The ADA as a Tool for Advocacy: A Strategy for Fighting Employment Discrimination against People with Disabilities

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THE ADA AS A TOOL FOR ADVOCACY: A STRATEGY FOR FIGHTING EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES

ELLEN M. SAIDEMAN

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I. INTRODUCTION

Nearly two-thirds of Americans with disabilities currently are unemployed although most are able to work and want to work.\(^2\) Many of those who have jobs are underemployed.\(^3\) Without employment, people with disabilities are forced to live on meager government benefits at a huge cost to taxpayers.\(^4\) People with disabilities face substantial barriers to employment including architectural barriers which prevent many from entering the workplace, prejudice and stereotypical assumptions about what people with disabilities can do, and a lack of accessible transportation that makes it impossible for many to get to work.

The goal of the Americans with Disabilities Act of 1990 [hereinafter ADA]\(^5\) is to dismantle barriers to employment and encourage full participation in American life for people with disabilities. The ADA is the first national legislation to place the same opprobrium on disability-based discrimination as on discrimination on the basis of race, sex, national origin, religion and age. The employment provisions went into effect two years after passage of the ADA, on July 26, 1992.\(^6\)

People with disabilities have high expectations of the ADA. However, passage of the law alone has not automatically removed the barriers to equal opportunity for people with disabilities. Much of the hard work of implementing the ADA will fall to the disability rights movement just as implementation of the Civil Rights Act of 1964 required hard work by the civil rights and women's rights movements.

The disability rights movement may be able to benefit from looking at the successes of the civil rights and women's rights movements in the area of employment discrimination. Attorneys for those movements focused on employment policies and practices that affected large numbers of minorities and women. Thus, for example, the civil rights movement focused on job requirements that were not work-related and had a disparate impact on

\(^2\) A 1985 Harris poll found that 70% of working age people with disabilities were unemployed, two-thirds of whom wanted to work. Joseph P. Shapiro, Liberation Day for the Disabled, U. S. NEWS & WORLD REP., Sept. 18, 1989, at 20, 22.

\(^3\) In 1988, women with disabilities earned 38% less than women without disabilities, and men with disabilities earned 36% less than men without disabilities. H.R Rep. No. 485(2), 101st Cong., 2nd Sess., at 32 (1990).

\(^4\) The United States spends nearly $60 billion each year on disability benefits and welfare costs for people with disabilities. Shapiro, supra note 2, at 22.


\(^6\) Congress designed the effective dates of the ADA to give those subject to the ADA grace periods to come into compliance voluntarily. For the first two years, the law was limited to employers of 25 or more employees. 42 U.S.C. § 12111(5)(A) (Supp. IV 1992). As of July 26, 1994, the law has the same scope as The Civil Rights Act of 1964 [hereinafter Title VII], 42 U.S.C. § 2000e(b) (1988 & Supp. IV 1992), and applies to any employer with 15 or more employees.
minorities such as intelligence tests and high school diploma requirements.\(^7\)

The women's rights movement made pregnancy discrimination,\(^8\) sexual harassment,\(^9\) equal pay,\(^10\) and comparable worth\(^11\) high priorities.

The disability rights movement must identify analogous priority areas that affect a large number of people with disabilities. This article proposes that the disability rights movement should focus on cases involving barriers to hiring people with disabilities, discrimination in benefits, and issues of reasonable accommodation. To begin with, challenges to discrimination in hiring must be a top priority because so many people with disabilities have been denied employment. Benefits are an important area for attention because benefits are an important part of compensation and because people with disabilities are disproportionately affected by limitations on health insurance and other benefits. Finally, reasonable accommodation cases should be given a high priority because many people with disabilities need changes in the workplace and work rules in order to have equal opportunity and because the ADA explicitly requires reasonable accommodation.

Unlike Title VII of the Civil Rights Act of 1964 [hereinafter Title VII], the ADA's provisions barring employment discrimination are extremely detailed. In light of the Supreme Court's emphasis on the specific language of statutes,\(^12\) the focus should be on implementing the explicit provisions of the Act, particularly where cases are brought in federal court solely on ADA claims.

\(^7\)In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the NAACP Legal Defense Fund succeeded in challenging, as racially discriminatory, requirements that employees have a high school diploma or pass intelligence tests. The Court held that Title VII proscribed "not only overt discrimination but also practices that are fair in form but discriminatory in operation." Id. at 431. Nearly twenty years later, the Court sharply limited the application of the disparate impact theory in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989). After much controversy, Congress passed, and President Bush signed, the Civil Rights Act of 1991, which set forth the standard for proving disparate impact. 42 U.S.C. Section 2000e-2(k).

