

**THE AMERICANS WITH DISABILITIES ACT AND TITLE I —
WHY THE ADA HAS NOT INCREASED EMPLOYMENT
FOR PERSONS WITH DISABILITIES**

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ABSTRACT

The Americans with Disabilities Act (ADA) has been hailed as a landmark piece of civil rights legislation and a boon to people with disabilities in the United States. Title I of the ADA specifically addresses employment discrimination toward persons with disabilities. Congressional proponents of the ADA anticipated that the statute would bring about a reversal of the high unemployment numbers among the disabled. This thesis examines the unemployment data for persons with disabilities 10 years following enactment of the ADA. It shows that the ADA has not reversed unemployment trends among persons with disabilities. This work compares the expectations of the bill's sponsors and/or advocates for improvements in employment opportunities for working aged adults with disabilities, provided for by Title I of the ADA, with the actual outcomes. This thesis highlights some of the principal problems inherent with the law itself, problems that may be contributing to the ADA's inability to reverse high unemployment numbers among the disabled. This paper also addresses concerns within the US business community regarding implementation of the law. The results presented show that the ADA has not brought about the flood of litigation originally anticipated by American business, neither has it increased frivolous litigation. Data are also offered which demonstrate that compliance with the law in the form of accommodation expenses for persons with disabilities is not onerous. Finally, this study presents some of the ongoing problems with regard to discrimination against persons with disabilities in the workplace.

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Chapter 1

Introduction and Background: The Failure of the ADA to Increase Employment for Persons with Disabilities

On July 26, 1990 President George H. W. Bush signed into law the Americans with Disabilities Act. Prior to officially signing the bill, President Bush made the following remarks:

This is an immensely important day... Three weeks ago we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another 'independence day,' one that is long overdue. With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through onceclosed doors into a bright new era of equality, independence, and freedom (Bush 1990).

The Americans with Disabilities Act (ADA) has been hailed as a landmark piece of civil rights legislation (Equal Employment Opportunity Commission 2002) and a most considerable boon to people with disabilities in the United States in general. In fact, when President George H. W. Bush spoke to a Rose Garden gathering just prior to

signing the bill into law, he went so far as to analogize the enactment of the ADA with the signing of the Declaration of Independence. President Bush analogized the enactment of the ADA with a more complete fulfillment of the underlying principles associated with those self-evident truths which are addressed therein (Bush 1990).

Ten years following its enactment, Justin Dart, one of the foremost disability rights advocates in the United States and one of only two disability rights advocates who happened to be featured on the dais with President Bush when the ADA was signed into law, made the following comments on the bill's success:

Has [the ADA] been a success? Yes. Relative to civil rights laws of the past... I believe that the ADA has been more successful than anyone had a right to expect... More importantly, millions of decisionmakers have been forced to recognize people with disabilities as full members of the human race, as citizens with the power to advocate and to sue for their rights (as quoted in Treanor 2000, Foreword, pg. iii).

The ADA's civil rights guarantees are equivalent to earlier protections and securities which have heretofore been founded in US law in behalf of other principal minorities (The Center for an Accessible Society 2002). In short, the overall scope of the ADA in addressing the barriers to participation by people with disabilities in the mainstream of society is very broad. It has been looked upon — by its proponents and its detractors alike — as a sweeping reform effort in relation to how Americans can and should view people with disabilities in mainstream society.

Title I of the ADA specifically addresses employment discrimination toward people with disabilities. More specifically, in the context of employment, Title I of the

ADA prohibits disability discrimination in all employment practices, including job application procedures, hiring, firing, compensation, advancement, and other terms and conditions of employment. The ADA applies to all employers “with 15 or more employees, including private employers, state and local governments, educational institutions, employment agencies, and labor organizations” (Jasper 1998, 5).

In more general terms, Title I was considered perhaps the most highly anticipated feature of this sweeping legislation. It held out the promise of restoring dignity to adults with disabilities in the United States who sought to secure employment in order that they might be able to achieve the independence that is so closely and integrally associated with the American dream. Prior to the ADA becoming law, unemployment among persons with disabilities was roughly two-thirds of the disabled populace (Burke 2004, 78).

Employment is the key to independence and self-sufficiency in any capitalist society, but perhaps no more so than within the United States. Therefore it is not surprising that so much attention regarding implementation of the ADA has tended to focus on the employment issues (Title I), often overshadowing other aspects of the law. Employment, after all, is “the great equalizer” for people with disabilities, and it is without any doubt the catalyst to independence (Milk 1980, as quoted in Percy 2001, 3).

As former Chairman of the President’s Committee on the Employment of People with Disabilities Tony Coelho¹ noted in an open letter to ABC News in 1996: “The ADA is an important and long overdue civil right law for the 49 million individuals with disabilities in our country. We with disabilities want to work and pay taxes, instead of

¹ Tony Coelho has suffered from lifelong epilepsy.

costing the U. S. more than \$200 billion annually in public subsidies. We want to earn money and patronize businesses, and we will use our \$188 billion in discretionary income to benefit those businesses that make us feel welcome” (Coehlo 1996).

That the disabled want to work has been confirmed by numerous studies, including a 1986 Lou Harris survey which found that two-thirds of the disabled people polled who are not employed said that they wanted to work (Harris Interactive Inc. 1986).

Additionally, as former Senator Bob Dole noted on the Senate floor in 1988, numerous studies indicate that the majority of disabled persons in the US who are actively employed perform their job functions equally as well or even superiorly than their fellow able-bodied workers. Notwithstanding this unique fact, persons with disabilities continue to be this country’s “most unemployed and underemployed demographic group” (Congressional Record 1988d, 15773).

It is clear that the proponents of the ADA believed that enactment of this bill would significantly change this unfortunate set of employment circumstances for the disabled. In sum, there is no shortage of public statements made by disability advocates, members of Congress, and even some celebrities in relation to the highly anticipated and liberating effects which the ADA would almost surely bring to pass in relation to employment prospects for people with disabilities.

Examining the Impact of Title I of the ADA

This thesis will address the following key questions regarding the ADA’s effects on employment for people with disabilities:

- Has the ADA brought to pass the anticipated results intended by sponsors of the law at the time of its becoming law (1990)?

- Has the ADA had a positive or negative overall impact on business (e.g. compliance and litigation costs for employers with 15 or more employees)?
- What does the future hold for people with disabilities as a result of the passing of the ADA in 1990?

To answer these questions I will compare the expectations of the bill's sponsors and/or advocates for improvements in employment opportunities for working aged adults with disabilities, provided for by Title I of the ADA, with the actual outcomes. Together with evaluating the ADA's impact on employment opportunities, I will also examine the associated compliance costs that were not anticipated at the time.

Title I 10 Years Later

Roughly 10 years following passage of the ADA, Edward D. Berkowitz, Chair of the Department of History at George Washington University, testified before the U.S. House's Subcommittee on Social Security of the Committee on Ways and Means (July 2000). As a part of that House testimony, Dr. Berkowitz noted that the ADA has fallen short of its proponents' original expectations and anticipations. In particular, Dr. Berkowitz noted that the formation of several key civil rights statutes, including the Americans with Disabilities Act, has proven unsuccessful in having an abrupt and positive effect with regard to the overall status of the federal government's disability outlays. "The ADA has not led to the substitution of jobs and independent living for cash disability benefits, despite the hopes of those who lobbied for the law's creation" ("Social Security Disability Insurance" 2000).

By relying primarily on the following resources, I will demonstrate that the proponents of the ADA most overestimated the positive employment benefits of the ADA:

- Concerning the expectations of the ADA's proponents, I rely on US Senate floor debates and testimony from 1988 through late 1989. These debates focused specifically on the Americans with Disabilities Act (Congressional Record). US House floor debates and testimony from 1988 through late 1989 (Congressional Record). I also use other secondary analyses of the process of passing the ADA.
- I also draw on other independent analysis of similar data from individual scholars and ADA experts.
- Finally, I employ secondary analyses of the costs of the ADA to US business (employers with 15 or more employees). Such analysis will include independent reports and/or published works by researchers associated with (but not entirely limited to) the Cato Institute ((O'Quinn 1991) and (Olson 1997)), the US Commission on Civil Rights (US Commission on Civil Rights 2000), and Cornell University researchers David Stapleton and Richard Burkhauser (Burkhauser and Stapleton 2003a).

Thesis Structure

Chapter 2 provides a brief overview of the development of the ADA legislation. It provides historical background with respect to the legislation which preceded the ADA, key congressional players who were responsible for its legislative framing, as well as the principal issues that were debated on the House and Senate floors prior to the bill becoming law. This historical perspective is critical in understanding not only the

structure of the bill, but more importantly the expectations of congressional proponents of the ADA, specifically with respect to employment numbers for persons with disabilities.

Chapter 3 examines employment data 10 years following the ADA's enactment. As the data will show, the ADA has not led to a reversal of high unemployment numbers for persons with disabilities. Instead, unemployment among the disabled has actually increased since the bill was first signed into law.

Chapter 4 addresses specific problems with the law. Chief among these is the overly broad and purposely vague nature of the statute. As a result of this imprecise use of statutory language, many of the intentions of the framers of the ADA have been frustrated. As this chapter will highlight, this is especially true with regard to judicial application and enforcement of the law.

Chapter 5 addresses the question of whether the ADA has brought to pass an increase in litigation, particularly with respect to frivolous litigation. As the bill was being debated in the halls of Congress, there were many who declared that if the ADA became law it would create a flood of litigation, much of it being frivolous in nature. Chapter 5 examines whether this prediction has been brought to fruition through formal enactment of the bill.

Chapter 6 deals with the American business community and its long-standing antipathy towards the ADA. US business interests proclaimed that the ADA would hinder the natural capitalistic forces associated with US free-market enterprise, particularly with respect to the costs that would be incurred by US business as the federal government forced implementation. Chapter 6 addresses these claims and provides data showing that the ADA has not been overly burdensome within the American marketplace.

In the Conclusion (Chapter 7) I will not only briefly review the information provided in the previous chapters — particularly with regard to the unemployment numbers for persons with disabilities — but also add additional data with regard to ongoing discrimination against persons with disabilities in the workplace. I will also summarize the principal findings with regard to why the ADA has not reversed the high unemployment numbers for persons with disabilities.

SUMMARY

At the conclusion of President George H. W. Bush’s speech prior to signing the ADA into law, he took special effort to highlight the following:

With, again, great thanks to... those who worked so tirelessly for this legislation on both sides of the [political] aisles... I salute you. And on your behalf, as well as the behalf of this entire country, I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down (Bush 1990).

This thesis asks to what extent the “shameful wall of exclusion,” referred to by President Bush has been demolished as a result of the 1990 passage of the ADA, *specifically with limited regard to Title I of the ADA.*

Chapter 2

The ADA: A Brief Legislative History

Introduction

If a single overarching purpose could be assigned to the enactment of the Americans with Disabilities Act, it would be to eradicate discrimination¹ against the disabled in the United States (Bagenstos 2004; Rovner 2004). Congressional proponents and disability activists alike have long believed that it is discrimination — the violation of the civil rights of the disabled — that constitutes the paramount obstacle that prevents the disabled from enjoying a life of true independence and self-reliance. Continued

¹ A note regarding the use of the term “discrimination”: a question could be posed with respect to whether the federal and state governments look upon discrimination against the disabled in the same manner as when considering race, ethnicity, religion, etc. Writing in *The Nation*, Robert Scheer noted that “What is at issue is the interpretation of the Fourteenth Amendment to the Constitution extending the protection of universal civil rights to all Americans regardless of the state in which they reside. The Fourteenth Amendment—originally addressing the issue of racial discrimination—explicitly empowers Congress to pass ‘appropriate legislation’ needed to guarantee equal protection of the law for all” (Scheer 2000). Although *Board of Trustees of the University of Alabama v. Garrett* found that there was insufficient congressional enforcement power to override the authority of the state under the Fourteenth Amendment, it is still evident that the framers of the ADA intended for the statute to be established upon the principles inherent within the Equal Protection Clause under the Fourteenth Amendment (see *Board of Trustees of the University of Alabama v. Garrett* 2001). Furthermore, according to the US Commission on Civil Rights, “The Equal Protection Clause of the 14th Amendment directs that all persons similarly situated should be treated alike. State legislation or other official action that is challenged as denying this right is presumed to be valid and will be sustained if the classification drawn by the statute is “rationally related” to a legitimate state interest... These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Therefore, laws that classify based on race, lineage, or national origin are subject to ‘strict scrutiny’ and will be sustained only if they are suitably tailored to serve a compelling state interest... Official discrimination resting on gender or illegitimacy fails unless it is substantially related to a sufficiently important governmental interest” (US Commission on Civil Rights 2000, 6, Footnote).

discrimination, ADA proponents argue, is analogous to an unending series of insurmountable barriers, barriers which continue to force people with disabilities to rely upon government handouts rather than enjoying lives of self-sufficiency. In patterning the ADA after the 20th century civil rights legislation, the expectations of congressional and disability proponents was to see a reversal of the high unemployment numbers among persons with disabilities as well as a reversal of government expenditures through the removal of discriminatory barriers by enactment of the ADA.

Discrimination toward the disabled and the free exercise of civil rights that have long been denied to persons with disabilities in the United States frequently took center stage in the legislative history of the ADA. Iowa Senator Tom Harkin, the chief Senate sponsor of the bill, went so far as to refer to the proposed law as a “20th century Emancipation Proclamation for people with disabilities” (Linn 1990). Evan J. Kemp Jr., the man who presided over the Equal Employment Opportunity Commission in 1990, the government agency which is responsible for implementation of the ADA, noted that the statute, “called an end to the policy of segregation, isolation, [and] excluding disabled people from society” (“Entering a New Era; New Disability Law Is ‘Dream Come True’” 1990).

The purpose of this chapter is to provide a very brief narrative of the key legislative efforts of the U.S. Congress to eliminate discrimination and uphold the basic civil rights of all disabled Americans. Key statements of congressional proponents will be highlighted to provide an overview of the statutory history of disability laws along with an explanation of the legislative approach, one which shifted from a “medical/charity model” to one which keenly focused on civil rights principles. This

chapter will also present a brief summary of the legislative discussion leading up to enactment of the ADA.

BRIEF OVERVIEW OF DISABILITY LEGISLATION IN THE U.S.

The 1973 Rehabilitation Act constituted Congress' first real attempt to address the issue of civil rights as well as to directly confront its inherent companion-discrimination (US Commission on Civil Rights 2000, emphasis added). This Act "prohibited employment discrimination against qualified persons with disabilities by the federal government, federal contractors, and entities that receive federal funds" (Braddock and Bachelder, 6). This piece of legislation essentially laid the groundwork for the Americans With Disabilities Act. By banning discrimination against the disabled, disability advocates declared that the United States came out of the dark ages with regard to disability legislation and civil rights protections in general (Congressional Record

1988b).² Section 504 of the 1973 Act states that, "... no otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (Vocational Rehabilitation and Other Rehabilitation Services Rights and Advocacy Act 1994, 1).

The history of governmental and social dealings with the disabled has been one in which disabled individuals were treated as inferior and deficient when compared with the rest of mainstream society (Drimmer 1993).

Images of the disabled as either less or more than merely human can be found throughout recorded history. There is the blind soothsayer of ancient Greece, the early Christian belief in demonic possession of the insane, the persistent theme in Judeo-Christian tradition that disability signifies a special relationship with God. The disabled are blessed or damned but never [wholly] human (Diller 1998, n36).

² The term "disability" can (and often does) have many and disparate meanings within a given society. It is important to identify this term upfront in this paper, as the terms "disability" and "disabled" will be used repeatedly. For the purposes of this thesis, the noun "disability" and noun and adjective forms of "disabled" will refer to the socially constructed aspect of disability. That is, those who suffer from disabilities are "disabled" not simply because they are medically determined to be lacking in certain physical and/or mental abilities, but perhaps more importantly because society is currently organized and constructed in such a way that there are those who are prohibited from full and active participation (such a construction of society represented one of the foremost reasons for enactment of the ADA). According to the *Oxford English Dictionary*, disability refers to an "incapacity in the eye of the law, or created by the law; a restriction framed to prevent any person or class of persons from sharing in duties or privileges which would otherwise be open to them." In this sense, the severity of any given disability is very much determined by the construction of social reality (and specifically the laws that govern civilization) that makes up the society in which the disabled constitute a part. (For an exhaustive treatment of this subject, see John Searle's "The Construction of Social Reality".) By extension, the Americans with Disabilities Act builds upon the socially constructed foundation of US civil rights law by declaring that discrimination against the disabled, i.e. any social construction which would forever prohibit the disabled from exercising their civil rights to be illegal (i.e. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV, United States Constitution).

During colonial America, disabled individuals were looked upon as deserving of pity for their physical and impoverished state, yet never as equals deserving of equal standing in society.³ Later, with the advent of the Industrial Revolution, the disabled were viewed unfit for this new manufacturing economy and marketplace and were fundamentally cut off as a direct result of their physical and/or mental incapacities. Such segregation only solidified the disabled's disengagement from larger aspects of society as a whole. As disability historian Jonathan Drimmer noted, "The history of society's formal methods for dealing with handicapped people can be summed up in two words: segregation and inequality" (Drimmer 1993, 1359).

Throughout the 20th century, the US government made several well-meaning but piecemeal attempts to address the needs of its disabled citizens. Beginning with the Smith-Sears Act of 1918 and the Smith-Fess Act of 1920—two laws which constituted the foundation for vocational rehabilitation in this country — Congress began its long statutory journey toward addressing the needs of these disabled members of society. However, most of these pieces of legislation fell well short of competently and sufficiently meeting such needs of the disabled. Table 2.1 gives a brief overview of Congress' attempts to address the unique needs of disabled Americans prior to the enactment of the ADA in 1990.

³ Themes from being hailed as a heavenly oracle to a devil's offspring litter the legacy of this fear of the physically and mentally infirm throughout recorded history. Such prevalent misunderstandings have left the disabled misunderstood, social outcasts, and often at the mercies of others. History even records that imperfect children were routinely abandoned by their parents or killed for their disturbing uniqueness (US Commission on Civil Rights 2000).

Table 2.1 Legislation for the Disabled in the United States

Year	Name of Legislation	Key Features
1918	Smith Sears Act	<ul style="list-style-type: none"> • Provided vocational rehabilitation for disabled <i>military</i> personnel to return to civilian employment. • Aimed to assist discharged military personnel with disabilities to seek active and regular employment.
1920	Smith-Fess Act (Vocational Rehabilitation Act)	<ul style="list-style-type: none"> • The first federal civil vocational rehabilitation act for disabled persons who were <i>not</i> war veterans. • Provided vocational training, placement, and counseling. • The first statute to assist disabled citizens who were born with disabilities
1936	Randolph-Sheppard Vending Stand Act	<ul style="list-style-type: none"> • Gave the blind the authority to operate vending stands on federal property. • Aimed at independence and self-sufficiency for a specific segment of the disabled population. • Provided jobs but did not promote integration into the workforce.
1973	Rehabilitation Act of 1973	<ul style="list-style-type: none"> • Aimed to eliminate discrimination based on disability by those receiving federal financial subsidies. • Offered rehabilitation to <i>all</i> disabled individuals associated with federal employment or federal contracts.
1986	Air Carrier Access Act	<ul style="list-style-type: none"> • Prohibited discrimination against people with disabilities by all commercial air carriers. • A precedent to the ADA in that it sought to secure the <i>civil rights</i> of all disabled persons with respect to transportation issues.
1988	Fair Housing Amendments Act	<ul style="list-style-type: none"> • Extended provisions of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) to protect persons with disabilities.

Source: Table is based on accounts found in US Commission on Civil Rights 2000, 5-9.

The Rehabilitation Act of 1920

The Vocational Rehabilitation Act of 1920 (also known as the Smith-Fess Act) originally became law during the term of President Woodrow Wilson and, unlike its forerunner The Smith-Sears Act,⁴ was the first disability law to take into account individuals who were *born* disabled. This statute was also the first to extend its parameters to include anyone with a disability (US Commission on Civil Rights 2000).

The fact that people born with disabilities, not just injured war veterans, were covered under the act illustrated Congress' beginning appreciation for all people with disabilities. At the same time, however, the absence of a provision regarding societal discrimination in the language of the bill underscores the continued belief that the lack of participation of people with disabilities in employment and other areas was due to their limited capabilities (US Commission on Civil Rights 2000, 5).

While the Vocational Rehabilitation Act of 1920 was an important step forward in seeking to significantly enlarge the scope of previous disability-rights legislation, it nevertheless continued to view the disabled *individual* as being defective rather than any aspect of the larger *society*, a problem which Congress sought to address in the Rehabilitation Act in 1973.

The Rehabilitation Act of 1973

The heart of the 1973 Act was rooted in the civil rights movement and the scope of the act extended to all areas in which the government finances or conducts activities and programs, including employment, education, housing, transportation, health services,

⁴ The Smith-Sears Act of 1918 only targeted the rehabilitation of veterans injured in the service of their country (US Commission on Civil Rights 2000).

recreation programs, and others. Title VI of the Civil Rights Act of 1964 was used as a pattern for the 1973 Rehabilitation Act. The Civil Rights Act of 1964 constituted a primary foundation for the rights and protections of all Americans by prohibiting discrimination of race, sex, religion, and national origin. Congressional proponents wanted to extend these parameters to include persons with disabilities (US Commission on Civil Rights 2000, 5). According to one disability historian, Richard K. Scotch, Section 504 “transformed federal disability policy by conceptualizing access for people with disabilities as a civil right rather than as a welfare benefit” (US Commission on Civil Rights 2000, 10).

