were 8,156 Title VII resolutions for which the EEOC obtained \$126.5 million in monetary benefits, translating into an average of \$15,510 per successful charging party.⁵⁴ Under the Equal Pay Act (EPA),⁵⁵ the EEOC achieved 168 resolutions in FY 2005 for which it obtained monetary relief and recovered \$3.1 million, for an average award of \$18,452, and in FY 2006 it likewise obtained \$3.1 million in monetary benefits in 142 resolutions, for an average of \$21,831 per individual.⁵⁶ The Title VII and FY 2005 EPA statistics, therefore, are quite close to those reflecting ADA recoveries.

It should also be noted that charging parties may often accept relatively modest monetary relief in EEOC conciliations because their cases have not yet required them to invest the time, money, and emotion involved in protracted litigation. Moreover, ADA recovery amounts might be particularly low because many charging parties might be largely satisfied by the provision of reasonable accommodations that enable them to work comfortably. Non-monetary relief, such as reasonable accommodation, is not reported on the EEOC website.⁵⁷

B. Lawsuit Settlement Amounts

As discussed above, settlement statistics are difficult to find and compile,⁵⁸ but research revealed two sources that were illuminating in this regard. One is Jury Verdict Research® (JVR).⁵⁹ In a 2001 publication called *Disability Discrimination: Employment Practices Verdicts, Settlements and Statistics*, JVR compared the median settlement amounts in different types

52. The U.S. Equal Employment Opportunity Commission, Age Discrimination in Employment Act (ADEA) Charges: FY 1997–FY 2006, <http://www.eeoc.gov/stats/adea.html> (last visited Nov. 5, 2007). Recoveries under the ADEA might be relatively high because, by definition, these cases involve older workers (forty years of age or older) who may have seniority and high salaries and, therefore, expect large backpay awards. See 29 U.S.C. § 631 (2000) (limiting the ADEA's protection to "individuals [who are] at least 40 years of age").

53. The U.S. Equal Employment Opportunity Commission, Title VII of the Civil Rights Act of 1964 Charges: FY 1997–FY 2006, <http://www.eeoc.gov/stats/vii.html> (last visited Nov. 5, 2007).

54. *Id.*

55. 29 U.S.C. § 206(d) (2000).

56. The U.S. Equal Employment Opportunity Commission, Equal Pay Act Charges (includes concurrent charges with Title VII, ADEA, and ADA): FY 1997–FY 2006, <http://www.eeoc.gov/stats/epa.html> (last visited Nov. 5, 2007).

57. See sources cited *supra* notes 49, 52, 53, 56.

58. See *supra* notes 40–41 and accompanying text.

59. See Jury Verdict Research Home Page, <http://www.juryverdictresearch.com/> (last visited Nov. 5, 2007).

of employment discrimination cases.⁶⁰ Having analyzed settlements collected during the “years 1994 through 2000,” it found the following median dollar sums:

age cases—\$65,500

disability cases—\$50,000

race cases—\$47,750

sex cases—\$70,000.⁶¹

The disability category thus ranked third out of four in terms of median settlement amount.

JVR describes its data-gathering methods as follows:

Reports are furnished by court clerks, independent contractors, plaintiff and defense attorneys, law clerks, legal reporters, publications and media sources. Cases with at least a minimum of information, including attorneys’ names, location of trial, court and docket numbers, date of trial or settlement and a brief explanation of the incident, are entered into the database and are forwarded to all known interested attorneys to provide missing or incomplete information.⁶²

Some attorneys are apparently willing to cooperate with JVR, possibly because it does not generate a product that is widely distributed or easily available to the public. JVR publications are available at a cost to customers who order them.⁶³ More specific searches of data sets are expensive and must be requested from a company representative.⁶⁴ Consequently, potential plaintiffs could not obtain the information disclosed by the attorneys without significant effort and expense, while litigating lawyers now have at least one resource that might enable them to make educated conjectures concerning the value of their cases. By contrast, many academic journals and ABA surveys are easily accessible to all through web searches.

Nevertheless, JVR provides the following caution to the readers of its *Disability Discrimination* publication:

60. See JENNIFER E. SHANNON & THOMAS D’AGOSTINO, *DISABILITY DISCRIMINATION: EMPLOYMENT PRACTICES VERDICTS, SETTLEMENTS AND STATISTICS* 13 (2001) (on file with *Alabama Law Review*).

61. *Id.* The publication notes that in state court the median disability discrimination settlement amount was \$43,000. *Id.* at 14.

62. *Id.* at 1.

63. See Jury Verdict Research & Litigation Products, <http://www.shoplrp.com/jvr.html> (last visited Nov. 5, 2007).

64. See Letter from Beth Gross Jones, Services Specialist, Jury Verdict Research, to author (July 17, 2004) (on file with author).

Jury Verdict Research® has increased its settlement data collection efforts at the continued request of its customers for analysis of this type of data. However, considering the immense and unquantifiable number of settlements reached annually, Jury Verdict Research® recognizes that, at this time, it is unable to gauge the size of the data sampling and cautions the reader concerning the interpretation and use of the settlement data.⁶⁵

In light of this qualification, I requested more detailed settlement statistics from JVR. I received a list of cases that were settled during the years 2002-2004 for which the company obtained settlement information. While the 2001 JVR publication does not indicate how many cases were included in its data set, the list I received is comprised of fifty sex discrimination cases filed in federal court under Title VII, thirty-four age discrimination cases filed in federal court under the ADEA, forty-one disability discrimination cases filed in federal court under the ADA, and seven pregnancy discrimination cases filed in federal court under Title VII.⁶⁶

Based on these data, the following calculations were made:

Case Type	Mean	Median
Sex discriminations	\$98,018	\$81,000
Pregnancy discrimination	\$96,000	\$57,000
Age discrimination	\$269,925 ⁶⁷	\$85,000
Disability Discrimination	\$415,225	\$75,000

According to this admittedly limited data set, ADA cases fall in the middle of the pack with respect to median settlement amounts and rank first with respect to mean figures.

A second source is a study of nearly five hundred employment discrimination cases filed in the U.S. District Court for the Northern District of Illinois in Chicago that were settled by magistrate judges from 1999 to 2005.⁶⁸ Comparing disability discrimination cases to cases involving discrimination based on age, religion or national origin, sex, sexual harassment, and race, the study found that the median dollar amount recovered by

65. Shannon & D'Agostino, *supra* note 60, at 1.

66. Data provided by Beth Gross Jones to author (on file with *Alabama Law Review*).

67. In addition, there was an award of \$250,000,000, which was not included for purposes of calculating the average because it would skew the results. The case was a class action brought on behalf of 1700 retired public safety officers. *See* EEOC v. California Public Employees' Retirement System (N.D. CA 95-03022).

68. *See* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 (2007).

ADA Title I plaintiffs, \$35,000, was equal to or exceeded the amount recovered by plaintiffs in each of the other categories.⁶⁹ The mean settlement amount for ADA litigants, \$62,111.01, exceeded all but the mean amount recovered by age discrimination plaintiffs.⁷⁰ A different comparison focused solely on lost wages and revealed that ADA plaintiffs' median percentage of lost wages recovered, 61.03%, exceeded that recovered by age and race plaintiffs. ADA plaintiffs' mean lost wages recovery, 105.82%, exceeded that of age and religion or national origin discrimination plaintiffs but not of those filing because of sexual harassment, sex discrimination, or race discrimination.⁷¹

IV. INSTITUTIONAL DISABILITY EMPLOYMENT POLICIES AND PRACTICES

In the field of Title I claim outcomes, one more territory remains largely uncultivated. It is reasonable to believe that many if not most individuals with physical or mental limitations who need work accommodations do not resort to the courts or even to administrative enforcement agencies. Instead, they approach their employers and request work adjustments, which are often granted without the intervention of any third party. Arguably, therefore, many requests are resolved informally through dialogues between em-

69. See *id.* at 148 fig.12; *infra* note 70 (providing precise figures).

70. See Kotkin, *supra* note 68, at 148 fig.12. The study provides bar graphs with increments of \$20,000 on the axis, but it does not indicate exact recovery amounts. See, e.g., *id.* I contacted Professor Kotkin and received further statistical details from her statistician, Rebecca Windom. She provided me with the raw data underlying the information reported in Figure 12. See *id.* Recovery figures are as follows:

Case Type	Median	Mean
disability (89 cases)	\$35,000	\$62,111.01
age (83 cases)	\$30,000	\$74,069.28
religion or national origin (17 cases)	\$32,500	\$29,779.41
sex (72 cases)	\$31,250	\$59,217.99
sexual harassment (50 cases)	\$31,250	\$52,057.98
race (144 cases)	\$21,250	\$40,399.42

Email from Rebecca Windom, Urban Justice Center, to Sharona Hoffman, Associate Dean, Case Western Reserve University School of Law (Dec. 5, 2006, 17:55:00 EST) (on file with *Alabama Law Review*) [hereinafter Windom, Email].

