THE AMERICANS WITH DISABILITIES ACT: AN UNFULFILLED PROMISE FOR EMPLOYMENT DISCRIMINATION PLAINTIFFS

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At the time of its passage in 1990, the Americans with Disabilities Act (ADA) was heralded as the twentieth century’s Emancipation Proclamation and Bill of Rights for an estimated forty-three million individuals with disabilities.¹ Broadly worded in its prohibition against discrimination in employment, public services, transportation, and public accommodations, the ADA is admittedly the most comprehensive piece of disability civil rights legislation ever enacted, profoundly affecting what it means to be disabled.² The expansive scope of the ADA was premised on Congress’s factual findings that the number of disabled Americans would grow as the population ages, that disabled Americans often have no legal recourse to redress discrimination, and that people with disabilities face serious social, vocational, economic, and educational disadvantages.³ Title I, the subject of this paper, prohibits state and municipal employers, private employers, employment agencies, and labor organizations from discriminating in employment against qualified individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.⁴

In the more than ten years since the ADA was enacted, the media’s often misleading and exaggerated portrayals of plaintiff victories under the ADA have resulted in a public that negatively perceives and grossly misunderstands the ADA.⁵ Because of the media’s statements that the ADA has created a “lifelong buffet of perks, special breaks and procedural

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4. 42 U.S.C. §§ 12,111-12,112.
protections” for people with questionable disabilities and is used “to trigger an avalanche of frivolous suits clogging federal courts,” the public inaccurately believes that many ADA plaintiffs are undeservedly and unjustifiably compensated.

But according to one management attorney, “No plaintiff’s attorney in his right mind will now take on an ADA contingency fee case and expect to make any money.” Although the statistics vary by a few percentage points, the consensus of academics, the American Bar Association, and practitioners for both employers and employees is that employers prevail in over ninety percent of ADA Title I cases at the trial court level and in eighty-four percent of cases at the appellate level. These statistics belie the perception that the ADA creates a windfall for plaintiffs. Instead, they demonstrate the need for reform of a statute whose “heart has been cut out” by the courts. In construing and applying Title I of the ADA, courts have defied congressional intent and limited the scope of the ADA to a very narrow class of plaintiffs. One plaintiffs’ attorney laments that with the exception of the obviously disabled—the wheelchair-bound, the blind, and the deaf—the ADA is basically dead” for most prospective plaintiffs. It may seem incomprehensible that the “Emancipation Proclamation” and the “Bill of Rights” for disabled individuals has been reduced to such a largely ineffective tool. However, the courts’ restrictive reading of the ADA has deterred plaintiffs from bringing claims and has predominantly resulted in plaintiffs’ defeat where they have either ignominiously or defiantly dared to challenge their statistical odds. Such abounding defeat has left plaintiffs, plaintiffs’ attorneys, and academics wondering how the promise of the ADA has so quickly become an empty promise for the intended beneficiaries of the ADA while providing a near promise of victory for employers.

This paper will examine the factors that operate in conjunction to

deprive the ADA of its force in protecting disabled employees. First, I will outline the types of cases brought under the ADA and the statistics documenting the remarkable success rate for employers under the ADA. I will then explain why plaintiffs and the plaintiff bar may nonetheless continue to initiate and appeal ADA cases. Second, I will delineate several potential factors that can explain the primarily pro-defendant outcomes under the ADA, namely: (1) the courts' abuse of the summary judgment device; (2) the courts' failure to defer to the Equal Employment Opportunity Commission's (EEOC) guidance; (3) the apparent hostility of certain judges, especially in conservative circuits, to ADA claims; (4) the EEOC's infrequent participation in litigation; and (5) the Supreme Court's use of the ADA's flexible and ambiguous statutory language to narrow the grounds for recovery under the ADA. Third, I will explore the remaining options for ADA advocates, which principally include either lobbying for congressional reform of the ADA to elucidate its statutory intent or turning to state law as a substitute for the ADA. Ultimately, I conclude that both of these alternatives prove unsatisfactory, particularly in light of the current legal and political climate.

I. PRO-DEFENDANT OUTCOMES IN ADA TITLE I CASES

A. Types of Claims Raised Under the ADA

A report on the EEOC's litigation docket from 1992 through March of 1998 reveals the types of ADA cases that the EEOC handled during this period of extensive plaintiff loss. In this timeframe the EEOC resolved 180 cases and was handling ninety-eight active ones. Of these 278 active and resolved cases, 470 charges of discrimination were outlined (many cases involved more than one discrimination charge). Forty-six percent of the cases were related to hiring and employment status, with charges about hiring policies and actions and terminations the most prominent. Twenty percent dealt with the failure of employers to provide reasonable accommodations. Eighteen percent involved treatment by employers, including terms and conditions of employment, retaliation for complaints, harassment and hostile work environments, and violations of confidentiality. Nine percent dealt with unlawful disability-related

13. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 418-19.
Six percent involved the discriminatory effects of disability benefits and health insurance coverage. The report reveals wide variety in the type of conditions experienced by the plaintiffs, including life-threatening conditions (e.g., cancer), congenitally induced disabilities, learning and attention deficit disorders, hearing and vision impairments, loss of limbs due to workplace accidents, depression, and back problems or injury. Many types of entities were charged with discrimination under the ADA, ranging from small private concerns to major corporations.

B. Statistics Documenting the Pro-Defendant Outcomes in ADA Title I Cases

Despite the diversity of claims asserted, disabilities alleged, and employers sued, ADA employment discrimination plaintiffs almost uniformly lose. Only plaintiffs in prisoner rights cases fare as poorly as ADA plaintiffs. Plaintiffs in litigation involving comparable areas of law, such as Title VII of the Civil Rights Act of 1964, succeed at much higher rates than ADA plaintiffs. Between 1992 and 1998, defendants won in approximately 93% of reported ADA employment discrimination cases decided at the trial court level. Thirty-eight percent were decided on

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18. Id. at 419.
19. Id.
20. Id.
21. Id.
22. Colker, supra note 5, at 100.
23. Id. See also Colker, supra note 9, at 252 (noting the differences between Title VII suits alone as compared to when they are included with ADA actions).
24. Colker, supra note 5, at 109. The statistics from this article are based on an examination of all ADA appellate employment discrimination decisions available on Westlaw since the ADA became effective in 1992 through July 1998, supplemented by a few additional cases available through other electronic services. Id. at 103. Ms. Colker also examined the aggregate trial court outcome data for these ADA employment discrimination cases. Id. However, as the author concedes, there are methodological problems with relying on published opinions only. Id. at 104. In fact, ADA outcomes are probably more pro-defendant than this data indicates because the data only reflect those cases where judges published opinions available to the public. Id. at 105. Many summary opinions in favor of defendants are not published, such as motions for summary judgment and dismissals. Id. To assess trial court outcomes, the author analyzed data from the American Bar Association of final trial court outcomes, including both state and federal trial courts. Id. at 109. More than 90% of the cases are in federal trial courts. Id. at 109 n.45. "The data only include employment cases against ADA Title I defendants and exclude cases brought against public entities. Moreover, the data do not screen out frivolous litigation." Id. See also Colker, supra note 9, at 246 (discussing "selection bias" in the analysis of ADA cases on appeal). The database for this article consists of appellate ADA employment discrimination decisions that are available on Westlaw. Id. at 244. Thus, this database "cannot precisely answer the question of what percentage of ADA cases result in favorable verdicts. It can only tell us how the appellate system handles those verdicts on appeal." Id. at 245. Also,
summary judgment and 54% were resolved through a decision on the merits.\textsuperscript{25} Not only did defendants prevail at a very high rate through dismissal, judgment, or verdict, but they also prevailed at a similarly high rate on appeal.\textsuperscript{26} Of those cases appealed between 1992 and 1998, defendants succeeded in 84% of reported cases.\textsuperscript{27} Between 1994 and 1999, defendants triumphed in over 86% of ADA appellate cases.\textsuperscript{28} Conversely, between 1992 and 1998, plaintiffs won in only 6% of cases at the trial court level and in 52% of the cases in which defendants appealed these judgments.\textsuperscript{29} Of the few cases in which plaintiffs prevailed at both the trial and appellate levels, their rewards were reduced on appeal in 28% of cases.\textsuperscript{30} Another statistic indicates that defendants are far more likely to attain a reversal on appeal than are plaintiffs, with defendants attaining a full reversal in 42% of appellate litigation and obtaining a reduction in the damages award in an additional 17% of cases, while in contrast, plaintiffs obtain a reversal of pro-defendant judgments in only 12% of cases.\textsuperscript{31}