SWITCHING FROM MEDICAL/CHARITY TO CIVIL RIGHTS MODEL

Prior to enactment of the ADA, all vocational rehabilitation laws and virtually all US disability policy was based upon what Drimmer has identified as the “medical” or “charity” model of disability. The fundamental principle which underlies the medical/charity model “is that disability is an infirmity that can only be properly addressed by doctors and rehabilitation professionals who attempt to ‘cure’ or ‘fix’ the person with a disability” (Drimmer 1993, 1347). According to this specific model, the problem of disability resided wholly within the individual who happened to be disabled and/or infirm, *and therefore it was the individual*, rather than society, who must be the focus of all rehabilitation and subsequently be returned to gainful employment (Drimmer 1993, emphasis added).

In the 1970s and 1980s, the public and Congress began to change their overall perceptions of individuals with disabilities in society. Standing on the foundation of the

civil rights movement, “access to mainstream America was recognized as a fundamental right” worthy to be enjoyed by all citizens of the nation (US Commission on Civil Rights 2000, 4). According to Drimmer, a new civil rights model was adopted in which legislation for the disabled (and related policies which followed) finally began to advocate the shifting of attention from the disabled’s physical and/or mental limitations to the disabled’s monumental struggle with economic and social disadvantages. As a new attempt to change *society’s* view of the disabled, rather than strictly focusing upon the so-called deficiencies of disabled individuals, the civil rights model’s purpose was threefold: (1) to efface the aberrant and long-held misconceptions and opinions embraced by the general public; (2) to eradicate the inequality caused by such preconceptions; and (3) to pursue a “level playing field, or equality of opportunity, through aggressively securing access to, and independence in, all aspects of society” (Drimmer 1993, 1358). The result of this new focus on civil rights was a need for new legislation.

The Path to the ADA

The ADA is deeply rooted in two acts which were designed to afford equal opportunity to persons previously excluded from full participation in American life. The general principle of nondiscrimination had already been enshrined in the Civil Rights Act of 1964, while the Rehabilitation Act of 1973 provided guidelines for applying this principle to the disabled. According to former Rep. Major Owens, who served as a major proponent of the ADA in the House during the late 1980s, the 1973 Rehabilitation Act was indeed “a proud monument to the principles of equality” (Congressional Record 1988b, 1310), but one that simply did not go far enough in addressing the needs of *all*

disabled Americans.⁵ Recognizing a type of glass ceiling for the disabled within society, Congress saw the need to rectify this crime of prejudice by declaring it unlawful to segregate or exclude based solely upon disability (Congressional Record 1988b).⁶ Because the 1973 Act only covered federal dealings with the disabled, i.e. federal employees and private companies which dealt directly with the federal government, a broader aspect of discrimination protection was needed.

In crafting the Americans with Disabilities Act, the primary principle which Congressional proponents hoped to directly address was the sheer difficulty disabled individuals had of securing employment, a necessary step for becoming independent. It was evident that Congress was beginning to realize that the disabled were often not given the initial opportunity to demonstrate their talents and abilities to perform certain jobs. Instead, what frequently reigned were unfortunate myths and stereotypes regarding the disabled applicant's inability to perform his or her job functions "which ultimately preclude the disabled citizen from receiving offers of employment or promotion" (Feldblum 1991, 82).

The ADA's most fundamental objective was to elevate the disabled's quality of life by directly addressing the civil rights of *all* disabled Americans. The ADA was to differ from previous disability legislation by providing and broadening rehabilitation programs and services, including funding for new types of disability research. Unlike federal disability statutes, the ADA "would include a nondiscrimination provision and

⁵ Former Rep. Owens declared, "We may have inherited a society that segregates and excludes people with disabilities, but we don't have to maintain it" (Owens 1988, 1311).

⁶ According to former New York Rep. Major Owens, Congress stipulated that "... when fears and myths about the disabled systematically result in unfair exclusion and segregation, it is wrong and should be illegal" (Owens 1988, 1310).

mandate to every federal agency to establish an affirmative action plan to encourage the hiring, placement, and promotion of individuals with disabilities” (US Commission on Civil Rights 2000, 9). It was the fundamental hope and desire of Congressional proponents that this monumental piece of legislation would, in a more direct and competent fashion, now address the long standing injustices facing the disabled.

ADA Proponents Exercise Their Political Voice

The strategy of the ADA proponents was clear: they wanted to make certain that all members of Congress who had the opportunity to vote on the ADA understood that it was not simply a vote on a proposed piece of legislation dealing with the technicalities of the law. Rather, it was a vote on *civil rights* and it was to be understood that the Americans with Disabilities Act would be founded on *civil rights* principles. As Massachusetts Senator Edward M. Kennedy declared in the fall of 1990, “We have all learned something about the evils of discrimination in any form, and the importance of judging individuals by their abilities — not patronizing misconceptions, demeaning stereotypes, and irrational fears about their disabilities” (Kennedy 1990, 19).

Former Massachusetts Rep. Silvio Conte noted that even twenty-five years after the monumental Civil Rights Act, an act which illegalized discrimination, there were still American citizens deprived of fundamental freedoms. On April 29, 1988, he noted that, “for the 36 million⁷ Americans who have disabilities, equality of opportunity is a concept that often has no meaning in their daily lives” (Congressional Record 1988c, 1307). The

⁷ This number has risen substantially — to an estimated 58,000,000 in 2003 — since former Rep. Conte delivered these remarks on the House floor in 1988. (Source: US Census Bureau)

ADA legislation before Congress was to be the equalizing means of providing those opportunities by upholding the basic civil rights of the disabled community.

Acknowledging the foremost problem facing disabled citizens was discrimination, Rep. Conte was convinced that the language of the ADA had to combat discrimination head-on, as he indicated when he stated the following on April 29th, 1988: “We are proposing today a legislative solution as a means to remedy this serious societal problem and, as it did 25 years ago, proclaim as a national policy the elimination of second-class citizenship for a group of Americans” (Congressional Record 1988c, 1307). After years of neglect, the civil rights protections which were established in 1964 were finally being applied to a minority which had suffered discrimination for a great portion of this nation’s history. According to former New York Rep. Major Owens, the Americans with Disabilities Act directly fastens several of its stipulations to canonized sections of current U.S. civil rights statutes (Congressional Record 1988b).

Other supporters, like Former Maine Representative Joseph Brennan, stressed that the ADA was as much about *human rights* as it was about civil rights and highlighted this issue on May 17, 1990 when he declared, “This legislation has been considered the greatest piece of civil rights legislation since the 1964 Civil Rights Act. I urge my colleagues to resist putting various price tags on human rights and employment opportunities for people with disabilities” (Congressional Record 1990b, 2443). The ADA represented the formulation of new law which would have as its nucleus key social doctrines that would protect and ensure the human and civil rights of the disabled, to insure their return as equals in an otherwise estranged society. It would be able to propel human and civil rights themes forward “by declaring that people with disabilities are an

integral part of society and, as such, should not be segregated, isolated, or subjected to the effects of discrimination” (Young 1997, xi).

EXPECTATIONS OF THE PROPONENTS

When Congress initially decided to take up the issue of the proposed Americans with Disabilities Act in 1990, disabled adults were, as they are now, seriously struggling to find their way in the American workplace. Most disabled adults were not part of the active American workforce. Rather than being actively and regularly employed, the majority of all disabled adults in the US were receiving government checks and those disabled persons who did have consistent employment tended to earn roughly one-third less than their non-disabled co-workers (Olson 1997).

Members of Congress and the disabled community alike continued to believe that the fundamental reason for these high rates of unemployment was outright prejudice and discrimination — a violation of civil rights (Olson 1997). For instance, Former California Rep. Levine declared on the House floor in 1990, “The attitudes nondisabled persons have toward fellow disabled citizens are often the most important factor leading to segregation, exclusion, discrimination, and unemployment. In the era we live in, we are witnessing a long-overdue shift, during which old prejudices are changing. The ADA will change these attitudes even more” (Congressional Record 1990c, 2633).

The passage of the ADA would bring about many desperately needed legal measures that were expected to address the long history of discrimination against the disabled in this country. To do this, the U.S. Government would have to broaden its civil rights protections and the means of enforcing them. The framers of the ADA planned on

using previous civil rights statutes as the foundational blueprint for how the ADA was to be structured. The ADA would therefore principally build upon the progress that had been made in the realm of civil rights.

In this process of structuring the ADA legislation, the National Council on Disability would come to serve as a unique sovereign entity within the national government structure. The NCD was created to serve as an independent advisory agency to the executive and legislative branches of US government. This agency would “provide recommendations to the President and Congress on disability policy issues” and would serve as a formal representative “for all people with disabilities, regardless of severity or age and from culturally diverse populations” (National Council on Disability 2006). The NCD was an integral player in the development of the ADA. The research that this agency performed and the subsequent data that was collected enabled the President and the Congress to more fully understand and appreciate the civil rights protections that were needed for members of the disabled community.

The National Council on Disability and the ADA

The National Council on Disability (NCD) was the first governmental organization to formulate a federal legislative proposal which attempted to revamp the shortcomings and overall flaws of previous disability statutes, especially by focusing on the *civil rights* of the disabled. Originally created in 1978 as an advisory board inside the Department of Education, it was converted into an autonomous agency of the federal government in 1984.⁸ It is the sole federal agency with the duty of addressing, evaluating,

⁸ NCD members are selected and appointed by the President. Such nominated members are then confirmed by the full U.S. Senate (National Council on Disability 2000).

and submitting influential policies on the affairs of the disabled to the president, as well as to Congress. This agency's unique charge is "to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature or severity of the disability, and to empower them to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society" (National Council on Disability 2000a, 72).⁹

The NCD's early and pivotal involvement in the ADA's formation was manifested in 1984 when Congress requested an accounting of the federal disability programs and policies then in place. At the time, Congress was seeking the organization's advisement on the minimization of government funding to promote independent living among the disabled. The NCD's response was to counter with a proposal for a type of equal opportunity law, a recommendation which would form the statutory foundation for the ADA (Young 1997).

Employment Opportunities

The segregation of the handicapped has been especially detrimental with respect to employment opportunities for this minority. The National Council on Disability's Sandra Swift Parrino declared in 1990 that employers are very reluctant to adapt their own business environments in order to integrate disabled laborers, which is precisely the reason why so many of the disabled are ultimately unable to enter the workforce and are required to rely upon government assistance (Shapiro 1994). Congressional proponents noted that only a bill such as the Americans with Disabilities Act would bring about a

⁹ To chart their yearly progress, the NCD submits an overview that evaluates current policies, analyzes their development, and checks that the agency is on target with meeting the needs of all disabled Americans (US Commission on Civil Rights 2000).

considerable reversal of these dismal unemployment figures by upholding the basic civil rights of the disabled, in this case with respect to the opportunity for employment.

Former California Rep. Tony Coelho noted the following on the House floor on April 29, 1988 concerning employment rights, “This act will make it illegal to deny job opportunities to qualified applicants on the basis of handicap. The act will cover the same range of employment activities as those covered by Title VII of the Civil Rights Act of 1964” (Congressional Record 1988a, 1309). This legislation was intended to not only protect the civil rights of the disabled, but to reverse the US government’s view on its disabled citizenry and society’s outlook on their physically and/or mentally impaired neighbor.

Senator Tom Harkin, the primary architect of what became the ADA, echoed similar sentiments regarding the need for this groundbreaking piece of legislation:

In sum, there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life (Congressional Record 1989b, 10713).

On November 17, 1989, Senator Dave Durenberger of Minnesota made a prediction on the Senate floor regarding the ADA’s anticipated benefits in overcoming discrimination and opening the doors of employment opportunity for persons with disabilities. First, he believed it would eliminate the obstacles which have prevented millions of disabled Americans from participating in the American marketplace as active and contributing laborers. The elimination of such barriers would allow each of these

individuals to now fully take part in American society, something from which they have been barred for an extended period. In his closing, he argued that acceptance of this statute would affirm and proclaim once and for all that the disabled must be granted the same prospects for success in our capitalistic society as their able-bodied counterparts (Congressional Record 1989a).

Additional Benefits

It was believed by Congressional proponents that numerous advantages with enabling disabled individuals to participate in the workforce would benefit the American economy as a whole. A decrease in the shortage of workers, an increase of tax revenue, and a decrease of government handouts would be just a few benefits manifested by employing the disabled populace. Former Minnesota Senator Dave Durenberger echoed emphasized these points when he noted that, besides its moral rightness, the ADA offered obvious economic advantages, not only to direct beneficiaries of the Act, but to society as a whole (Congressional Record 1990a).

The first such benefit would be a clear dent – even if small – in the growing federal budget deficit. By giving equal employment opportunity to people who could work, but who were kept from working by misguided prejudice, the ADA would move many thousands of citizens from the welfare rolls to the role of gainfully employed taxpayers. Congress would be granting disabled individuals the chance of becoming financially independent, no longer completely reliant upon government assistance for their most essential needs and wants.

Changes in federal law through the enactment of the ADA would not only grant independence to persons with disabilities, but would also significantly reduce the amount

of federal funds being depleted in order to sustain people with disabilities. Granting employment opportunities for the disabled would increase the overall tax proceeds by employing those who are currently subsisting off of federal handouts (Congressional Record 1990a). This emphasis on reduced payments to Americans with disabilities as a result of their own employment was a factor which was highlighted by numerous congressional proponents of the ADA.

A further potential benefit of the proposed law was an improvement in the nation's competitiveness. A June 1990 article in Business Week lauded the potential passage of the ADA by publishing that such a law would come at just the right instance to help combat the extensive labor shortages predicted in the United States as this industrialized nation moved into the 21st-century ("An Enabling Law for the Disabled" 1990). The ADA would help ease the problem by adding to the labor pool a large number of people who, though afflicted with a wide range of physical disabilities, offered needed talents that could help improve the country's economic performance (Congressional Record 1990a).

Former President Bill Clinton called attention to the need for members of Congress and all Americans alike to focus on the extended and positive economic implications of the ADA when he said: "If we want to keep our economy growing with continued low inflation and low unemployment, we must draw on the untapped potential of our people.... Americans with disabilities who want to work shouldn't have to wait one more day" (Clinton 1999).

The ADA represented nothing less than a win-win statutory proposal. The associated fringe benefits of the statute's enactment were not difficult to understand —

putting millions of disabled Americans back to work (or initially into the job force) would have positive economic benefits for the American economy in general and for the US government in particular.¹⁰

LEGISLATIVE DISCUSSION OF THE ADA AND ITS PASSAGE

Not unlike the history of the American Revolution, one in which the underlying cause of freedom and liberty was challenged by enormous odds, the Americans with Disabilities Act was similarly brought to fruition by what many participants in Congress and observers alike see as nothing short of a miracle. This massive piece of legislation was one that ultimately made it through numerous congressional committees, survived several attempts at amendment, and encountered numerous challenges from specific Congressional interests supported by various business lobbies (Young 1997).

The ADA was put forward by Congressional proponents Former Senator Lowell P. Weicker and Former Congressmen Tony Coelho on April 28 and 29, 1988 to the Senate and House (Young 1997). No one in Congress expected it to pass in the first go-around. Instead, it was hoped that the public awareness generated on the coattails of the 1988 election campaign would ensure the bill a priority placement in Congress the following year. To accomplish this, nationwide networks were organized to vocalize society's demand for the ADA and numerous testimonies of the hardships and struggles facing the disabled were presented before Congress. Not leaving the bill's future entirely

¹⁰ A 1990 Boston Globe editorial on the proposed ADA legislation declared that having the disabled participate in the workforce will offset the overall expense incurred for accommodations in the work place ("Dismantling the Barriers" 1990).

to public outcry, disability advocates began soliciting candidates on Congressional and presidential levels who would staunchly support the ADA's future (Young 1997).

After the 1988 elections, the bill finally had the supporters it needed to be in a probable position to become law. George H. W. Bush was elected president of the United States and his staunch support of the ADA represented one of the key ingredients in its ultimate passage. Congressman Coelho won his reelection while Senator Weicker failed to reclaim his seat in the Senate. Iowa Senator Tom Harkin intervened and became the Senate's chief disability-rights proponent, including taking over for Senator Weicker as chief architect of the emerging ADA bill (Young 1997).¹¹

The ADA was presented before the Senate by Senator Harkin and before the House by Congressman Coelho on May 19, 1989, both campaigning for the passage of this vital civil rights bill (Young 1997). As Jonathan Young reported in his history of the ADA, "after hearings were held in May and June of 1989, the Senate entered a series of negotiation sessions with the Bush administration to craft a bipartisan, compromise bill. On August 2, 1989, the Senate Committee on Labor and Human Resources voted unanimously to report the ADA, as amended, to the Senate floor. The Senate passed the ADA by a vote of 76 to 8 on September 7, 1989" (Young 1997, xix). Deliberation in the House would go into the following year.

¹¹ It was felt by many ADA proponents that Senator Harkin was a prime choice to replace Former Senator Weicker, not only because of Senator Harkin's Senate experience but also as a direct result that the Harkin family knew of the many disadvantages which had been placed upon disabled Americans for generations as a result of being without fundamental protections such as those found within the ADA. As author of the ADA, its enactment was one of Sen. Harkin's proudest achievements as an elected official. Sen. Harkin would later recount: "My family and I had first-hand experience with disability discrimination. My brother Frank was born profoundly deaf. He was sent across the state to attend a residential school for the deaf. In those days, they were called 'schools for the deaf and dumb' and I remember Frank telling me: 'Tom, I may be deaf, but I am not dumb.' They told my brother that he had only three options: He could be a baker, cobbler, or printer's assistant. The ADA has changed the employment opportunities for people like my brother—they are now doctors, lawyers, educators, and entrepreneurs" (Harkin 2003).

Beginning in August 1989, Congressman Coelho led the effort to make sure the ADA, which had successfully passed in the Senate, would not become diluted in the House — a task that would require a great amount of determination by himself and subsequently by his colleague, Congressman Steny H. Hoyer. Due to pressure from ADA opponents, the House was chiefly captivated with the impact the ADA's requirements would have, legally and monetarily, on the realms of private enterprise affected by this bill. The expense of compliance and possible lawsuits alone could cause considerable or undue financial hardships for American business and government enterprise.¹²

Ultimately, House Congressional proponents of the ADA were able to assuage a majority of their fellow House members, notwithstanding the fact that all business-interest concerns had not been entirely resolved. On May 22, 1990, the ADA was passed by a vote of 403 to 20 in the House (Young 1997). “The House and Senate then passed the ADA in final form on July 12 and 13, 1990. On July 26, before about 3,000 persons, President Bush signed the ADA into law as Public Law 101-336” (Young 1997, xx).

The broad support for the ADA accounts for its singular status in the history of disability legislation. While most of its individual stipulations were already on the books at the state and local levels, the ADA far surpassed existing law in the scope of its support for the disabled and was the first legislation to apply to private business, as well

¹² Middle ground between Congress and the business community was found in the form of a hotly debated amendment named “The Chapman Amendment.” This amendment protected an employer's right to discharge an employee on the grounds of his or her illness if their position of employment placed others in danger of contracting the same illness. Congressional proponents and the disabled community refused to support an ADA with the Chapman Amendment attached to it because they believed it would erode the gains made by the disabled in regard to their civil rights and would give the employers too much power. After the ADA passed in the House, the House and Senate met where conferees rejected and removed the Chapman Amendment (Young 1997).

as to public facilities. Based on the foundation of earlier Civil Rights laws, the ADA was also the first disability legislation to recognize the Constitutional and civil rights of the disabled. For this reason, the act mandates that governments and businesses not only end discriminatory practices, but, to the extent that funding is available, also undertake proactively to provide the disabled with equal opportunities to enjoy all aspects of a full life that their condition allows (Young 1997).

CONCLUSION

Congressional proponents of the Americans with Disabilities Act, disability activists, and members of the disability community in the United States, were most anxious to begin to see the numerous positive benefits they believed would be inevitably brought to fruition as a result of the enactment of this monumental disability-rights legislation. Various policy studies have demonstrated that antidiscrimination legislation such as the Civil Rights Act of 1964 diminished discrimination in the marketplace, advanced the assimilation of minorities into the workforce, and improved minority wages and overall financial welfare (DeLeire 2003). Congressional proponents of the ADA were confident that the bill would bring to pass similar benefits for disabled citizens.

Now it remained to be seen whether or not this new formal enactment would actually bring about positive changes in the disabled's quality of life. It was believed that bringing an end to the discrimination against the disabled populace by establishing laws to protect their civil rights would subsequently bring about a reversal of their bleak employment figures. However, the question of the ADA's cost to US businesses under Title I (employment provision) was still forefront in the minds of both Congressional

ADA proponents and within the business community at large. Would the ADA's formal enactment and implementation actually bring about the unmanageable cost burdens predicted by the business community? Or would the ADA prove to be far less imposing (financially and otherwise) than originally predicted by business leaders and their representatives in Congress?