71. See *id.* at 154 fig.18. The study provides bar graphs with increments of 50% on the axis, but it does not indicate exact recovery percentages. See, e.g., *id.* I contacted Professor Kotkin and received further statistical details from her statistician, Rebecca Widom. She provided me with the raw data underlying the information reported in Figure 18. See Kotkin, *supra* note 70, at 154 fig. 18. Ms. Windom notes that "the differences in percent of lost wages recovered by type of discrimination were *not* statistically significant, in part because we were missing a lot of data on lost wages." Windom, Email, *supra* note 70. Nevertheless, the following are the figures she provides:

Case Type	Median	Mean
disability (44 cases)	61.03%	105.82%
age (42 cases)	51.84%	94.78%
religion or national origin (9 cases)	62.50%	79.78%
sex (23 cases)	77.55%	179.28%
sexual harassment (26 cases)	107.45%	186.69%
race (73 cases)	58.82%	164.29%

No explanation is provided as to why fewer cases were included in this figure than in the figure discussed *supra* note 70 and accompanying text. However, it is likely that the researchers were not able to obtain lost wages information in some of the cases for which they obtained settlement amount data.

ployers and employees prior to the filing of EEOC charges or lawsuits and with no written settlement. This hypothesis is supported by information published in several studies that are detailed in this Part.

A. *Bruyère Study*

The most comprehensive study of informal employer accommodation requests was conducted by Susanne Bruyère of Cornell University's School of Industrial and Labor Relations.⁷² In a study entitled *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, Bruyère concludes that private and federal employers are in fact providing accommodations to applicants and workers with disabilities.⁷³ The survey was conducted through a computer-assisted telephone interviewing system and involved members of the Society for Human Resource Management who were randomly selected from among small, medium, and large private-sector organizations, as well as "human resource and Equal Employment Opportunity personnel [in] 96 . . . federal agencies."⁷⁴ The survey featured a large number of questions concerning policies and practices that affect applicants and employees with disabilities.⁷⁵ It was answered by 813 private sector respondents out of 1,116 that were contacted (a 73% response rate) and by 403 federal agency representatives out of 415 that were contacted (a 97% response rate).⁷⁶

Bruyère's study relied on employer self-reporting and did not seek independent verification through interviews with employees or examination of accommodation records.⁷⁷ This, of course, is a limitation, but is characteristic of studies that rely on a survey technique.⁷⁸ In addition, Bruyère's results might be skewed by the fact that only 73% of private sector recipients responded to the survey. If the remainder of recipients did not respond because they have refused to provide requested accommodations, the outlook for workers with disabilities might not be as bright as the study suggests.

Among respondents, only 13% of private employers and 14% of federal employers asserted that they "do not keep data on accommodations."⁷⁹ The

72. See SUSANNE M. BRUYÈRE, *DISABILITY EMPLOYMENT POLICIES AND PRACTICES IN PRIVATE AND FEDERAL SECTOR ORGANIZATIONS I* (2000), available at <http://digitalcommons.ilr.cornell.edu/edicollect/63> [hereinafter BRUYÈRE STUDY].

73. See *id.* at 8. Some of the study's results were also published in Susanne M. Bruyère et al., *Identity and Disability in the Workplace*, 44 WM. & MARY L. REV. 1173 (2003) [hereinafter Bruyère, *Identity and Disability*].

74. See BRUYÈRE STUDY, *supra* note 72, at 8.

75. See *id.* at 30-54.

76. See *id.* at 8.

77. See *id.*

78. See, e.g., Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 682 n.147 (2006).

79. See BRUYÈRE STUDY, *supra* note 72, at 12. Those who do not keep the data may do so in order to avoid discovery of accommodation information if they receive an EEOC discrimination charge or are sued.

remainder primarily maintain it for purposes of future accommodations, tracking costs, dispute resolution, reporting requirements, and claim handling.⁸⁰

Respondents reported that they provided the following accommodations:

Type of Accommodation	Private Employers	Federal Employers
Making existing facilities accessible	82%	93% ⁸¹
Restructuring jobs/work hours	69%	87%
Reassigning employees to vacant positions	46%	58%
Modifying equipment	59%	90%
Modifying training material	31%	49%
Providing readers or interpreters	36%	79%
Implementing flexible HR policies	79%	93%
Changing supervisory methods	35%	55%
Providing transportation accommodations	67%	86%
Providing written job instructions	64%	69%
Modifying the work environment	62%	93% ⁸²

While these figures are generally high, they suggest that federal employers are even more apt to provide accommodations to people with disabilities than are private employers. They may also suggest that federal employers more often hire individuals with disabilities and therefore face the need to provide accommodations with greater frequency. Unfortunately, some of the above categories are ambiguous and would benefit from further

80. *See id.*

81. It should be noted that the ADA requires that public services and public accommodations remove architectural and other barriers that inhibit accessibility for people with disabilities. *See* 42 U.S.C. §§ 12131–12181 (2000). Public accommodations are private entities such as hotels, restaurants, and medical offices, whose operations affect commerce. *See id.* § 12181(7). The ADA requirement may explain the very high number of employers who state that they have made existing facilities accessible. Employers are likely enhancing accessibility not in response to employee requests for accommodations, but because they are required by law to do so.

82. *See* BRUYÈRE STUDY, *supra* note 72, at 11 fig.3. It is unclear from the survey how “modif[ying] work environment” differs from other types of accommodations, such as “restructure[ing] jobs” or “chang[ing] supervisory methods.”

elucidation. For example, the meanings of “flexible HR policy,”⁸³ “changed supervisory methods,”⁸⁴ and “modified work environment”⁸⁵ are all unclear.

Among private employers, over 93% asserted that their company had made at least one of the above-listed accommodations.⁸⁶ When asked about specific changes to workplace policies, over half of respondents replied that they had done all of the following: taken steps to “ensur[e] equal pay and benefits, [introduced] flexibility in[to their] performance management system[s], modif[ied] . . . return-to-work polic[ies], and adjust[ed] medical policies.”⁸⁷

Employers were also asked about the degree to which they provide pre-employment accommodations for applicants in the following categories: providing accessible recruiting, interview, and orientation locations; providing accessible restrooms; modifying job applications, interview questions, and aptitude and medical testing; and providing information for people with impairments in hearing, vision, or learning ability.⁸⁸ With respect to each question, between 10% and 60% of respondents answered that they never had to provide the accommodation at issue.⁸⁹ Among those who did encounter a need to provide an identified accommodation, generally fewer than 10% reported difficulty in providing the accommodation, except in the categories of providing information for individuals with hearing, vision, or learning impairments.⁹⁰

It should be noted that a separate study found e-recruiting websites to lack accessibility for people with visual impairments.⁹¹ Using “automated accessibility testing software,”⁹² the study analyzed “31 corporate e-recruiting [w]ebsites.”⁹³ It determined that all “of the job board pages [and t]he vast majority of corporate e-recruiting sites [tested] failed” to provide accessibility.⁹⁴ A secondary “simulated application process evaluation [found] only three of . . . nine job boards and three of . . . twelve corporate [web]sites [to be] accessible enough to” allow people with visual impair-

83. *Id.*

84. *Id.*

85. *Id.*

86. See SUSANNE M. BRUYÈRE ET AL., COMPARATIVE STUDY OF WORKPLACE POLICY AND PRACTICES CONTRIBUTING TO DISABILITY NONDISCRIMINATION 6 (2004), available at <http://digitalcommons.ilr.cornell.edu/edicollect/104>.

87. See *id.* at 11.

88. See BRUYÈRE STUDY, *supra* note 72, at 13 fig.5.

89. See *id.*

90. See *id.* In these categories, 25% of private employers had difficulty providing information for hearing or learning impaired applicants, and 36% of private employers had difficulty providing information for visually impaired candidates. *Id.* The figures for the federal sector were 8% and 15%, respectively. *Id.* In addition, 14% of private sector respondents reported having difficulty providing accessible restrooms, though only 10% of federal employers experienced difficulty in this realm. *Id.*

91. See SUSANNE M. BRUYÈRE ET AL., HR PROCESSES AND IT ACCESSIBILITY FOR PERSONS WITH DISABILITIES: IMPROVING EMPLOYER PRACTICES UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT 2 (2003), available at <http://digitalcommons.ilr.cornell.edu/edicollect/67>.

92. *Id.*

93. *Id.*

94. *Id.*

ments to complete all phases of the online application process.⁹⁵ The study concluded that much improvement is needed in the emerging area of electronic recruiting.⁹⁶

The *Disability Employment Policies and Practices* study also inquired about the degree of ADA training received by human resources professionals in the private and federal sectors.⁹⁷ Largely, the response was impressive. Most often, training was provided with respect to non-discriminatory recruiting (reported by 91% of federal respondents and 85% of private sector respondents), reasonable accommodations (87% of federal respondents and 71% in the private sector), confidentiality requirements (85% and 87% respectively), and non-discriminatory disciplinary practices (87% and 85% respectively).⁹⁸ Less frequently, training was provided concerning allowable limitations on health plans (given by 38% of federal employers and 51% of those in the private sector), the ADA's interaction with other legislation (50% and 51% respectively), and written resources on accommodations (58% and 45% respectively).⁹⁹ These latter areas, however, might be perceived as more specialized, so that relevant training would be undertaken only by employers that are large enough to have legal counsel departments, benefits specialists, or human resources managers.