Arguably, these statistics overstate defendants' victories in ADA cases because while plaintiffs may not be succeeding in court, they may be obtaining settlements to compensate them for the discrimination they experience.\textsuperscript{32} However, one plaintiffs' attorney reports that she has not seen much of a willingness on the part of employers to settle ADA cases on the merits.\textsuperscript{33} This underestimation is further exacerbated by the fact that this database is not reflective of all appellate opinions because not all unpublished opinions are included. Id. The appellate investigations in the employment discrimination area reflect a selection bias because the largest categories of cases that are decided on appeal are dismissals and summary judgment motions, which are pro-defendant outcomes. Id. at 246. Therefore, it can only be concluded that 87% of the cases appealed and made available on Westlaw had resulted in dismissals or grants of summary judgment for defendants at the trial court level, not that 87% of all ADA cases result in dismissals or pro-defendant summary judgment decisions. Id. See also Wilmarth, supra note 8 (noting that the American Bar Association reports that defendants prevailed in 92% of ADA cases between 1992 and 1997 and in over 95% of cases in federal court in 2001, but failing to clarify whether these statistics reflect cases decided at the trial court level, at the appellate level, or both).

\begin{thebibliography}{10}
\bibitem{25} Colker, \textit{supra} note 5, at 109.
\bibitem{26} Id. at 108.
\bibitem{27} Id. at 100.
\bibitem{28} Ruth Colker, \textit{The Americans with Disabilities Act: The Death of Section 504}, 35 U. MICH. J.L. REFORM 219, 221-22 (2002) (this statistic reflects data available on Westlaw for the relevant period).
\bibitem{29} Colker, \textit{supra} note 5, at 107. \textit{See also} William P. Perkins & Kimberly A. Altschul, 'Toyota' \textit{Makes It a Bumpy Ride for ADA Plaintiffs}, N.Y. L.J., Mar. 19, 2002, at 1 (noting that the percentage of federal cases in which plaintiffs have prevailed under the ADA has decreased annually, with plaintiffs prevailing in 8% of the actions brought in 1992 through 1997, 5% in 1998, 4% in 1999, and 3% in 2000).
\bibitem{30} Colker, \textit{supra} note 5, at 108.
\bibitem{31} Colker, \textit{supra} note 9, at 248.
\bibitem{32} Id. at 256.
\end{thebibliography}
employment discrimination cases. Management attorneys are often paid on an hourly basis, so from an economic standpoint, it is not logical for them to counsel their clients to settle soon after a complaint is filed. Typically, management attorneys advise their clients to try to dispense with ADA cases on a motion for summary judgment before they offer a settlement. Because there are many coverage requirements that must be met before the merits of the claim are reached, it often pays for employers to attempt to obtain summary judgment before considering settlement. Employers would rather spend their money trying to win on summary judgment than settling in order to limit other employees' incentives to sue. Moreover, because plaintiffs typically settle for less than they seek in litigation, it is problematic to characterize settlements as pro-plaintiff or pro-defendant outcomes.

Although explicit settlement data are not available, the EEOC reports that over 15% of the charges filed under the ADA from 1992 through 2000 resulted in pro-plaintiff “merit resolutions” at the pre-trial stage. But this figure includes cases in which the EEOC found reasonable cause to believe that discrimination had occurred, yet was unable to obtain a successful conciliation. If the unsuccessful conciliations are removed from the “merit resolution” category, then only 12% of all claims filed with the EEOC resulted in outcomes favorable to plaintiffs. However, 31% of the charges filed with the EEOC resulted in “administrative closures” whereby the plaintiffs sought right-to-sue letters without pursuing the formal merit resolution process with the EEOC. It is possible that some of these “administrative closure” cases resulted in pre-trial settlements, but the

33. Telephone Interview with Alice Ballard, Esq., National Employment Lawyers Association Member (Apr. 11, 2003).
34. Id.
35. Id.
36. Id.
37. Id.
38. Colker, supra note 9, at 256.
40. Colker, supra note 9, at 256.
41. Id.
42. Id. "Administrative closures" also include cases where investigations were terminated for reasons such as a failure to locate the charging party, the charging party failed to respond to EEOC communications, the charged party refused to accept full relief, and the case was mooted due to the outcome of related litigation. See Percy, supra note 12, at 416 (finding that in the period from 1992 to 1998, about 34% of the charges filed with the EEOC were classified as “administrative closures”).
EEOC does not collect such data.\textsuperscript{43} Because of the "administrative closure" cases, resolution was possible for just under 70\% of the charges filed with the EEOC.\textsuperscript{44} Considering only the resolved cases, a merit resolution was achieved in 22\% of cases filed with the EEOC if the unsuccessful conciliations are counted as "merit resolutions."\textsuperscript{45} This figure decreases to 17\% of the cases if the unsuccessful conciliations are not counted.\textsuperscript{46} Again, this figure is roughly the same as the success rate for prisoner tort cases.\textsuperscript{47} The average award for a case in the "merit resolution" category is $13,406.\textsuperscript{48} After the EEOC "filters" through the charges it receives, about 88\% of the cases filed are ultimately eligible to become court cases after the issuance of a right-to-sue letter, with the EEOC finding no reasonable cause to believe that discrimination occurred in more than half of them.\textsuperscript{49}

C. Why Plaintiffs and the Plaintiff Bar Continue to Initiate and Appeal ADA Cases

Faced with staggeringly low chances of success, plaintiffs and plaintiffs' lawyers have significantly reduced the number of claims they bring under the ADA. In 1995, the number of claims filed with the EEOC reached its peak with about 20,000 cases filed.\textsuperscript{50} Subsequently, the EEOC experienced an annual decrease in the number of disability charges it received: 17,806 in 1998, 17,007 in 1999, and 15,864 in 2000.\textsuperscript{51} The number of filings in 2000 represents about a 20\% decline from 1995, a mere five years earlier.\textsuperscript{52}

\textsuperscript{43} Colker, supra note 9, at 256.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. See also Percy, supra note 12, at 416 (finding that in the period from 1992 to 1998, 22\% of EEOC claimants received a favorable outcome, including settlements, withdrawal of charges upon receipt of benefits, and findings of reasonable cause).
\textsuperscript{47} Colker, supra note 9, at 256.
\textsuperscript{48} Id. at 257. It is not surprising that the average settlement figure for charges filed with the EEOC is low given that claimants bear no costs in filing their claims. Moreover, many lawyers may seek administrative closures in their strongest cases because they are eager to seek a settlement or trial court victory for their client and see little monetary benefit through their participation in the EEOC conciliation process. The low average size of award gained through the EEOC's process would not be sufficient to pay a lawyer on an hourly or contingency fee basis. Id. Thus, it may be rational for lawyers to opt out of the EEOC's process, especially because the average award where a plaintiff obtains a trial victory is over $100,000. Id. See also Percy, supra note 12, at 416 (noting that monetary benefits awarded through settlements and conciliation agreements totaled more than $211 million between 1992 and 1998).
\textsuperscript{49} Colker, supra note 9, at 257.
\textsuperscript{50} Loomis, supra note 11, at 8.
\textsuperscript{51} Perkins & Altschul, supra note 29, at 4.
\textsuperscript{52} Loomis, supra note 11, at 8.
Although plaintiffs and plaintiffs' lawyers have reacted to their grim chances of success by decreasing the number of ADA cases they commence, they continue to initiate and appeal a seemingly disproportionate number of cases despite such unfavorable statistics. Four factors may explain this apparent irrationality. First, in the initial generation of cases interpreting a statute such as the ADA, the decision of plaintiffs' lawyers to bring and appeal cases under that statute may be colored by their experience litigating similar cases, namely those under section 504 of the Rehabilitation Act of 1973, Title VII, or the ADEA.\footnote{Colker, supra note 5, at 110 (footnotes omitted).} Plaintiffs' lawyers may overestimate their prospects of winning ADA cases if their experiences in related areas of law have been more promising.\footnote{Id.} At the trial court level, it is possible that plaintiffs' attorneys miscalculate their chances of prevailing in the lower courts based on their more frequent positive outcomes under section 504, the precursor to the ADA.\footnote{Colker, supra note 9, at 262-63.} Moreover, on the eve of the ADA's enactment, plaintiffs' success rate on appeal under section 504 was about 35%, considerably higher than under the ADA, which perhaps partially clarifies why the plaintiff bar still takes on the risk of an appeal.\footnote{Colker, supra note 28, at 223-24.} Plaintiffs' lawyers may also have not anticipated the pro-defendant ways in which courts would adjudicate ADA cases, especially where the courts' methodologies run counter to prior decisions under section 504.\footnote{Colker, supra note 5, at 110.} For example, as will be discussed in greater detail in section II of this paper, the courts' use of the summary judgment device and the courts' failure to defer to EEOC regulations, particularly in the most pro-defendant circuits, contradict precedent under section 504.\footnote{Id.} Finally, pro-plaintiff section 504 cases, such as \textit{PGA Tour, Inc. v. Martin} and \textit{School Board v. Arline},\footnote{532 U.S. 661 (2001) (determining that a golfer with a leg circulation condition that partly limited his ability to walk was entitled to coverage under the ADA).} as well as the ADA case \textit{Bragdon v. Abbott},\footnote{480 U.S. 273 (1987) (finding a plaintiff with tuberculosis to be covered by the ADA).} continue to give plaintiffs' attorneys hope for their clients.\footnote{524 U.S. 624 (1998) (holding that a plaintiff with asymptomatic HIV was disabled under the ADA).} Because the plaintiffs in these decisions continued to perform most life activities with little difficulty and did not experience what many attorneys regard as seriously disabling conditions, attorneys are still willing to take a chance 