\(^8\)After the Supreme Court held that an employer did not violate Title VII's ban on sex discrimination by providing disability benefits for temporary disabilities but not for pregnancy, General Electric v. Gilbert, 429 U.S. 125 (1976), women's rights advocates shifted their efforts to legislation. Congress responded by passing the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).


Although many of the major civil rights and women's rights employment discrimination cases were brought as class actions, many disability cases may not be well-suited for class actions. One problem is that it may be difficult to show that particular plaintiffs are "typical" for class action purposes because there are many different disabilities and the needs of individuals with the same disability often vary. Another problem is that it may be difficult to show that the class is sufficiently "numerous" for class action purposes because there may be few people with disabilities in a particular line of employment.

Some cases, however, may be suitable for class actions. These include challenges to civil service requirements and other broad policies, and cases involving particular fields where there are significant numbers of people with similar disabilities employed or underemployed. Bottom line: before filing a class action it is important to define the scope of the class and the nature of the issue. As a matter of strategy, it may be useful to file a test case on behalf of an individual and later amend the complaint to assert class claims.

Disability rights lawyers should consider the pros and cons of the various different causes of action. Because exhaustion of administrative remedies is not required under section 504 of the Rehabilitation Act of 1973, consideration should be given to bringing employment discrimination claims under section 504. State and local human rights laws may offer better remedies. Furthermore, those who are not protected by the ADA may have claims under other statutory provisions.

Disability rights lawyers should also focus on procedural issues. Since suits under federal statutes may be brought in either federal or state court, absent an explicit provision to the contrary, consideration should be given to filing cases in state court. This is particularly true where the issue raised is not explicitly addressed by the ADA and where there are analogous state law claims. Thought should also be given to requesting jury trials rather than relying on judges.

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16 By its express terms, the ADA is not to be construed to "invalidate or limit the remedies, rights and procedures of any Federal law, or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection" than the ADA. 42 U.S.C. § 12201(b) (Supp. IV 1992).
17 For example, the ADA does not protect individuals employed by very small employers (with fewer than 15 employees), 42 U.S.C. § 12111(5) or by bona fide private membership clubs. 42 U.S.C. § 12111(5)(b)(ii). Cases against such employers may be brought under state and local human rights laws and under Section 504 if the entity receives federal funds. While Congress is subject to the ADA, 42 U.S.C. § 12209 (Supp. IV 1992), the United States government is not subject to the ADA, 42 U.S.C. § 12111(5)(B)(i). Cases against the federal government must be brought under § 504.
II. THEORIES OF DISCRIMINATION

There are essentially three different theories that are used to prove discrimination against people with disabilities: disparate treatment, disparate impact, and denial of reasonable accommodation. Disparate treatment—that a person has been treated differently because of membership in a protected class—may be proved by direct evidence of discrimination or by inference. Today, employers are often open about discriminating against people with disabilities. They frequently know little about disabilities and make their decisions based on stereotypes rather than on individualized assessments. Further, medical examinations and inquiries are required by the ADA to be conducted after a job has been offered thereby enabling job applicants to determine that their disability was the determining factor in the hiring decision. Once an employer admits that the individual was treated differently because of a disability, a prima facie case of discrimination has been established and the question then becomes whether the discrimination was unlawful.

When employers become more sophisticated and remove the policies and practices that explicitly say "no disabled may apply," discrimination becomes more subtle and more difficult to prove, as it has in the case of race and sex discrimination. At this point, presumptions and inferences become vitally important in proving discrimination. In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth the criteria for making a prima facie case of disparate treatment in a hiring case: (1) whether the plaintiff belongs to a protected class; (2) whether the plaintiff applied for a job for which the employer was seeking applicants; (3) whether the plaintiff was rejected despite his qualifications; and (4) whether the employer continued to seek applications for persons of plaintiff's qualifications after the plaintiff's rejection. Once the employee has made a prima facie case, it is the employer's burden to rebut the prima facie case by showing the adverse employment action was taken for a legitimate non-discriminatory reason. Once the employer provides a non-discriminatory reason, it is extremely difficult to prove discrimination due to the Supreme Court's recent decision in *St. Mary's Honor Ctr. v. Hicks*. In this case, the Supreme Court held that a plaintiff can not prove discrimination by merely demonstrating that an employer's reason for denying employment is pretextual. What more is needed, absent a smoking gun, is unclear.

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19 411 U.S. 792, 802 (1973). Although *McDonnell Douglas* involved race discrimination under Title VII, its analysis has been applied to a broad range of discrimination cases including disabilities discrimination cases.