In addition to a wealth of other information, the *Disability Employment Policies and Practices* study furnishes data about the resources used by employers to resolve disability issues in the workplace.¹⁰⁰ Employers reported turning to a wide variety of resources, including the organizations' EEO office, internal and external legal counsel, safety/ergonomics staff, state vocational rehabilitation services, the EEOC, disability management/benefits staff, dispute resolution centers/mediators, union representatives, the Job Accommodation Network,¹⁰¹ local independent living centers, and regional ADA technical assistance centers.¹⁰² Federal employers reported using their EEO offices most frequently (90% of federal employers) followed by internal legal counsel (85%), with the smallest percentage of federal employers using technical assistance centers (20%) and external legal counsel (13%).¹⁰³ Private employers most frequently turned to external legal counsel (82% of private employers) followed by professional societies

95. See *id.*

96. See *id.* at 2-3.

97. See BRUYÈRE STUDY, *supra* note 72, at 22 fig.19.

98. See *id.*

99. See *id.*

100. See *id.* at 23 fig.20, 24 fig.21.

101. *Id.* The Job Accommodation Network Home Page describes the organization as follows: "a free consulting service designed to increase the employability of people with disabilities by: 1) providing individualized worksite accommodations solutions, 2) providing technical assistance regarding the ADA and other disability related legislation, and 3) educating callers about self-employment options." Job Accommodation Network Home Page, <http://www.jan.wvu.edu/> (last visited Nov. 5, 2007).

102. See BRUYÈRE STUDY, *supra* note 72, at 23 fig.20, 24 fig.21.

103. See *id.* at 23 fig.20.

or business organizations (62%).¹⁰⁴ These employers utilized unions (12%) and dispute resolution centers or mediators (10%) least often.¹⁰⁵

It should be noted that “court” was not one of the options offered to respondents. Thus, it is unclear whether internal and external counsel were utilized in association with litigation or an EEOC charge, or prior to the filing of an EEOC charge when an employee has just filed an internal grievance or submitted a request for an accommodation. However, Bruyère reports that 72% of respondents indicated that they never had a Title I claim filed against them.¹⁰⁶ Bruyère does not clarify what the term “claim” means, but it is reasonable to assume that to most employers, “claims” would include internal grievances, EEOC charges, and lawsuits. Thus, it is likely that a large majority of requests for accommodation are resolved without developing into formal disputes at all and that employers often consult their attorneys simply to determine the appropriate course of action in response to accommodation requests.

B. Other Reports

1. Minnesota State Agencies

A second, narrower report focuses on ADA compliance by Minnesota state agencies in fiscal year 2005.¹⁰⁷ This report, like the *Disability Employment Policies and Practices* study, indicates that employers are responsive to the needs of individuals with disabilities.¹⁰⁸ Of eighty-eight agencies, thirty-eight reported receiving a total of 279 new requests for accommodation, while fifty asserted that they had received no such request during the period July 1, 2004 to June 30, 2005.¹⁰⁹ Of the 368 requests processed during this time period, the agencies approved 305 (82.88%), denied 28 (7.61%), modified 15 (4.08%), and had 20 (5.43%) still pending when the report was submitted.¹¹⁰

The accommodations provided included qualified readers or interpreters (130 or 38.46%), new equipment or devices (64 or 18.93%), modified equipment or devices (40 or 11.83%), part-time or adjusted work schedules (34 or 10.06%), removal of accessibility barriers (27 or 7.99%), job restructuring (22 or 6.51%), and alteration of rules, policies, and practices (13 or

104. See *id.* at 24 fig.21.

105. See *id.*

106. See Bruyère, *Identity and Disability*, *supra* note 73, at 1183. Employers that did report having a claim filed against them were generally large organizations. See *id.*

107. 2005 ADA ANNUAL REPORT (Oct. 2005), available at <http://www.doer.state.mn.us/odeo-ada/ad-tools/2005%20ADA%20Annual%20Report.pdf> [hereinafter ADA ANNUAL REPORT].

108. See *id.* at 4.

109. *Id.* at 2. The agencies receiving requests handled an average of seven requests each. See *id.*

110. *Id.* at 4. The agencies reported processing 312 requests made by current employees and 46 requests made by applicants. *Id.* at 8. It should be noted, however, that there is a discrepancy between the total number of processed requests reported on this page (358) and the earlier-reported total (368) discussing the status of the accommodations. See *id.* at 4, 8.

3.85%).¹¹¹ The average cost of the accommodations was \$398.79, with a high of \$23,192 and a low of zero.¹¹²

Despite receiving hundreds of requests for accommodation, the agencies reported having only nine complaints filed through their internal grievance procedures and only a total of fourteen charges filed with the EEOC and Minnesota Department of Human Rights.¹¹³ Thus, the vast majority of requests for accommodation received positive responses from employers and did not generate any legal proceedings.

2. *Maryland State Agencies*

An accounting of reasonable accommodation requests and resolutions is also included in Maryland's 2005 *Annual Statewide Equal Employment Opportunity Report*.¹¹⁴ The report tracked the requests for accommodation received and processed by 25 state agencies during fiscal year 2005.¹¹⁵ The agencies received 35 requests from applicants and 225 requests from employees.¹¹⁶ Of these, 231 were granted, 22 were denied, and 6 were pending at the time the report was written.¹¹⁷ No details are provided concerning types of accommodation, costs, or further action taken by those whose requests were rejected.¹¹⁸

3. *Workplace Accommodations Empirical Study*

Another source of information is a study involving interviews of employers who contacted the Job Accommodation Network (JAN) concerning workplace accommodations.¹¹⁹ The researchers interviewed employers in 2004 and 2005¹²⁰ and obtained responses from 540 employers who sought advice from JAN because they were asked for job accommodations.¹²¹ The

111. *Id.* at 5. Eight accommodations (2.37%) were categorized as "other." *Id.*

112. *Id.* at 2.

113. *Id.* at 8.

114. MD. DEP'T OF BUDGET & MGMT., ANNUAL STATEWIDE EQUAL EMPLOYMENT OPPORTUNITY REPORT 11-12 (FY 2005), available at http://www.dbm.maryland.gov/dbm_publishing/public_content/dbm_taxonomy/employee_services/equal_employment_opportunity/statewide_equal_opportunity_report_for_fiscal_year_2005.pdf [hereinafter MD. REPORT].

115. *Id.* at 12.

116. *Id.*

117. *Id.* The report notes that all state agencies responded to the Department of Budget and Management's request for information and that these are the only twenty-five that indicated they had received requests for accommodations. *Id.* The report does not disclose how many agencies claimed they had received no requests for accommodation. *Id.* at 11-12. It should also be noted that the document indicates that a total of 260 requests for accommodation were received by state agencies, but it only provides the status of 259 requests. *Id.* at 12. No explanation is given for this small discrepancy.

118. *See id.* at 11-12.

119. *See* Helen A. Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917 (2006). The article explains that "JAN is a free consulting service, funded by the U.S. Department of Labor's Office of Disability Employment Policy." *Id.* at 927.

120. *Id.* at 928.

121. *Id.* at 928, 933.

investigators found that 55.2% of requests were granted or “pending implementation,”¹²² while of the remaining 44.8% of requests, 74.3% were denied, 19.9% were pending, and 2.5% were withdrawn by employees.¹²³ According to the study, employers granted 61.2% of 402 requests made by employees whom the employer considered to have substantial limitations of major life activities and 42.6% of 101 requests made by employees with more minor limitations.¹²⁴

The study also addressed the cost of accommodations.¹²⁵ It found that 49.1% of accommodations were made at no direct cost to the employer.¹²⁶ Of accommodations with a direct cost, 74.8% involved expenditures of \$500 or less in the first calendar year, with a median cost of \$500.¹²⁷ When attention was focused on the limitation’s degree of severity, the researchers found that for accommodations that required an expenditure, the median was \$629 for employees “with substantial limitations” and \$100 for employees with more minor impairments.¹²⁸ While “the majority (79.7%) of employees [discussed during the interviews] had substantial limitations,”¹²⁹ employers were willing to accommodate even those who were not technically covered by the ADA if the cost was sufficiently low.¹³⁰

V. ASSESSING THE EFFICACY OF TITLE I OF THE ADA

A. *The Bad News: Judicial Outcomes and Employment Rates*

1. *Low Plaintiff Win Rates*

I now turn to the question of what can be learned from the statistics presented above. It is indisputable that plaintiffs whose cases are resolved through federal or state court opinions very rarely prevail against employers.¹³¹ A number of scholars have proposed theories to explain this phenomenon.

First, judges might be resistant to the ADA because it fails to fit into the familiar civil rights model of other employment discrimination statutes.¹³²

122. *Id.* at 933.

123. *Id.* The article provides no explanation with respect to the remaining 3.3% of requests that were not granted. *See id.* Of the requests denied, 58.5% were rejected because the employer determined that the employee was not entitled to an accommodation under the ADA or a state law, 0.4% were rejected because they were not feasible, and 15.4% were rejected for reasons that are not explained by the authors. *See id.*

124. *Id.* at 935.

125. *Id.* at 937–40.

126. *Id.* at 937.

127. *Id.* 937–38.

128. *Id.* at 938.

129. *Id.* at 930.

130. *Id.* at 939.

131. *See supra* Part II.

132. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (“[I]n some ways the civil rights model is not an ideal fit with the problems posed by the issue of disability.”); James Leonard, *The Equality Trap: How Reliance on Tradi-*

Statutes other than the ADA require only that employers refrain from excluding qualified individuals because of their minority status.¹³³ The laws' theory is that attributes such as sex, religion, color, national origin, or age, do not affect job performance,¹³⁴ and, therefore, if minorities are included in the workforce, they will perform as well as other employees.¹³⁵ By contrast, the ADA acknowledges that individuals' physical and mental disabilities might pose limitations relevant to job performance.¹³⁶ The statute does not allow employers to automatically exclude such people but rather requires that they be accommodated, at the employers' expense, if accommodations are feasible and will allow individuals with disabilities to perform essential job functions.¹³⁷ Some hypothesize that judges are simply uncomfortable placing such demands on employers, and, therefore, rarely rule in the plaintiffs' favor.¹³⁸ Employers, after all, are not to blame for the plaintiffs' disabilities, and it might thus seem unreasonable to require them to absorb costs associated with these conditions. Moreover, the burden of accommodation is presumably distributed unevenly among employers, because some employers will have many applicants and employees with disabilities, and others will have none.

One manifestation of this discomfort might be the courts' extremely narrow interpretation of the statutory term "disability," which is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."¹³⁹ Courts often find that a plaintiff is not sufficiently limited to meet the "substantially limits" requirement or that the constraint in question affects a narrow area of functionality but not a "major life" activity.¹⁴⁰ Thus, for example, courts have repeatedly ruled that individuals with mental retardation do not have a disability because they are

tional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective, 56 CASE W. RES. L. REV. 1, 5 (2005) (explaining that with respect to the ADA, "Congress wished to move beyond the traditional civil rights laws' focus on evenhanded treatment; instead, the ADA imposed obligations on covered entities—such as employers—to alter their environments in favor of those with disabilities").

133. See Leonard, *supra* note 132, at 8.

134. Exceptions are allowed for the rare case in which a particular attribute constitutes a bona fide occupational qualification (BFOQ), such as when a woman is needed to serve as a dressing room attendant in a women's clothing store. See 42 U.S.C. § 2000e-2(e)(1) (2000) (establishing the BFOQ defense).

135. See Leonard, *supra* note 132, at 28–29.

136. See 42 U.S.C. § 12112.

137. See *id.* § 12112(b)(5)(A) (establishing the reasonable accommodation mandate); see also Waterstone, *supra* note 3, at 1818).

138. See Diller, *supra* note 132, at 22–23 (noting that there may be a judicial backlash against the ADA because courts are resistant to its reliance on the civil rights model); Waterstone, *supra* note 3, at 1819 (stating that commentators have "suggest[ed] that courts (and the public), while accustomed to an antidiscrimination framework, are less comfortable with, and perhaps hostile to, an accommodation mandate").

139. 42 U.S.C. § 12102(2)(A).

140. See Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal*, 13 KAN. J.L. & PUB. POL'Y 485, 489 (2003–2004) ("[O]nly a surprisingly narrow band of individuals with disabilities are protected by Title I."); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1224–26 (2003) (discussing the courts' restrictive interpretation of the term "disability").

not substantially limited with respect to any major life activity.¹⁴¹ Consequently, plaintiffs encounter significant difficulty convincing the courts that they are entitled to ADA coverage by virtue of having a “disability.”¹⁴² A plaintiff who does not meet the threshold requirement of being an individual with a disability under the ADA will be given no further consideration by the court, and the questions of whether she should be granted a reasonable accommodation or is entitled to damages will never be reached.¹⁴³

The problem is exacerbated by another of the ADA’s requirements, namely, the obvious need for the individual to be qualified for the job in question with or without an accommodation.¹⁴⁴ The statute does not demand that employers hire people who cannot perform the job under any circumstances, such as, for example, blind people applying for the position of truck driver.¹⁴⁵ This reality creates a Catch-22.¹⁴⁶ Plaintiffs who emphasize the seriousness of their limitations in order to be deemed to have a “disability” will often inadvertently convince the court that they are not qualified for the job; plaintiffs who emphasize that they are qualified for the job might be perceived as insufficiently limited in their major life activities, and, therefore, not disabled.¹⁴⁷ Thus, there is a very narrow window of opportunity for plaintiffs to be both disabled and qualified, thereby meeting all requirements for ADA coverage.

Yet another possible explanation for the low plaintiff win rate in ADA cases is that only the weakest cases remain unresolved until a court opinion is rendered. As previously discussed, many employers appear willing to provide accommodations before any formal dispute develops.¹⁴⁸ Because many individuals with disabilities are likely satisfied by accommodation of their needs and are not seeking large damages awards, employers might be particularly receptive to internal resolution of many ADA claims in their infancy. Likewise, employers may feel better about providing a reasonable accommodation than paying damages because the former is a response to a request for help while the latter is compensation for employer wrongdoing.

141. See generally Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001).

142. See *Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874, 876-78 (11th Cir. 2007); *Martin v. Discount Smoke Shop, Inc.*, 443 F. Supp. 2d 981, 992-94 (C.D. Ill. 2006). See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (asserting that courts were concerned about the vagueness and potentially expansive scope of the ADA and consequently, clipped the breadth of the statute excessively); Waterstone, *supra* note 3, at 1814-17 (discussing the failure of many cancer patients to prove that they have disabilities).

143. See, e.g., *Martin*, 443 F. Supp. 2d at 994 (“Because Plaintiff has failed to establish the first element of her prima facie case that she was disabled within the meaning of the ADA, she is not entitled to recover under the ADA.”).

144. See 42 U.S.C. § 12111(8) (defining the term “qualified individual with a disability”); *id.* § 12112(a) (prohibiting discrimination against qualified people with disabilities).

145. See 42 U.S.C. § 12111(8) (“The term ‘qualified individual with a disability’ means 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.”) (emphasis added).

146. See Hoffman, *supra* note 140, at 1232.

147. See *id.* (discussing the Catch-22).

148. See *supra* Part IV.

Concern about potential workplace morale problems and adverse media attention might further induce employers to resolve claims early. Employers who seem unresponsive to the needs of people with disabilities might be perceived by other employees to be harsh and heartless and might be deemed by the media to be worthy subjects of exposés. In addition, some workers with disabilities might have modest expectations and be satisfied if their employers make sincere efforts to accommodate them, even if their requests are not fully granted. Thus, employers might respond positively to most reasonable claims asserted by individuals with disabilities and persevere in litigation to the point of summary judgment only in weak cases asserted by obdurate and irrational plaintiffs.

Commentators further argue that many individuals with disabilities are impoverished and cannot afford to retain lawyers and experts for ADA cases, which are expensive to litigate.¹⁴⁹ Consequently, many strong cases may not be pursued for lack of funding. When plaintiffs do hire attorneys, they may receive incompetent representation, because the more experienced and skilled employment attorneys are familiar with the low plaintiff win rates and may be reluctant to accept ADA cases.¹⁵⁰ Ineffectual representation will further weaken some cases as they are presented to the courts.

2. *Employment Rates of Individuals with Disabilities*

Another arena in which Title I of the ADA has failed to produce an improvement for individuals with disabilities is entry into the workforce and employment rates. According to a 1999 Census Bureau Current Population Survey, 34% “of men and 33% of women with work disabilities were employed [that year], compared to 95% of men and 82% of women without work disabilities.”¹⁵¹ According to a 2000 Harris Survey, only 32% of adults with disabilities between the ages of eighteen and sixty-four stated that they were employed, while 81% of people without disabilities in the same age group had employment.¹⁵²

Experts who have studied employment statistics have also concluded that employment rates for those with disabilities declined in the 1990s after enactment of the ADA.¹⁵³ According to one source, from 1989 to 2000 the

149. See Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 595–96, 612 (2005) (discussing the poverty rate among individuals with disabilities, the expense of litigating ADA cases, and the fact that legal assistance is often unaffordable).

150. See *id.* at 616 (“[L]awyers are being driven away from litigating under Title I.”); Van Detta & Gallipeau, *supra* note 37, at 515, 574 (explaining that poor lawyering could be at the root of plaintiffs’ inability to prevail in Title I cases).

151. Bruyère, *Identity and Disability*, *supra* note 73, at 1173.

152. NATIONAL ORGANIZATION ON DISABILITY, EXECUTIVE SUMMARY: 2000 N.O.D./HARRIS SURVEY OF AMERICANS WITH DISABILITIES (July 2000), available at <http://www.nod.org/index.cfm?fuseaction=page.viewPage&pageID=1430&nodeID=1&FeatureID=861&redirected=1&CFID=10343078&CFTOKEN=32075722>.