Chapter 3 addresses both of these larger questions by providing a summary of the latest data on employment of persons with disabilities. The data provide significant evidence that proponents of the ADA — specifically congressional proponents of the bill — overestimated the positive effects that would be brought to pass through the law's enactment.

Chapter 3

Latest Employment Figures and the Ever-Changing Definition of Disability

Introduction

According to many political and disability-rights observers, Congress scored a major victory for the disabled when the Americans with Disabilities Act passed in 1990. Both congressional proponents of the ADA as well as disability rights activists believed that passage of this statute would bring about the much-needed legal remedies to combat the pervasive discrimination facing the disabled populace and to reestablish them as an integral part of society. Yet it remained to be seen exactly how successful the ADA was to be in creating employment opportunities for adults with disabilities in the United States and to what extent the public predictions by Congressional proponents of the ADA on this very subject would be fulfilled.

Despite the great attention that was given by members of Congress to passing the ADA, more than 10 years following its enactment, Congress has paid almost no attention

to the effectiveness of the law.¹ This chapter will look at the employment rates for disabled persons 10 years following the ADA's enactment. It will demonstrate that formal enactment of the ADA did *not* bring about the highly anticipated and positive changes in employment opportunities for persons with disabilities. Quite simply, the ADA has not reversed the longstanding and high unemployment trends among persons with disabilities.² Beyond this basic finding, I illuminate at least two of the major problems facing the federal government in measuring the success and/or failure of the ADA. First, the official definition of "disability" has become a major obstacle for interpreting the unemployment rates of the disabled due to the broadening *definition* of disability. (This subject is touched upon in both this chapter as well as in Chapter 4.) This ever-widening definition's application and range of claimants have been in a constant state of evolvment with continued pressure for its expansion since the enactment of the law.³ Secondly, no official and comprehensive study of the ADA has been mandated by Congress to measure its effectiveness since becoming law more than a

¹ This is especially true with regard to whether or not it has led to the predicted increase in employment opportunities for persons with disabilities. Even though the ADA legislation was promoted by its Congressional proponents as being the means of providing the disabled community with fundamental civil rights and the opportunity to improve their quality of life, what was missing was a basis for anticipating the ADA's likely effectiveness. Surprisingly, since its passage, no official federal analysis has focused on investigating and exploring the performance of the ADA to factually measure its legislative efficiency as law (Percy 2001).

² According to one analysis, the ADA has actually resulted in an increase in unemployment since its enactment (Houtenville and Daly 2003, 88).

³ It is important to note that a seemingly ever-evolving definition of disability is not an unusual set of circumstances, legislatively speaking, for a state. Society must constantly grapple with its evolving views of its disabled members (an apt discussion of this issue is found in Drimmer 1993, 1356-1357). Drimmer adds this important comment later in his paper: "*There has been a general evolution in the treatment of people with disabilities from resentment and intolerance to mere toleration. The current congressional view is that the 'problem' still resides within the individual with a disability, as opposed to society. People with disabilities are still given charitable rights in response to their blameless 'unfortunate circumstances.'* Public policy still focuses, as it has for centuries, on diminishing the negative social effects of people with disabilities" (Drimmer 1993, 1405, emphasis added). This "general evolution" also includes, of course, the very definition of disability itself.

decade ago. The problems posed by the lack of such effort are compounded by problems associated with government's method of data-collection.

The limitations of the federal government's primary method of determining who is disabled in the US, the Current Population Survey (CPS), and the limitations of similar federal data-collecting resources, present ongoing problems in accurately assessing the strengths and weaknesses of this landmark piece of legislation. A natural outgrowth of these inadequate data-collection processes has been a widening of the conflict among experts and government agencies as to why there continues to be such high unemployment among the disabled populace.

CURRENT EMPLOYMENT NUMBERS

Since the enactment of the ADA in 1990, a broad range of accomplishments have been realized with regard to implementation of the law: all of the administrative regulations associated with the new law have now been put in place; cities and towns have begun spending billions of dollars to make facilities accessible; assistive technology is increasingly being utilized in the work place; implementation guidelines have been crafted; numerous complaints have been officially registered with the Equal Employment Opportunity Commission and the Justice Department; multiple settlements have been negotiated or imposed; and many or most of the legal barriers to entry into the workplace have been removed (Percy 2001). It would seem after the considerable efforts which have been made to implement this new and landmark law that the employment statistics for adults with disabilities would surely reflect a drop in the number of unemployed. However, this has not proved to be the outcome.

Instead of dropping, unemployment rates have generally remained stable with roughly 70 percent unemployment, depending upon the particular study cited.⁴ This figure is slightly higher than that which was originally quoted by some Congressional proponents during the time in which the ADA was debated in Congress. For example, while the National Council on Disability places the unemployment rate at roughly 70 percent since the time of the ADA's enactment, in 1989 Former Senator Weicker noted on the House floor that *two-thirds* of persons with disabilities in the US were unemployed (as quoted in Bagenstos 2003a, footnote n204, emphasis added).

According to a separate study, unemployment rates rose by roughly 10 percent during the first decade following the ADA's enactment for men with disabilities and rose roughly 5 percent for women (Houtenville and Daly 2003, 88). It remains a stark fact that persons with compelling and significant disabilities also suffer from the highest unemployment rates of any group of citizens in the US. What's more troubling is that this pattern occurs irrespective of their education or professional qualifications (McKay 2005).

A study which scrutinized the employment rates of the disabled as well as the able-bodied from 1987 through 1998 found that unexpectedly, the employment rates of disabled men and women declined during the period beginning in 1992:

For disabled men, employment rates *fell* from 41.6% in 1992 to 34.4% in 1998, and for disabled women, employment rates *fell* from 34.3% to 29.5% (see Burkhauser et al., 2000, Table A6, 47). Given the rising demand for

⁴ According to the National Council on Disability, "Unemployment rates for working-age adults with disabilities have hovered at the 70 percent level for at least the past 12 years" (National Council on Disability 2000a).

labor during this expansion and the rising employment levels of other workers, it is surprising that the disabled did not enjoy parallel gains. The explanation of this counterintuitive drop in employment remains unclear (Dooley and Prause 2003, 71, emphasis added).

Further emphasis on the fact that the ADA has failed to reverse high unemployment numbers among the disabled was provided by Andrew Houtenville of Cornell University, and Mary Daly of the Federal Reserve Bank of San Francisco, who co-wrote a paper in 2003 entitled “Employment Declines among People with Disabilities.” Within this paper they note that the decline in employment rates for persons with disabilities “was broad-based, [and] present in a wide range of demographic and educational subgroups” (Houtenville and Daly 2003, 88).

According to Richard Burkhauser and David Stapleton, both of Cornell University’s Institute for Policy Research,

Despite the promise of the Americans with Disabilities Act of 1990, eight years of uninterrupted economic growth, and a series of government initiatives to integrate those with disabilities into the workforce, survey data tell us that the employment rates of working-aged men and women with disabilities *declined substantially* during the 1990s business cycle. In fact, the employment rate of working-aged people with disabilities was lower in 2000, the peak year of the 1990s business cycle, than at the bottom year of that business cycle (1992). At the same time, employment rates of those without disabilities grew (Burkhauser and Stapleton 2003b, 369, emphasis added).

The public predictions of congressional proponents of the ADA — declarations by members of Congress stating that this new law would open many doors of opportunities and level the playing field for persons with disabilities in the US — appear to not have been brought to fruition. According to Samuel Bagenstos, Assistant Professor of Law, Harvard Law School, “the ADA appears to have had *no* significant positive effect on the rate of employment of people with disabilities” (Bagenstos 2003a, 923, emphasis added). According to Ruth Colker, Professor of Law at Ohio State University, “No study has been able to establish that the ADA has had any positive impact on the employability or poverty rate of individuals with disabilities” (Colker 2005, 69).

With regard to the question of exactly why the ADA has not had a more positive effect on such employment rates, the hypotheses are numerous and complex. Nevertheless, there are two emerging schools of thought which may be said to constitute the leading theories: (1) the inherent vagueness of the law, including the ever-expanding definition of disability,⁵ and (2) a lack of reliable and mutually agreed-upon methods of analysis for determining exactly who is disabled in the US. While neither of these unemployment hypotheses present direct causal ties to the ongoing high unemployment numbers for persons with disabilities, and while other theories have been propounded since the ADA’s enactment (some of which are covered in later chapters), there is some agreement among experts that each of these factors remain principally problematic as

⁵ This also includes its attendant “reasonable accommodations” clause, which will be touched upon in Chapter 4.

they relate to the larger questions of unemployment among the disabled. A closer look at each of these aspects constitutes the remainder of this chapter.

THE EVER-EXPANDING DEFINITION OF DISABILITY

Georgetown University law professor Chai Feldblum, one of the chief drafters of the ADA, noted in the Washington Post in March of 2002 that those sections which provide a definition of disability and related terms were crafted with extraordinary care by expert legal advisors from both the business and disability communities (Lane 2002). However, notwithstanding the care which went into drafting the legislation, the ADA will remain not only controversial but perhaps increasingly problematic as the disabled community, the business community, and the federal courts wrestle with the issue of defining exactly who is and is not “disabled.”

Originally defined to include any physical or mental impairment which “substantially limits one or more of the major life activities” (Americans with Disabilities Act 1990a), the definition of “disability” has since been construed with amorphous and indefinite linguistic assembly. Opponents of the law have repeatedly called attention to the indistinct nature of the statute’s provisions, the end result of which makes determining who is and is not disabled under the statute remarkably complicated. Questions regarding “major life activities” and “substantial limitation” on these major life activities are proving surprisingly complex. According to University of Iowa law professors Peter Blanck, Susan Schwochau, and Chen Song, there can be no conclusive reply to these legal and policy questions because “an answer today may be in need of revision tomorrow” (Blanck, Schwochau, and Song 2003, 321). Even Feldblum

acknowledged, “It never occurred to us that those words would be applied with such constricted interpretations... Congress intended to cover people with a range of health conditions without much lawyer time spent on how disabling the impairment was” (as quoted in Egelko 2002). It was now apparent that the problem of the ever-changing definition of disability would be one of a perpetual nature.

From the outset of the official enactment of the ADA, courts have been trying earnestly to more precisely define just what it means to be disabled. At the same time, thousands of people are attempting to benefit from a law which some attorneys have described as being the most significant employment bill since the Civil Rights Act of 1866 (“Disabilities Act Is Causing Weird, Enormously Costly Complications” 1995). The question of perpetually high unemployment numbers, if not an actual increase in the number of disabled claimants, brings the following questions to the forefront of the discussion: is the increasing unemployment rate among disabled adults in the US a result of the failure of the ADA to fulfill its Title I mandate in opening up employment opportunities for persons with disabilities? Or do the numbers represent this ever-widening circle of disabled claimants as a result of the ever-expanding definition of disability?

Personal and Legal Interpretations of “Disability”

In order for the federal government to attempt to determine the disabled populace it conducts surveys in which respondents are asked to perform a type of self-evaluation with regard to their disability status. According to Bagenstos,

There are three major sources of comprehensive government-compiled disability statistics: the Centers for Disease Control’s National Health

Interview Survey (NHIS); the Census Bureau and Bureau of Labor Statistics' joint Current Population Survey (CPS);⁶ and the Census Bureau and Bureau of Labor Statistics' joint Survey on Income and Program Participation (SIPP). Unfortunately, these sources do not measure disability according to the ADA's definition. Instead, they use a number of different definitions, none of which captures everyone who is covered by the ADA's disability definition, and some of which also capture individuals who are not covered by that definition (Bagenstos 2004, 531).

The daunting task of providing a definitive definition of disability is further complicated in that there will be inevitable variations of stated conditions from one person to the next (Blanck, Schwochau, and Song 2003). Individuals naturally vary in their understanding of the word "disability" and, hence, they may over or under state their respective conditions. Therefore, determining disability status quickly moves into an entirely novel realm of complexity when individuals are left to assess themselves without a common standard on which to base their claims.

As a result of the nature of this ongoing problem, in its 2002 annual report, the National Council on Disability recommended that "The Federal Government should not encourage or support the dissemination of employment data until a methodology for assessing employment rates among people with disabilities that is acceptable to leading researchers and demographers in the field and credible to persons with disabilities can be 'developed'" (National Council on Disability 2002b). In a nutshell, this statement

⁶ CPS data is usually referred to by economic, labor-policy, and disability experts more often than the other forms of survey data as a result of the fact that "the CPS has been shown to provide a consistent measure of trends in the employment status of people with disabilities" (Houtenville and Daly 2003, 88).

summarizes the ongoing problems the federal government (as well as independent researchers) will face as they attempt to determine the effectiveness of the ADA.⁷

Without clearly delineating what constitutes “disability,” determining exactly who is disabled is something which then is left open to personal and legal interpretation. Economic experts like the Washington Post’s Robert Samuelson feel that such a lack of a definition “skirts the hard political problem of critically inspecting who’s disabled” (Samuelson 1999). In his opinion, to truly face the problem of ascertaining who is disabled would be to acknowledge that the situation of the severely disabled is far more serious than originally considered, while the slightly disabled that are able to work full-time and receive benefits may not be truly in need of government assistance (Samuelson 1999, 3C).

Professor Douglas Kruse and Professor Lisa Schur, both of Rutgers University, have commented that constant vigilance in observing shifting definitions of “disability” and routinely reviewing disability policy will strengthen federal aims to effectively predict employment rates and the influence of public policy among the disabled community (Kruse and Schur 2003). The federal government, in other words, must consistently attempt to further refine (and perhaps even narrow) the definition of disability. This must be done in order to prevent the inclusion of most Americans into the ranks of the officially disabled.

In 1984, Deborah Stone, then a professor at Harvard University, wrote a prescient work entitled *The Disabled State*. Within this volume Dr. Stone called attention to the

⁷ More on the NCD’s recommendations for improving the government’s surveying and statistical methodologies is contained later in this chapter.

fact that governments throughout the industrialized world were already experiencing extraordinary difficulties in coping with this fluctuating definition of disability:

The disability concept is in fact highly flexible. Despite all efforts, even the medical concept remains very loosely defined, and the mechanism for determination of disability offers many opportunities for purposeful manipulation. The assignment of citizens into [government-based] distributed systems remains a highly political issue which is not readily resolved by the creation of formal administrative schedules or the delegation of decisions to the medical profession (or any other technical experts). Thus, there is a constant struggle over the boundaries, which manifests itself in the shifting pressures for expansion and contraction of the disability category (Stone 1984b, 140).

As long as this situation persists — the lack of a coherent and clearly stated definition of disability — it will be impossible to accurately ascertain the performance of the ADA, not to mention employment figures for persons with disabilities.

Pressures To Contract and Expand Definition

In commenting on the increasing expansion and contraction of the disabled definition's boundaries, Dr. Stone noted that these pressures come from three major sources: (1) Individuals who are seeking aid – those who pressure the government to expand parameters by applying to programs and acting to receive favorable decisions; (2) gatekeepers of the programs – those who actually make eligibility decisions and put pressure on the definition's boundary by applying their own professional norms and biases to individual cases; and (3) high-level policymakers — the legislators,

administrators, and judges who create the general rules by which disability programs operate and who thereby design and redesign the boundary-maintaining mechanism itself (Stone 1984b). As a result of this shifting definition of disability — this sand bed which is supposed to constitute a foundation for all governmental assessments, decisions, and projections in relation to the disabled – the very task of primary measurement of the disabled category itself becomes significantly problematic.

In a 1998 case, for example, the Supreme Court handed down a decision which stated that an individual with HIV could be covered under the ADA even though physical symptoms of the virus were absent. As a result of this and other similar rulings, many in the American business community became concerned. Such employers are under legal obligation to make reasonable, and sometimes expensive, accommodations for persons with disabilities, and many felt that the expense of such accommodations could get out of hand (“Politics Versus Prudence” 1999). However, in a 1999 Supreme Court ruling which attempted to rein in this ever-expanding definition of disability, Justice Sandra Day O’Connor, writing for the seven-member majority, noted that if the seemingly wide coverage under the ADA was not addressed, as many as 160 million Americans could potentially be immediately qualified as persons with disabilities (*Sutton v. United Air Lines, Inc.* 1999). A 1999 editorial in The Denver Post summarized the potential conundrum by noting that if the ADA’s definition of disability was expanded to include virtually all actively employed Americans, the end result would be a clear dilution of the significance of this statute, especially for those who are actually mentally and physically disabled (“Politics Versus Prudence” 1999).

Bagenstos echoed Justice O’Connor’s concerns when he said:

When critics of decisions interpreting the ADA speak of “the principles upon which the [statute] is premised,” they appear to assume that... the statute is premised on a particular conception of disability and the appropriate societal response to it, a conception that draws on a major strand of the thinking of disability rights advocates. Roughly put, under that conception disability consists of the quantum of disadvantage an individual experiences because of the incompatibility between that individual’s actual or perceived physical or mental condition and the societal institutions that control access to an opportunity she desires. The appropriate societal response to disability, in this view, is to rearrange the institutions that control access to opportunities and make them accessible to all individuals who are currently excluded by them (Bagenstos 2004, 926).

Such remedial justice in behalf of the disabled would prove not only unmanageable but unintelligible given the fact that such a form of justice — that which seeks to compensate the disabled for any and all economic and social shortcomings which may have been brought about as a result of their disability — cannot be handed out by mere mortals.⁸ The courts must rely upon more tangible and lucid principles and doctrines when attempting to apply the ADA. Unfortunately, such lucidity — in the form of agreed-upon federal measures and standards — is presently missing.

In 2002, the Supreme Court created a rather constricted definition of what it means to be disabled (*Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams*

⁸ According to Ruth Colker, the Court “has tried to find a definition of disability that is broad enough to cover approximately 43 million Americans but not so broad as to cover 150 million Americans” (Colker 2005, 105).

2002). The Court ruled that an assembly-line worker who suffered from carpal tunnel syndrome could not be classified as disabled while she could still participate in regular day-to-day actions which might include personal hygiene and domestic cleaning, among others. Most striking, within the decision the justices also manifested an indication that they did not consider routine employment to constitute a “major life activity.”⁹ Such a decision is key because only major life activities are covered under the ADA. Furthermore, the justices seem prepared to provide future rulings along these same lines — that an individual cannot be considered as disabled simply as a result of the fact that they can no longer maintain employment (Egelko 2002).

Concerning this ruling, Justice O’Connor wrote that the ADA’s definition of disability “must be interpreted strictly to create a demanding standard” (as quoted in Egelko 2002). Not doing so, she noted, would result in a much higher number of disabled Americans than Congress believed existed when they passed the law. Or more particularly, she emphasized the fact that the Court would step in where Congress had feared to tread, i.e. defining a disability more precisely or even more exactly in order to stem the tide of litigation which they believed would be the ultimate result if the Court was reluctant to act.

⁹ Such a constriction of the definition of disability was not foreseen by congressional proponents of the ADA, and certain legal observers believe that with these recent rulings, the Supreme Court has hamstrung the law: “This narrow construction of the definition of disability, commentators suggest, has contributed to plaintiffs’ low success rates in ADA cases, which has in turn limited the ADA’s effectiveness (particularly Title I)... Administrative agencies and policy bodies have also pointed the finger at the Supreme Court, and specifically its decisions that define disability, as the culprit for what is wrong with the ADA... The National Council on Disability... has issued a report entitled ‘Righting the ADA,’ intended to recommend to the President and Congress on how to best protect the civil rights of people with disabilities. This report takes the position that ‘several of the Court’s rulings involving the ADA [particularly Sutton and Toyota] depart from the core principles and objectives of the ADA,’ compromising Title I’s effectiveness” (Waterstone 2005, 1815-1816).

Palo Alto lawyer Fred Alvarez, who served on the U.S. Equal Employment Opportunity Commission and was an assistant labor secretary overseeing disability programs, said the Supreme Court justices are merely attempting to bring a measure of lucidity to the law: “They’re looking at a statute that can be read to cover almost everyone in the country... [the Supreme Court is] now saying that Congress could not have intended that” (as quoted in Egelko 2002). Another lawyer who primarily represents the business community at large, Douglas Dexter of San Francisco, said the court is intentionally keeping the definition of disability, “quite narrow... the narrowest you could interpret it within the language of the statute” in order to restrict the expansion of the definition of disability because the Court is trying to limit the impact of the “fairly dramatic requirement that’s being imposed on employers” to accommodate the disabled under the ADA (as quoted in Egelko 2002).¹⁰

Where the courts will ultimately conclude with regard to their efforts to rein in the definition of disability remains an open question. The outcome of such judicial wrangling will have a significant impact on the actual number of officially disabled US citizens covered by the ADA, as well as the number of disabled who may be included in the high unemployment rates reported by the US Census Bureau.

DIFFICULTY IN MEASURING ADA’S EFFECTIVENESS

With regard to the actual number of persons who are disabled in the United States, the reality of the situation at hand is that the federal government does not know who is actually disabled. Therefore, a most legitimate and pressing question regarding disability

¹⁰ More on the impact the ADA has had on the business community will be discussed in Chapter 5.

policy in the US could be stated as follows: If the federal government doesn't actually know who is and is not disabled in the United States, how is it possible for the government to be able to successfully oversee the workings of this considerable law?