20 Id.


22 See Plass, supra n. 12, for a discussion of the effect of *St. Mary's* on Title VII litigation.
The disparate impact theory covers discriminatory practices that are facially neutral but have a disparate impact on members of a protected class. The ADA employment provisions specifically adopt disparate impact language. The ADA bars "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability." The ADA also bars:

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

The ADA makes clear that its definition of discrimination is not exclusive, so the theory of disparate impact may be used in any ADA case, if appropriate.

The principle of "reasonable accommodation" acknowledges that changes in the standard workplace and work rules are needed in order for many people with disabilities to have equal opportunity. Doorways must be widened and ramps built to enable people with mobility impairments to enter the workplace. Telecommunication devices for the deaf [hereinafter TDDs] must be provided to enable people with hearing impairments to use the telephone, and computers and readers must be provided to enable people with visual impairments to read. People with disabilities such as mental illness and kidney disease may need work schedules that enable them to get needed medical treatment during the standard work day. The ADA requires employers to provide "reasonable accommodation" and gives as examples making workplaces accessible, providing readers and interpreters, and restructuring jobs.

Although the term "reasonable accommodation" was first used to give meaning to non-discrimination in Title VII’s definition of discrimination based on religion, the ADA expressly imposes greater burdens than the Supreme Court has mandated under Title VII. Much of the litigation under Title VII on reasonable accommodation is therefore inapplicable to ADA cases. Reasonable accommodation as required by the ADA is discussed in detail herein at Part VI.

24 42 U.S.C. § 12112(b)(6).
25 42 U.S.C. § 12111(9).
26 Title VII states:
   The term "religion" includes all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).
27 See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)(finding that Title VII's reasonable accommodation requirement imposes no more than a "de minimis" cost on employers).
In developing a litigation strategy to implement the ADA's employment provisions, the disability rights movement should use each of these three theories of discrimination. Focusing on discrimination cases that blatantly violate the ADA, and on the easiest disparate impact cases will facilitate developing the law by setting a base of good precedent to be later used in more difficult cases.

III. DEFINITION OF DISABILITY

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."28 The Equal Employment and Opportunity Committee [hereinafter E.E.O.C.] has taken the position that temporary disabilities29 and pregnancy are not covered by the ADA.30 If an employer can accommodate temporary disabilities, it seems unfair to deny the protection of the law to people who have temporary disabilities. Presumably, the theory is that when a person recovers from a broken limb, he or she can find another job. Yet, today jobs are often not easy to find. The enactment of the Family and Medical Leave Law may ameliorate some of the harshness of this rule by providing medical leave for people with temporary disabilities and for new parents.31

The E.E.O.C. does make clear that measures that ameliorate disability such as medicines and prosthetic devices cannot be considered in determining

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2842 U.S.C. § 12102(2) (Supp. IV 1992). 42 U.S.C. § 12211 (Supp. IV 1992) specifically states that the following are not disabilities: "(a) homosexuality and bisexuality" and; "(b)(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania or pyromania;" and "(3) psychoactive substance abuse disorders resulting from current illegal use of drugs."

29EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE 1) OF THE AMERICANS WITH DISABILITIES ACT (Jan. 1992) [hereinafter E.E.O.C. TECHNICAL ASSISTANCE MANUAL]. The E.E.O.C. Technical Manual at 21 states: "A broken leg that heals normally within a few months would not be a disability under the ADA. However if a broken leg took significantly longer ... to heal and during this period could not be used, s/he would be considered to have a disability."

30Id. at 18. Discrimination against pregnant women is barred by the Pregnancy Discrimination Act of 1978, 42 U.S.C. Section 2000e(k). However, that law does not on its face require reasonable accommodation of pregnancy. See discussion of reasonable accommodation, infra.

31The Family and Medical Leave Act of 1993, 29 U.S.C.A. § 2601 (West Supp. 1994), provides that eligible employees are entitled to a total of twelve workweeks of leave during any 12-month period for the birth or adoption of a child, to care for a spouse, son or daughter, or for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.A. § 2612(a) (West Supp. 1994).
whether a person has a disability. Thus, a person whose epilepsy is completely controlled by medication is considered a person with a disability under the ADA.

In many cases, however, there will be no dispute that an individual has a disability. In litigating an ADA case, it is important to have a clear understanding about how the client's disability fits into the ADA statutory structure, even though alternate theories may be pursued simultaneously. This approach may have particular appeal for people who wish to avoid the stigma of disability. They may argue that they have a condition that meets the first prong of the definition of disability but does not affect their ability to perform their job in any way. They may further argue that their disability is a perceived disability, based solely on social conditions that make it a disability.