\footnote{53. Colker, supra note 5, at 110 (footnotes omitted).} \footnote{54. Id.} \footnote{55. Colker, supra note 9, at 262-63.} \footnote{56. Colker, supra note 28, at 223-24.} \footnote{57. Colker, supra note 5, at 110.} \footnote{58. Id.} \footnote{59. 532 U.S. 661 (2001) (determining that a golfer with a leg circulation condition that partly limited his ability to walk was entitled to coverage under the ADA).} \footnote{60. 480 U.S. 273 (1987) (finding a plaintiff with tuberculosis to be covered by the ADA).} \footnote{61. 524 U.S. 624 (1998) (holding that a plaintiff with asymptomatic HIV was disabled under the ADA).} \footnote{62. See Ballard, supra note 33 (discussing the implications of these cases upon the plaintiff bar).}
under the ADA where they view their clients as more gravely disabled.63

Second, the instability and inconsistency in ADA caselaw forces plaintiffs to continually adjust to a moving target.64 The conditions for a major adjustment in the plaintiff bar’s behavior have not yet occurred under the ADA because of the lag time between Supreme Court decisions and lower court litigation.65 ADA cases have been and continue to be filed in the lower courts before the Supreme Court has yet rendered a comprehensive set of decisions defining what it means to be disabled.66 It will take several more years for a new generation of cases to be filed that have incorporated the Supreme Court’s new set of rules, and by then, the Supreme Court may have rendered other conservative decisions that plaintiffs’ lawyers have thus far not anticipated.67 Consequently, the predicate for “rational litigation” may not yet exist for the plaintiff bar.68

Third, plaintiffs’ lawyers might continue to appeal adverse decisions, despite their poor statistical odds, because they have simply determined that the lower courts have made egregious errors that have some possibility of being corrected on appeal.69 Alternatively, their decisions to appeal might result from the fact that they have a substantially more positive sense of their clients’ cases than do the trial courts.70

Finally, plaintiffs’ lawyers may also be unaware of the statistics or may simply not believe they apply to the particular case they are litigating.71 Many plaintiffs’ lawyers feel outraged at how disabled employees are treated and have difficulty turning down non-meritorious cases because their general sense of fairness is violated by such cases.72 Many lawyers and their clients falsely think disabled employees are entitled to certain protections and special treatment, such as believing that an employee cannot be fired when he is out on disability, receiving workers’ compensation, or in possession of a doctor’s note.73 They also often incorrectly assume that disabled employees are entitled to work on “light duty”—jobs reserved for employees who have been out on workers’ compensation—and are required to return to work in less physically demanding positions.74 This “folk law” creates rampant misperceptions

63. Id.
64. Colker, supra note 9, at 264.
65. Id.
66. Id. at 264-65.
67. Id. at 265.
68. Id.
69. Colker, supra note 5, at 109.
70. Id.
71. Id. at 109-10.
72. Ballard, supra note 33.
73. Id.
74. Id.
among plaintiffs' attorneys and inflates their perceived chances of success, leading them to improperly use the ADA to try to obtain such benefits for their clients.\textsuperscript{75} Thus, many "blind alleys" exist that lawyers will venture down once or twice before realizing the error of their ways.\textsuperscript{76}

II. FACTORS THAT EXPLAIN PLAINTIFFS' EXTENSIVE LOSSES UNDER THE ADA

No single factor accounts for the success or failure of a particular plaintiff under the ADA. However, when ADA cases are examined collectively, certain trends emerge that explain plaintiffs' high failure rate. The combined data demonstrates that several procedural and substantive factors operate in conjunction to hinder plaintiffs' ability to win, thus rendering the ADA a meaningless statute for many who face disability discrimination in employment. The most significant factors contributing to pro-defendant outcomes in ADA cases are: (1) the courts' abuse of the summary judgment device; (2) the courts' failure to defer to the EEOC's guidance; (3) the apparent hostility of some courts, particularly in conservative circuits, to ADA claims; (4) the EEOC's infrequent participation in plaintiffs' ADA litigation; and (5) the Supreme Court's use of the ADA's flexible and ambiguous language to narrow the potential grounds of recovery for ADA plaintiffs.\textsuperscript{77}

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Colker, \textit{supra} note 9, at 271-76. It is interesting to note the factors that do not significantly affect whether an ADA plaintiff wins or loses: the theory of disability asserted by the plaintiff, the defenses raised by the defendant, and the plaintiff's occupation. See \textit{id.} at 271-76. Although the type of impairment alleged by the plaintiff was somewhat statistically significant in the database of appellate outcomes from 1992 to 1998, Ms. Colker predicted that its statistical significance would diminish or even reverse in light of the Supreme Court's subsequent decisions narrowing the definition of disability. \textit{id.} at 273-74. Plaintiffs who alleged extremities impairments or impairments due to diabetes were more likely to prevail than other plaintiffs. \textit{id.} at 273. The plaintiffs with extremities impairments had a variety of problems ranging from arthritis to amputated limbs, but not including back injuries. \textit{id.} Additionally, Ms. Colker found the type of discrimination asserted to be statistically significant, but did not consider this factor to be among the most important in determining plaintiffs' appellate outcomes. \textit{id.} at 271-72. According to her data, a plaintiff who alleged a discriminatory demotion was much more likely to prevail than other plaintiffs. \textit{id.} at 272. Such plaintiffs had a 13% chance of prevailing whereas plaintiffs alleging other forms of discrimination had between a 1% and 5% chance of prevailing. \textit{id.} Moreover, harassment claims correlated with plaintiff loss. \textit{id.} The data also revealed that whether the defendant was a public or private entity was not significant in predicting appellate outcomes. \textit{id.} at 275. Finally, Ms. Colker ruled out the possibility that judicial uncertainty, stemming from the ADA's status as a new statute, is a factor in predicting ADA outcomes. \textit{id.} at 258. She rejected this potential explanation because judicial outcomes have remained relatively constant and pro-defendant since 1994. \textit{id.} at 242.
A. Courts' Abuse of the Summary Judgment Device in ADA Cases

Federal district and appellate courts hearing ADA cases are arguably abusing the summary judgment device with the result that plaintiffs are unjustly deprived of both their right to a jury trial and their potential right to compensation under the ADA. One defense attorney even admits that ADA cases "are mostly decided for the employer on summary judgment by the trial judge, without a jury ever hearing the story." The abuse of the summary judgment device occurs in two ways. First, district courts refuse to send normative factual questions to the jury and instead substitute their own normative judgments. This abuse of the summary judgment device affects overall substantive outcomes because plaintiffs fare better in jury trials than in bench trials in both employment discrimination and civil rights cases. Second, courts also abuse the summary judgment device by creating an impossibly high threshold of proof necessary for defeating a summary judgment motion. In particular, courts ignore that the defendant might bear the burden of proof when seeking summary judgment on issues such as whether a plaintiff poses a direct threat to the health or safety of others. Courts often grant summary judgment for the defendant on such issues despite what appear to be genuine issues of fact raised by the plaintiff.

1. Normative Factual Questions Intended for the Jury

Normative factual questions such as whether a plaintiff has a "disability," whether a requested accommodation is "reasonable," whether a plaintiff is "qualified" to perform the "essential" functions of a job, whether a hardship imposed by an accommodation is "undue," or whether a purported threat poses a significant risk to the health and safety of others should be sent to a jury. Although it is difficult to determine when a question involves the type of normative factual question that is appropriate for a jury, courts typically use a functional test to make this determination. Prior practices of the courts regarding similar types of questions should be given strong consideration in applying the functional test. Thus, the best source of analogy would undeniably be the caselaw

78. Wilmarth, supra note 8.
79. Colker, supra note 5, at 101.
80. Id. at 102.
81. Id.
82. Id.
83. Id.
84. Id. at 111-12.
85. Id. at 111.
86. Id.
under section 504 of the Rehabilitation Act since Congress explicitly requires the ADA to be interpreted consistently with section 504. The section 504 caselaw strongly suggests that many of the questions raised by the ADA require normative judgments and factual inferences that should be decided by a jury rather than by a judge if the evidence presents a genuine issue of material fact. The Supreme Court and the lower federal courts have mostly characterized disability-related issues under section 504 as factual in nature.