The task of determining a correct estimation of the disabled populace is one that is rife with contention, at least as far as labor-policy and disability experts are concerned (Kruse and Schur 2003; Samuelson 1999; Stone 1984a). For instance, Peter Blank of the University of Iowa's Law School recently highlighted one of the principal difficulties associated with attempting to study disability issues: simply utilizing current surveying methods in determining the disabled populace is not nearly as simple as that of determining the sex or ethnicity of a particular population, for example. The reason for this is due to the manifestly diverse types of disabilities and their varying characteristics, contrasting conditions, and manifested durations (Blanck, Schwochau, and Song 2003). Unfortunately, the Current Population Survey (CPS) — the survey from which the federal government obtains its primary disability numbers — does not allow for such disparate analyses.

Current Population Survey

According to the US Census Bureau's web site,

The Current Population Survey (CPS) is a monthly survey of about 50,000 households conducted by the Bureau of the Census for the Bureau of Labor Statistics. The survey has been conducted for more than 50 years. The CPS is the primary source of information on the labor force characteristics of the U.S. population... Respondents are interviewed to obtain information about the employment status of each member of the household 15 years of age and

older. However, published data focus on those ages 16 and over. The sample provides estimates for the nation as a whole and serves as part of model-based estimates for individual states and other geographic areas (U.S. Census Bureau).

While the Current Population Survey continues to represent the primary means of data-collection utilized by the federal government, it is certainly not without its critics. Labor experts Richard Burkhauser and David Stapleton (2003), both of Cornell University, question the accuracy of the CPS due to its *self-evaluation* format.¹¹ Such self-evaluation measures represent the types of methods principally employed by the Bureau of Labor Statistics and the US Census Bureau, data-collection methods which may be seriously flawed.

The principal problem associated with reliance upon CPS is that in having the option to identify themselves as disabled, survey participants are not only more likely to persist in identifying themselves as truly disabled over prolonged periods of time, they are also more likely to be influenced by other economic and labor force factors such as the current demand for particular skills, current economic conditions, and current employment guidelines (Kaye 2003). According to Burkhauser and Stapleton, such a form of surveying caters to “the size and composition of the population who consider themselves to have work limitations [which can fluctuate according] to changes in the policy and economic environment” (Burkhauser and Stapleton 2003b, 373). The key point is that *it is the members of the disabled community themselves* who are providing

¹¹ An example of the questions which pertain to disability under the monthly CPS can be found in Appendix A.

the principal data utilized by the federal government in determining the disabled populace. It is not difficult to see how such methodologies can easily become suspect.

The validity of the CPS employment rate measure has been called into question because of the possible sensitivity of the size and composition of the population who consider themselves to have work limitations to changes in the policy and economic environment (Burkhauser and Stapleton 2003b, 373).

Many labor policy experts and labor economists alike believe that the number of individuals who are declaring themselves to be disabled (through the CPS) and the ever-increasing unemployment rate for persons with disabilities are problems that cannot be ignored. With the CPS's data fundamentally unauthenticated, federal analysts are incapable of linking any growth or decline in the employment of the disabled populace to a definitive law or government program, let alone determining whether or not it is even legitimately tracking the disabled (National Council on Disability 2000a). This was not the outcome forecasted by Congressional proponents of the ADA.

Calls for Improvement in Data Collection Methods

In assessing the current methodologies of data collection, both government and independent experts alike have called for significant improvement in such survey and statistical methodologies. According to the National Council on Disability's 2000 *Progress Report*, "the collection of data and research on people with disabilities has made incremental progress, at best" over recent years (National Council on Disability 2000a, 16). While the US Census Bureau is endeavoring to further its reporting abilities to solicit explicit information, current and official information available does not provide

adequate data to be able to make conclusive decisions regarding the steady climb of high unemployment figures.

University of Iowa Professors Peter Blanck, Susan Schwochau, and Chen Song came to the same conclusions regarding the lack of foundational data upon which government officials, policymakers, labor experts, and disability advocates alike might be able to build current and future US disability policy: “We submit that existing empirical research provides little basis on which policymakers can make informed decisions regarding whether the ADA is the cause of employment declines and should thus be amended, repealed, or left untouched” (Blanck, Schwochau, and Song 2003, 326).

Congress simply has not created an effective and comprehensive mechanism for monitoring the overall success of the ADA (Percy 2001). One of the greatest challenges in improving the CPS’s efficacy and efficiency is the fact that there currently exists insufficient financial and human resource capacity to monitor implementation and compliance (not to mention enforcement of penalties when the law has been violated). In reality, those limited government resources that are currently in place (e.g. limited resources associated with government agencies such as the Equal Employment Opportunity Commission, the Department Of Justice, and the National Council on Disability, for instance) offer only a mere piecemeal collection of information about those disabled persons who experience discrimination based on their disability. According to Steven Percy of the University of Wisconsin, Milwaukee,

We currently lack systematic means to assess the overall effectiveness of ADA implementation... What is needed is more research—and greater resources to support research studies—aimed at understanding what does

and does not work in implementation, what best practices might be identified and communicated to others, and how we can move beyond stereotypes and misconceptions to greater opportunities for people with disabilities (Percy 2001, 638).

Notwithstanding the fact that the CPS is an inadequate and flawed instrument to trace employment trends, government spending nevertheless depends on this widely valued survey for researching employment rates of the disabled populace. Such reports are still looked upon as the most reliable forms of data surrounding employment rates for persons with disabilities in the United States (National Council on Disability 2000a).

THE NATIONAL COUNCIL ON DISABILITY'S RECOMMENDATIONS ON DATA COLLECTION

In association with the lack of available data as well as the lack of suitable research methodology in place at the federal level, the NCD made several significant recommendations to the federal government in its 2000 *Progress Report*. Foremost among these recommendations was the express need for a comprehensive and collaborative exertion on the part of multiple federal data-collecting agencies. In particular, the report noted that “the US federal statistical system comprises some 70 agencies which collect and disseminate information for use by governments, businesses, researchers, and the public” (National Council on Disability 2000a, 17). It is not difficult to understand how statistics procured by one federal agency may be misunderstood or may conflict with another set of statistics from another agency. Therefore, the report urged all federal agencies “to review their current research-funded grants and contracts to

ensure that research reports regarding employment of people with disabilities do not use unreliable databases” (National Council on Disability 2000a, 17). Finally, the report strongly advises Congress to conduct a comprehensive assessment of all statistical research endeavors currently under the auspices of the Interagency Council on Statistical Policy (National Council on Disability 2000a).

The continued rise in unemployment numbers for adults with disabilities in the United States represents a reversal of the expected employment numbers of congressional ADA proponents. Yet the numbers themselves simply do not tell the whole story. Much more research and associated data are needed.

CONCLUSION

This chapter has shown that with regard to unemployment rates among the disabled, the results anticipated from enactment of the ADA were not brought to fulfillment. According to at least one report, the unemployment rates actually rose — roughly 10 percent during the first decade following the ADA’s enactment for men and roughly 5 percent for women — as a result of the ADA becoming law. This actual rise in unemployment for persons with disabilities continues to represent a unique labor policy puzzle.

This chapter has also presented two of the principal arguments asserted by disability and labor-policy experts alike as to why the ADA has not had a more positive effect on the unemployment numbers of persons with disabilities. A combination of the shifting definition of disability and the inadequate statistical methodologies for measuring unemployment among the disabled has left government and policy experts unsure as to

exactly why the ADA has not had a more positive effect. Performing more precise research will require the government to take two courses of action: (1) produce a strong and lucid definition of disability in order to clearly and appropriately identify who is disabled, and (2) correct the format of the Current Population Survey (or employ another type of survey altogether) to provide the much needed demographic information as to who is disabled in America.

Thus far, the US Census Bureau is the only federal agency which is presently responsible for determining the exact number of persons in the US who suffer from an official disability. The fact that no official federal or independent-agency study has been conducted on the successes and failures of the ADA likewise continues to represent a significant roadblock to better understanding not only the ADA's effectiveness but also the true status of the disabled population in the US. As long as the definition of disability remains elusive, the greater the number of individuals able to claim disability status; the greater the number of individuals claiming official disability status, the greater the potential for higher numbers of unemployed disabled adults.¹²

The above factors point to a critical reality: The unemployment figures for adults with disabilities in the US have not improved since the ADA was enacted in 1990. This unanticipated lack of a reversal of high unemployment numbers (at least among ADA proponents) may stem from an increase in self-determined disability status (in association with the CPS) or it may be the result of other factors such as the inherent vagueness of the law, which will be discussed in Chapter 4. However, unless and until the federal

¹² Discernable insights show there is a connection between the growth in the number of disability claimants and the escalating unemployment rate for persons with disabilities. For further information, see: (Burkhauser and Stapleton 2003b)

government takes the advice of the National Council on Disability in developing better methods for more accurately determining who is and is not disabled in the US, it will have a similarly and perpetually difficult time in ever accurately determining the number of unemployed disabled adults, and consequentially, whether or not the ADA is actually doing more harm than good in seeking to reverse this unfortunate trend.

Having considered the basic problem of employment for the disabled since passage of the ADA, in Chapter 4 I will look at structural problems with the ADA that may possibly account for the continuing trend of unemployment among the disabled. Chapter 4 will look at the structural problems with the ADA. In particular, it will more closely examine the overall scope of the law and whether or not the ADA was overly broad in its approach to defining disability. Such an overly broad definition of disability, some experts contend, constitutes one of the primary reasons the ADA has not been more effective in reversing unemployment trends among disabled adults.

Chapter 4

Problems with the Law

Introduction

Why has the ADA failed to have the results that proponents anticipated? This ongoing policy puzzle remains as yet unsolved. However, one of the chief problems hampering the effectiveness of the ADA is the statute's architecture, particularly with regard to the definition of disability. As a result of the language of the statute (particularly its vagueness), the ADA has been considered problematic (Bagenstos 2003a, 976; Bagenstos 2003b, 874; Hoffman 2003, 1230, 1232; Lee 2003, 13; Mathes 1999, 252; McPheeters 1998, 198; National Council on Disability 2002a, 1; National Council on Disability 2004, 32, 65; Young 1997, 82). An inability to clearly define and delineate exactly what constitutes a disability represents the Achilles heel of the law.

The framers of the ADA also decided to rely upon voluntary compliance with the law rather than structuring the bill in such a way that failure to comply would automatically result in serious penalty. As a result of the ADA's lack of teeth, enforcement of the civil rights statute has been less than ADA proponents would have originally hoped.

This chapter seeks to provide the reader with a brief overview of the two major problems that exist with the law — problems which prevent Title I (especially) from fulfilling its mandate in creating more employment opportunities for persons with disabilities. These two major problems are: (1) the imprecise language of the ADA, and (2) the law’s reliance upon voluntary compliance rather than active enforcement.

THE IMPRECISE LANGUAGE OF THE ADA

The ADA’s progress has been halted as a result of its own vagueness (see Crossley 1999, 624, footnote n18). The legislation is often simply ignored because it is overly broad in its architecture (Crossley 1999, 636). Others have stressed that it is impossible for businesses to decipher and abide by the statute’s requirements because not even the courts can agree on precise rules of interpretation. Still others feel that the ADA was originally unclear with regard to the specific conditions and timetables for making accommodations to structures constructed prior to the law’s enactment (Leonard 2000). Added to these considerable difficulties, the law was intentionally written with such broad strokes that some believe it is impossible to know for certain what conditions qualify as protected disabilities (for an exploration on the vagueness of the ADA see Dudley 1999; Stuhlberg 1991).¹ Finally, business leaders continue to question exactly how business should respond to such profound statutory vagueness as it relates to their day-to-day operations (“Lawmucking Congress -- Disabilities Act a Sloppy Effort” 1999).

¹ In referencing *Toyota v. Williams* (2002), a case in which the Supreme Court constricted the definition of disability, Rep. Steny H. Hoyer (D-Md.), one of the principal proponents of the ADA in the House, noted: “As the congressman who shepherded the legislation through the House of Representatives, I believe that the ‘intent of Congress’ was clearly more expansive than [the Supreme Court’s] ruling would suggest” (Lane 2002).

Was the Vagueness of the Law Intentional?

Disability advocates point to the fact that the sometimes imprecise language utilized throughout the ADA is advantageous and was indeed very much intentional. The language of the ADA, they contend, is intentionally broad in order to ensure that all types and varieties of disabilities are covered (Wolfe 1998). Evan J. Kemp, Jr., chairman of the Equal Employment Opportunity Commission at the time of the ADA's enactment, said the ADA's "rules were purposely left vague to allow for the expansion of interpretations in the future" (as quoted in Holmes 1991). Mr. Kemp also noted that precise policies and regulations dictating to business owners the exact manner in which they must provide support and accommodation pertaining to every personal need of any disabled employee would have been needlessly complex.

The ADA was therefore crafted with language which was intentionally broad from the very outset. Peter David Blanck of the University of Iowa Law School noted the following in 2000:

... just as late nineteenth-century federal legislation embodied a vague and capacious conception of disability that ultimately benefited veterans who convinced local physicians to certify them as pension-worthy, it is possible that the ADA's 'notoriously, albeit intentionally, vague' definition of disability will ultimately become a source of expanded rights for the disabled rather than a barrier to successful litigation (Blanck 2000, 49).

According to disability advocates, it was essential that the ADA not be structured too narrowly. Any contracted assembly of the law would similarly constrict the possibility of the expansion of the rights of the disabled as time progressed and as the law

was further refined in the courts.² As Ruth Colker, Professor of Law at Ohio State University, has explained in her review of the development of the ADA,

The report of the Senate Committee on Labor and Human Resources (along with the floor debate) made it clear that Congress maintained its intention to provide broad coverage. For example, the committee report made manifest that it intended the term ‘disability’ to be interpreted broadly. It specified that the term includes ‘orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism’ (as quoted in Colker 2005, 35-36).

Yet the intentionally vague language of the statute has come under fire. Some political commentators have begun to seek a more precise explanation for the ADA’s failure to increase employment opportunities for the disabled. As a result of the continually high number of individuals who are disabled and unemployed, some have begun to plainly place the blame on Congress for what they see “as a poorly worded statute with so many vague terms as to render the legislation unworkable” (see Crossley 1999, 625; Malloy 2001, 606).

² In regard to this natural evolution of statutory implementation and interpretation, Mary Crossley, Professor of Law at the University of California, Hastings College of Law, has noted that, “The amount—though not timing—of litigation is also undoubtedly attributable to the imprecision of the statutory definition itself and to the inherent difficulties of identifying members of the ADA’s ‘protected class.’ The ADA prohibits discrimination against an ‘individual with a disability’ and defines disability primarily as a ‘physical or mental impairment that substantially limits one or more of the major life activities of such individual.’ The statute, however, neglects to define any of this definition’s constitutive elements. The result is a definition that is notoriously, albeit intentionally, vague and thus subject to varying interpretations” (Crossley 1999, 624).

However, on the opposite side of the aisle, there are those who believe that there is a certain amount of wisdom in the intentional vagueness contained within the statute:

The EEOC Technical Assistance Manual states, ‘Neither the statute nor EEOC regulations list all diseases or conditions that make up ‘physical or mental impairments,’ because it would be impossible to provide a comprehensive list, given the variety of possible impairments.’ If the statute specifically articulated those... illnesses protected, it would invariably leave out others that should legitimately be included... The statute should not be a license to discriminate by virtue of too much specificity, but the Act should do more in order to clearly apprise employers of their obligations while apprising employees of their rights. (Mika and Wimbiscus 1996, 189-190).

As discussed above, the balancing act that Congress created within the law itself was, according to some disability and legal experts, precisely correct in not defining any physical or mental impairment too specifically—specificity which would prohibit some legitimate claims under the law. Yet at the same time, other experts believe that clarity and specificity are absolutely necessary in order to not only hinder abuse but to bring about appropriate implementation of the law itself, something which these experts believe is a goal which may be increasingly out of reach. The balancing act that Congress implemented in the design of the statute is one that has now been passed to the courts in order to achieve some form of order out of this intentional vagueness.

The Vagueness of “Reasonable Accommodation” and “Disability”

Along with the vagueness associated with defining what constitutes a disability under the law, there is also the vagueness intrinsic to the phrase “reasonable

accommodation.” The ADA requires that every employer make reasonable accommodations for each qualified individual with a disability. Yet as long as this phrase remains problematic (as far as interpretation is concerned), the law will continue to be less effective than its congressional proponents originally intended.

According to many within the business community, successfully interpreting what constitutes a reasonable accommodation remains a significant problem. The statute itself declares, “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” (Americans with Disabilities Act 1990a). On its face, such a definition does not seem overly complex or fraught with potential statutory entanglements. Yet this has been the exact outcome of what legal and labor policy experts refer to as an unnecessarily or overly vague legislative clause. As a result of the vagueness of the law there has emerged a tendency on the part of ADA proponents to construe more tortured and complex definitions of phrases such as “reasonable accommodation.”

For instance, in 2000 the NPR broadcast *All Things Considered* posted a special story which focused on the 10-year anniversary celebration of the ADA. Within that broadcast, Dick Thornburgh, who served as Attorney General in George H. W. Bush’s Administration, attempted to clarify the meaning of disabled. He explained that the legal definition of disability is based on, “the inability of an individual to participate in a major life activity or perceived as being unable to participate, meaning that they cannot be treated differently as though they had a disability” (The Diane Rehm Show, NPR, as

quoted in Perry 2003, 74). According to many legal observers, such tortured definitions are far too frequently at the heart of the ADA as a direct result of its unfortunate crafting.

According to Alex Long, Assistant Professor of Law, Oklahoma City University School of Law, it was Congress' own legislative miscarriage which has led to the legal problems that plaintiffs have encountered in association with the reasonable accommodation clause. Because Congress failed to unmistakably identify and delineate the precise extent of an employer's responsibilities under the reasonable accommodation clause, the Supreme Court (among others) has felt it necessary to step into the fray:

One of the more plausible explanations for the courts' strict interpretations of the definition of disability is that courts have created a high disability threshold in order to avoid having to decide difficult reasonable accommodation issues. According to this theory, because Congress failed to provide courts with any meaningful guidance as to when a proposed accommodation is reasonable or imposes an undue hardship, courts have been reluctant to permit plaintiffs to pass the disability gate, lest they be forced to delve into the minutia of the workplace with little more to go on than an abstract notion of reasonableness (Long 2004, 622-623).

The use of imprecise language also applies to Congress' attempts to further define exactly what is a disability under the law. For example, a disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities" (Americans with Disabilities Act 1990a). As a 1999 editorial in The Columbus Dispatch noted, "Try to find a medical, emotional or psychological condition ... that wouldn't fit into such a yawning definitional chasm" ("Lawmucking Congress --

Disabilities Act a Sloppy Effort” 1999). With respect to exactly what is and is not a “reasonable accommodation” under the statute, legal experts are expressing similar confusion and frustration. According to the ADA statute itself,

The term ‘reasonable accommodation’ may include: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and with other similar accommodations for individuals with disabilities (Americans with Disabilities Act 1990b).

Although the language used in this section is highly technical, the overall and lasting impact is still one of ambiguity and uncertainty. The word reasonable is fraught with danger simply because what may be reasonable to one side of the legal or political aisle may be totally unreasonable to the other. The word “reasonable” is also wide and broad in its etymological history. “There are few words in the English language more open to interpretation, disagreement and confusion than ‘reasonable’” (Riordan and Patton 2001). Yet the word “reasonable” continues to constitute the backbone of the comprehensive statute known as the ADA.

Given the inherent subjectivity of the term and the absence of any meaningful definition of ‘reasonable accommodation’ in the text of the ADA or of useful guidance in the legislative history, it should come as no surprise

that the federal courts have struggled for the past 11 years to interpret and apply the concept — often with mixed results (Riordan and Patton 2001).

As long as any aspect of a law remains interpretively problematic, it weakens the law and makes it more ineffectual. If the enforcement branch of government (i.e. the Executive branch) experiences difficulty in interpreting the law, such difficulty hampers its enforcement powers. Furthermore, anything that makes the law vague makes it more prone to be evaded or circumvented.

What was Congress' reasoning behind leaving the bill seemingly so open to individual interpretation? According to some policy experts, it comes down to the fact that the ADA may never have been passed if disability itself had been defined more specifically and with much more careful attention to detail. Giving a more precise definition to disability — to that which qualifies an individual to be disabled under the statute — would mean that members of Congress would have had to be responsible for literally defining who won and who lost under the statute, as far as members of the disabled community are concerned. If the definition of disability were too narrow, the end result would be an alienation of a certain number of disabled constituents. This certainly doesn't mean that congressional proponents of the ADA were backing the law (including its inherent vagueness) simply to secure the support of their disabled constituency. Instead, it is important to remember that the idea of inclusiveness was paramount in framing the law.

As a result of the dominant focus on inclusiveness, the statute resulted in the definition of disability becoming rather vague. More precisely defining “reasonable accommodation” as well as “undue hardship” also would have resulted in members of

Congress engaging in potentially excessive battles with the business community, a tussle many were anxious to avoid. “It was much simpler and safer to leave those difficult issues unresolved and toss it to the executive branch to sort out” (“Lawmucking Congress -- Disabilities Act a Sloppy Effort” 1999).