There is likely to be litigation over the meaning of perceived disability which the ADA defines as "being regarded as having such an impairment." The regulations list three different circumstances under which an individual is "regarded as having such an impairment." These circumstances arise when the individual:

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
3. Has none of the impairments defined in paragraphs (h)(1) or (2) but is treated by a covered entity as having a substantially limiting impairment.

The first and third subsections differ only as to whether the person actually has a physical or mental impairment. For both subsections, the critical inquiry is whether the employer treats the individual as having a substantially limiting impairment even though he or she is not in fact substantially limited. The employer's stated reasons for an adverse employment decision may show that the actual or perceived disability is seen as substantially limiting. In a recent case under section 504, the First Circuit found that an employer's action in


34 29 C.F.R. § 1630.2(k) (1994). This definition mirrors the definition of "perceived disability" under § 504. See 45 C.F.R. § 84.3(j)(2)(iv) (1993), which provides: Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) [physical or mental impairment] of this section but is treated by a recipient as having such an impairment.
denying employment because of a perceived disability (morbid obesity) demonstrated that the employer considered the disability substantially limiting. The employer’s doctor testified that the decision to deny employment was based on his belief "that her morbid obesity interfered with her ability to undertake physical activities, including walking, lifting, bending, stooping, and kneeling, to such an extent that she would be incapable of working as an IA-MR." The court went on to say: 

By his own admission, Dr. O’Brien believed plaintiff’s limitations foreclosed a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide. Detached jurors could reasonably have found that this pessimistic assessment of plaintiff’s capabilities demonstrated that appellant regarded Cook’s condition as substantially limiting a major life activity—being able to work.

The court, therefore, found that denying an individual a single job that requires no unique physical skills "due solely to the perception that the applicant suffers from a physical limitations [sic] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an individual as if her condition substantially limited a major life activity, viz., working."

The ADA clearly protects individuals who are perceived to have AIDS, which is an undisputed disability. The HIV-infection is also a disability. To prevail in an ADA claim, however, one must provide evidence that the discrimination is due to the perceived disability, e.g. AIDS or HIV-infection. Accordingly, courts probably will not subsume all discrimination against gay and lesbian individuals as "disability discrimination" on the theory that the motivating factor is AIDS-related without some evidence of AIDS-related discrimination.

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35 Cook v. Rhode Island Dep’t of Mental Health, Retardation, and Hospitals, 10 F.3d 17 (1st Cir. 1993). The court stated that cases involving perceived disabilities under Section 504 were "hen’s teeth rare." Id. at 22.

36 Id. at 20. An IA-MR is an institutional attendant for the mentally retarded.

37 Id. at 25.

38 Id. at 26.

39 The ADA excludes sexual orientation from the definition of disability. 42 U.S.C. § 12211(a).

40 In Petri v. Bank of New York Co. Inc., 582 N.Y.S.2d 608, 612 (Sup. Ct. 1992), the court held that a gay man had stated a claim for disability discrimination because he had alleged that the employer knew that he was gay and had had sexual relations with a person who was HIV positive. Plaintiff’s allegations, when read favorably, could be deemed to allege that he was fired because it was believed that he had been HIV infected as opposed to actually suffering from AIDS. This analysis upheld the claim even though the court ruled that being gay alone was not sufficient to state a claim for perceived disability. Id. The court stated, "To construe mere membership in a group at risk as
The perceived disability definition also extends to individuals who do not have disabilities within the first prong of the ADA definition. The example used throughout the legislative history was that of an individual with a severe facial scar who is not impaired in any major life function but does suffer from discrimination. The perceived disability definition may protect individuals who have physical characteristics that subject them to denials of employment opportunities for reasons that are not job-related. The argument would be that the denials are based on the perception that the physical characteristic is a disability.

The development of genetic screening tests opens up the possibility of discrimination based on a genetic condition that has not yet been manifested such as Huntington's chorea, or a genetic propensity to a disability such as heart disease. Discrimination based on such genetic information should be found unlawful under the ADA as discrimination on the basis of a record of a disability or perceived disability.

One issue that may arise is whether individuals who fall within the second and third prongs of the definition of disability are entitled to reasonable accommodation. In many cases, an individual with a record of disability or a perceived disability who does not have a current disability does not need reasonable accommodation, but rather needs non-discrimination. In some circumstances, reasonable accommodation may be required to correct the perception of disability. For example, where an individual has less than perfect vision and the job has vision requirements, the individual's vision with the use of glasses, an auxiliary aid, should be considered.