The ADA uses everyday terms like "substantial limitation," "direct threat," "reasonable accommodation," and "undue hardship," all of which clearly require some normative evaluation. Although a judge would need to instruct a jury on the statutory definitions of such terms, ultimately some person or group must determine whether a limitation places an individual outside the norms of society, whether a threat to health or safety is significant, whether there is a reasonable accommodation that would permit a plaintiff to perform the essential functions of the job, and whether a hardship is undue. To determine that a particular plaintiff's handicap qualifies as a "disability" requires jury deliberation is a more challenging question, although there are strong indications that it does. The ADA itself and the regulations passed pursuant thereto compel an individualized inquiry into whether a person is disabled.

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87. Id. See 42 U.S.C. § 12,201(a) (1994) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.").

88. Id. at 111-12.

89. Id. at 112. For example, in Arline, the Supreme Court stressed the factual nature of the direct threat defense in a case involving the contagiousness of a teacher with a record of tuberculosis. See Sch. Bd. v. Arline, 480 U.S. 273, 287 (1987). See also Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996) (holding that the questions of whether a plaintiff is disabled and whether a plaintiff was fired because of his or her disability are questions of fact, so long as the facts make these issues "debatable question[s]").

90. Id. at 114.

91. Id. at 114-15.

92. Id. at 115.

93. Id. See 42 U.S.C. § 12,102(2) (1994) ("The term 'disability' means with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . .")

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a 'laundry list' of impairments that are 'disabilities.' The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.

disabled as a result of his HIV infection, but declined to hold that an HIV infection is inherently a disability under the ADA.\textsuperscript{95}

2. An ADA Plaintiff’s Burden on a Motion for Summary Judgment

Admittedly, the Supreme Court’s decision in \textit{Anderson v. Liberty Lobby, Inc.}\textsuperscript{96} has increased the burden on plaintiffs in defeating a motion for summary judgment, mandating that the non-moving party go beyond the pleadings to defeat the motion.\textsuperscript{97} However, the plaintiff “need only present evidence from which a jury might return a verdict in his favor.”\textsuperscript{98} \textit{Anderson} dictates that the amount of evidence needed to defeat a motion for summary judgment is contingent on the type of inquiry at issue, i.e., the inquiry involved in ruling on a motion for summary judgment implicates the substantive evidentiary standard of proof that would apply at trial.\textsuperscript{99} Thus, in ADA cases, a court should determine whether a plaintiff can defeat a motion for summary judgment on these normative, factual issues by taking into account the plaintiff’s evidentiary burden.\textsuperscript{100} Plaintiffs bear the burden of proving they are disabled and that an accommodation is reasonable under the ADA, while defendants bear the burden of proving that a proposed accommodation creates an undue hardship, that a risk of harm is a “direct threat,” or that a medical examination of an incumbent employee is “job-related and consistent with business necessity.”\textsuperscript{101} Consequently, it should be easier for a plaintiff to defeat a defendant’s motion for summary judgment on issues such as “direct threat” than on issues such as the definition of “disability.”\textsuperscript{102} However, even on those issues on which the plaintiff bears the ultimate burden of proof, the plaintiff does not have to offer uncontroverted proof simply to get the case to a jury.\textsuperscript{103} ADA plaintiffs need only offer proof under the preponderance of evidence standard.\textsuperscript{104}

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\textsuperscript{95} Colker, \textit{supra} note 5, at 115 (citing \textit{Bragdon}, 524 U.S. at 641-42).
\textsuperscript{96} 477 U.S. 242 (1986).
\textsuperscript{97} Colker, \textit{supra} note 5, at 116-17 (citing \textit{Anderson}, 477 U.S. at 257).
\textsuperscript{98} \textit{Id.} at 117 (quoting \textit{Anderson}, 477 U.S. at 257).
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} (quoting 42 U.S.C. § 12,112(d)(4)(A) (1994)).
\textsuperscript{102} \textit{Id.} at 117-18.
\textsuperscript{103} \textit{Id.} at 118.
\textsuperscript{104} \textit{Id.}

\end{footnotesize}
3. The Appellate and Trial Courts' Documented Abuse of the Summary Judgment Device

The ordinary language of the ADA, coupled with section 504's precedent, indicates that a jury, not a judge, should decide genuine issues of material fact under the ADA because the resolution of these issues depends on individualized findings. Nevertheless, courts routinely decide fact-intensive cases without sending them to a jury. One scholar has documented a trend that overwhelmingly demonstrates that judges in the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits decide most normative, factual questions in ADA cases. The Sixth Circuit case *EEOC v. Prevo's Family Market, Inc.* is representative of the appellate courts' tendency to decide questions that belong in the province of the jury and to place an improperly large burden of proof on the plaintiff in determining whether there is a genuine issue of material fact. In *Prevo's Family Market* the issue was whether the employer had unlawfully conditioned the plaintiff's continued employment upon his revealing the results of an HIV examination. The trial court granted summary judgment for the plaintiff and the jury awarded him compensatory and punitive damages. The Sixth Circuit reversed the grant of summary judgment and ruled that the trial court should have granted summary judgment for the defendant, failing to consider that the defendant had the burden of proving that the HIV examination request was lawful. Thus, the appellate court ignored Anderson's mandate that a court must take into account the evidentiary burden of proof in deciding whether summary judgment is appropriate. Additionally, the Sixth Circuit's decision implied there was not sufficient evidence of genuine issues of material fact even though the jury's award of $45,000 in punitive damages suggested the jury did not believe the defendant's argument that it was acting reasonably and in good faith. By remanding the case to the trial court to grant summary judgment for the defendant, the Sixth Circuit effectively instructed the lower courts to grant motions for summary judgment despite disputed factual records and issues on which the moving

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105. *Id.* at 115-16.
106. *Id.* at 119.
107. 135 F.3d 1089 (6th Cir. 1998).
108. Colker, *supra* note 5, at 120.
109. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 121.
party bore the burden of proof. Unfortunately, the Sixth Circuit is far from alone in its approach to granting summary judgment in ADA cases. Viewed collectively, appellate courts are often “too quick to take cases from juries as well as too willing to render judgments in favor of defendants.”

Regrettably, the appellate courts’ consistent message regarding the use of the summary judgment device has not gone unheeded by the district courts. An evaluation of trial court data collected by the ABA suggests that these appellate cases are reflective of a similar pattern at the trial court level. Thirty-eight percent of trial court cases that were not appealed were resolved through summary judgment in favor of the defendant-employer, while only 1% were resolved through summary judgment in favor of the plaintiff. Although it is unclear from this data what percentage of the cases decided on the merits were actually decided by a jury, it is obvious that a minimum of 39% of the cases were decided by a judge without assistance from a jury.

These appellate and trial court patterns documenting the frequent abuse of the summary judgment device are disturbing because they run counter to Congress’s intent in passing the ADA. Congress’s declaration at the time of the ADA’s enactment that there were about forty-three million disabled Americans shows that Congress did “not intend the courts to consider instances of discrimination to be rare, isolated events.” Rather, Congress expected the courts to use realistic burdens of proof to reflect its belief that discrimination was pervasive and required swift redress. In deciding normative, factual questions and in misallocating parties’ burdens of proof, the courts are depriving ADA plaintiffs of their statutory rights, thus rendering the ADA an empty promise.