Not long after formal enactment of the ADA, the National Legal Center produced a brief guidebook for American companies. Calling attention to the widely held legal opinion that the law is overly broad and oftentimes vague, the guidebook counseled business owners that it was probably necessary to allow a full decade of evolution—in the realms of legal interpretation and regulatory compliance—to be brought to pass before the American marketplace would be able to successfully deduce exactly what the ADA required of individual enterprises. Until this process has been brought to full fruition, the National Legal Center advised, both business owners and employees with disabilities were likely to face an undecided and somewhat agonizing education process (“Lawmucking Congress -- Disabilities Act a Sloppy Effort” 1999).

The vagueness of the law and the decision of its crafters not to specifically limit definitions of disability and reasonable accommodations, for instance, continue to create significant problems for all parties involved in successfully incorporating the ADA into the American marketplace.

The Effect of Recent Supreme Court Decisions on the Reasonable Accommodations Clause of the ADA

Recent Supreme Court decisions have sought to constrict the definition of disability (*Sutton v. United Air Lines, Inc.* 1999; *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams* 2002; *US Airways, Inc. v. Robert Barnett* 2002). This constriction

of the definition of disability, and therefore exactly who qualifies as disabled under the ADA, likewise constricts the potential accommodation costs for the US business community. It also limits the likelihood of successful discrimination suits against American companies. Such decisions are rendering moot some of the cries of the business community against the costs of accommodations, as well as the cries against the potential for frivolous and excessive litigation. (This subject will be addressed further in Chapter 5.)

With these recent rulings it appears that the judicial branch of the federal government is not going to allow the ADA to become a fiscally open-ended legal device in securing accommodations for employees with disabilities. These rulings also make it clear that the Supreme Court will not allow the relatively new law to act as a formal redress for every conceivable form of potential discrimination against the disabled. Notwithstanding the fact that some disability advocates see these fresh rulings as unfortunately limiting the ADA's original purpose, the Court has found sufficient need to provide a more contracted application window as the government seeks to protect the civil rights of persons with disabilities. This need is a direct product of the intentional vagueness of the law.

As a result of these recent rulings, a number of labor and disability policy experts are now proffering the idea that the ADA must be amended if it is ultimately to be as efficacious as its proponents and framers originally intended. Among those changes which are being most highly recommended is the congressional upending of these recent Supreme Court decisions (Waterstone 2005, 1820). The NCD, for example, is strongly suggesting an amendment of the current definition of disability under the ADA in order

to ultimately rescind *Sutton v. United Air Lines, Inc.* (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams* (2002). Additionally, the NCD is also recommending a clarification of the “major life activity” clause:

The NCD would ... legislatively clarify that substantial limitation of major life activity means “either total inability to perform an activity or significant restrictions as to the condition, manner, or deviation under which an individual can perform,” instead of “prevents or severely restricts an individual from performing the activity” (thus overturning Williams). Commentators have also urged that the “regarded as” prong be restored to more of a catch-all provision. Finally, the NCD recommends revising the ADA to counteract the perceived enlargement of employers’ defenses on the lack of “reasonableness” of a requested accommodation (Waterstone 2005, 1820-1821).

The clarifications that may come as a result of amending the current definition of disability would probably prove helpful. The present broad and perhaps vague definition of disability has proven to be unworkable, at least with regard to the original expectations of congressional proponents of the ADA. More specifically, changing the language surrounding the major life activity clause of the ADA may go a long way towards bringing to fruition the broad inclusion of large numbers of persons with disabilities under the protective civil rights canopy known as the ADA.

Increase in Litigation

Because of the fact that many legal experts believe that the ADA was crafted too broadly – meaning that it was crafted using imprecise and undefined terms — the task of

fleshing out such meanings was consequently left to the federal judiciary. According to some observers, the result has been an increase in overall disability litigation, a concern that is addressed in Chapter 5.³ Certain ADA opponents believe that as a direct result of the vagueness of the language, the statute has been most welcome for trial lawyers, promoting a steady and costly number of lawsuits (O'Quinn 1991).

Speaking to a group of business lawyers in 2002, Supreme Court Justice Sandra Day O'Connor said the ADA illustrated what happens when a bill's sponsors "...are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together... That Act is one of those that did leave uncertainties as to what Congress had in mind" (as quoted in Lane 2002).⁴ The supposedly intentional vagueness of the ADA's language and structure continues to be an ongoing problem many years after the bill's enactment in 1990.⁵

Certain lawsuits seem inevitable as a result of Congress designing the ADA to be purposely vague.⁶ Because of the imprecise language of the law, the ADA naturally

³ According to these same observers, such increased litigation further perpetuates the underlying myth associated with the ADA in general: that hiring people with disabilities is a risk because of the attendant and predictable litigation which, they believe, most probably will follow.

⁴ The ADA's vagueness has been particularly troublesome to American business. Wendy Lechner, who directed research and policy for the National Federation of Independent Business, echoed these sentiments in 1992: "This is one of the most damaging bills to business in a long time. So much about the law is vague that business owners won't know until they've been sued whether they're in compliance" (Spayd 1992).

⁵ Writing in USA Today, author James Bovard, who serves as a policy advisor to The Future of Freedom Foundation and is a frequent contributor to the American Spectator, highlighted the vagueness of the law when he noted the following in 1994: "The Americans with Disabilities Act is legislation at its worst: vague, confusing and self-righteous. It is the epitome of a pseudo-law that gives vast coercive, arbitrary power to a federal agency and judges and yet prevents businesses from knowing what they must do to obey the law. The law's regulations are replete with the phrase 'on a case-by-case basis' because Congress and federal bureaucrats refuse to specify what is illegal behavior regarding the disabled. Instead of bright lines, Congress and the Equal Employment Opportunity Commission have produced a verbal slop bucket, the type of gruel certain to produce a feeding frenzy among lawyers" (Bovard 1994).

⁶ For example, what actually constitutes a "reasonable accommodation" versus an "undue hardship" for any particular US enterprise may depend chiefly on its total available assets (Kilborn 1992).

becomes less effective as a result of decreased potency. Furthermore, for the rule of law to guard and protect the rights of a nation's citizenry, citizens need to understand what the laws mean. "Laws must be clear, specific and stable so that citizens, businesses and public institutions know what is legal and illegal and can plan accordingly" ("Lawmucking Congress -- Disabilities Act a Sloppy Effort" 1999). It is impossible for citizens, associations of citizens, business groups, or individual enterprise entities, i.e. corporations, to be able to effectively operate "within the law" unless and until such entities understand what the law actually is. Unfortunately, when the rules governing a society are purposely vague, the society as a whole runs a great risk of undermining the very intention of establishing a democratic society: "...to the end it may be a government of laws and not of men."⁷

THE ADA AND VOLUNTARY COMPLIANCE

Another problem with the crafting of the ADA—one of the chief weaknesses according to critics throughout the disabled community—is its simple lack of teeth. Unlike the previous civil rights laws upon which the ADA has been founded, it relies more on "voluntary compliance" rather than strict, authoritative enforcement on the part of the federal government. According to some experts, the federal government has

⁷ From the Massachusetts Constitution, Part The First, art. XXX (1780).

actually commenced a very limited number of legal cases (Kelly 2000).⁸ Because the Justice Department and EEOC have been especially mindful of a potential backlash within the business community, enforcement of the ADA has been approached through a stratagem of “education, persuasion, and mediation” (Kelly 2000).

Former Attorneys General Janet Reno and Dick Thornburgh echoed this point in a Wall Street Journal article in 1995:

Our top priority [within the Justice Department] has been to encourage *voluntary* compliance. We have geared the department’s efforts toward education—providing technical assistance and information to help businesses and local governments comply with the act in easy, cost-effective ways... And we have sought to use the ADA’s enforcement tools—litigation and civil penalties—only as a resort against those who thumb their noses at the law (Reno and Thornburgh 1995, emphasis added).

One reason the Justice Department may be able to achieve results through voluntary compliance is the unobtrusive average costs associated with reasonable accommodations under the ADA. According to the National Council on Disability, the average cost incurred by business in accommodating a person with a disability, i.e. the actual cost of fulfilling the ADA’s reasonable accommodation provision, is about \$200.

⁸ One of the consistent clarion calls from the disabled community is for more funding to be appropriated by Congress (to the Justice Department) in order to more effectively enforce the ADA. In a June 2000 report produced by the National Council on Disability, the Council drew attention to this fact by stating the following: “Critically, many of the shortcomings of federal enforcement of ADA identified in this report are inexorably tied to chronic underfunding and understaffing of the responsible agencies. These factors, combined with undue caution and a lack of coherent strategy, have undermined the federal enforcement of ADA in its first decade. Their net impact has been to allow the destructive effects of discrimination to continue without sufficient challenge in some quarters” (National Council on Disability 2000b, 2-3). As long as Congress does not appropriate sufficient funding for ADA enforcement, disability advocates argue, the ADA will always remain a somewhat impotent law with regard to preventing and eradicating discrimination against the disabled.

This figure, while representing only a single study, nevertheless does not present the appearance of any considerable or onerous burden which may have been feared by the American business community.⁹ A separate study focused on the accommodations made for employees with disabilities at Sears and Roebuck Co. From 1990 through 1997. “Nearly all of the 500 accommodations sampled at Sears required little or no cost. Effective accommodations included assistive technology, improved physical access (such as closer parking spaces), changed schedules, assistance by others, and changed job duties. During the years 1990-1997, the average direct cost for accommodations was less than \$45” (Berven and Blanck 1999, 65).

Even though such costs are well within reason, the disabled community still contends that many US companies are refusing to provide such accommodations. Therefore, notwithstanding these seemingly unobtrusive costs, the ongoing problem of a lack of ADA enforcement has created a climate within the American marketplace that discrimination against the disabled—in hiring practices, for example—will continue to be tolerated (Rulli and Leckerman 2005, 612).¹⁰

⁹ The figure quoted by the NCD was originally produced by the Job Accommodations Network of the President’s Committee on Employment of People with Disabilities (Bristo 1998).

¹⁰ In 2000, NCD released a report entitled “Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act.” The finding of the report was that the ADA has been less effective than it might have been since its enactment in 1992 as a result of insufficient leadership as it pertains to the subject of legal enforcement. What is missing, the report noted, was leadership and a coherent plan among the various federal agencies in promoting ADA enforcement. “NCD’s main conclusion was that chronic underfunding and understaffing of responsible agencies, undue caution, and the absence of a coherent strategy have undermined federal enforcement of ADA in its first decade” (“National Council on Disability Urges More ADA Enforcement” 2000, 4). The report went on to note that notwithstanding the fact that Congress has directed more funding for enforcement during recent years, the lasting damage of underenforcement (as a result of inadequate funding) may have already been done. However, key data on ADA enforcement, such as the amount of money that the EEOC spends annually on enforcement or the number of EEOC employees that are assigned to ADA enforcement, are not readily available.

The emphasis on voluntary compliance provides few incentives for businesses to make accommodations. Compounding the lack of federal initiative in bringing lawsuits against those guilty of noncompliance is the fact that the ADA prohibits monetary damages being awarded to persons with disabilities. This naturally creates a lack of incentive on the part of potential plaintiffs and their attorneys in bringing legal action against those who may be guilty of ADA violations. “Despite all the rhetoric regarding frivolous lawsuits, it has been very difficult to find lawyers willing to litigate [potential ADA cases]” (as quoted in Kelly 2000). Furthermore, the vast majority of all disabled individuals in the US do not possess the financial resources to be able to pursue antidiscrimination litigation under the guise of the ADA (Taggart 2003, 875-876).

As a result of the lack of judicial assertiveness on the part of the federal government — according to the disability community, at least — many businesses, as well as state and city governments, are apathetic when it comes to the aspect of compliance. The uncomplicated reason for this may be found in the fact that they have had very little to fear, according to disability advocates (Kelly 2000). Many of these businesses, in addition to state and city governments, have chosen to do nothing unless and until they are formally sued by the federal government for violation of ADA compliance. As Steven Gold, a Philadelphia ADA lawyer, has said, “It’s as if the [federal government] is saying, ‘If you break the law, the penalty is that you will have to obey it.’ That’s not a big penalty” (Kelly 2000). Or as Matthew Taggart¹¹ has pointed out, “States have no real incentive to comply voluntarily with Title I if they risk only injunctive costs. Averting possible litigation is a poor incentive for states to make the

¹¹ J. D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2003.

accommodations that people with disabilities need if the worst consequence of losing a lawsuit is that they will be forced to make the accommodation they were theoretically required to make in the first place” (Taggart 2003, 877).

Most disability advocates continue to believe that the ADA’s language regarding voluntary enforcement is problematic, to say the least (Taggart 2003, 874-878). As long as compliance with the ADA remains more voluntary rather than something that is officially and vigorously enforced, they contend, the ADA will continue to prove to be a far less effective remedy against discrimination in the workplace (Schwab 1997).

CONCLUSION

This chapter has provided the reader with an overview of the two overarching problems that exist with the ADA — specifically those problems which have prevented the law from creating more employment opportunities for persons with disabilities: (1) the imprecise language of the ADA, and (2) the law’s reliance upon voluntary compliance rather than active enforcement.

The imprecise language of the statute has created an environment in which the courts are often hamstrung in attempting to apply the law. As a result of the broad and imprecise definition of disability, it has become extremely difficult for the courts to be able to consistently apply any set of coherent and congruous principles as they may apply to the civil rights of persons with disabilities. As a result of the inherent vagueness of the statute, the Supreme Court has, of necessity, been forced to constrict the definition of disability in an attempt to establish a set of legal guiding principles in dealing with disability rights claims.

As a result of the law's reliance upon voluntary compliance, effective redress of grievances under this federal law have been frustrated. Disability advocates, for example, believe that as long as the law is structured to rely upon such voluntary compliance, discrimination against the disabled in the workplace will persist. The Justice Department, however, believes that stiff penalties should remain a last resort in enforcement measures. In general, the federal government believes that encouraging voluntary compliance will be more successful than active enforcement in the long run, particularly as a result of the fact that most accommodation costs (for US business) are not overly burdensome and can be easily implemented.¹²

Among legal and disability policy experts it is generally agreed that these two problems continue to constitute the chief obstacles in the use of the ADA as a successful and effective remedy in creating more employment opportunities for persons with disabilities in the US.

Chapter 5 addresses specific questions surrounding the ADA and the potential for increased litigation: has the ADA increased litigation since its enactment in 1990? Has

¹² While the Justice Department does not believe that most accommodations constitute that which could be considered onerous or overly burdensome by US business (see section on "About Accommodations" at <http://www.dol.gov/odep/pubs/fact/ada92fs.htm>), it is important to note, however, that "Measures constituting a reasonable accommodation are, however, significantly limited by the requirement that such measures must not impose an undue burden on the employer. In determining whether a requested accommodation poses an undue hardship, several factors are considered, such as (1) the nature and cost of the accommodation; (2) the size and financial status of the employer; (3) accommodations that are 'unduly costly or extensive;' or (4) which fundamentally alter a business' operations or a programs nature are considered unreasonably burdensome. Undue hardship is also determined on a case-by-case basis by measuring the impact of accommodations proposed by employees as applicable to individual job duties. Consequently, related court decisions reflect the diversity of the American workplace" (Nelson 2001). Some accommodation expenses, for example, required under the ADA may indeed constitute an undue burden. For the most part, however such accommodation requirements are "generally... not expensive." Therefore, throughout the remainder of this thesis I will employ the Justice Department's phraseology (i.e. "generally... not expensive", see section on "About Accommodations" at <http://www.dol.gov/odep/pubs/fact/ada92fs.htm>) as it applies to the individual burden which the ADA places upon US business to provide accommodations for persons with disabilities.

the ADA led to an increase in frivolous litigation since it became law? Chapter 5 will examine the litigation data during the first 10 years following formal enactment of the ADA. The data presented in the following chapter shows that amplified fears of increased or frivolous litigation as a result of the ADA becoming law are unsubstantiated.

Chapter 5

Litigation and the ADA

Introduction

At the time the Americans with Disabilities Act was actively debated within the halls of Congress, many members of the business community, as well as labor policy experts, believed that the proposed bill was an open invitation to increased litigation.¹ At one point during this period of Congressional debate, the Wall Street Journal even referred to the anticipated statute as “The Lawyer’s Employment Act” (see “The Lawyer’s Employment Act” 1989).² Opponents of the bill believed that it was initially flawed not only because it did not properly account for the unique parameters which surround the American marketplace, but also because it would relentlessly put American

¹ It is somewhat puzzling that such a bill would spring forth from a time in which there was so much negative media coverage with respect to the litigious nature of our society in the 1980s and 1990s (Burke 2004, 63). Given the fact that the total number of lawsuits filed in the US had risen dramatically during this period, it is odd that the ADA was crafted in such a manner as to appeal to this same method of conflict resolution (for an exploration of the rise of litigiousness in the US, see Howard 1994).

² Utilizing the judicial branch of government to make law is something that is viewed with a certain amount of contempt in respective political circles. Some even see this type of policymaking as a form of judicial activism, especially with regard to social policy (for an exhaustive discussion of this subject, see Robert H. Bork’s “The Tempting of America”). “The debate over judicial policymaking as a consequence of this type of litigation, often known as social reform litigation, can be traced back many decades, when litigants, representing groups with little ability to influence the political process through conventional means sought to further their policy goals in the judicial arena. Their suits, most often claiming deprivation of constitutional and statutory rights, spawned a debate among scholars over the role of litigation in public policymaking. Opponents of reform litigation contend that it can lead to judicial over-reaching by allowing the courts to invade the province of legislative and administrative bodies; a task for which, they argue, courts are neither constitutionally nor functionally suitable” (Mezey et al. 2002, 50).

business on the defensive.³ According to one legal expert, the ADA represents “a litigious policy, and the effort to stop its enactment fits into the resistance category of anti-litigation efforts” (Burke 2004, 61).

This chapter asks whether or not the ADA has produced disproportionate litigation and what impact such litigation has had upon US business and government interests ten years following the ADA’s becoming law. To answer this question, the chapter will consider viewpoints from both sides of the debate, including those of Congressional and other ADA proponents as well as those of business leaders and the business community. In the end, however, this chapter will show that the ADA’s enactment has not been the cause of any remarkable increase in litigation (including frivolous litigation), a repeated claim that was made by representatives of the US business community before and after the bill became law.

THE ARGUMENT THAT ADA HAS NOT PRODUCED INCREASED LITIGATION

The mainstream media has routinely depicted the ADA as being nothing short of a legal boon for plaintiffs pushing discrimination cases. Not long after the ADA became law, legal experts were predicting that the statute would now cover conditions “including infertility, well-controlled diabetes, and cancer that is in remission after treatment” (Greenhouse 1998). As noted *supra*, the projected increase in litigation was supposed to

³ Just prior to the ADA becoming law, New York Times reporter Susan Lasky wrote, “Businesses are actively trying to ease the potential burdens of legislation by getting Congress and the White House to modify some requirements and including further special exemptions” (Rasky 1989).

be nothing short of epic in its proportions.⁴ Yet data that has been accumulated thus far show that this avalanche of ADA-based litigation has not been brought to fruition. Furthermore, as a result of the fact that defendants prevail in most ADA cases (see *infra*), the number of discrimination lawsuits that are instigated suggests that most attorneys are wary of initiating any discrimination suits that may be lacking in legal vigor.

According to the Department of Justice, the ADA has actually resulted in a surprisingly small number of lawsuits — only about 650 nationwide in the first five years following the ADA’s enactment. The Department believes that this represents “a very small fraction compared to the 6 million businesses, 666,000 public and private employers, and 80,000 units of state and local government that must comply with the law” (Department of Justice 1996). Along the same lines, Former US Attorneys General Janet Reno and Dick Thornburgh have stated:

Litigation under the act has been rare. The Justice Department and the Equal Employment Opportunity Commission, together, have averaged fewer than 25 suits during each of the past five years. A Justice Department review revealed about 650 ADA cases nationwide. Whether you compare these numbers to the total number of non-ADA cases in federal courts (about 850,000) or the number of employers covered by the act (about 650,000),

⁴ To guarantee the ADA’s powers of protection with regard to discrimination against the disabled, Congress decided to establish a very deliberate arrangement of judicial review within the bill, one that placed the judicial branch of government as the primary guarantor and adjudicator of those civil rights which the Act was seeking to institute. Without any great surprise, the community which comprises the disabled quickly approached the judicial branch in seeking to find redress of its discrimination grievances. As a direct result of Congress’ careful crafting of the ADA, the courts soon began to significantly influence the administration and implementation of the ADA, especially at the federal level because it is the federal courts which decide most discrimination cases brought under the ADA (Mezey et al. 2002, 50).

one thing is clear: The ADA has not resulted in a flood of litigation (Reno and Thornburgh 1995).

There are some legal experts who believe that the ADA represents an almost guaranteed innocent or dismissal verdict for defendants under Title I of the statute. Ruth Colker has referred to the ADA as “a windfall for defendants” (Colker 1999). She and other experts believe that plaintiffs have a minimal chance at best in being successful in obtaining redress under the ADA. Recent studies have reported that both public and private defendants triumph in the vast majority of all cases brought under the guise of the ADA (see Colker 1999; Colker 2001; Parry 1998; Parry 2000):

[Parry’s] results showed 291 cases involving a victory for an employer, 130 cases in which no decision was reached and only 13 cases in which the employee prevailed. Even more disheartening for ADA plaintiffs, most of the 291 victories for employers (almost 90%) resulted from judicial rulings on procedural grounds, suggesting that most ADA litigants are unable to overcome the jurisdictional and definitional barriers erected by the courts. Parry also noted the steady decline in employees’ victories over the years: 8.4% during the 5 years from 1992 to 1997; 5.6% in 1998; and 4.3% in 1999 (Mezey et al. 2002, 53).