153. See, e.g., DAVID C. STAPLETON ET AL., HAS THE EMPLOYMENT RATE OF PEOPLE WITH DISABILITIES DECLINED? 1 (December 2004), available at

employment rate for men with disabilities fell by 22%, while that of men without disabilities diminished by only 1%.¹⁵⁴ During the same time, the employment rates of women with disabilities fell by 1%, while that of women without disabilities grew.¹⁵⁵ Another study concluded that employment for disabled men decreased by 7.2% relative to employment for non-disabled males from 1990 to 1995.¹⁵⁶ Still other experts attempted to refine these statistics by providing more nuanced definitions of “disability.”¹⁵⁷ Thus, “[w]hen ‘disability’ [was] defined as an impairment that imposes limitations on any life activity,” the percentage of people with disabilities who were employed dropped from 49% in 1990 to 46.6% in 1996.¹⁵⁸ When “disability” was defined as any diagnosed impairment, the decline was “from 84.7% in 1990 to 77.3% in 1996” for men, though women’s employment rates were static at around 63%.¹⁵⁹ If “disability” was defined specifically “as an impairment that . . . limits the [function] of working, [the drop was] from 42.1% in 1990 to 33.1% in 2000 [for men and] from 34.9% to 32.6%” for women during that decade.¹⁶⁰

The reasons for this decline have puzzled many scholars, and several potential explanations for it have been developed. First, it is possible that the vagueness of the term “disability” makes it difficult to elicit accurate responses through a survey instrument.¹⁶¹ Some people with mild physical or mental limitations might consider themselves disabled, while others with more serious conditions might not, thus skewing survey outcomes.¹⁶² Furthermore, when surveys attempt to define the term “disability” for respondents, they do not use language that mirrors the ADA’s definition of disability,¹⁶³ namely “a physical or mental impairment that substantially limits [a] major life activit[y].”¹⁶⁴ Arguably, if one were to examine solely the employment rates of people covered by the ADA, one would find different statistics.¹⁶⁵

A second explanation could be that the ADA’s reasonable accommodation requirement has made employers even more reluctant to hire individuals with disabilities than they were before the statute’s enactment.¹⁶⁶ Em-

<http://digitalcommons.ilr.cornell.edu/edicollect/92>.

154. *Id.*

155. *Id.*

156. Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 705 (2000).

157. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 19–20 (2004).

158. *Id.* at 19.

159. *Id.*

160. See *id.* at 19–20.

161. See STAPLETON ET. AL, *supra* note 153, at 1–2.

162. See *id.* at 2 (explaining that an individual who works even though she has a significant impairment might state that she does not have a disability, while an unemployed person with the identical condition might respond in the affirmative to a question about disability status).

163. See Bagenstos, *supra* note 157, at 21.

164. 42 U.S.C. § 12102(2)(A) (2000).

165. See Bagenstos, *supra* note 157, at 21.

166. See Leonard, *supra* note 132, at 56–61.

ployers, fearing that they will have to absorb high costs of accommodations if they employ individuals with disabilities, might prefer to reject their applications, thereby avoiding the accommodation question.¹⁶⁷ Employers might calculate that the risk of litigation over an adverse hiring decision is minimal because discrimination is very difficult to prove with respect to subjective hiring decisions. The employer can often argue convincingly that the candidate was not sufficiently impressive during her interview or that it seemed as though the applicant's personality was not a good fit for the job, and the unsuccessful candidate will not have a performance record at the company to prove her competence.¹⁶⁸

It is also possible that lingering stereotypes and biases contribute to the exclusion of individuals with disabilities from the workplace. Susanne Bruyère's survey lends some credence to this theory.¹⁶⁹ When asked about specific barriers to the employment of persons with disabilities, the indicated percentage of employers responded that they perceived the following factors to be obstacles:

Cost of accommodation: 16% of private employers, 19% of federal employers;

Cost of training: 9% of private employers, 11% of federal employers;

Cost of supervision: 12% of private employers, 10% of federal employers;

Attitudes & stereotypes: 22% of private employers, 43% of federal employers;

Supervisor knowledge of accommodation: 31% of private employers, 34% of federal employers;

Lack of required skills and training: 39% of private employers, 45% of federal employers;

Lack of relevant experience: 49% of private employers, 53% of federal employers.¹⁷⁰

These data suggest that employers often bar employment to people with disabilities because they believe them to be unqualified or too inexperienced for the job, and these beliefs might be erroneous in more than a few cases.

167. *See id.* at 56.

168. *See id.* at 59.

169. *See* BRUYÈRE STUDY, *supra* note 72, at 15.

170. *Id.*; *see also* Bruyère, *Identity and Disability*, *supra* note 73, at 1181.

Thus, low employment rates for people with disabilities may be partly attributable to employers' tendency to deny serious consideration to some applicants with disabilities because of perceived educational, training, or prior work history deficiencies, or, more bluntly, because of biased attitudes towards people with disabilities.¹⁷¹ Bruyère's findings, however, are ambiguous because she represents in another study that 51% of U.S. employers reported actively recruiting candidates with disabilities.¹⁷²

The most compelling explanation, however, might relate to the lack of universal health care coverage in this country. Ironically, employment can adversely affect the ability of individuals with disabilities to obtain adequate health care coverage because it renders them ineligible to receive Social Security Disability Benefits.¹⁷³ According to a 2007 survey of 1,997 private and public employers with three or more workers only 60% of employers offer health insurance benefits to their employees.¹⁷⁴ Employees with disabilities, who may often work part time or have low-paying jobs, are less likely to receive employer-provided health insurance.¹⁷⁵ The availability of public insurance for the disabled unemployed drastically reduces their incentive to seek employment and might make it impractical or imprudent for these individuals to work in the private sector.¹⁷⁶ The increased availability of Social Security Disability Benefits (SSDI) and other benefits during the last two decades may have further contributed to the low employment rates in the disability community.¹⁷⁷

None of the reports discussed in this section includes statistics that reveal whether the number of individuals with disabilities seeking entry into the workforce has increased or decreased since the ADA's enactment. Unfortunately, my research disclosed no empirical studies that address the question of how many people with disabilities have attempted to obtain employment and how many have found it impossible to do so. This absence constitutes one of several gaps in the empirical literature concerning the ADA.

171. See Bruyère, *Identity and Disability*, *supra* note 73, at 1195–96.

172. See SUSANNE M. BRUYÈRE ET AL., COMPARATIVE STUDY OF WORKPLACE POLICY AND PRACTICES CONTRIBUTING TO DISABILITY NONDISCRIMINATION 8 (2004), available at <http://digitalcommons.ilr.cornell.edu/edicollect/104>.

173. See Bagenstos, *supra* note 157, at 26–27 (discussing the importance of health insurance to individuals with disabilities).

174. The Kaiser Family Foundation and Health Research and Educational Trust, *Employer Health Benefits 2007 Annual Survey* 3 (2007), available at <http://www.kff.org/insurance/7672/upload/76723.pdf>.

175. See Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2005 Current Population Survey*, EBRI ISSUE BRIEF, Nov. 2005, at 4.

176. See Bagenstos, *supra* note 157, at 27 (“[P]ublic insurance is saddled with requirements that lock people with disabilities out of the workforce.”).

177. See *id.* at 21–22 (discussing the relaxation of SSDI eligibility standards throughout the 1980s and asserting that this may have initiated the departure of many individuals from the workforce during the 1990–1991 recession); see also STAPLETON ET AL., *supra* note 153, at 4 (discussing the rapid growth in federal support programs, as a result of which, “[i]n 2002 [alone], the federal government spent \$213 billion [and the states spent \$44 billion in assistance to] working-age [individuals] with disabilities and their dependents”).

Thus, the link between lower employment rates for people with disabilities and the passage of the ADA is uncertain. Assuming that it is not attributable to flawed survey questions, the phenomenon might be largely a product of economic and political realities in the United States, and consequently, it is arguable that the ADA is not itself associated with diminished employment of individuals with disabilities.

B. The Good News: Conciliations, Settlements, and Internal Resolutions

1. The Statistics

The picture painted by data other than judicial outcomes and employment rate statistics is much brighter for individuals with disabilities. For those individuals with disabilities who are members of the workforce, the post-ADA workplace appears to offer a more comfortable and hospitable environment. Ironically, the ADA might also offer significant benefits for individuals who would not technically be classified as people with disabilities under the statute's ever-narrowing definition but who are perceived by employers to be covered by the ADA because of illness or impairment.¹⁷⁸

EEOC merit resolution¹⁷⁹ rates for ADA cases (22.1% in 2005 and 23.4% in 2006)¹⁸⁰ are well within the range of merit resolutions for charges brought under the other statutes enforced by the EEOC: Title VII (21.9% in 2005 and 22.5% in 2006),¹⁸¹ the ADEA (19% in 2005 and 19.8% in 2006),¹⁸² and the EPA (24.9% in 2005 and 23.1% in 2006).¹⁸³ The average amount of monetary benefits obtained by the EEOC for successful charging parties (\$15,615 in 2005 and \$16,223 in 2006) is also comparable to sums obtained for individuals filing charges under other statutes.¹⁸⁴

Although a limited data set exists concerning lawsuit settlement amounts, the figures that are available are reassuring regarding disability accommodation in the workplace.¹⁸⁵ According to JVR, median settlement amounts in ADA cases, \$50,000 according to data compiled in 2001 and \$75,000 according to data for the years 2002-2004, fall within the range of settlements for other types of employment discrimination cases.¹⁸⁶ A study of nearly five-hundred employment discrimination cases resolved by Chicago magistrate judges in 1999-2005 reveals that Title I settlements were

178. See Scharz et al., *supra* note 119, at 941 ("Employers provided accommodations to a substantial number of employees who did not meet the ADA's definition of disability.")

179. Merit resolutions are defined as "[c]harges with outcomes favorable to charging parties and/or charges with meritorious allegations [including] settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations." Definitions of Terms, *supra* note 48.

180. Americans with Disabilities Act of 1990 (ADA) Charges: FY 1997-FY 2006, *supra* note 49.

181. Title VII of the Civil Rights Act of 1964 Charges: FY 1997-FY 2006, *supra* note 53.

182. Age Discrimination in Employment Act (ADEA) Charges: FY 1997-FY 2006, *supra* note 52.

183. Equal Pay Act Charges (includes concurrent charges with Title VII, ADEA, and ADA): FY 1997-FY 2006, *supra* note 56.