IV. CHALLENGING HIRING PRACTICES

Given that the majority of people with disabilities are unemployed, a high priority should be given to cases that challenge discrimination in hiring people with disabilities. The focus should be on the broad policies that preclude people with disabilities from employment without an individualized assessment as to whether a particular individual is able to perform the essential job tasks with reasonable accommodation.

A. Otherwise Qualified Individuals

The ADA prohibits discrimination against a "qualified individual with a disability," which is defined as an individual with a disability "who, with or equivalent to a perceived disability would be to import into the statute the ban on sexual orientation that has to date been conspicuously omitted." Id. at 612.

41 See, e.g., Padilla v. City of Topeka, 708 P.2d 543 (Kan. 1985) (inability to meet standard of visual acuity in each eye of no less than 20/50 is not a disability).

without reasonable accommodation, can perform the essential functions of the employment position.\textsuperscript{43} Under section 504, courts have consistently required that a potential employee's fitness for employment be tested on an individualized basis and not reflect assumptions about persons with disabilities in general.\textsuperscript{44} Because the law requires that a person's ability to do a job be assessed on an individualized basis, the outcome of many employment cases has turned on factual issues and on expert opinion. Court decisions under section 504 have been mixed and have often varied by profession.\textsuperscript{45} Decisions under section 504 often have had disappointing results for advocates, particularly in cases involving the uniformed services.\textsuperscript{46}

The individual with a disability bears the burden of proving that he or she is "qualified." As a general rule, in section 504 cases, individuals with disabilities have prevailed in challenging blanket exclusions where they were able to show that they could safely perform the job. For example, two courts have held that state education regulations which mandated that school bus drivers have all four extremities violated section 504. In both cases, the plaintiffs had lower extremity amputations, but had been retrained in the operation of a motor vehicle and could do so safely.\textsuperscript{47}

Where the employer contends that a person is not qualified to perform a job because of a disability, the plaintiff's attorney must present convincing evidence that demonstrates the disability is not a valid basis for disqualifying the individual from the job. Stereotypes about people with disabilities are pervasive because people rely on heuristics and biases to guide and simplify

\textsuperscript{43} 42 U.S.C. § 12111(8).

\textsuperscript{44} See School Bd. v. Arline, 480 U.S. 273 (1987) (holding that all persons with contagious diseases could not be denied jobs solely because some pose severe risks); In re Granelle, 510 N.E.2d 799 (N.Y. 1987) (holding that under the New York State Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1993), an individual with an asymptomatic back condition, known as spondylolisthesis, could not be automatically disqualified from a position as a police officer based on speculation about future injury).

\textsuperscript{45} Compare Arline, 480 U.S. 273, supra n.44 with Southeastern Community College v. Davis, 442 U.S. 397 (1979) (holding that denying admission to nursing school to a hearing impaired individual who used a hearing aid did not violate § 504).

\textsuperscript{46} As a general rule, courts have upheld medical disqualifications from positions in the uniformed services except when the individual is not in fact disabled and the disqualification is based on hypothetical or speculative risks, \textit{i.e.,} cases involving a record of disability or perceived disabilities. See Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978) (holding that a police department must disregard childhood history of epilepsy where the applicant had been seizure-free since childhood). See also Granelle, 510 N.E.2d 799.

thought. It is important to rebut these preconceptions which are held by judges, juries and lawyers as well as by employers.

Attorneys should heed Oliver Wendell Holmes' famous maxim: "The life of the law has not been logic: it has been experience." That the plaintiff or a person with the same or a similar disability has done the job well is terrific evidence that an individual with a disability is qualified to do the job. Thus, a court gave "great weight" to the fact that the plaintiff had served as a Little League coach on the field for three years without incident in finding that banning wheelchairs from the coach's box violated the ADA. Similarly, another court was persuaded that an obese woman could serve as an institutional aid for people with mental retardation, in part because of her previous satisfactory performance at a time when she was as obese as at the time of her reapplication. Furthermore, expert evidence may also be useful in establishing that people with particular disabilities may be qualified.

Many employers have uniformly excluded individuals with disabilities from particular positions. Challenging such exclusions should be a high priority, particularly where state law sanctions such exclusions. The Supremacy Clause of the United States Constitution makes federal law the supreme law of the land. Therefore, any state or local law that disqualifies individuals with disabilities cannot be used as a defense by employers who discriminate in violation of the ADA.