With regard to Ruth Colker’s initial 1999 study, the information is not much better in relation to the fate of plaintiffs filing suit under the ADA. Colker noted that “ADA litigants in employment discrimination cases have one of the worst success rates of any group of litigants, with only prisoners losing their cases as frequently” (as quoted in Mezey et al. 2002, 53). Through her investigation of ADA cases she discovered that

defendants prevailed 84% of the time. Within appellate cases, ADA defendants produced even better results. Such cases favored defendants 93% of the time (Colker 1999). Both Colker's and Parry's studies report very similar findings.⁵

These investigations clearly show that plaintiffs prevail in only a very small number of discrimination cases filed under the rubric of the ADA.⁶ Such data suggest that the judicial branch of government continues to prevent the onslaught of the predicted success of plaintiffs with respect to excessive and frivolous litigation so feared by the American business community.⁷

HAS THE ADA PROMOTED FRIVOLOUS LITIGATION?

One of the foremost fears amongst ADA detractors — mainly those individuals and/or groups found within the business community — is that the ADA would bring not only a flood of litigation, but more particularly that such litigation would be

⁵ Although employers prevailed in over 92 percent of ADA cases, businesses still had to absorb the legal costs associated with the litigation. “The expense of litigating these cases cost employers \$309.1 million or an average of approximately \$25,000 per lawsuit” (Graves 2003).

⁶ In November 1998, testimony was presented before the U.S. Civil Rights Commission which specifically quoted “an American Bar Association finding that plaintiffs have failed to show any unlawful discrimination in 92 percent of the cases litigated under the ADA” (Taylor 1999).

⁷ Notwithstanding the fact that the ADA has not resulted in the somewhat anticipated increase in litigation, it is nevertheless a noteworthy aspect of the development of the bill that there was very little opposition within Congress to what *potentially* might have become a significant spring of federal legal action (Burke 2004, 62). It is notable because the idea that members of the disabled community could appeal to the judicial branch rather than the executive branch was something that may not have been satisfactorily addressed in the debates. It appears that there was very little opposition to the proposal that disabled individuals would be best advantaged in pursuing accommodations through litigation. As one legal expert has claimed, with very few exceptions, there was virtually no one in Congress who seriously investigated the underlying arguments of the ADA with regard to its theoretical principles. Meaning, it seems no one in Congress questioned the statutory arrangement of the bill which sought resolution through litigation rather than through bureaucratic channels (Burke 2004, 62).

disproportionately frivolous in nature.⁸ In 1998, for example, a senior editor at Reader's Digest asserted that plaintiffs "have used the ADA to trigger an avalanche of frivolous suits clogging the federal courts" (Armbrister 1998, 145). Chairman Sam Graves of the House Subcommittee on Rural Enterprises, Agriculture, and Technology said on April 28, 2003:

The Americans with Disabilities Act (ADA) creates too many frivolous lawsuits. The ADA is supposed to provide protection for the disabled, not provide an incentive or an excuse for people to sue a small business owner. Every time this law is abused and a frivolous lawsuit is filed, small businesses and their employees are left to pay the bill... The threat of instant civil litigation is not the best way to achieve this goal (Graves 2003).

It is the ADA's considerable statutory breadth which, according to some members of Congress, represents its chief weakness. For instance, during a subcommittee hearing in 2003, Chairman Graves said that the principal reason for the significant increase in the number of frivolous lawsuits in relation to disability issues was directly related to the ADA's "broad scope and vague interpretation" which makes it difficult for small businesses to be aware of the standards they must meet (Graves 2003).

However, an examination of EEOC data seem to provide a relatively solid foundation with regard to the argument that the ADA has not produced a greater number of annual frivolous lawsuits (on average) than any of the other federal civil rights statutes now on the books.

⁸ As attorney Tony Amaida summarized in Boston University's Law Review in 2001, "Significant public and judicial backlash has cast the ADA as imposing overly burdensome requirements on business and as a vehicle for many frivolous lawsuits" (Maida 2001).

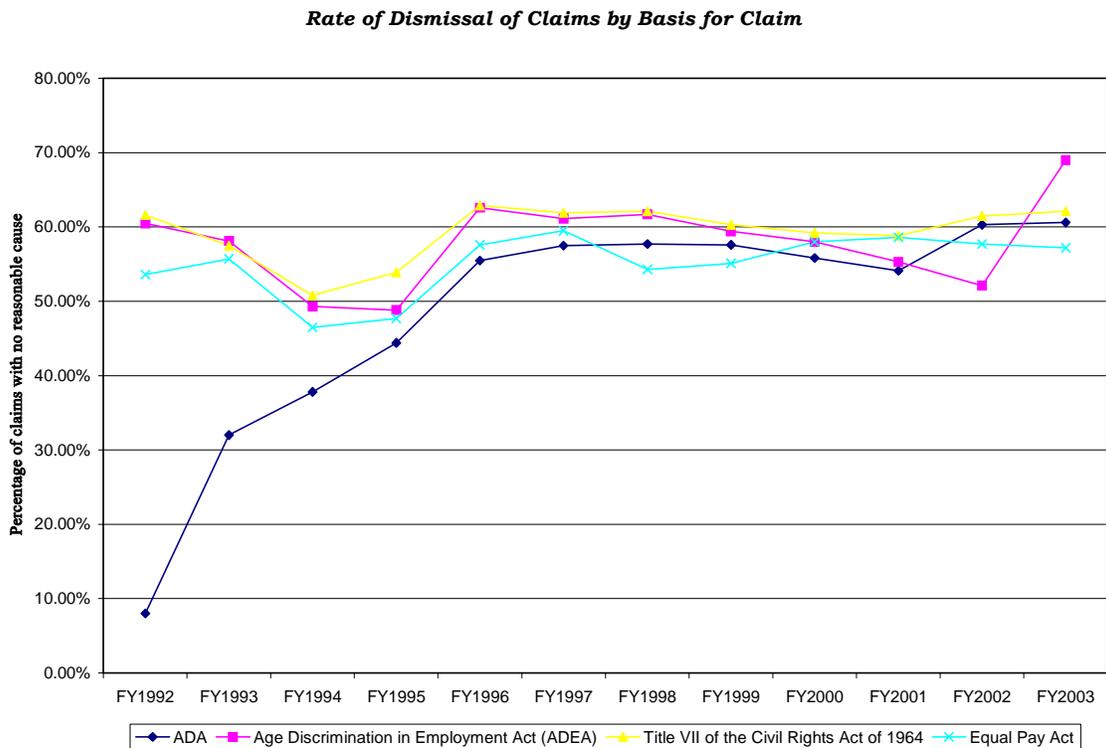
EEOC Data and the Question of Frivolous Litigation

From 1992 through 2002 there were a total of 491 total discrimination cases prosecuted in association with the Americans with Disabilities Act. In order to give some idea of how the ADA compares with other civil rights legislation, it is helpful to note that during the same period, there were 2,510 cases prosecuted in association with Title VII of the Civil Rights Act of 1965; 528 cases were prosecuted under the auspices of The Age Discrimination in Employment Act of 1967; and 21 cases were prosecuted under The Equal Pay Act of 1963 (Equal Employment Opportunity Commission 2006). Such data suggest that the ADA has not resulted in the flood of litigation anticipated by opponents of the legislation.

According to data provided by the Equal Employment Opportunity Commission, the federal agency responsible for handling all ADA complaints, the number of claims which the EEOC determined to have no reasonable cause⁹ was in line with other federal antidiscrimination statutes. When measured against Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Equal Pay Act, between 1992 and 2003 the ADA did not register a significantly higher number of “no reasonable cause” claims as determined by the EEOC (Table 5.1). What Table I (below) shows is that the ADA has not produced a significantly higher number of frivolous or no-basis lawsuits compared with other major US civil rights statutes.

⁹ The EEOC’s website did not provide any information on exactly how the federal agency determines a particular discrimination claim to have reasonable or no reasonable cause.

Table 5.1



Source: Equal Employment Opportunity Commission, “Enforcement Statistics and Litigation” (see <http://www.eeoc.gov/stats/enforcement.html>).

While this fact does not necessarily rule out the possibility that the ADA may yet produce a considerable number of frivolous lawsuits, it does nonetheless provide evidence that the ADA does not produce significantly more “no reasonable cause” claims than other antidiscrimination statutes handled by the EEOC. The claims by US business interests that the ADA is responsible for a flood of frivolous lawsuits is, thus far, without foundation.

Not So Frivolous

The Justice Department wholly rejects the idea that it or any other federal government agency has spent time involved in frivolous litigation. The Department's enforcement of the ADA, they believe, has been most fair and rooted in common sense. The overwhelming majority of the complaints received by the Department, according to its own literature, have merit: "Our focus is on fundamental issues related to access to goods and services that are basic to people's lives. We have avoided pursuing fringe and frivolous issues and will continue to do so" (Department of Justice 1996).

Notwithstanding such a position on the part of the federal government, it is still widely believed by many employers that the ADA is being misused by people with average or ordinary physical complaints rather than being strictly utilized by more serious disability cases. Yet, the fact of the matter, according to the Justice Department, is that "trivial complaints do not make it through the system" (Department of Justice 1996). Combined with recent Supreme Court rulings that have significantly narrowed the opportunity for plaintiffs to file discrimination lawsuits under the ADA, US business could be justified in taking a collective sigh of relief with regard to their stated fears (during the statute's debate within Congress) that the ADA would constitute a windfall for plaintiffs. Instead, a number of fairly rigorous studies have shown the exact opposite to be the reality (see Burkhauser and Stapleton 2003a; Colker 1999; Colker 2001; Lee 2003; Mezey et al. 2002; Stein 2003).

RECENT SUPREME COURT RULINGS

As noted in Chapter 4, recent Supreme Court decisions are reducing the vigor of the argument that the ADA represents a legal license — a veritable *carte blanche* — to pursue frivolous litigation. As was also stated in chapter 4, the primary reason for this is because of the considerable narrowing of the definition of what it means to be disabled as it pertains to the ADA. Such a constriction of the definition of disability renders much of the debate between the disabled community and American business interests ineffectual. It is as though the Supreme Court has now come into the middle of a boxing match, playing the role of referee, and sending each contender permanently to their respective corners.

In particular, Supreme Court Justice Sandra Day O'Connor, writing for the majority in more than one of these decisions, seemed quite concerned regarding the overly expansive definition of disability crafted under the ADA, a definition that would include perhaps as much as 50% of the population of the United States as being disabled. In *Sutton v. United Air Lines, Inc.* Justice O'Connor penned the majority decision for the Court which attempted to limit precisely who may qualify as disabled under federal law. The decision significantly restricted those citizens who would now be classified as officially disabled, thus considerably diminishing the number of potentially successful discrimination complaints (Jones 2005). In particular, the need to be officially categorized as an individual suffering from a disability constitutes the basic threshold in any ADA lawsuit and the ruling held that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment” (*Sutton v. United Air Lines, Inc.* 1999). The unanimous decision of the

Court stated that in order for an individual to be classified as disabled under the parameters of the ADA, they must manifest substantial limitations inherent in their disability that are integral to daily life, not just an expression of those signs and symptoms which may prevent certain job functions and responsibilities.

Similarly, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams* Justice O'Connor again wrote the Court's unanimous decision, noting that to be qualified as an individual with a disability under the ADA, "an individual must have substantial limitations that are central to daily life, not just limited to a particular job" (as quoted in Jones 2005, 5). She also stated that, "If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher" (*Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams* 2002).

Following the *Toyota v. Williams* ruling, business organizations noted that this decision would help in discouraging costly and unnecessary lawsuits brought against US companies. A spokesman for the US Chamber of Commerce declared that because of the Supreme Court narrowing the definition of what it means to be disabled, the result will naturally be fewer cases brought to court because "plaintiffs and attorneys are not stupid; they're not going to file cases that they think have a small chance of success" (Masterson 2002).

In *US Airways, Inc. v. Robert Barnett* it was Justice Stephen Breyer who wrote the majority decision concerning the ongoing question of reasonable accommodations under the ADA. "In Barnett the Court held that an employer's showing that a requested

accommodation by an employee with a disability conflicts with the rules of a seniority system is ordinarily sufficient to establish that the requested accommodation is not ‘reasonable’ within the meaning of the ADA. Thus, the times when an employer must provide reasonable accommodation were limited” (Jones 2005, 5).

These recent Supreme Court rulings should put US business at some ease with regard to the number of future ADA lawsuits. These rulings confirm that the judicial branch of government is not going to allow the ADA to become a fiscally open-ended legal device with respect to the role of business in providing accommodations for employees with disabilities. Notwithstanding the fact that some disability advocates see these recent Supreme Court rulings as unfortunately limiting the ADA’s original purpose, the Court has found sufficient need to provide a more contracted application window as the government seeks to protect the civil rights of persons with disabilities.

Since the ADA was officially enacted in 1990, it seems the tables have turned for the disabled community. The hopes were high that now that the ADA was law, government and the US business community, in particular, were going to be forced to acknowledge the specific needs of this unique minority. Protection of the Constitutional and human rights of the disabled, it seemed, was now guaranteed under this trailblazing civil rights statute. Yet if the disabled community expected a windfall with regard to antidiscrimination protection and significantly increased employment possibilities, they were soon to be disappointed.

Nevertheless, it is equally important to note that the fundamental problem with the law (as noted in Chapter 4) was the vagueness and the breadth of the statute itself. Necessarily, therefore, the Supreme Court has stepped in to provide not only a constricted

definition of disability, but also a much-needed reworking of the overly-broad and indistinct sections of this epic piece of legislation. While it could certainly be argued that the disabled have lost many of their initial rights and protections under the ADA, it is also logical to argue that interpreting the “reasonable accommodation” clause was bound to produce never-ending debate (particularly between the disabled and business communities). The Court foresaw that such endless disputes were doing both sides a disservice, particularly the business community which, prior to the more recent Supreme Court decisions, was often in the dark in regard to how to successfully and appropriately interpret the statute with respect to their own individual capitalistic enterprises.

As a result of these more recent decisions, and notwithstanding the outcries from the disabled community, a more workable reading of the ADA has now begun to be crafted by the highest court in the land. It is unfortunate that the ADA was not originally more well thought-out and more extensively deliberated.

LITIGATION FEARS AMONG POTENTIAL EMPLOYERS

The ADA has also attracted debate with regard to the question of whether the relatively new law has now instilled a reluctance within potential employers to hire persons with disabilities. This possible disinclination likewise arises out of the potential for increased litigation. The question then becomes: as long as the potential for additional litigation exists, will potential employers risk hiring the disabled?

As a result of potential litigation costs (or fears of such potential costs), those who are the most seriously disabled may turn out to be the primary victims of the loose definitions of disability (see chapter 4) and the extensive potential for litigation which is

inherent in the Act itself (Becker 1999, 21). Therefore, to prevent such costly lawsuits, the anecdotal evidence (see *infra* Acemoglu and Angrist 2001; DeLeire 2000) is that many companies may avoid hiring job applicants whom they believe would prove litigious under the ADA.

Such behavior on the part of potential employers of the disabled would explain the notable results in separate studies by economists Daron Acemoglu and Joshua Angrist of the Massachusetts Institute of Technology (Acemoglu and Angrist 2001) and Thomas DeLeire of the University of Chicago (DeLeire 2000). They find that employment of disabled workers fell rather than rose since enactment of the ADA, mainly as a result of reduced hiring rather than an increase in the termination of the disabled. They report that the effect on employment was greatest in medium-size companies since small companies are largely exempt from this legislation.

To date, with the exception of Acemoglu and Angrist (2001) and DeLeire (2000), there have been no additional studies which purport to show that members of the disabled community have suffered potential job losses or lack of hiring as a result of fears within the business community that potential litigation (under the ADA) may be the result of hiring a disabled employee. However, some experts now contend that disabled workers may find that job prospects have grown dimmer (instead of the anticipated reversal of unemployment figures) because while the law indeed grants the disabled new rights, it also imposes on them a new burden: “All disabled workers,” says Walter Olson, an expert on litigation with the Cato Institute, “are now a legally high-risk category of worker to hire” (Lochhead 1991).

As a result, the prospective cost of hiring the disabled will rise, according to Carolyn Weaver, an economist at the American Enterprise Institute in Washington. “The less skilled the worker, and the higher the cost of his or her accommodation, the less willing an employer will be to bear the added legal risk” (Lochhead 1991). Yet such arguments remain specious due to the lack of accompanying data which would show a causal link between employers’ fears of hiring the disabled and the continued high unemployment numbers of persons with disabilities.¹⁰

CONCLUSION

The purpose of this chapter was to provide the reader an overview with regard to the aspect of litigation and the continued implementation of the Americans with Disabilities Act. As this chapter has noted, there are employment, disability, legal and other experts who have varying viewpoints in relation to this subject. There are those who believe that the threat of litigation is absolutely essential in order that the US business community take disability rights (or the violation thereof) seriously. Then there are those who reside, philosophically speaking, on the opposite side of the aisle — those who believe that the ADA is improperly construed in that it provides too much initial power into the hands of plaintiffs and ignores the rights of defendants (mainly those found within the US business community).

Recent Supreme Court rulings have significantly narrowed not only the definition of disability but also the window of opportunity for persons with disabilities to seek

¹⁰ There have similarly been no official studies conducted since the ADA’s enactment in 1990 which specifically proves a reluctance on the part of employers in general to hire persons with disabilities as a result of potential litigation.

redress through the judicial system. Such rulings have indeed limited the ADA's scope, breadth, and power. Yet such a lawful constriction was necessary in bringing needed boundaries and focus in association with the actual implementation of the Act. Certainly the business community has, in some measure, taken a collective sigh of relief as their fears of unending and frivolous litigation have been quieted.

This chapter has also briefly addressed the questions surrounding the potential for increased litigation as a result of the formal enactment of the ADA. It has been shown that there has been no significant increase in litigation when compared with other civil rights legislation. Furthermore, the prediction of a veritable wave of frivolous litigation tied to the ADA has not been realized. Additionally, fears associated with the hiring of persons with disabilities may be overstated. To date, there is very little data which support the contention that US businesses are steering away from hiring persons with disabilities as a result of potential litigation.

Chapter 6 focuses on the ADA's impact on US business. Specifically, chapter 6 addresses the questions of whether the ADA places arduous burdens upon US enterprise in association with providing accommodations for disabled employees. Chapter 6 will show that the "reasonable accommodations" clause of the ADA has not proven overly burdensome for US businesses as a result of the fact that most accommodation costs are generally not expensive ("The American with Disabilities Act Public Law 101-336" 2001).

Chapter 6

The ADA's Impact on US Business

Introduction

In general, US business has always manifested healthy antipathy toward the ADA. As was noted in chapter 5, one of the primary reasons for this antipathy surrounded the belief within the business community that the ADA would undoubtedly lead to increased litigation, including litigation which was often times frivolous. The data presented in the previous chapter has shown that the fears within the business community regarding litigation were chiefly unfounded. The same could be said with regard to another reason US business has always disliked the ADA: the cost of accommodations for disabled employees, costs which must be borne by individual businesses with 15 or more employees.

Accommodation costs constituted one of the central questions at the forefront of the congressional debate surrounding the ADA. As disability historian Jonathan Young has noted: "The ADA is unique in the context of civil rights legislation because it requires that businesses and governments do more than just cease discriminatory actions. They must also take proactive steps to offer equal opportunity to persons with disabilities, commensurate with their economic resources" (Young 1997, xx). Yet in regard to

accommodation expenses borne by US business, the question of what exactly is “commensurate” has often posed quandaries for American enterprise.

Ten years following the ADA’s official enactment, Pat Cleary, Vice President of Human Resource Policy at the National Association of Manufacturers declared that “The ADA is a constant nuisance and a source of an awful lot of mischief for large employers” (Lochhead 2000). Is such a position—one that has been repeatedly exclaimed by various members of the business community since the ADA became law—truly accurate? Is the ADA always a perpetual nuisance to US business interests? Or has the ADA proven to be far less burdensome than what was originally feared?¹ The purpose of this chapter is to specifically address these questions. This chapter will first highlight business’ ideological antipathy towards the ADA, and secondly it will address the findings of a limited number of empirical studies of the ADA’s impact on human resource management. As the data presented in this chapter will show, such accommodation costs are not onerous.

BUSINESS’ THEORETICAL ANTIPATHY TOWARDS THE ADA

The American business community has, in large measure, opposed the ADA. Such opposition stems from the business community’s belief that the statute creates an atmosphere for potential litigation with respect to discrimination against persons with disabilities in the workplace. Additionally, US business representatives have spoken out against the ADA because they feel that the statute gives too much power to the federal

¹ “Early on there were dire predictions about what the ADA would cost those required to comply with it” (Rubin 1999).

government in dictating how these businesses should be run. According to American business interests (as well as labor and disability policy experts), the employment stipulations inherent within the ADA destabilize one of the fundamental canons of the industrial marketplace: the freedom to set employment policy in accordance with strict capitalistic requirements, not human wants (O'Brien 2005, 1529).