B. Courts’ Failure to Defer to the EEOC’s Guidance in Interpreting the ADA

1. Congress’s Clear Intent that the Courts Defer to the EEOC in Interpreting the ADA

The courts’ refusal to defer to the EEOC’s guidance in interpreting the
ADA has also contributed to the prevalence of pro-defendant outcomes.\textsuperscript{122} Despite the fact that the plain language of the ADA instructs courts to abide by agency interpretations of the ADA, many lower courts nonetheless decline to do so.\textsuperscript{123} The ADA specifically requires courts to defer to the EEOC’s historic views under section 504 of the Rehabilitation Act, as well as the EEOC’s contemporaneous views under the ADA.\textsuperscript{124} Congress expressly delegated enforcement of the employment discrimination provisions of the ADA to the EEOC.\textsuperscript{125} Adhering to the ADA’s requirement that employment regulations be issued within one year of the date of the ADA’s enactment, the EEOC published final rules, which contained an appendix entitled “Interpretive Guidance.”\textsuperscript{126} Thus, not only was the EEOC required by Congress to draft regulations, but the EEOC also did so in a manner that is usually accorded the highest judicial deference.\textsuperscript{127} Moreover, agency regulations are especially entitled to deference when it is evident that Congress approves of them.\textsuperscript{128} By directly incorporating preexisting section 504 of the EEOC regulations into the ADA, Congress unambiguously indicated that it endorsed the agency’s historical interpretation of disability discrimination law.\textsuperscript{129} Congress’s incorporation of section 504 regulations into the ADA reflected its satisfaction with the regulatory process, as well as its expectation that the courts would defer to agency expertise when interpreting the ADA’s language.\textsuperscript{130}

The ADA states that courts should interpret the ADA consistently

\textsuperscript{122} Id. at 101.
\textsuperscript{123} Id. See also § 12,117(b) (1994) (requiring the EEOC to promulgate regulations that prevent conflicting standards when reviewing complaints); 42 U.S.C. § 12,201(a) (1994) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 791-794(e)) or the regulations issued by Federal agencies pursuant to such title.”).
\textsuperscript{124} Colker, \textit{supra} note 5, at 134. See also 42 U.S.C. § 12,201(a) (1994) (denoting the importance of and guidance offered by the regulations issued by federal agencies).
\textsuperscript{125} Colker, \textit{supra} note 5, at 134. See 42 U.S.C. § 12,116 (1994) (“Commission shall issue regulations in an accessible format to carry out this subchapter.”); see also Percy, \textit{supra} note 12, at 415-16 (describing the charge of the EEOC).
\textsuperscript{126} Colker, \textit{supra} note 5, at 134. See 42 U.S.C. § 12,116 (1994) (noting the EEOC’s ability to issue regulations). In 1990, the EEOC issued an advance notice of proposed rulemaking in which it sought comments on the definition of terms such as disability, reasonable accommodation, and undue hardship. \textit{See} 55 Fed. Reg. 31,192 (Aug. 1, 1990). Seven months later, the EEOC published a notice of proposed rulemaking. This proposed rulemaking included both regulations and an appendix containing interpretive guidelines. \textit{See} 56 Fed. Reg. 8578 (Feb. 28, 1991).
\textsuperscript{127} Colker, \textit{supra} note 5, at 134.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 135.
with section 504's precedent. Thus, it is instructive to examine the amount of deference accorded to the views of the administrative agencies charged with enforcing section 504 in order to ascertain the degree of deference due to the EEOC in its enforcement of the ADA. The Supreme Court has repeatedly stated that the lower courts should defer to the views of the U.S. Department of Health, Education, and Welfare (HEW), and the Department of the Health and Human Services (HHS) in interpreting section 504. Because Congress enacted the ADA against the backdrop of section 504, which sent a firm message of judicial deference to agency regulations, Congress intended to delegate to the EEOC a commensurate amount of authority as was delegated to the HEW and the HHS. Congress also expected an equivalent amount of judicial deference to the EEOC's regulations.

2. Why the Courts Fail to Defer to the EEOC Under the ADA

Although the courts are supposed to give the same degree of deference to the EEOC as was given to the administrative agencies under section 504, the courts have instead accorded the EEOC the same degree of deference under the ADA as they do under Title VII and the ADEA. And, much as the courts reflexively disregard the EEOC's views under Title VII and the ADEA, the courts also decline to abide by the EEOC's regulations under the ADA. The courts have historically regarded the EEOC as having second-class status under Title VII because the EEOC was only given limited authority to promulgate regulations under Title VII. Therefore, the Supreme Court has regularly rejected the EEOC's positions under Title VII. Similarly, under the ADEA, the EEOC was not given enforcement

131. Id.
132. Id.
133. Id. See Consol. Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984) (holding that agency deference is particularly appropriate under section 504 because of the general principle that courts should defer to the contemporaneous regulations issued by the agency responsible for implementing a congressional enactment); see also Sch. Bd. of Nassau Cty. Fla. v. Arline, 480 U.S. 273, 279-80 (1987) (relying on the HHS's regulations because they provide an important source of guidance on interpreting the meaning of section 504).
134. Colker, supra note 5, at 138-39 (explaining how Congress specifically delegated authority to federal agencies to promulgate regulations under section 504, and how the Supreme Court subsequently deferred to the views of HEW and HHS in interpreting section 504).
135. Id.
136. Id. at 139.
137. Id.
138. Id. at 139-40.
139. Id. at 140. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (rejecting the EEOC's position that Title VII applies extraterritorially to regulate employment practices of American employers employing American citizens abroad); Gen. Elec. Co. v.
authority, and therefore the authority to promulgate regulations, until more than ten years after the ADEA was enacted.\textsuperscript{140} Thus, the Supreme Court has also refused to defer to the EEOC's regulations under the ADEA.\textsuperscript{141}

As a consequence of the second-class status accorded to the EEOC under Title VII and the ADEA, the courts appear to automatically assess the EEOC's views under the ADA in the same non-deferential manner.\textsuperscript{142} Rather than deciding how much deference to give the EEOC under the ADA, the courts have often inquired whether they should give the EEOC any deference at all.\textsuperscript{143} But in light of Congress's clear intent and the legislative history of the ADA, such a lack of respect for the agency's regulations and such a drastic reformulation of the role of the EEOC are plainly inappropriate.

3. Instances Where the Courts Have Refused to Defer to the EEOC's Guidance

In some cases, the courts have not rejected the EEOC's guidance outright, but have simply not given it the weight it deserves.\textsuperscript{144} However, in other cases, the courts have forthrightly disregarded the EEOC's guidance.\textsuperscript{145} Within the first six years of the ADA, several courts—namely the First, Third, Sixth, and Tenth Circuits—rejected EEOC guidance on mitigating measures,\textsuperscript{146} the subterfuge exception,\textsuperscript{147} and the collective bargaining rule.\textsuperscript{148}

For example, in \textit{Gilday v. Mecosta County},\textsuperscript{149} the Sixth Circuit expressly declined to follow the EEOC's guidance in a "mitigating measures" case.\textsuperscript{150} The court remanded the case because of the existence of a genuine issue of a material fact, but two of the three judges explicitly rejected the EEOC's interpretive guidance on "mitigating measures."\textsuperscript{151} These two judges found that the EEOC's interpretive guidance conflicted

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\textsuperscript{140} Colker, supra note 5, at 141.
\textsuperscript{141} \textit{Id.} See, e.g., Pub. Employees Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989) (finding the EEOC's interpretive regulation construing the "subterfuge" rule to be invalid based on a conflict between the plain language of the statute and the EEOC rule).
\textsuperscript{142} Colker, supra note 5, at 144.
\textsuperscript{143} \textit{Id.} at 144-45.
\textsuperscript{144} \textit{Id.} at 146.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} 29 C.F.R. app. § 1630.2(j) (1998); Colker, supra note 5, at 144-45.
\textsuperscript{147} 29 C.F.R. app. § 1630.16(f) (1998); Colker, supra note 5, at 145.
\textsuperscript{148} 29 C.F.R. app. § 1630.15(d) (1998); Colker, supra note 5, at 145.
\textsuperscript{149} 124 F.3d 760 (6th Cir. 1997).
\textsuperscript{150} \textit{Id.} at 766-67.
\textsuperscript{151} \textit{Id.} at 766-68.
with the text of the ADA, despite the rule's arguable consistency with the legislative history. Moreover, none of the judges thought the EEOC's guidance was binding law, but rather that it was merely an "interpretive rule," subject to less deference than a "legislative rule." Thus, much as courts are committing substantial errors of law by abusing the summary judgment device, the courts are also committing substantial errors of law by failing to defer to the EEOC's guidance in clear contravention of congressional intent. Although some courts may regard EEOC regulations as too "pro-plaintiff," the job of the courts is to apply the law as Congress mandates, and not to substitute their own judgments for those of Congress or those of the agencies that Congress has vested with enforcement authority.

C. The Apparent Hostility of Certain Circuits to ADA Claims

Although perhaps more of an explanation for why courts commonly abuse the summary judgment device and refuse to defer to the EEOC's guidance than an independent factor accounting for plaintiffs' high failure rate, the evident hostility of certain circuits, particularly conservative circuits, to ADA claims significantly contributes to plaintiffs' losses. However, the circuit in which a plaintiff litigates undoubtedly correlates with whether the plaintiff wins or loses. The D.C., Second, and Third Circuits are significantly more likely to produce pro-plaintiff results than the Sixth Circuit. The highly conservative Fourth Circuit is significantly more likely to produce pro-defendant results than the Sixth Circuit. Overall, the figures suggest that a plaintiff's probability of success is lowest in the Fourth Circuit and highest in the D.C. Circuit, ranging from less than 1% to about 15%.