Attorneys must focus on the ADA as a non-discrimination statute and look to analogous, non-discrimination statutes for provisions that permit discrimination. For example, Title VII and The Age Discrimination in Employment Act [hereinafter ADEA] permit discrimination where sex, national origin, religion, or age is a "bona fide occupational qualification" [here-
The Supreme Court has recently addressed the BFOQ exception in *International Union, UAW v. Johnson Controls*.\(^5\) The Court stated that "the BFOQ defense is written narrowly, and this court has read it narrowly."\(^5\) In *Johnson Controls*, the issue was whether an employer could exclude fertile female employees from certain jobs in a battery manufacturing plant because of concern for the health of fetuses that the employees might conceive.\(^7\) The Court held that the employer's protective policy violated Title VII.\(^5\) The Court stated that a benevolent motive does not immunize unlawful discrimination: "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."\(^5\)

The Court held that to satisfy the BFOQ requirement, a policy must be based on objective, verifiable requirements that concern job-related qualifications which relate to the central mission of the employer's business.\(^6\) The Court stated that the "unconceived fetuses" of Johnson Controls' workers were "neither customers nor third parties whose safety is essential to the business of battery manufacturing."\(^6\) The Court limited the safety exception to instances

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\(^5\) Title VII, 42 U.S.C. § 2000e-2(e), states:

It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

Race and color discrimination, however, is never acceptable. This is demonstrated by the fact that there is no bona fide occupational qualification exception for discrimination based on race and color in Title VII.

The ADEA provides that it shall not be unlawful for an employer "to take action otherwise prohibited by law "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1988). See Stephen F. Belfort, *BROQ Revisited: Johnson Controls Halts the Expansion of the Defense of Intentional Sex Discrimination*, 52 Ohio St. L.J. 5, 6 (1991) ("The most frequently litigated application of the BFOQ defense is with respect to distinctions based on gender.").


\(^5\) *Id.* at 201 (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122-125 (1985), and Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977)).

\(^5\) *Id.* at 190.

\(^5\) *Id.* at 200 and 211.

\(^5\) 449 U.S. at 199.

\(^5\) *Id.* at 201-203.

\(^5\) *Id.* at 203.

\(^5\) 449 U.S. at 199.
where sex or pregnancy actually interferes with the ability to perform the job. Disability advocates and attorneys should urge courts to follow the standards set in *Johnson Controls* in determining whether a person with a disability is qualified. These standards provide that a person with a disability may only be disqualified from a position if there are objective, verifiable requirements that concern job-related qualifications that relate to the central mission of the employer’s business.

Another important BFOQ case with widespread implications for the ADA is *Western Air Lines, Inc. v. Criswell*, which held that mandatory retirement at 60 for flight engineers violated the ADEA. Western Airlines used the engineer as the third crew member in the cockpit in addition to the captain and first officer. The engineer operates the flight controls only if the other two are incapacitated. The Court noted that the legislative history repeatedly emphasized that "the process of psychological and physiological degeneration caused by aging varies with each individual." The Court, therefore, found that "like its Title VII counterpart, the BFOQ exception ‘was in fact meant to be an extremely narrow exception to the general prohibition’ of age discrimination contained in the ADEA." Since safety is sometimes at issue in disability discrimination cases, it is very useful to look at the Court’s discussion in *Western Air Lines* of the standard for showing that a job qualification is "reasonably necessary" for the operation of the business. The Court said that the standard was not overly burdensome "when an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety." The Court found that the jury rejected the airline’s defense as a consequence of a defect in Western Air Lines’s proof.

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62 Id. at 204.

63 472 U.S. 400 (1985). Interestingly, in *Western Air Lines*, there was a jury trial and the jury concluded that the mandatory retirement rule, purportedly adopted for safety reasons, did not qualify as a BFOQ. Id. at 403.

64 Id. at 403. Although FAA regulations prohibit persons who have reached 60 from serving as pilots or first officers on commercial flights, "the FAA has refused to establish a mandatory retirement age for flight engineers." Id. at 404.

65 Id. at 409.

66 Id. at 412 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)). In *Dothard*, the Court (Rehnquist, J.) held that being male was a BFOQ for the job of correctional counselor in a "contact" position in a male maximum security prison. 433 U.S. at 336-337.

67 472 U.S. at 419.

68 Id.

69 472 U.S. at 420. The Court stated, "When the employer’s argument has a credible basis in the record, it is difficult to believe that a jury of laypersons—many of whom no doubt would have flown or could expect to fly on commercial air carriers—would not defer in a close case to the airline’s judgment." Id.
Attorneys must oppose the application of the "professional judgment rule" to ADA cases. The professional judgment rule was first enunciated in Youngberg v. Romeo, which involved the question of who determined whether treatment of mentally retarded patients in a state facility was "minimally adequate." The Court held that a decision, "if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." The professional judgment rule, which has been extensively applied in cases involving facilities for individuals with mental illness and mental retardation, has been attacked by commentators. Deference to the employer's professional judgment rule is clearly inappropriate in the context of a discrimination case.