By contrast, the ADA's employment provisions take into account human need. They have the potential to humanize the face of capitalism by altering this type of business rationality. No other provisions within labor law or civil rights law compel employers to pay heed to the individuality of their employees. Mandating that employers address workers' needs alters the logic underlying American business rationality, but not just because of the particular accommodations that those workers receive. As workers with disabilities engage with their employers in what the ADA calls an "interactive process," reasonable accommodations requests undermine managerial prerogative power (O'Brien 2005, 1529-1530).

From a more theoretical standpoint, the problem that US business has always had with the ADA stems from what Michael Ashley Stein, professor of law at the College of William and Mary School of Law, refers to as a legal theorist's faith "in the principles of neoclassical economic models of the labor market" viewpoint (Stein 2000, 314). This viewpoint asserts that any and all antidiscrimination statutes are simply inefficient and unnecessary attachments within the midst of the larger free-market apparatus. Such meddling by the government, in other words, slows down the more natural, more efficient

and efficacious workings of the capitalist society. It is far better to leave such a finely-evolved mechanism alone and let economic evolution, as it were, sort itself out.

According to such legal theorists, any law that expropriates an employer's power of preference with regard to the management of the affairs of his or her company — particularly with relation to hiring decisions — and that demands that different applicants other than those which are preferred by the employer be acquired by said company automatically produces suboptimal decisions. By extension, these same theorists dismiss the idea that such federal control of hiring decisions can be considered productive and curative policy on the part of the state. They believe that seeking to address such social inequalities through means of “legislative intercession” represents an unnecessary redistributive tactic, one that is certainly substandard when compared with the option of allowing normal market procedures and operations to naturally reestablish an environment in which antidiscrimination policies and practices are allowed to flourish (Stein 2000, 314).

As applied by law and economics commentators, the comprehensive normative goal of the neoclassical economic model is to achieve legal régimes whose efficiency mirrors those attained in an ideal market of perfectly competitive equilibrium. Under this scheme, the term ‘efficient’ (or ‘Pareto-efficient’) refers to the most optimal outcome or one having the greatest utility. It is in large part differences about how to determine what solutions are efficient that separate the various approaches within law and economics (Stein 2000, 314).

The business community would rather have government leave the marketplace alone to function as they believe it should: achieving the most optimal outcome as a result of the market's "survival of the fittest" foundational mechanisms. When government attempts to step in and regulate exactly how an employer, for example, should handle his or her hiring decisions — such as within the guidelines given to US business as they are contained in the Americans with Disabilities Act — the US marketplace has now been considerably compromised in its overall efficiency and efficacy.

As a further explanation of the position of many business leaders and economists, the ADA is objectionable on *moral* as well as economic grounds. Such contenders believe that within a free society the government should employ its coercive powers only to protect the life, liberty, and property of its citizens from outright aggression. Any attempt to enforce a certain congressionally-mandated standard of moral behavior, however noble or desirable, is beyond the proper scope of the government (O'Quinn 1991). According to those who have such moral objections with the ADA, discrimination aimed at persons with disabilities is unlike the discrimination which previous federal civil rights statutes seek to conquer: the eradication of discrimination against an individual's race or religious beliefs, for example, only requires the de minimis costs associated with enforcement. On the other hand, the ADA impels current and potential employers to tolerate considerable expenditures in association with accommodating employees with disabilities. Statutorily mandating that such expenses be borne by blameless US businesses (as well as state and local governments) is

unwarranted and morally disagreeable. “At the very least, strict limits should be adopted to minimize the costs imposed on the non-disabled” (O’Quinn 1991).

In conjunction with the argument over what constitutes the proper role of government in regulating and overseeing US business, the next section of this chapter will examine the extent to which the ADA has impacted US business as it specifically relates to human resource management. The following segment presents data on accommodation expenses for US business as corporate America seeks to comply with ADA regulations. The information presented goes directly to the heart of the question of whether the ADA creates financially prohibitive accommodation parameters for US enterprise.

EMPIRICAL STUDIES OF ADA’S IMPACT ON HUMAN RESOURCE MANAGEMENT

Although it has been noted several times throughout this thesis that the ADA has been largely unexamined (Percy 2001), there are a handful of studies which have sought to provide information on how human resource managers, for example, are dealing with implementing the law. These reports are important principally because they show that implementation of the ADA has not been overly burdensome on such human resource personnel or oppressive with respect to the companies at large.

Perhaps the most comprehensive report on the attempts of US business to cope with the ADA was produced in 1999 by The Society for Human Resource Management. The report was entitled *The ADA at Work: Implementation of the Employment Provisions*

of the Americans With Disabilities Act.² The report suggests that accommodating disabled workers under the ADA is perhaps less challenging and less cumbersome than business leaders had originally supposed.

Results from this survey include the following: Numerous US companies provide accommodations for those employees who are disabled. Such accommodations include improving the accessibility of existing facilities, increasing flexibility with regard to the functionality of managerial guidelines and procedures, and streamlining of job responsibilities or the modification of the number of hours on the job. Additionally, the bulk of those enterprises which were surveyed reported policy changes in regard to “their recruitment, preemployment screening, testing, and orientation procedures” in order that they might be in compliance with the ADA (Society for Human Resource Management 1999). Furthermore, the preponderance of these businesses also reported that arranging such accommodations for their disabled employees was not difficult or burdensome (Society for Human Resource Management 1999).³

² This report was the product of a survey conducted as a combined effort between The Society for Human Resource Management, Cornell University, the Washington Business Group on Health, and the Lewin Group, a national health care and health services consulting firm. Each of these independent organizations collaborated on the design and implementation of the survey. The survey sample consisted of 1,402 randomly selected members of The Society for Human Resource Management. The members “were chosen based on the size of the organization for which they work to provide a sample representative of small, medium, and large organizations in the United States. The survey was conducted via telephone interviews. The survey results are based on the 813 human resource professionals who completed interviews, a 73% response rate... Funded in part by the US Department of Education’s National Institute on Disability and Rehabilitation Research, this four-year research project “[focused] on the many issues employers face when implementing the stipulations of the Americans with Disabilities Act of 1990” (Society for Human Resource Management 1999).

³ It is critical to note that the report does not include any data on financial burdens incurred by US business as a result of implementing such accommodations and practices. It must be remembered that it was the explicit question of cost which constituted the original and most vocal complaints against the ADA by US business interests. Such missing data represents a crucial obstacle in attempting to more accurately determine the ADA’s overall impact on US business, specifically with regard to the original complaints leveled by the business community against the ADA.

Other studies similarly find that, aside from the expenses associated with discrimination lawsuits, American enterprises do not cite unwarranted costs as proof of an undue burden. According to one source, “50% of accommodations cost less than \$500; 19% cost nothing at all; more than 80% cost less than \$1,000” (“Reasonable Accommodations and the Americans with Disabilities Act” 2005). Another study of accommodation costs for disabled employees of federal contractors concluded that most accommodations cost very little or nothing; 50 percent reported that accommodations cost nothing, and another 30 percent reported accommodation costs of approximately \$500 (Lee 2003). It is difficult to purport that such expenses create any type of undue burden.⁴

A compilation of accommodation studies conducted just a few years after the ADA’s official enactment found that the bulk of accommodations that were provided to employees with disabilities were not unaffordable nor unreasonable (Unger 2002a, 76). Furthermore, an interesting side effect mentioned in these early surveys was that employers who made such accommodations for their disabled employees frequently discovered that many of these accommodations similarly benefited non-disabled workers; this resulted in boosting the overall monetary value of the industry (Unger 2002b).

Available data on accommodation costs do suggest that in many instances US business is making considerable strides towards offering accommodations to employees

⁴ It is important to note, however, that there are many labor policy experts who believe that an insufficient number of studies have been conducted in relation to the ADA’s impact on US business. On the subject of this alarming lack of data, Professor Peter David Blank of the University of Iowa’s law school recently noted that, “Systematic information, from a range of disciplines, on the work lives of persons with disabilities is lacking. The promise of the ADA and related anti-discrimination laws to prevent the exclusion from society of millions of qualified Americans with disabilities makes this lack of information troubling” (Blanck 1999, 3).

with disabilities in order to be compliant with federal law. Not every business in this country is making disability accommodations a top priority. Some businesses are simply ignoring the law. Nevertheless, the survey results show that a majority of US business enterprises are at least beginning to make adaptations to the way that their companies operate in order to accommodate persons with disabilities. The reality of the situation is that the early and often expressed apprehensions within the US business community—as such fears pertain to the costs of complying with the “reasonable accommodations” clause of the ADA—have not been brought to fruition.⁵ “The consistent finding from multiple surveys has been that expensive job modification or accommodations are rarely needed by workers with disabilities” (Unger 2002a, 47-48).

Although detractors of the law have continually disputed the “reasonable accommodation” requirement of the ADA, stating that it is unfair to require employers to fund such accommodations for their disabled workers, it is important to note that the expenses that may be taken on by such employers are nonetheless restricted by the statutory condition that such accommodations not impose any “undue hardship” (Malloy 2001, 617). Thus far, my research has been unable to uncover any study which purports

⁵ Furthermore, there has been no research which has been unearthed which likewise shows that the business community has been forced to hire unqualified disabled workers. According to the Department of Justice, this somewhat prevalent myth has no basis in fact. The reality is that “no unqualified job applicant or employee with a disability can claim employment discrimination under the ADA. Employees must meet all the requirements of the job and perform the essential functions of the job with or without reasonable accommodation” (Department of Justice 1996).

to show that the “reasonable accommodations” clause of the ADA is causing an undue burden upon US business.⁶

CONCLUSION

The purpose of this chapter has been to evaluate the impact of the ADA on US business. What is most apparent from the somewhat limited number of studies that have been conducted on the ADA’s impact on US business is that the law has not proven to be onerous to American enterprise. The fears, apprehensions, and overwhelmingly negative predictions that were readily expressed by US business prior to the ADA becoming law have not materialized. Studies show that notwithstanding the theoretical aversion US business has with the ADA, accommodation expenses are generally not overly burdensome on US enterprise (“The American with Disabilities Act Public Law 101-336” 2001). These studies have shown that most individual accommodations provided under the guise of the ADA have cost employers an average of \$500 or less. Such expenses cannot be considered excessive and do not provide evidence that the ADA is burdensome for business interests.

What is also apparent from the studies is that the federal government’s reliance upon voluntary compliance—rather than a dependence upon strictly enforced regulation—may represent an oversight agenda which ultimately may work better than

⁶ What is not widely known within the business community is that there are federal tax incentives available for businesses in regard to their ongoing efforts in complying with the ADA. Such tax incentives were specifically designed to work in tandem with implementation of the ADA, according to the Justice Department (“ADA Tax Incentives Packet for Business”). However, a 2002 study conducted by the US Chamber of Commerce noted that supervisors in the American workplace had a limited knowledge of the availability of tax credits as a source of assistance in employing and supporting persons with disabilities. According to Michael Stein, professor of law at the College of William and Mary, “employers have not generally utilized the existing tax credits and incentives that could balance out or even exceed accommodation costs” (Stein 2003, 179).

heavy-handed regulatory measures. It is certainly understandable that such substantial regulatory measures may be favored by the disabled community. Yet as a result of the ease of conforming, the ADA's inherent reliance upon voluntary compliance may represent a more user-friendly approach to government supervision. In other words, the federal government is so confident that most US businesses will find compliance with the ADA to be anything but burdensome, that a preference of heavy-handed enforcement would only constitute an unnecessary and highly antagonistic aspect of government regulation.

Chapter 7

Conclusion: The ADA and Ongoing

Problems of Discrimination

Introduction

Over 15 years following formal enactment of the ADA, unemployment numbers among the disabled continue to remain at approximately two thirds of all persons with disabilities (Pyle 2005). The causes for such perpetually high unemployment numbers remain elusive and puzzling (Burkhauser and Stapleton 2003a). As this paper has repeatedly noted, numerous legal, public policy, labor, and disability experts remain perplexed as to the precise reason as to why the ADA has not contributed to a reversal of what all of them view as an unacceptably high unemployment rate.

The focus of this thesis has been to assess the success of the Americans with Disabilities Act in expanding employment opportunities for persons with disabilities. The thesis has addressed the following principal questions surrounding the ADA's effect on employment for people with disabilities:

- **What actual impact has the enactment of the ADA had in creating real employment opportunities for people with disabilities?**
- **Has the ADA brought to pass the results anticipated by sponsors of the law at the time of its becoming law (1990)?**
- **What does the future hold for people with disabilities as a result of the passing of the ADA in 1990?**

In answering these questions I have compared the expectations of the bill's sponsors — with regard to employment numbers — with the actual results 10 years following the law's enactment. Additionally, I have also examined the associated question of compliance costs for US business as the American marketplace has attempted to implement the ADA. Such accommodation costs have been highlighted as a major roadblock to full implementation and success of the ADA.

FINDINGS

The following is a summary of the findings presented in this thesis with respect to employment for the disabled ten years following the enactment of the ADA:

The ADA has not been associated with an increase employment for the disabled.

Enactment of the ADA has not reversed unemployment trends among persons with disabilities. The unemployment rate for individuals with disabilities is roughly 70% (Bagenstos 2003a; Lafleur 2000; McKay 2005; National Council on Disability 2000a;

Stothers 2000; Wells 2001). This was virtually the same unemployment rate prior to enactment of the ADA. While there are many theories surrounding this ongoing policy puzzle, the fact remains that the unemployment numbers for the disabled have remained primarily stagnant or even experienced a slight increase, depending upon the study being referenced (Burkhauser and Stapleton 2003a).

The ADA has not been associated with the anticipated employment results originally intended by congressional and civil proponents of the bill.

Prior to the proposed bill becoming law, ADA supporters predicted that the statute would bring about a reversal of high unemployment rates among persons with disabilities. This has not been the case. As has been noted throughout this thesis, during congressional debates over the ADA, its proponents emphasized their confidence that formal enactment of the bill would indeed reverse the high unemployment trends among the disabled. More than ten years later, such positive employment numbers have not been brought to fruition.

According to some observers, employment prospects for persons with disabilities has now become even more bleak than prior to the ADA becoming law (see Acemoglu and Angrist 2001; DeLeire 2000; DeLeire 2003; Olson 1997). According to these labor policy experts, the ADA has created an environment in which employers are more reluctant to hire persons with disabilities as a result of potential lawsuits dealing with civil rights violations. Additionally, prior to the ADA becoming law there were various estimates which placed the unemployment rate for persons with disabilities at roughly 66% (for an exhaustive analysis of these pre-ADA employment figures, see Burkhauser

and Stapleton 2003a). Ten years following enactment of the bill, the unemployment rate has grown slightly to roughly 70% (as noted supra). While there are no studies which purport to show a causal link between this slight increase in unemployment for persons with disabilities and enactment of the ADA, it is nevertheless true that formal enactment of the ADA has failed to bring about the anticipated reversal (anticipated by its proponents) in high unemployment numbers.

The ADA has not proven to be onerous to US business interests — something that was predicted by opponents of the proposed bill prior to its being signed into law.

Many in the American private sector believed that the ADA would prove to be a highly burdensome form of regulation. In particular, the business sector believed that the ADA would require businesses to make generally costly accommodations for employees with disabilities. As this paper has demonstrated, most accommodation costs for US enterprise are relatively inexpensive (“The American with Disabilities Act Public Law 101-336” 2001).

The ADA has not been associated with a wave of increased, and perhaps even frivolous, civil rights litigation.

Prior to the ADA becoming law it was predicted that the new bill would open the legal floodgates and create a new wave of oftentimes frivolous litigation in association with the supposed violation of the civil rights of the disabled. Such a tidal wave of increased litigation has not been brought to fruition. Furthermore, as a result of the US

Supreme Court recently constricting the definition of disability, the opportunity for such a tidal wave of litigation to be brought to pass remains highly improbable.

Within the disabled community, the answer to the policy puzzle (Burkhauser and Stapleton 2003) can be found within the theme of ongoing discrimination. It has been noted that consistent discrimination against the disabled within the workplace (and within society at large) — notwithstanding formal enactment of The Americans With Disabilities Act in 1990 — remains the prime suspect for these seemingly perdurable unemployment figures. The remainder of this concluding chapter will provide a brief overview of how the aspect of ongoing discrimination may continue to hamper the designs and intentions of the architects of the ADA.

THE ADA AND ONGOING DISCRIMINATION

According to many disability experts, the ADA does not represent a failed law (Blanck, Schwochau, and Song 2003). It is continually hailed as a groundbreaking and monumental bill that, if interpreted correctly, can only improve the lives of disabled citizens in the United States.¹ Instead, they point to the fact that the law was never intended to directly address the long-standing and pervasive stigmas which have steadily built up over the decades (and even centuries) with respect to the disabled within American society. Such stereotypes often include the supposed inability of persons with disabilities to be able to compete effectively within the American marketplace.

¹ For a comprehensive overview of the National Council on Disability's position on the ADA — particularly how this organization believes that recent Supreme Court decisions have significantly weakened the relatively young law—see the “Righting the ADA” section of its web site: <http://www.ncd.gov/newsroom/publications/2003/policybrief.htm>

According to a 2001 report produced by the US Department of Labor's Office of Disability Employment Policy, discrimination continues to play a significant role in prohibiting people with disabilities from taking their rightful place within society:

People with disabilities face many barriers every day — from physical obstacles in buildings to systemic barriers in employment and civic programs. Yet often, the most difficult barriers to overcome are attitudes other people carry regarding people with disabilities. Whether born from ignorance, fear, misunderstanding or hate, these attitudes keep people from appreciating — and experiencing — the full potential a person with a disability can achieve (Office of Disability Employment Policy 2001).

The following sections will discuss how employers' perceptions and attitudes may contribute to discrimination and prevent the full employment of persons with disabilities in the US. Such challenges also reflect on the nature of the ADA in dealing with what some see as the prevalent threat of discrimination against persons with disabilities.

EMPLOYER ATTITUDES TOWARDS PEOPLE WITH DISABILITIES

There is some evidence that has shown that perhaps the most fundamental reason employment rates for persons with disabilities remain so high is because of employers' negative attitudes towards potential employees with disabilities. A review of the available literature on the subject finds that individual employer attitudes towards current or potential employees with disabilities constitute a primary dynamic with respect to

these high unemployment figures (Unger 2002a, 2).² The remainder of this section explores ongoing employer attitudes towards current or potential employees with disabilities in the workplace, attitudes which may contribute to the persistent high unemployment numbers for persons with disabilities. Potential contributing factors which will be touched upon in this section include the discriminatory effects of reduced expectations, type or severity of the disability and attitudes manifested by potential employers, previous experience with a disabled employee, and the size of the company which employs the disabled.

The Lingering and Discriminatory Effects of Reduced Expectations

One of the challenges that President George W. Bush issued during his first term in office—not only to certain minority communities in United States but to all Americans—was to actively “challenge the soft bigotry of low expectations” (Bush 2004). With respect to disability employment policy, it is necessary to recognize a form of discrimination that falls along these lines: the reduced expectation among potential employers that disabled workers can positively contribute their time, talents, and abilities as effectively as able-bodied workers. According to one survey, current and potential employers reported a number of worries with regard to the actual employment abilities of employees who were disabled. Such fears, it was also noted, may have come about as a

² The precise extent to which employers’ attitudes directly contribute to high unemployment rates is unknown because the number of studies is limited and the resulting data are often contradictory (Unger 2002a).

result of prevailing falsehoods and rumors rather than any first-hand experiences with employees who were disabled (Unger 2002a, 9).³

Of the limited number of studies which have been conducted, there is some evidence that the soft bigotry of low expectations is perhaps a contributing factor with regard to the ongoing high unemployment numbers.⁴ Because many of the data are contradictory, further research in this area of ongoing discrimination is warranted.

Contradictory Data on the Type Or Severity of Disability

The type or severity of the disability seems to play a role in attitudes manifested by potential employers. A certain number of studies have examined the workplace dispositions of employers towards disabled employees based upon the type or exact severity of the disability. The findings of these studies within this arena (from 1984 through 1997) show that employers expressed more concerns over hiring individuals with mental or emotional disabilities than hiring individuals with physical disabilities (Unger 2002a, 3): “The disability areas included blindness, cerebral palsy, paraplegia, emotional problems, epilepsy, amputation, deafness, and mental disabilities. Employers expressed the greatest concern toward employing individuals with mental disabilities and blindness and were least concerned about hiring individuals with epilepsy” (Unger 2002a, 3).

³ The report was also careful to note that although employers’ attitudes toward individuals with disabilities have been extensively studied, the accumulated research has nevertheless produced inconsistent findings. Factors identified as positive attributes by some employers (e.g., attendance, safety, productivity) have been cited as concerns by employers in other studies. Because of inconsistency in methodology, it is difficult to compare and derive conclusions based on the results of previous research. (Unger 2002a). Although it appears that employers’ ongoing concerns regarding expectations in employee productivity and competence continue to contribute to the high unemployment numbers among adults with disabilities, there is no direct evidence which conclusively proves such a connection.