Although there is no hard evidence to prove why the courts, especially

152. Id. at 767.
153. Id. at 763 n.2, 766.
154. The evident hostility of certain circuits, particularly conservative circuits, to ADA claims significantly contributes to plaintiffs' losses. Admittedly, courts' hostility to such claims may be more of an explanation for why courts abuse the summary judgment device and refuse to defer to the EEOC's guidance than an independent factor accounting for plaintiffs' losses.
155. Colker, supra note 9, at 274, 275 tbl.17.
156. Id. at 274. The Third Circuit results, however, may have been affected by its notoriously low publication rate. Third Circuit results are skewed toward plaintiffs because the court does not make its unpublished decisions available to electronic sources. Id. at 274 tbl.16, 275 (citing Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 91 n.70 (2001)).
157. Id. at 274, 275 tbl.17.
158. Id. at 275 tbl.17.
those in certain circuits, are hostile to ADA claims, several reasons may explain this phenomenon. Conservative courts may employ tools such as summary judgment because they desire to keep cases away from what they perceive as runaway juries. Judges may have become displeased with jury verdicts under Title VII and the ADEA and transferred those ill feelings to the ADA by preventing jury trials. They may refuse to defer to agency regulations not only because of their habit of disregarding EEOC expertise under Title VII and the ADEA, but also because they believe that the EEOC regulations are overly pro-plaintiff. These trends may have not arisen under section 504 because judges may have been more comfortable rendering pro-plaintiff verdicts under section 504 than they now are under the ADA. Furthermore, in applying the ADA, judges may have looked more to Title VII and the ADEA than to section 504 for guidance because Title VII and the ADEA also regulate private entities.

Yet courts’ hostility to ADA claims cannot be fully explained by the courts’ experiences with Title VII and ADEA cases. Although a pro-defendant trend exists for Title VII and ADEA claims, there is a more significant correlation between pro-defendant victories and the ADA than exists under Title VII or the ADEA. However, when a Title VII or an ADEA theory is presented as part of an ADA case, the lawsuit can be expected to succeed at about the same rate as a straight ADA case. Conversely, Title VII, and ADEA plaintiffs fare much better than ADA plaintiffs when they bring a claim that is not necessarily part of an ADA lawsuit.

An alternative explanation for why judges respond so negatively to ADA claims may be that they are reacting to the EEOC’s and select courts’ early liberal constructions of the ADA. For instance, EEOC regulations broadly interpreted “mitigating measures,” “the subterfuge exception,” and the “collective bargaining rule.” Perhaps in recent years, judges have sought to retract the scope of the ADA and regain control over its coverage because they believe that it was interpreted too broadly. However, judges are mistaken if they operate based on this rationale, because at least since

159. Colker, supra note 5, at 160.
160. Id.
161. Id.
162. Id. at 161. The defendants in section 504 cases are entities receiving federal financial assistance, in contrast to the private sector entities largely covered by the ADA.
163. Id.
164. Colker, supra note 9, at 252 (finding that Title VII plaintiffs fare much better than ADA plaintiffs when they bring a claim that is not necessarily part of an ADA lawsuit).
165. Id.
166. Id.
167. Colker, supra note 5, at 145.
1992, a highly pro-defendant trend has existed in ADA Title I cases.\textsuperscript{168}

Although the implications of and explanations for courts’ anti-ADA bias are not completely clear, it appears that many judges are so prejudiced against individuals with disabilities that they look disfavorably on any lawsuit brought by a disabled individual.\textsuperscript{169} Although in all cases a judge’s personal dislike for a type of claim has the potential to hinder a plaintiff’s ability to succeed, the systemic bias against ADA plaintiffs, particularly in conservative circuits, drastically increases a plaintiff’s prospect of encountering such a judge. Because the prejudice against plaintiffs is endemic at both the trial and appellate court levels, many plaintiffs are flatly denied the opportunity to a fair and impartial court.

D. The EEOC’s Infrequent Participation in Litigation as an Amicus

Although the EEOC does not have much clout in terms of a court’s willingness to defer to EEOC guidance under the ADA, the participation of the EEOC in a plaintiff’s litigation does substantially improve a plaintiff’s probability of victory.\textsuperscript{170} When the EEOC intervenes as an amicus, an ADA plaintiff’s predicted success rate increases from less than 3% to 18%.\textsuperscript{171} However, EEOC participation as an amicus is rare, with one commentator finding EEOC participation in only forty-two of 720 appellate cases.\textsuperscript{172} Although the EEOC evidently uses its resources effectively in advocating on behalf of oft-successful plaintiffs, the EEOC’s limited resource base prevents it from helping effectuate more pro-plaintiff outcomes. Moreover, the EEOC’s restricted funds prevent it from amply investigating plaintiffs’ charges and sufficiently pursuing settlements where evidence of discrimination is present. With greater financial backing, the EEOC could increase its intervention in the more than 40% of the cases filed where it issues a right-to-sue letter based on reasonable cause to believe that discrimination has occurred, but does little else to aid plaintiffs.

\textsuperscript{168} Colker, supra note 9, at 259 n.55 (noting that the ABA reported a consistently high win rate for employers from 1992 to 1997).

\textsuperscript{169} Id. at 252.

\textsuperscript{170} Id. at 276-77. It is also evident that a pro se plaintiff is much more likely to lose an ADA case than a plaintiff represented by counsel. See id. at 239.

\textsuperscript{171} Id. at 277. It should be noted, however, that EEOC participation as an amicus may not have caused the pro-plaintiff outcomes. Id. at 276. Rather, the EEOC might have chosen to participate in cases where plaintiffs were already likely to win. Id. Moreover, the EEOC’s participation as a party did not significantly correlate with a pro-plaintiff outcome. Id. But there were only eight cases in the author’s database where the EEOC participated as a party, thereby making it difficult to find statistical significance. Id. With more data, Ms. Colker posits that she might find that the EEOC’s status as a party is a significant factor. Id. Alternatively, the EEOC’s participation as an amicus might prove less objectionable to some judges than the EEOC’s participation as a party. Id.

\textsuperscript{172} Id. at 276.
If the EEOC received more funding, both courts and employers might be less apt to regard the EEOC as a toothless organization and become more prone to follow its guidance. But if no additional funds are appropriated to the EEOC, its ability to participate in plaintiffs’ litigation will continue to only benefit a select few.

E. The Supreme Court Has Used the ADA’s Flexible and Ambiguous Statutory Language to Narrow the Grounds for Recovery Under the ADA

Although the Supreme Court has historically been less active in the development of the ADA than it has been in the development of statutes such as Title VII, recent Supreme Court decisions have substantially narrowed fundamental ADA rights and the coverage of the ADA. The Supreme Court’s recent ADA cases establish more conservative positions than those put forth by the EEOC, leaving plaintiffs with increasingly limited grounds for recovery. Additionally, on average, the Supreme Court has been more conservative than the appellate courts in deciding ADA cases. For example, the overwhelming majority of appellate courts have accepted a broader definition of “disability” than was eventually accepted by the Supreme Court. Although the Supreme Court has rendered some pro-plaintiff decisions under the ADA, practicing lawyers in all but the Fourth Circuit would probably conclude that their chances of success are better before the lower appellate courts than before the Supreme Court. However, with the recent proliferation of Supreme Court decisions construing the ADA, the conservative trend will inevitably trickle down into the lower courts, further solidifying hostility toward ADA plaintiffs and thus reducing their chances of winning further.

173. Id. at 261-62, n.57. See, e.g., Barnes v. Gorman, 536 U.S. 181 (2002) (finding that municipalities are not subject to punitive damages in an ADA suit); US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (stating that an employer need not accommodate a disabled employee when it would violate a seniority system already in place); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) (holding that in order for a person to be “substantially limited” in a major life activity, he or she must be severely restricted in performing activities that are of central importance to most people’s daily lives—e.g., household chores, bathing, brushing one’s teeth—not just work-related tasks); Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999), Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999), and Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999) (concluding that individuals claiming the ADA’s protections must be evaluated in their corrected state).