184. See *supra* Subpart III.A.

185. See *supra* Subpart III.B.

186. See *supra* text accompanying note 61.

higher than those in most cases based on other protected classifications.¹⁸⁷ The study found that the median dollar amount recovered by ADA Title I plaintiffs was equal to or exceeded the amount recovered by plaintiffs filing cases alleging sexual harassment or discrimination because of age, religion or national origin, sex, and race.¹⁸⁸ The mean settlement amount for ADA litigants exceeded all but the mean recovery of age discrimination plaintiffs.¹⁸⁹

Most significantly, reports concerning reasonable accommodations provided by employers outside of the litigation or administrative enforcement context reveal that many employers are generous in providing accommodations without any prompting by external parties. For example, in Susanne Bruyère's study, over 80% of private sector respondents asserted that they made at least one of eleven listed accommodations.¹⁹⁰ Likewise, 93% of federal employers represented that they had modified facilities to improve accessibility, implemented flexible HR policies, and altered the work environment for ADA compliance purposes.¹⁹¹ Notably, 72% of respondents indicated that they never had a Title I claim filed against them,¹⁹² signifying that the vast majority of the accommodations were achieved without judicial or administrative intervention.

Reports concerning ADA compliance by Minnesota and Maryland state agencies are similarly encouraging. The Minnesota agencies reported approving approximately 83% of requests for accommodations processed during the 2005 fiscal year and granting modified versions of requested accommodations in approximately 4% of cases.¹⁹³ While the Minnesota state agencies received 279 requests for accommodation during the relevant time period,¹⁹⁴ only fourteen complaints were filed against the agencies with the EEOC or the Minnesota Department of Human Rights.¹⁹⁵ The Maryland agencies reported granting approximately 89% of accommodation requests.¹⁹⁶ Thus, almost all requests were resolved with a favorable outcome for the requesting party and without the intercession of external enforcement agencies.

A study involving 540 employers who contacted JAN was the least encouraging for Title I claimants, finding that only 55.2% of requests for accommodations had been granted at the time of the interviews, while 74.3%

187. See *supra* notes 68–70 and accompanying text.

188. See *supra* note 69 and accompanying text.

189. See *supra* note 70 and accompanying text.

190. BRUYÈRE STUDY, *supra* note 72, at 11.

191. *Id.*

192. See Bruyère, *Identity and Disability*, *supra* note 73, at 1183.

193. ADA ANNUAL REPORT, *supra* note 110, at 4.

194. *Id.* at 2.

195. *Id.* at 8. As noted earlier, Title I plaintiffs cannot file lawsuits without first exhausting their administrative remedies by filing a charge of discrimination with the EEOC or a state administrative agency. See *supra* note 45 and accompanying text.

196. MD. REPORT, *supra* note 114, at 12.

of the remaining requests were denied.¹⁹⁷ This data, however, may not be representative of typical cases because it was garnered from consultations between employers and JAN, a professional consulting service.¹⁹⁸ The requests at issue might have been particularly problematic, inducing employers to seek JAN assistance. In the alternative, the employers contacting JAN might be particularly sophisticated about the ADA's complexities¹⁹⁹ and, therefore, they are not only inclined to seek advice, but are also less prone to easily granting accommodation requests.

2. *Explaining the Statistics*

Why are employers settling with claimants or responding positively to requests for accommodation in the workplace when they could very likely prevail in court if the cases were litigated to the point of a judicial opinion?²⁰⁰ First, some employers might provide accommodations because they want to comply with the law and with their own sense of what constitutes ethical behavior.²⁰¹ Second, litigation may be expensive and may generate negative media attention, and, therefore, its risks may well outweigh its benefits in the eyes of many employers. If the issue at hand is a request for accommodation rather than a hiring or termination decision, it may often be easier and far less expensive for employers to provide an accommodation than to become embroiled in litigation. Thus, employers might be disinclined to hire lawyers or to invest in the effort of conducting complex analyses concerning the potential plaintiffs' disability status under the ADA when they could simply provide the requested accommodation.

The studies that have been conducted concerning costs of accommodations reveal that most accommodations involve very modest direct expenditures or none at all. The Minnesota state agency report discussed above found that the "[a]verage net cost incurred per accommodation" was \$398.79.²⁰² The workplace accommodation study involving employers who contacted JAN found that nearly half of accommodations required no monetary expenditure and for those that did, the median cost during the first year was \$500.²⁰³ An analysis of approximately 500 accommodations provided by Sears, Roebuck and Co. from 1978 to 1992 showed that the average cost

197. See Scharzt et al., *supra* note 119, at 928, 933.

198. See *id.* at 927–28, 933.

199. See *supra* Subpart V.A.1 (discussing the difficulties faced by plaintiffs who litigate ADA Title I cases).

200. See *supra* Part II (analyzing court determinations).

201. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (2006) ("If people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules.").

202. ADA ANNUAL REPORT, *supra* note 112, at 2.

203. Scharzt et al., *supra* note 119, at 937–38. Many accommodations, such as provision of special equipment to facilitate job performance, may not require significant expenditures after the initial purchase during the first year.

of accommodations was \$121.42 during the 1978-1992 pre-ADA period,²⁰⁴ and then, surprisingly, it dropped to \$45 during the years 1993-1996.²⁰⁵ Notably, this study indicates that Sears regularly made accommodations even before it was required to do so by law, a practice that may have been prevalent in many other workplaces.²⁰⁶ A 1995 report to Congress by JAN asserted that, typically, accommodations cost approximately \$200.²⁰⁷ It is important to acknowledge, however, that these studies do not address indirect costs relating to the hiring and retention of people with disabilities, such as potential absenteeism problems or increased health insurance costs.²⁰⁸

Third, some employers, especially those that are small or new, may not be sufficiently educated about ADA jurisprudence to be aware of the courts' narrow definition of "disability" and the strong likelihood that they would prevail in a lawsuit.²⁰⁹ Consequently, they might perceive Title I litigation as entailing greater risks for them than it actually does.

Fourth, employers may not want to adversely affect morale in the workplace by denying accommodations to ailing or disabled employees who may complain to their colleagues about the employers' harsh treatment. If an employee who is suffering from cancer requests time off for treatment or added breaks because of unusual fatigue, many employers are likely to grant the accommodation without careful analysis as to whether a court would deem the individual to be a person with a disability under the ADA's definition.²¹⁰ Although thorough legal research would reveal that numerous courts have ruled against cancer patients on the disability question,²¹¹ litigation

204. See PETER DAVID BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT—TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO. 18 (1996).

205. See *id.* at 17–18. Overall, no cost was associated with 72% of accommodations, 17% generated a cost of less than \$100, 10% required an expenditure of less than \$500, and 1% cost \$500–\$1000. *Id.* at 17.

206. See *id.* at 19.

207. See Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674 (2000). Professor Stein's article refers to other studies of accommodation costs in addition to the JAN study. See *id.* at 1674–77.

208. Other indirect costs could include compromised productivity and morale problems associated with incorporating individuals with mental illnesses into the workforce. *But see* Schartz et al., *supra* note 119, at 939 (discussing the benefits that employers enjoyed as a result of accommodating employees, including retaining qualified employees and avoiding the need to train new workers, improving employees' productivity and attendance, reducing insurance and worker's compensation costs, and enhancing diversity); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 104–06 (2003) (suggesting that employment and accommodation of people with disabilities produces economic benefits for employers because such individuals have lower job turnover rates, lower absenteeism, higher productivity, and greater dedication than people without disabilities).

209. See *supra* Subpart V.A.1 (discussing the difficulties faced by plaintiffs who litigate ADA Title I cases).

210. Some employees with cancer will be entitled to unpaid leave under the Family Medical Leave Act (FMLA). See 29 U.S.C. § 2612(a) (2000). However, this law applies only to employers with fifty or more employees, while the ADA applies to employers with fifteen or more employees. See *id.* § 2611(2)(B)(ii); 42 U.S.C. § 12111(5)(A). Thus, employers with between fifteen and fifty employees are not bound by the FMLA's mandate but are required to comply with the ADA.

211. See Korn, *supra* note 141, at 399 ("Numerous . . . courts have held that cancer survivors are not disabled within the meaning of the Act."); see also, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996) (finding that the plaintiff failed to establish that her breast cancer constituted a disability because she was not substantially limited in her ability to work); *supra* note 141 and accompany-

concerns may not be the only factor that an employer considers in deciding whether to grant or deny the employee's request. For example, an employer who denies a cancer patient's request risks alienating its workforce by seeming callous and unreasonable, and thus an employer may factor a general morale element into its decision to grant or deny the employee's request.

The perception that many ADA claims are resolved internally and informally through discussions between employers and employees is arguably supported by recent EEOC charge receipt statistics. The number of ADA charges filed with the EEOC peaked in 1995 at 19,798.²¹² The number of charge receipts steadily declined during the following ten years, reaching a low of 14,893 in 2005,²¹³ though the figure jumped slightly in 2006 to 15,625 charges filed.²¹⁴ The overall decline might indicate that fewer individuals find it necessary to file a formal charge of discrimination in order to have their disability-related needs met in the workplace because of positive employer response to their requests for accommodation.²¹⁵

3. *The Expressive Power of the Law*

The statistics discussed in this Article suggest that the vast majority of claims arising under Title I are resolved before cases are introduced to the realm of the courts. Consequently, despite the very low plaintiff win rates in judicial opinions, the ADA has effectively promoted civil rights by providing powerful incentives for employers to respond to the needs of workers with physical and mental impairments.