⁴ The general manager of UNUM/Provident, the largest international provider of individual and group disability insurance, has noted that one of the primary difficulties which remains with respect to increasing the employment numbers among persons with disabilities relates to the fact that employers are simply not educated about persons with disabilities: “Their own inexperience with disabilities can manifest as fear, no matter how well-intentioned they are” (Royse 1999).

Additionally, “findings from a survey of Fortune 500 companies — conducted in 1991 — found that over 90% of the respondents responded affirmatively to hiring individuals with physical disabilities or hearing impairments, 39% responded affirmatively to hiring individuals with severe physical disabilities, and 20% responded affirmatively to hiring applicants with severe mental disabilities” (Unger 2002a, 3). In a relatively similar study, employers from a number of companies and enterprises located throughout Arkansas and Oklahoma were of the mindset that current or potential employees with mental and emotional disabilities constituted an increased workplace quandary when compared with other current or potential employees with less severe disabilities (Johnson 1988).

These surveys, while somewhat outdated, suggest the possibility that the high unemployment rate for persons with disabilities may reflect the fact that persons suffering from certain “severe” disabilities are far more likely to be denied employment opportunities as opposed to someone with a less severe physical disability. Or more particularly, persons with less severe physical disabilities may be employed much more regularly than the overall and considerably high unemployment rate of persons with disabilities in general would suggest.

However, more up to date findings seem to present contradictory data. In association with studies that were performed more recently, employers communicated inclinations that were more complimentary towards potential employees with more severe disabilities. In particular, these employers noted that such severely-disabled employees were reliable and industrious and possessed important and positive characteristics including communication and social interaction skills, as well as

optimistic outlooks that were encouraging toward their fellow coworkers (Unger 2002a, 4). “Almost three-fourths (74.4%) of the employers believed that the productivity rates of workers with severe disabilities can be as high as those of workers who are not disabled” (Unger 2002a, 4).⁵

Yet with regard to studies that were done on employee reliability, for example, the data once again proved contradictory. A 1991 study found that employer attitudes with respect to disabled employees was likely to be more positive with regard to the aspects of “turnover, absenteeism, and work performance” (Unger 2002a, 3-4). However, the results of this study seem to contrast with other reported findings from an earlier collection of studies (1984-1988). “Over two thirds of the executives in the 1991 study agreed with statements indicating that workers with disabilities perform as well as and have a lower turnover rates than their counterparts without disabilities, whereas findings from two earlier studies revealed employers’ concerns with the productivity or performance of workers with disabilities” (Unger 2002a, 3-4). As with other aspects of employers’ attitudes towards persons with disabilities in the workplace, further research on how the type or severity of an employee’s disability reflects upon potential discriminatory dispositions among employers is warranted.

Previous Experience With A Disabled Employee

Current data seem to suggest that an employer who has had previous experience with a disabled employee is more likely to look favorably upon an a potential employee who is likewise disabled. “Employers who have had previous experiences with

⁵ “The perceptions of [these] employers ... contradict the findings of prior employer attitudinal research. However, it is unclear how much the idea of social desirability influences employer responses” (Unger 2002a, 4)

individuals with specific disabilities, such as deafness, mental retardation, epilepsy, and psychiatric disability... reported more favorable attitudes toward hiring applicants with the same disability” (Unger 2002a, 4).

An associated study helps to prove the point. As part of an investigation of the attitudes of employers in relation to workers who happened to be deaf, the findings showed that employers who possessed previous experience employing deaf workers held more affirmative outlooks in regard to future hiring of potential deaf employees. It was also shown within this same study that those employers who had limited or no experience employing persons who happened to be deaf also manifested heightened fears with regard to worker safety. It can be noted therefore that work experience with disabled employees may be considered an integral factor toward current and future hiring decisions made by employers (Unger 2002a, 4-5). In an additional study, a sample from Fortune 500 companies was examined. The study reported “that the more exposure respondents had with employees with disabilities in their own workforce, the more positive their reported attitudes” (Unger 2002a, 5). Such studies also seem to provide some evidence that those individuals who have prior experience working with persons with disabilities generally retain a more positive outlook (coupled with reduced concerns) in relation to employing persons with disabilities.⁶

The data that were collected for the studies above reflected the American workplace prior to full implementation of the ADA. Following the official enactment of the bill, investigations of employer attitudes towards persons with disabilities diverged.

⁶ “Gruenhagen reported comparable findings in a study of fast-food restaurant managers regarding their previous experience with individuals with mental disabilities, their attitudes toward hiring them, and their opinions about their place in society” (Unger 2002a, 5).

A 1994 study, for example, was unable to discover any discernible association between an employers' prior work-related experience in hiring persons with disabilities and their occupational and managerial mindset toward these disabled employees (Kregel and Tomiyasu 1994). Whether or not these managers had any prior experience with disabled employees, they routinely expressed positive outlooks and complimentary feelings toward employees with disabilities (Unger 2002a, 5). Therefore, although the data seem to be contradictory, a preponderance of evidence suggests that prior work experience with persons with disabilities leads to more positive outlooks with respect to future hiring decisions. More research within this area of potential employment discrimination is warranted.

Size of the Company Which Employs the Disabled

Fourth, some studies suggest that the size of a company seems to affect employers' and fellow-employees' opinions of persons with disabilities. It was naturally assumed that the larger an employing company, the more access an employer has to resources, e.g. human resource management, financial, social, etc., to be able to adapt to the special needs of disabled employees. However, results of various studies focusing on the size of a potential employer has been somewhat contradictory. Prior to formal execution of the ADA in the American workplace, findings seemed to show that larger companies characteristically held a more positive attitude with respect to disabled employees. Studies performed after the ADA became law were unsuccessful in showing a relationship between size of company and extent of favorable attitudes towards current and potential employees with disabilities. Regardless of the size of an enterprise, after

enactment of the ADA employers continued to report positive attitudes with respect to disabled employees (Unger 2002a, 5).

Based upon the small number of studies, if discrimination against the disabled occurs in the workplace, it is often just as likely to occur in large corporations as it is within small companies. This suggests that the level or type of human resource management does not necessarily translate into more automatically successful results in hiring people with disabilities. Large corporations with ample resources and staff are just as likely to potentially discriminate against the disabled as are small businesses (Unger 2002a, 5).⁷

Ongoing Discrimination — Summary of Findings

The research data thus far represent a very mixed bag. When one study purports to show that large companies actually do a better job of hiring and managing disabled workers, another study seemingly refutes these data and presents an equally dim outlook for potential disabled employees. Notwithstanding the ADA's attempts to legislate, as it were, increased employer understanding of current and/or potential employees with disabilities, these studies do give some evidence that while there is headway that is being made with respect to rooting out discrimination in the workplace, enduring myths and misconceptions may continue to pose ongoing problems in regard to full implementation of the ADA.

⁷ "Similar inconsistencies have been found in investigations of the relationship between the type of industry and employer attitudes toward persons with disabilities in the workforce. Findings from studies conducted both prior to and after the implementation of the ADA's employment regulations failed to confirm a relationship between type of industry and employer attitudes toward hiring persons with disabilities" (Unger 2002a, 5).

At the same time, however, there appears to be a renewed emphasis on employers' recognizing the significance of employing workers with disabilities in an effort to enhance their image in the community, strengthen their commitment to corporate social responsibility, or increase the diversity of their workforce to reflect that of the general population. Even so, these efforts on the part of current and potential employers have somehow failed to directly translate into a marked increase in the hiring of adults with disabilities.

It is also important to note that of the studies mentioned here, very few of them were conducted with actual front-line supervisors or employer representatives who had real-life and ongoing experience supervising or evaluating the abilities of disabled employees. It is also important to note that senior-level supervisors and human resource executives have a unique and profound responsibility in creating and applying guidelines and procedures that fully incorporate and utilize disabled employees within the workplace. It is often the most immediate supervisor(s) of the disabled, however — not senior-level managers — who actually appraise a disabled employee's labor and individually attend to specific challenges and requirements of employees who happen to be disabled. In other words, those senior level managers who devise the rules and regulations which govern the daily operations of the lives of disabled employees — especially how employees with disabilities ultimately integrate into the operations of the enterprise — are often those who have little direct interaction with such disabled employees.

A question that arises as a result of these studies is whether or not a lack of first-hand knowledge and experience with disabled employees indirectly contributes to the

development and perpetuation of policies and procedures which may continue to similarly perpetuate myths and misconceptions, and which may discourage future hiring of people with disabilities? As was noted in a recent summary of such studies, “Future research efforts need to be directed at both corporate or senior management and direct-line supervisors” (Unger 2002a, 8).

Finally, there remain many senior managers within corporate America who continue to feel that much more effort should be exerted — within their respective companies as well as within other corporations — to fully and successfully incorporate current and potential employees with disabilities into the labor force (Unger 2002a, 9). Yet at the same time that such worthwhile sentiments are expressed, the employment rate for persons with disabilities does not seem to reflect any collective action on the part of such employers, in general, to bring about this necessary integration of people with disabilities into the American workforce. There may be some employers who are making headway in increasing employment opportunities for persons with disabilities. However, the statistics that continue to report that roughly 70 percent of persons with disabilities are presently unemployed highlights the need for much more action on the part of individual employers.

CONCLUSION

The purpose of this chapter has been to provide the reader with a brief overview of key elements of potential ongoing discrimination against the disabled, notwithstanding the enactment of the ADA in 1990. What this chapter has shown is that notwithstanding the fact that there have been no official or conclusive studies performed on the varying

aspects of potential discrimination against the disabled, there are many disability and labor policy experts who believe that discrimination remains a consistent and vexing problem for persons with disabilities in the US. If anything, this chapter has highlighted the need for further studies as it relates to the potential for enduring discrimination and the impact that such discrimination may be having in preventing Title I of the ADA from fulfilling its mandate.

As stated repeatedly throughout this thesis, it was the foremost purpose of the ADA to root out discrimination against the disabled and to open up windows of opportunities which have heretofore been denied. Yet notwithstanding the fact that nearly 15 years have passed since the ADA's enactment, ongoing discrimination continues to play a very real role in the lives of persons with disabilities in the US who are seeking to benefit from the ADA's promised protections (Simon 2006).

RECOMMENDATIONS FOR FURTHER RESEARCH

While there are many areas surrounding the ADA which constitute fertile ground for ongoing research, particularly with respect to why there has not been a correlation between the formal enactment of the ADA and a reduction in the high unemployment numbers among persons with disabilities, this thesis has specifically uncovered the need for further research in the following three primary areas:

First, as the National Council on Disability has made abundantly clear, the present federal data-collection methodologies are inadequate with respect to measuring employment for persons with disabilities. It bears repeating that the current system "comprises some 70 agencies which collect and disseminate information for use by

governments, businesses, researchers, and the public” (National Council on Disability 2000a). In order for the government to have a more accurate knowledge of precisely who is and is not employed (with respect to the disabled) it will be necessary for this system to be improved, especially with regard to the correlation of information collected by each independent agency.

Secondly, the definition of disability must be amended in order to create a more workable designation and classification of persons with disabilities in this country. This amended definition of disability must be inclusive enough to guarantee the protection of the civil rights of those who suffer from mental and physical disabilities (originally estimated at 43 million Americans, see Americans with Disabilities Act 1990c) and yet be particular enough to prevent the inclusion of as many as 160 million Americans (see *Sutton v. United Air Lines, Inc.* 1999) within that same classification.

Lastly, research needs to be conducted with respect to the effects of ongoing discrimination in the workplace. Ongoing discrimination may manifest itself in the perpetually low expectations of persons with disabilities (Teicher 2003), or it may take the form of fear or outright hostility toward disabled employees. Further studies may prove beneficial in highlighting the lasting consequences that employers’ attitudes towards employees with disabilities have on employment numbers for the disabled. The methodologies for measuring ongoing discrimination may need to be further developed or refined in order to more accurately determine the extent to which such ongoing discrimination plays a role in the enduring high unemployment numbers for persons with disabilities.

This thesis has supplied the reader with a concise history of the development of the legislation that would become the Americans with Disabilities Act. The historical context that was provided (in Chapter 2) accomplished two specific goals: First, it presented the key congressional players who would be responsible for structuring the ADA bill prior to its official enactment. Secondly, it highlighted the expectations of congressional proponents of this legislation, principally with regard to the viewpoints held by these proponents that the ADA would reverse the high unemployment numbers of persons with disabilities.

This thesis has also examined employment data for persons with disabilities 10 years following the ADA's enactment. The data presented in Chapter 3 clearly showed that the ADA has not led to a reversal of the high unemployment numbers for persons with disabilities, as congressional proponents had originally hoped prior to formal enactment.

This document has also addressed some of the chief problems with the structure and content of the ADA (Chapter 4). Foremost among these is the purposely vague nature of the law. As a result of the framers constructing the bill with such purposely vague characteristics, the judicial branch of government (which is responsible for the application of the law) has experienced considerable difficulty in administering the law. This ongoing problem with regard to enforcement of the ADA continues to hamper its as yet unrealized effectiveness in reversing such high unemployment numbers.

Chapter 5 has shown that the ADA has not brought to pass the anticipated flood of litigation originally supposed by opponents of the law. Chapter 6 considered the long-standing antipathy which the American business community has had towards the ADA.

As with Chapter 5's examination of the expectation of increased litigation, Chapter 6 addressed the belief within the business community that the new law would result in costly accommodations for employees with disabilities. However, this chapter has shown that average accommodation expenses for US enterprise are not overly burdensome.

According to this author, the principal reason that the ADA has not contributed to a reversal of high unemployment numbers for persons with disabilities in the US is as a result of the counterproductive structuring of the law itself. As a result of the inherently vague nature of the law, the desired outcomes of congressional proponents — specifically with relation to a reversal of these high unemployment numbers — were not brought to fruition.

As chapters 4 and 5 highlighted, the US Supreme Court has been forced to perform a very real amount of interpretive cleanup work with regard to the administration of the law. Necessarily, the Court has been obligated to constrict the definition of disability in attempting to apply the law with regard to civil rights cases. Such a constriction of what it means to be disabled in the United States has led to a frustration of the original objectives of congressional proponents of the ADA.

With regard to the aims of this paper, such a constriction has consequently prevented the ADA from having a more positive impact on unemployment for persons with disabilities. It is the view of this author that when legal experts see the ADA as a windfall for defendants (Colker 1999), and with persons with disabilities now finding that the very definition of disability has been significantly constricted, the natural outcome is a weakening of the ADA. (If not having weakened the law, such Supreme Court actions have at least enervated the original ideas, hopes, and expectations of its congressional

framers and proponents alike with regard to Title I. The simple truth may very well be that as a result of this constriction of the definition of disability, fewer persons with disabilities in this country are benefited by the law. And again, this specifically applies to Title I.)

As the Supreme Court has performed its judicial function in reordering and restructuring the ADA, it has also, of necessity, hamstrung the law's power to help reverse the high unemployment numbers for persons with disabilities. There are those who believe that it is now necessary to take alternative steps in redefining disability (Waterstone 2005). As Case Western Reserve University Professor of Law, Sharona Hoffman, has noted,

The definition of the term "disability" is severely flawed and hinders the achievement of corrective justice. The definition provides little guidance to litigants and to the courts concerning who can be deemed an individual with a disability and obligates courts to engage in the burdensome task of individually assessing each plaintiff's functionality level. This process leads to inconsistent court decisions concerning which conditions constitute disabilities ... and to an ever-narrowing judicial interpretation of the scope of the protected class. Unlike the groups protected by other civil rights statutes, individuals with disabilities, as currently defined, do not constitute a discrete and insular minority' and are not easily identifiable as a class (Hoffman 2003, 1218).

Professor Hoffman's specific recommendation for making the ADA more effective is similar to those made by the NCD: amend the current definition of disability.

Hoffman recommends that those who are due civil rights protection under the ADA should be legislatively collected under a protected class, one that has been sufficiently restructured by Congress “so that it is more easily discernable and more like other classes that have gained civil rights protection because of their histories of exclusion and marginalization” (Hoffman 2003, 1218). Furthermore, she has proposed that an entirely new categorical system be established in order to redefine this protected class and in order to boost the statute’s effectiveness.

With regard to what extent the definition of disability (as well as the reasonable accommodation clause) must be amended, or with respect to the question of to what extent a recategorization of the protected class under the ADA is needed, such inquiries are beyond the scope of this paper. Nevertheless, as a result of the lack of a reversal of the high unemployment numbers among persons with disabilities, it is evident that the present statutory framing of the ADA (as it applies to Title I) represents a failure of at least the original objectives and expectations of congressional proponents.

Other factors beyond the legislative framing of the ADA may be contributing toward the lack of a reversal of these high unemployment numbers. Such potential factors have been touched upon within this paper. However, it is the position of this author that such factors as employers’ fears of litigation, poor data-gathering and reporting methodologies, the potentially unattractive nature of accommodation expenses, or the element of enduring discrimination all constitute subalternate theories. Unless and until the aspect of the statute’s framing is addressed as a principal theoretical contributor

to the ongoing high unemployment numbers for persons with disabilities, the original expectations of the law's proponents will not be realized.⁸

As Deborah Stone has noted within her book *The Disabled State*, defining (or redefining) what it means to be disabled represents a complicated and ongoing process for any industrialized nation (Stone 1984a).⁹ A perfect definition of disability, one that is sufficiently inclusive and at the same time bureaucratically workable, may always be out of reach. Nevertheless, I am in agreement with Justice Sandra Day O'Connor and Justice Stephen Breyer (and the respective majority of the justices in each case) regarding present legislative construction of the ADA: the law is currently too broad, vague and overly inclusive, and if interpreted as originally written by Congress would expand the protected class to include approximately one half of the population of the United States.¹⁰ Such a definition of disability (along with its attendant reasonable accommodations clause) is untenable.¹¹

⁸ In speaking of the inherently vague language utilized in the ADA, including the definition of disability, I am also aware of the fact that such a redefinition of disability must also be advanced in association with disability surveys conducted by the US Census Bureau and other governmental organizations. The "expanding definition of disability," as I and others have used this or very similar terminology, may be said to encompass those individuals who, by self-determination, include themselves within the realms of the disabled. To what extent this self-determination of disability status is impacting the unemployment numbers of persons with disabilities is a subject that is in dire need of further study. I echo the calls of the NCD in more closely tying together the data-gathering methodologies of various federal agencies responsible for monitoring employment numbers among the disabled.

⁹ One of the many poignant passages found within Deborah Stone's book is the following as it relates to any given state's ability to determine what constitutes disability: "The evaluation of impairment is thus full of errors of reification and false precision. It assumes a direct correspondence between physiological processes and functional abilities. It conceives of functional ability as a single but composite entity that can be measured on an integer scale. Finally, it assumes an equivalence between different anatomical or physiological systems, so that, for example, a loss of either 20 percent of normal respiratory capacity or 20 percent of normal musculoskeletal function yields a 20 percent impairment" (Stone 1984a, 116).

¹⁰ "Justice Sandra Day O'Connor, writing for the seven-member majority, noted that should uncorrected conditions be included in the act, some 160 million Americans would be qualified as disabled" ("Politics Versus Prudence" 1999).

¹¹ This is especially true when considering data-gathering methodologies, as noted in Chapter 3. If the definition of disability is vague or overly broad, there will always be considerable and persistent difficulty as the government seeks to accurately determine employment rates for persons with disabilities.

It may seem strange that such a position would be taken by someone who is officially disabled, someone who it might naturally be supposed would be more favorable toward a broad and seemingly all-inclusive definition of disability. However, years of research have produced this viewpoint. The more that I have studied the issue, the more convinced I am that Justice O'Connor and Justice Breyer are correct as they have sought for a more limited, and more strict, if you will, definition of disability. The reason for this, I believe, is that a more constricted definition of disability is a more precise definition; a more precise definition represents a more workable definition, legislatively and bureaucratically speaking.

A more workable definition of disability will, I believe, lead to a greater realization of the original hopes and expectations of congressional (and other) proponents of the ADA as they pertain to employment opportunities for persons with disabilities in the United States.

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Appendix A

As noted in Chapter 3, the Current Population Survey (CPS) represents one of the US Census Bureau's primary data-gathering instruments in helping to determine the employment rates for persons with disabilities. Survey questions pertaining to disability within the CPS's monthly survey include the following four questions.

From Basic Monthly Survey

Question: What is the main reason you were not looking for work during the Last 4 Weeks?

Valid responses include:

- Believes No Wrk Avl In Line Lk Or Area
- Couldn't Find Any Work
- Lacks Necessary Schooling/Training
- Employers Think Too Young Or Too Old
- Other Types Of Discrimination
- Can't Arrange Child Care
- Family Responsibilities
- In School Or Other Training
- Ill-Health, Physical Disability
- Transportation Problems
- Other—Specify Ill-Health, Physical Disability

Question: Last month you were reported to have a disability. Does your disability continue to prevent you from doing any kind of work for the next 6 months (including working in the family business or farm)?

Valid responses include:

- Refused
- Don't Know
- Blank
- Yes
- No
- Did Not Have Disability Last Month

Question: Does your disability prevent you from accepting any kind of work during the next six months? Valid Entries

Valid responses include:

- Refused
- Don't Know
- Blank
- Yes
- No

Question: Do you have a disability that prevents you from accepting any kind of work during the next six months? Valid Entries

Valid responses include:

- Refused
- Don't Know
- Blank
- Yes
- No