174. See supra note 173.
175. Colker, supra note 9, at 262.
176. Id.
177. Id. (noting the narrow definition of disability used in the Fourth Circuit). An example of a pro-plaintiff Supreme Court decision is Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that under the ADA, HIV infection was a “disability” even though it had not progressed to the so-called symptomatic phase).
1. The ADA's Intentionally Vague Language Embodies the Principles of Flexibility and Balance

The Supreme Court has limited the ADA's coverage and plaintiffs' potential grounds for recovery by interpreting the ADA's flexible and ambiguous statutory language to narrowly define such issues as who is disabled, what requested accommodations are reasonable, and what constitutes major life activities. The language in the ADA regarding such issues as coverage and employers' obligations is inherently and intentionally vague, a product of political compromise. At the time of the ADA's passage, this vagueness was not seen as problematic because the ADA's language is similar to that of the Rehabilitation Act. For almost two decades, courts had been construing the Rehabilitation Act's language to cover people with a wide range of health conditions. Unfortunately, the courts of the 1970s and 1980s, which had liberally embraced the Rehabilitation Act, were changing, as was the Supreme Court. By the time ADA cases reached the Supreme Court, it had a conservative majority with little interest in an expansive reading of civil rights laws. The ADA's nebulous and adaptable language proved problematic for such a legalistic court, leading to rigid, textual constructions of the ADA's coverage.

Admittedly, the language of Title I of the ADA embodies not only the principle of flexibility, but also the principle of balance. The ADA's statutory language does not contain a long list of specific declarations about what employers must do or not do to comply with regulatory mandates. Rather, the ADA requires broadly defined affirmative accommodations for persons with disabilities and specifies basic operating principles that allow flexibility in attaining compliance, while attempting to balance the needs of people with disabilities with the costs incurred by employers. For example, although Title I requires covered employers to make reasonable accommodations to employ persons with disabilities, this mandate is tempered by the stipulation that accommodations are not required when the

178. See supra note 173.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id.
185. Percy, supra note 12, at 414.
186. Id.
187. Id.
"covered entity can demonstrate that the accommodation would impose an undue hardship on the operations of the business of the covered entity." In essence, the ADA purposefully does not seek to explicitly define all mandates or answer all questions about implementation.

Instead, the ADA challenges employers and disabled employees to find creative solutions that can meet individual needs, while it also considers the cost or the disruption experienced by employers as they make accommodations.

On the upside, the ADA’s principles of flexibility and balance may foster innovative solutions for employers and employees. But the downside, particularly in the early years prior to establishment of general understandings and administrative and legal precedent, is that the federal courts are granted a key role in defining the reach and breadth of the ADA, rendering case-by-case determinations as to plaintiffs’ rights. Moreover, as discussed above in Section II(A), the courts have largely refused to let juries make these case-by-case determinations, further ensuring the ADA plaintiffs’ defeat.

2. Cases Where the Supreme Court Has Justified its Pro- Defendant Outcomes Using the ADA’s Ambiguous Language

The Court endorsed the case-by-case approach previously in Albertson’s, Inc. v. Kirkingburg and Sutton v. United Air Lines, Inc. and most recently in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams. The Court has repeatedly stressed that a “one size fits all” approach to the ADA, wherein a particular medical impairment is conferred ADA disability status, is inappropriate. Justifying its decisions based on the ADA’s flexible and ambiguous language and on its balancing requirement, the Court has recently used the case-by-case approach to arrive at principally pro-defendant outcomes. For example, in a 1999
trilogy of decisions—Sutton, Albertson's, and Murphy v. United Parcel Service, Inc.—the Supreme Court essentially held that individuals claiming the ADA's protection must be evaluated in their corrected states. The Court opposed the EEOC's position on this issue. Thus, people who use medication, medical devices, or other measures to fully correct their impairments are not considered disabled under the ADA. Because the ADA does not expressly list which particular impairments qualify someone as disabled, the Court was able to justify this exclusion in the ADA's coverage. The Court looked to the ADA's plain language, stating that "because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability." Of course, the Court added that the ADA does protect people who are still substantially limited in a major life activity after taking medication or using a medical device, thus reiterating the statute's requirement that the determination of a disability must be made on a case-by-case basis. The Court believed that holding otherwise would create a system where an individual would often be treated as a member of a group having similar impairments, rather than as a person whose situation should be assessed on an individualized basis. However, the Court's assurance is likely of little comfort to the millions of people consequently eliminated from the ADA's coverage. Subsequent to this trio of decisions, courts have found people with bipolar disorder, epilepsy, diabetes, prosthetic legs, and other conditions outside the ADA's protection even if the person argues that he or she was discriminated against because of that mitigated condition.

Because the ADA does not specify what constitutes a major life activity, the Sutton Court managed to find support for its holding that a person must show he or she is limited in a broad class of jobs, not just in performing a particular job—a very challenging case for a plaintiff to make. In Sutton, the plaintiffs argued that they were substantially limited

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197. Coyle, supra note 179, at 8. See Albertson's, 527 U.S. at 566 (addressing a case where a one-eyed truck driver was terminated by his employer); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) (describing a case where a truck mechanic lost his job because of high blood pressure that was controllable through medication); Sutton, 527 U.S. at 483 (discussing how pilots were denied employment by an airline because of near-sightedness even though their vision was correctable with contact lenses).

198. Coyle, supra note 179, at 8.

199. Fried, supra note 10, at 5.

200. Sutton, 527 U.S. at 482.

201. Id. at 483.

202. Id.

203. Coyle, supra note 179, at 8.

204. Id.

205. Id.
in the major life activity of working since United Airlines failed to hire them.\textsuperscript{206} The Court rejected this claim, responding that because the plaintiffs could be employed by other airlines that did not impose the same vision requirement on pilots, they are not substantially limited in working and thus, are not covered by the ADA.\textsuperscript{207} Here, too, the Court's position conflicted with that of the EEOC, which defined major life activity to include working, seeing, hearing, speaking, breathing, learning, caring for one's self, walking, and performing manual tasks.\textsuperscript{208}

While management attorneys say that the Court's narrowing of the definition of disability reduces the number of frivolous suits, plaintiffs' lawyers lament that these decisions have led to fewer good cases being filed and to a greater likelihood of employers prevailing on summary judgment.\textsuperscript{209} Plaintiffs' lawyers further complain that the Court's decisions erroneously give employers the right to discriminate against those with treatable conditions.\textsuperscript{210} Plaintiffs' lawyers state that they cannot imagine that Congress intended to exclude a huge number of people from ADA coverage because these people are trying to function as best as they can on the job.\textsuperscript{211} One of the drafters of the ADA attacked the Court's decisions as "creat[ing] the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing."\textsuperscript{212} Effectively, the Sutton trilogy stands for the proposition that even though a disabling condition represents a limitation of a major life activity (e.g., sight, blood circulation) and that the conditions, even when corrected, lead to job termination, the ADA does not apply.\textsuperscript{213} Moreover, since employers are now legally permitted to refuse to hire or retain employees despite their correctable disabilities, the potential exists for major insurance companies to offer price incentives to employers who discriminate against applicants or employees with disabilities such as depression, diabetes, and thyroid conditions, who are fully functioning but medically expensive.\textsuperscript{214}

Most recently, in Toyota, the Court again narrowed the class of disabled individuals protected under the ADA by developing the meaning of "substantially limited." The Court held that in order for a person to be "substantially limited" in a major life activity, he or she must be severely restricted in performing activities that are of central importance to most

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\textsuperscript{207} \textit{Id.} at 493.
\textsuperscript{208} Fried, \textit{supra} note 10, at 5.
\textsuperscript{209} \textit{Id.} at 6.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} Percy, \textit{supra} note 12, at 431 (citing Linda Greenhouse, \textit{High Court Limits Who is Protected by Disability Law}, N.Y. TIMES, June 23, 1999, at 1).
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} Ballard, \textit{supra} note 33.
\end{flushleft}
people’s daily lives (e.g., household chores, bathing, brushing one’s teeth), not just work-related tasks. The Court said that the ADA must be strictly construed “to create a demanding standard for qualifying as disabled . . .” Although some plaintiffs’ lawyers say that *Toyota* is nothing new in principle, they fear that lower courts could use it to raise the bar higher for claimants with difficulties doing manual tasks. Other plaintiffs’ lawyers worry that in order for a plaintiff to qualify as disabled, he would have to show that he cannot brush his teeth, comb his hair, or wash his face, but he can still perform the manual tasks required in a job. Whatever the ultimate effects of *Toyota* prove to be, *Toyota* undeniably continues the Court’s trend in construing the ADA’s ambiguous language so as to weigh the interests of the employer more heavily than those of the employee.