The Supreme Court in Western Air Lines, an age discrimination case arising under the ADEA, recognized the inappropriateness of the professional judgment standard. The Court said, "A rule that would require the jury to defer to the judgment of any expert witness testifying for the employer, no matter how unpersuasive, would allow some employers to give free reign to the stereotype of older workers that Congress decried in the legislative history of the ADEA." Similarly, deference to employers' experts in ADA cases would allow some employers to give free reign to the stereotype of workers with disabilities that Congress decried in the legislative history of the ADA.

Simon v. St. Louis County, a case arising under section 504, demonstrates the pitfalls of the professional judgment rule. Simon, a police officer who had become a paraplegic as a result of a shooting, was an extremely sympathetic plaintiff. He was fired after his injury because he was unable to make a forceful

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71457 U.S. at 323.
72 See, e.g., Susan Stefan, Leaving Civil Rights to the Experts: From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L. J. 639 (Dec. 1992) (citing other commentators in footnotes 78 and 225 who also attack the professional judgment standard and its rationale).
73472 U.S. at 423. The Court went on to say that given the evidence provided by the employee, the employer's attempt to justify its decision on the basis of the contrary opinion of experts—solicited for the purposes of litigation—is hardly convincing on any objective standard short of complete deference. Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision.

Id.
arrest or to transfer to another position in the department. The Eighth Circuit upheld the district court's ruling that the standard of forceful arrest and transfer to another position were necessary to the job and uniformly applied. The police had presented expert testimony that the requirements were nationwide standards for active commissioned police officers and "were reasonable and necessary to guarantee efficient police work." The district court thus relied on the mantra of "nationwide standard" without any analysis or scrutiny of the standard, stating that the court was "unwilling to second guess the decisions of those infinitely better versed in the intricacies of personnel, planning, municipal finance, and law enforcement techniques."

The district court in Simon was particularly impressed that "police officers have a duty to enforce the law even when they are not on duty." From the decisions, it is unclear whether the plaintiffs attacked this defense contention on cross-examination or proffered expert witnesses. The "off-duty" importance of the "forcible arrest" standard to St. Louis County might have been countered, for example, by evidence (including testimony on cross-examination) that a large proportion of police officers did not live in the county and, therefore, did not provide any off-duty protection to the county's citizens.

The district court was also concerned that Simon was only the tip of an iceberg. The court feared that if Simon prevailed, "All positions currently held by commissioned officers who are not likely to make forceful arrests would be open to those not able to effect such an arrest," with the result that the police strength would be significantly less than authorized. Because decisions under the ADA are to be decided on an individualized basis, the issue must be whether it is an undue burden to hire a particular individual. Thus, if the police force could reasonably accommodate Simon but could not accommodate 100 paraplegic police officers, then it would have to accommodate Simon and any other qualified paraplegic individual until the additional hire would cause an undue burden. Of course, it may be unlikely that 100 otherwise qualified paraplegics would seek jobs as police officers in St. Louis County.

Litigation involving standards such as those at issue in Simon must be fact specific. The mandate of the ADA is to look at the particular employer in question. Allegedly nationwide standards such as those at issue in Simon must be attacked because they do not allow the searching inquiry into the essential functions for a particular employer. This is particularly true where the standards encompass a wide variety of employers. For example, police forces may range from one sheriff towns to major metropolitan police forces. Where

75735 F.2d at 1083.
76 Id. at 1085.
77 Id. at 1084.
78563 F. Supp. at 79.
79 Id. at 79.
80 Id. at 80.
there may be legitimate reasons for specific criteria, such as the forceful arrest requirement, it is vital to focus on the particular individual involved. Thus, the question under the ADA is not whether it is important that police officers be able to make forceful arrests. The real issue presented is whether there is a particular position that could be modified or restructured so that the particular individual in question, who is unable to meet that forceful arrest requirement, may serve as a police officer. There can be no dispute that in a large metropolitan police force there is a great need for police officers to serve in positions where ability to make a forceful arrest is not required. For example, proof could be adduced that even in an extreme emergency, such as the recent L.A. riots, the San Francisco earthquake, or Dade County's Hurricane Andrew, there were a number of police officers who were required to serve in office positions. Thus, except where there is a very small police force, it should be possible to demonstrate that even in a calamity, a certain number of police officers would be required to serve in positions where forceful arrests would not be necessary.