The conclusion that the ADA changed employer behavior regardless of its anemic enforcement by the courts is consistent with a well-established theory concerning the impact of statutory mandates. In addition to governing human behavior through rules and sanctions, the law conveys social messages.²¹⁶ Revisions in the law can induce people to change their beliefs and behavior, at least in part, because human beings desire social approval and strive to conform to public norms.²¹⁷ The public statements made by the law can, therefore, be even more powerful than its threat of sanctions in

ing text.

212. See The U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges: FY 1992–FY 1996, <http://www.eeoc.gov/stats/ada-charges-a.html> (last visited Nov. 6, 2007).

213. See Americans with Disabilities Act of 1990 (ADA) Charges: FY 1997–FY 2006, *supra* note 49. In 2004, 15,376 ADA charges of discrimination were filed with the EEOC. See *id.*

214. See *id.*

215. Another possible explanation is that employees are learning of the purported judicial hostility towards the ADA and deciding not to pursue cases even at the administrative level. Other reasons for the decline might exist as well.

216. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

217. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340, 358–59, 369–72 (2000) (discussing incentives provided by the law that are associated with people's desire for social approval).

influencing behavior.²¹⁸ Some scholars refer to this phenomenon as the “expressive” function or power of the law.²¹⁹ For example, environmental protection laws can mold human attitudes towards natural resources.²²⁰ Laws that prohibit littering can shape human conduct even if they are not accompanied by vigorous enforcement activity.²²¹ Similarly, statutes governing cigarette smoking in public places, alcohol consumption by minors, and seatbelt use can shift societal norms and promote social advancement by virtue of their very existence.²²²

The expressive power of the law might be evident in the ADA arena as well. Some evidence suggests that employers feel social pressure to express positive attitudes towards individuals with disabilities, though this has not translated into higher employment rates for the disabled in the last two decades.²²³ Employers may voluntarily comply with the ADA, at least insofar as providing accommodations to members of the workforce, despite litigation statistics that would seemingly discourage them from doing so. In fact, they might be even more generous than they are required to be under the courts’ narrow definition of “disability,” extending accommodations to people with a variety of ailments who would not be covered by the ADA if their disability status were scrutinized by a judge.²²⁴ Thus, the existence of the ADA and public discourse about it might be eroding inherent biases against individuals with disabilities.²²⁵

218. See TYLER, *supra* note 201, at 3–4 (explaining that people may “feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law [because of] personal morality or legitimacy.”); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 615 (1998) (“That people care intensely about what laws express is confirmed by the tremendous political salience of capital punishment, flag desecration, and other criminal-law issues that have only trivial or ambiguous regulatory significance.”); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000) (stating “that law influences behavior independent of the sanctions it threatens to impose, that law works by what it says in addition to what it does”).

219. See Kahan, *supra* note 218, at 615 (speaking of “the expressive rationality of criminal law”); Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391, 399 (2004) (explaining the view “that laws and legal actors can send stigmatizing messages that result in concrete harms separate and apart from any denial of government benefits”); McAdams, *supra* note 218, at 1650 (stating that law has both a punitive and “an ‘expressive’ function”).

220. See Sunstein, *supra* note 216, at 2024.

221. See *id.* at 2032–33.

222. See *id.* at 2052.

223. See Brigida Hernandez & Christopher Keys, *Employer Attitudes Toward Workers with Disabilities and their ADA Employment Rights: A Literature Review*, J. REHAB., Oct./Nov./Dec. 2000, at 4, 4–5, available at http://findarticles.com/p/articles/mi_m0825/is_4_66/ai_68865430/pg_3. The authors write that “it has become socially appropriate for employers to espouse positive global attitudes toward these individuals[, but observes that] global acceptance of these workers seems superficial and is likely not indicative of significant efforts to employ them.” *Id.* at 5.

224. See, e.g., Schartz et al., *supra* note 119, at 939 (stating that employers appear willing to accommodate individuals without substantial limitations if the costs of doing so are sufficiently low).

225. See generally Christine Jolls, *Antidiscrimination Law’s Effects on Implicit Bias*, in 3 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW: BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION 69 (Mitu Gulati & Michael J. Yelnosky eds. 2007), available at <http://ssrn.com/abstract=959228> (discussing the effect of antidiscrimination laws on people’s implicit biases).

Title I of the ADA, in particular, was designed to change workplace behavior and not to generate more business for the courts.²²⁶ The very concept of reasonable accommodation implies cooperation between employers and employees within the private realm of the employment relationship. The EEOC elucidates the reasonable accommodation mandate in the federal regulations it promulgated pursuant to the statute, stating that “it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability” in order to determine the appropriate accommodation.²²⁷ The emphasis, therefore, is on dialogue between employees and decision-makers in the work setting.

The ADA’s introductory provision further reinforces the importance of the expressive power of the law.²²⁸ The text declares that the statute is being enacted in order to promote the goals of “equality of opportunity, full participation, independent living, and economic self-sufficiency” for individuals with disabilities.²²⁹ These ambitious goals can only be achieved through voluntary conduct by U.S. employers, who must embrace and become committed to them. If employment decisions are based purely on a calculus regarding whether one is likely to be prosecuted for a violation of the law, the status of individuals with disabilities will not be meaningfully advanced. While governmental enforcement is important for purposes of deterrence and interpretation of ambiguous statutory language by the judiciary, voluntary compliance should be the rule, and litigation should be the rare exception.

4. *A Call for Further Study*

This Article has questioned the common assumption that Title I of the ADA has done little if anything to promote equal employment opportunities for individuals with disabilities. It has uncovered statistical evidence regarding EEOC charge resolutions, settlement statistics, and reasonable accommodation reports that suggest that employers are responding to the needs of individuals with disabilities who are members of the workforce.

The data sets upon which I base my arguments, however, are clearly limited in scope and suggest, rather than conclusively prove, the points made above. I have also found two important shortcomings in the available empirical literature. First, no study addresses the question of how many individuals with disabilities are attempting unsuccessfully to enter the workplace. Thus, it is unclear whether the disability community’s low employment rate is a shortcoming of the ADA or is due to many individuals’ reluctance to apply for jobs because they cannot afford to lose Social Secu-

226. See 42 U.S.C. § 12101 (2000).

227. See 29 C.F.R. § 1630.2(o)(3) (2007).

228. See 42 U.S.C. § 12101.

229. *Id.* § 12101(a)(8).

rity Disability Benefits and health care coverage.²³⁰ Second, it is unclear how many employers were providing accommodations even before the ADA's enactment out of human compassion and a desire to behave reasonably towards their employees.²³¹ Without this information, it is impossible to assess the full extent to which the ADA has induced employers to engage in behavior that they would not otherwise demonstrate; that is, to offer accommodations that they would refuse to provide absent a legal mandate. Unfortunately, this data deficiency is unlikely to be remedied because it would be very difficult to conduct a study that would elicit reliable information about practices that were prevalent over fifteen years ago.

For purposes of accurately measuring the impact of the ADA, much larger and more complete data sets must be compiled in the future. Although employers may hesitate to disclose information about internal grievance resolutions, settlement offers, and reasonable accommodations for fear that it will encourage frequent claims and demands for accommodation by employees, this information is crucial to a meaningful assessment of the statute's efficacy. Indeed, more generally, information concerning the outcomes of unreported cases, settlements, and pre-litigation activity is essential to the assessment of any statutory mandate.

Employers and individuals with disabilities alike have much to gain from the collection of ADA settlement and resolution information. The data is invaluable not only to academics and policy-makers who wish to assess the ADA's impact, but also to private parties. Both employers and employees might look to precedents in determining whether to assert or grant a request for accommodation. For cases that have progressed beyond the informal resolution stage, the data could enable parties to evaluate the worth of their cases while deciding whether to settle or proceed to trial.²³²

At the heart of this Article, therefore, lies a call for further study of the ADA's impact outside of the courtroom.²³³ Efforts such as those undertaken by JVR and the Cornell Employment and Disability Institute under the leadership of Susanne Bruyère are invaluable and must be followed by further study initiatives.

Experienced and skilled organizations such as JVR or the Cornell Employment and Disability Institute can induce cooperation from data subjects by guaranteeing that the employers' and employees' or applicants' identities will remain anonymous when the information is published.²³⁴

230. See *supra* text accompanying notes 173–177.

231. See BLANCK, *supra* note 204, at 17–19 (discussing accommodations provided by Sears, Roebuck and Co. during the pre-ADA years 1978–1992).

232. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927 (2006) (arguing that the confidentiality of most settlements “skews empirical studies of discrimination litigation, which inform the public debate about the prevalence of bias [and] hampers lawyers’ ability to counsel and negotiate on behalf of discrimination claimants”).

233. See Burris et al., *supra* note 33, at 252 (“Having made the investment in the ADA, it is imperative to gather the information necessary to determine what the actual costs and benefits of that investment are, and we ought to suspend final judgment until we have done so.”).