*Toyota* and the *Sutton* line of cases illustrate how the ADA’s deliberately vague language, intended to provide broad protection for disabled individuals, has come back to haunt the statute’s drafters and advocates and ultimately, the disabled community itself. One ADA drafter noted in hindsight that disabilities activists now concede that Congress did not use the right words to convey its intent to expand the Rehabilitation Act’s protections. Congress may have not realized the difficulty of defining the elusive “disability” concept. The Court has failed to recognize that even though some elements of the ADA provide flexibility in crafting accommodations so as to balance required accommodations against the costs incurred in achieving compliance, the ADA simultaneously creates an expansive anti-discrimination mandate. The ADA’s pliability means it should be interpreted as comprehensive in scope and application. Many key definitions were purposefully left open-ended to effectuate a liberal interpretation, such as the definition of persons covered under the Act. In seeking to avoid unnecessarily limiting the ADA’s coverage, the drafters chose not to include a list of disabling conditions or circumstances that would trigger legal protection under the ADA. Rather, they opted to use a definition that focused on the conditions that impair “major life activities”—current, past, or perceived by others. This wide-ranging definition signals an aggressive approach to triggering protections under

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216. Id.
218. Id.
219. Coyle, supra note 179, at 5.
221. Id. at 415.
222. Id.
223. Id.
224. Id.
the ADA.\textsuperscript{225}

Regrettably, the Supreme Court has instead viewed this language as an invitation to continually narrow disabled individuals' rights. Those who support the Court's restricted reading of the ADA would obviously counter that if Congress disapproved of the Court's approach, then Congress would react by amending the ADA. Although this argument may have merit, it does not excuse the Court's blatant rejection of explicit statements of congressional intent, as well as EEOC regulations, with which the ADA specifically mandates compliance. Even management attorneys admit that "for those of us practicing since [the ADA's] enactment, we would have speculated in the earlier years that there would have been more comprehensive coverage of the disabled in the workplace than interpreted by the Supreme Court."\textsuperscript{226} Another attorney concedes that even though she normally represents employers, she thinks that "the ADA has been interpreted much more narrowly than Congress intended and that hard-working disabled employees are rightly disappointed that the ADA has become a very ineffective tool for their plight."\textsuperscript{227}

III. THE FUTURE FOR ADA TITLE I PLAINTIFFS

In light of the many procedural and substantive legal obstacles faced by ADA plaintiffs, their successes are unjustifiably few. The federal courts are largely responsible for the current inhospitable status of the ADA toward plaintiffs. They have interpreted and applied the ADA so as to eviscerate Congress's legislative intent. Consequently, the courts have stripped many arguably deserving plaintiffs of their statutory rights, rendering the ADA an unfulfilled promise.

Two alternatives remain for plaintiffs, plaintiffs' lawyers, and disability advocates. First, they could lobby Congress to amend the ADA in order to reinvest it with Congress's original intent. In fact, many ADA proponents are now urging Congress to respond to the \textit{Sutton} trio of cases and \textit{Toyota} by elucidating that the ADA's ambiguous statutory language was intended to expansively cover a large class of disabled individuals.\textsuperscript{228} If Congress more specifically defines key terms in the ADA, courts will have less room to mold the ADA to their personal visions of who and what it is intended to cover.

\begin{itemize}
  \item \textsuperscript{225} \textit{Id.}
  \item \textsuperscript{226} Coyle, \textit{supra} note 179.
  \item \textsuperscript{227} Wilmarth, \textit{supra} note 8.
  \item \textsuperscript{228} Coyle, \textit{supra} note 179. One plaintiffs' attorney believes that another way to mitigate the \textit{Sutton} trilogy's effects is to lobby for a new statute that would prohibit employers from discriminating against employees who are medically expensive, so as to counteract the pressure that insurance companies may place on employers to refuse to hire such people. \textit{See} Ballard, \textit{supra} note 33.
\end{itemize}
Additionally, Congress should be encouraged to reaffirm the respective burdens of proof for employers and employees under the ADA. It should also be persuaded to rewrite the ADA so as to underscore which questions under the ADA are meant for jury deliberation and which are for the courts. Moreover, Congress should be lobbied to revise the ADA so as to emphasize to the courts that they should give greater deference to EEOC regulations and should attempt to interpret the ADA in a manner consistent with the regulations. Congress should explicitly vest the EEOC with the authority to issue regulations interpreting the term "disability." Congress cannot rid the judiciary of its bias against ADA cases. But if Congress made substantive changes and clarifications to the ADA, courts would be less capable of couching their hostility toward ADA claims in legalistic explanations. Explicit congressional intent as to the ADA's coverage would give courts less discretion in interpreting the law and would compel more pro-plaintiff outcomes, despite the judges' particular views as to the desirability of ADA lawsuits. Finally, Congress should be convinced to appropriate more funding for the EEOC so that it can more effectively carry out its statutory duties. If the EEOC had more resources, it could better investigate ADA claims as well as pursue more claims on behalf of plaintiffs with meritorious cases.

Although legislative intervention would clearly be the most advantageous route for ADA supporters, this path presents many challenges. The ambiguous language of the ADA partly reflects the difficulty that Congress initially had in passing the statute. Convincing Congress, particularly the current conservative Congress, to enact a more precise civil rights statute seems unlikely. Moreover, many of the desired changes to the ADA, such as strengthening the EEOC, would require greater congressional expenditures. Making the recommended changes to the ADA would also impose increased fiscal burdens on employers, a constituency favored by the current Congress. Perhaps Congress could designate certain funds to assist employers in providing employment accommodations to disabled employees, thus preventing the filing of some ADA charges. However, this change would also require greater financing from the federal government, making its feasibility questionable. Thus, while eventual changes to the ADA are possible, imminent amendments seem improbable until a more liberal Congress takes control.

The second alternative is that ADA advocates could accept that until Congress strengthens and clarifies the ADA's protections, or until the courts are reconstituted with more liberal judges, state law must be relied upon to fill the ADA's void. Attorneys representing both management and employees already predict that plaintiffs will increasingly turn to state law

and state legislatures for protections against disability discrimination. However, as one commentator has noted, it would be ironic if employees were forced to depend on state law because "disability discrimination is a federal problem and the ADA . . . was designed to end a hodgepodge of state protections." In states like New York, Connecticut, and New Jersey, where the state laws define disability more broadly than the current ADA caselaw, disabled employees will continue to obtain relief. However, those disabled employees in states such as Massachusetts, Rhode Island, New Hampshire, and Pennsylvania, where the disability laws mirror the ADA or where the state supreme courts interpret state disability law in accordance with the ADA, will remain remediless. In states like New Jersey where there is a strong disability statute that includes no administrative exhaustion requirement prior to the filing of a suit, a two-year statute of limitations, a right to a jury trial, and where the state supreme court aspires to provide more protection for disabled individuals than under the federal system, plaintiffs will fare much better than their counterparts in neighboring Pennsylvania. In Pennsylvania, the state law is interpreted to comport with the ADA and plaintiffs have no right to a jury trial. Thus, not only will the deterioration of the ADA continue to affect the number of federal suits brought, it will also reduce the number of suits initiated in states where the laws mimic the ADA. Finally, unlike under federal law, some state laws that protect the disabled, such as New York law, do not provide for attorneys' fees or punitive damages. Without these remedies available, plaintiffs' attorneys may be even more reluctant to accept such cases. Therefore, while state remedies can substitute for the ADA in some jurisdictions, state laws as a whole cannot satisfactorily replace the ADA.

IV. CONCLUSION

Although the future effectiveness of the ADA is uncertain, the ADA has forever changed the workplace by making employers much more

230. Coyle, supra note 179; see also Perkins & Altschul, supra note 29 (describing the decrease in the number of federal disability charges received by the EEOC); Fried, supra note 10 (stating that many predict a larger number of plaintiffs will seek relief under state laws that provide broader protection than the ADA).
231. Coyle, supra note 179.
232. Fried, supra note 10; see also Ballard, supra note 33.
233. Id.
234. Ballard, supra note 33.
235. Id.
236. Fried, supra note 10.
237. Loomis, supra note 11.
238. Id.
sensitive to disabled employees than they were prior to its passage. While ADA plaintiffs recover at a much lower rate than was originally hoped for, a wide variety of disabled individuals with a diverse array of disabling conditions have used the protections of the ADA to fight discrimination and have received damages or other redress. But, the empirical data existing on the ADA presents a grim image of the reality faced by the average ADA plaintiff. Furthermore, the known statistics portray only a partial picture of the ADA’s efficacy because they fail to measure or address such key issues as how many disabled people experience discrimination, how many know of ADA protections, and how many are unwilling or incapable of using the ADA to redress the discrimination they encounter. Until these questions can be answered—vast questions given the number of people experiencing mental or physical disabilities and the number of private and public sector entities regulated by the ADA—we will not be able to answer, with complete confidence, the fundamental question of how successful the ADA is in eliminating discrimination based on disability. However, even if the answers to these questions reveal an unexpectedly positive outlook for disabled individuals, until ADA employment discrimination plaintiffs begin to prevail in more cases, many will continue to regard the ADA as an empty promise.

239. Wilmarth, supra note 8.
241. Id.
242. Id.