234. Researchers could de-identify survey responses and create a separate key so that, if necessary,

Yet, while the efforts of private enterprises are laudable, the collection of comprehensive information might best be achieved through mandatory reporting requirements involving the courts and the EEOC. Many parties ask courts to retain jurisdiction over settlements for enforcement purposes.²³⁵ In these cases, the courts could exercise greater discretion concerning settlement terms and limit the number of settlement agreements that remain confidential.²³⁶ In the alternative, data could be released in de-identified form. Information about settlements could be collected by the Department of Justice's Bureau of Justice Statistics²³⁷ and compiled into publicly available reports.

In addition, courts could be required to enter all public data about cases online in a manner that would make records easily searchable. Thus, information could be garnered about cases that lack reported decisions without having to physically examine paper files stored in the courthouse.²³⁸

The federal appellate, district, and bankruptcy courts already participate in the Public Access to Court Electronic Records (PACER) system.²³⁹ Each court has its own URL on the system and maintains its own database of case information, which can be accessed for a fee by those who register with PACER.²⁴⁰ A PACER database can be searched by case number, party name, social security number, tax identification number, or filing date range, depending on the court in question.²⁴¹ Currently, however, cases cannot be searched by category such as "employment discrimination" or accessed in more than one court at a time.

A new service, Justia,²⁴² constitutes an adjunct to PACER and allows for searches in various databases such as "All Federal District Courts"²⁴³ by a large number of categories, including "Americans with Disabilities—Employment."²⁴⁴ The retrieval appears in reverse chronological order and allows searchers to link to PACER for documents and additional docket

responses could be linked by an authorized individual to the respondent.

235. See, e.g., Fiftal, *supra* note 41, at 504.

236. See *id.* at 505–06 (arguing that, for the most part, courts should employ a balancing test to determine whether settlement terms are to remain confidential in each case).

237. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DATA QUALITY GUIDELINES 9 (Sept. 2002), available at <http://www.ojp.usdoj.gov/bjs/dataquality/guidelines.htm#guide2> ("The collection of BJS statistics occurs when a determination is made by the U.S. Attorney General, the BJS Director, or the U.S. Congress that there is a policy-relevant need for a data collection.").

238. See Kotkin, *supra* note 68, at 127–28, 160–61 (describing the Chicago Magistrate judges mechanism for recording settlement information and discussing the benefits of collecting aggregate settlement data and making it publicly available); Yeazell, *supra* note 42, at 970–71 (discussing the potential creation of a mandatory settlement reporting system, subsidized by a small increase to the civil case filing fee, that is designed to publish de-identified data).

239. Public Access to Court Electronic Records Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Nov. 6, 2000).

240. See *id.*

241. See PACER Database Frequently Asked Questions, <http://pacer.psc.uscourts.gov/faq.html#CR2> (last visited Nov. 6, 2007).

242. See Justia Home Page, <http://www.justia.com> (last visited Nov. 6, 2007).

243. See Justia Federal District Courts Filings & Dockets, <http://dockets.justia.com/> (last visited Nov. 6, 2007).

244. See *id.*

information, though the database includes only cases filed after January 1, 2004.²⁴⁵ It would be most helpful if Justia were expanded to include earlier cases, and a similar electronic database were developed for state courts.

EEOC regulations could also be revised to add a regulatory requirement that all reasonable accommodation requests and their resolutions be reported to the EEOC along with data concerning the number of employees with known disabilities in each workforce.²⁴⁶ Such a reporting requirement would not be unprecedented. The federal regulations require that employers with one hundred or more employees complete "Employer Information Report EEO-1" forms and submit them to the EEOC on an annual basis.²⁴⁷ The form solicits data concerning employees' "sex and race/ethnic[ity]."²⁴⁸ The EEOC guarantees confidentiality concerning employers' individual identity, stating that it will only publish information that is aggregated by industry or geographic location.²⁴⁹ The EEOC could extend its record-keeping regulations²⁵⁰ and require employers to report data regarding how many employees with disabilities they have, to their knowledge,²⁵¹ and what requests for accommodation were made, granted, and rejected by the employer. The data could then be compiled into a report similar to the ones published by Minnesota and Maryland concerning ADA compliance by their state agencies.²⁵² If the information is truly to enable assessment of the ADA's effi-

245. *See id.* For ADA Title I cases available through Justia see <http://dockets.justia.com/> (search using "Civil Rights – Americans with Disabilities – Employment" as "Lawsuit Type") (last visited Nov. 6, 2007).

246. It would be more difficult to ask employers to report the number of applicants with disabilities because employers are not permitted to make medical inquiries or conduct medical tests before extending conditional offers of employment to candidates. *See* 42 U.S.C. § 12112(d)(2) (2000). Consequently, hiring officials who comply with the law will not be aware of any but the most obvious disabilities, and it would be unwise to institute a reporting requirement that might pressure them to violate the prohibition of premature health-related inquiries.

247. *See* 29 C.F.R. § 1602.7 (2007).

248. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, STANDARD FORM 100, REV. 3-97, EMPLOYER INFORMATION REPORT EEO-1 INSTRUCTION BOOKLET 3, available at <http://www.eeoc.gov/eo1survey/e1instruct.html>.

249. *See id.* at 2 ("All reports and information from individual reports will be kept confidential, as required by Section 709(e) of Title VII. Only data aggregating information by industry or area, in such a way as not to reveal any particular employer's statistics, will be made public.").

250. *See* 42 U.S.C. § 12116 (empowering the EEOC to issue regulations for purposes of enforcing the ADA).

251. One complication would be the difficulty of assessing who is and is not an individual with a disability under the ADA's amorphous definition. This might explain why employers have not been previously required to provide such information. To address this problem, employers might need detailed instructions concerning who should and should not be considered to have a disability. The EEOC has developed a list of conditions that have been the subject of ADA charges of discrimination. *See* The U.S. Equal Employment Opportunity Commission, ADA Charge Data by Impairments/Bases-Receipts, <http://www.eeoc.gov/stats/ada-receipts.html> (last visited Nov. 6, 2007). The agency could provide this list on its form and instruct employers to indicate whether they know of any employees with these conditions. Employers, however, should not be encouraged to conduct medical testing or make inquiries solely for the purpose of filling out EEOC forms, but rather should be asked only to respond concerning disabilities that are otherwise known to them. The data gathering process should not make applicants and employees more vulnerable to discrimination and privacy breaches by inducing employers to seek information about disabilities that they would not otherwise discover.

252. *See supra* Subpart IV.B.

cacy, all employers covered by the ADA should be required to submit data, regardless of their size.²⁵³

Among the respondents to the *Disability Employment Policies and Practices* study, 87% of private employers and 86% of public employers indicated that they already collect and record data concerning reasonable accommodations in their workplaces.²⁵⁴ Assuming that these responses are representative of U.S. employers generally, it appears that the overwhelming majority of employers already maintains information concerning the processing of reasonable accommodation requests and would not be significantly burdened by a reporting requirement.

VI. CONCLUSION

In recent years, scholars and advocates have expressed growing frustration with Title I of the ADA, decrying its failure to achieve a more hospitable workplace for individuals with disabilities.²⁵⁵ Nevertheless, plaintiffs still file thousands of lawsuits under the ADA,²⁵⁶ the EEOC still receives approximately 15,000 ADA charges of discrimination each year,²⁵⁷ and employers still process numerous requests for accommodation.²⁵⁸ Why do individuals with disabilities persist in asserting their rights if they have little hope of success?

This Article has argued that the Title I environment is less bleak than suggested by previously published studies. It is undeniable that plaintiffs rarely win in cases that are resolved through judicial opinion and that there has been no apparent increase in employment rates for those with disabilities since the ADA's enactment.²⁵⁹ However, ADA plaintiffs do not fare poorly with respect to EEOC merit resolutions,²⁶⁰ and evidence suggests that they also obtain meaningful relief through case settlements²⁶¹ and requests for workplace accommodation that are granted by employers.²⁶² These successes may explain the continued employee-initiated activity under Title I of the ADA.

In order to further develop and bolster this theory, additional information is needed concerning extra-judicial ADA resolutions. I have argued generally that it is difficult to judge the efficacy of a law without comprehensive information about its effect outside the courtroom. This is particu-

253. The ADA covers employers with fifteen or more employees. See 42 U.S.C. § 12111(5)(A).

254. See BRUYÈRE STUDY, *supra* note 72, at 12.

255. See *supra* Part II & Subpart IV.A (discussing low plaintiff win rates in Title I cases and several theories that could explain this phenomenon)

256. See Moss et al., *supra* note 4, at 305.

257. See Americans with Disabilities Act of 1990 (ADA) Charge Receipts FY 1992–FY 2006, *supra* note 49.

258. See *supra* Part IV (discussing institutional disability employment policies and practices).

259. See *supra* Subpart V.A.

260. See *supra* Subpart III.A.

261. See *supra* Subpart III.B.

262. See *supra* Part IV.

larly true in the personal and sensitive realm of disability discrimination, in which all parties often prefer to maintain secrecy about claims and disputes.²⁶³ The Article calls for experts to conduct further studies and for mandatory reporting requirements to be established so that reliable information can become increasingly available. Until such data are gathered, we will not be able to ascertain the degree to which Title I has fulfilled its stated purpose of “address[ing] the major areas of discrimination faced day-to-day by people with disabilities.”²⁶⁴

263. *See supra* Part IV.

264. 42 U.S.C. § 12101(b)(4) (2000).