1. Reasonable Accommodation

Attorneys and advocates should devote their efforts to ensure that reasonable accommodations are considered in determining whether an individual with a disability is qualified. For example, if an individual with a hearing impairment applies for a position where hearing is required, the employer's hearing tests should test the applicant's hearing with a hearing aid, rather than without the hearing aid. In a case involving school bus drivers, a court found that the employer should consider requiring the use of an inexpensive battery tester to check the power and operability of the hearing aid before each bus trip, and the carrying of a spare aid and extra batteries to eliminate the risk of sudden mechanical failure. Reasonable accommodation is discussed in detail, infra.

81563 F. Supp. at 81. In Simon, the district court specifically found that there were four positions that Simon could perform if the forceful arrest and transfer requirements were modified. Id. at 80.

82See Strathie v. Department of Transp., 716 F.2d 227, 234 (3d Cir. 1983) (court found blanket exclusion of hearing aid wearers from school bus driver positions violated Section 504 and remanded the case to determine whether a wearer of a stereo hearing aid would present an appreciable risk to the safety and control of school bus passengers if permitted to drive school buses). See also Crane v. Dole, 617 F. Supp. 156, 160-61 (D.D.C. 1985) (with use of hearing aid, individual was qualified to perform the essential functions of the position as an Aeronautical Information Specialist within the F.A.A.); Waskewicz v. Guy, 535 N.Y.S.2d 345, 348 (Sup. Ct. 1988) (hearing aid wearer must be granted membership in volunteer fire department if his hearing meets test with use of hearing aid).

83Strathie, 716 F.2d at 232-33.
2. Essential Functions

Much litigation will focus on the fact-intensive question of whether a job task is an "essential function." In determining whether a task is essential, the ADA states that, "consideration shall be given to the employer's judgment . . . and that, if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." The regulations state that a job function may be considered essential for any of several reasons, including, but not limited to, the following:

(i) The function may be essential because the reason the position exists is to perform that function;
(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

The regulations describe some of the evidence used to determine whether a position is essential:

(i) The employer's judgment;
(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement; and/or
(vi) The current work experience of past or current incumbents in similar jobs.

Attorneys and advocates must submit arguments that certain job functions are essential to close scrutiny.

3. Direct Threat

a. Threat to Self

The ADA states that qualification standards may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Yet, the ADA regulations allow an employer to require "that an individual not pose a direct threat to the health or safety of

84 42 U.S.C. § 12111(8).
85 29 C.F.R. § 1630.2(n)(2)(1994).
86 Id. at § 1630(n)(3).
himself/herself or others." This provision is extremely controversial. In response to comments opposing the "threat to self" language, the E.E.O.C. stated that the regulation was "consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act" of 1973. The inclusion of "threat to self" may be attacked as contrary to the explicit language of the statute which only refers to the direct threat to "others." The use of "threat to self" could allow employers to give reign to paternalism and benevolence. Here, policies designed to "protect" people with disabilities should be given the same treatment as similar policies that have been purportedly adopted to "protect" women from the rigors of jobs that pay high wages.

In evaluating claims about risks to self, it is important to place risk on the job in context. Many jobs involve serious and even fatal risks to the employee. For example, every day police officers, fire fighters and soldiers risk death and professional athletes risk serious injuries. Because employment is risky, worker's compensation was created to provide compensation to those workers who are injured. Thus, when the risk is to the employee and not to others, the question becomes whether the decision to run that risk should be made by the employee or the employer. The women's rights movement fought against protective legislation that deprived women of the choice to take high-paying jobs. In Johnson Controls, the Supreme Court found that the employer could only consider the safety exception in those instances where sex or pregnancy actually interfered with the ability to do the job. The Court said that the decision as to whether to work in circumstances hazardous to a possible fetus was up to the woman. The Court noted that the danger to the woman herself did not justify discrimination.

In a similar light, disability rights advocates and attorneys should fight for the right of people with disabilities to make choices, including choices that pose risks to their lives and their safety. In analyzing a case where an employer says that the job is hazardous to the individual with a disability, it can be very useful to ask what the answer would be if the discriminatory reason was gender.

88 29 C.F.R. § 1630.2(r)(1994).
90 See discussion of Johnson Controls, 499 U.S. 187, supra notes 55-62 and accompanying text.
91 499 U.S. at 206.
92 Id. ("Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents").
93 Id. at 202. See also Dothard, 433 U.S. at 355. ("[i]n the usual case, the argument that a particular job is too dangerous for a woman may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself").
b. Threat to Others

The issue of whether an individual's disability creates a direct threat to others is likely to be an area of great controversy and litigation. Attorneys and advocates should closely scrutinize any argument that a person with a disability poses a direct threat. In many cases, the employer may have no factual basis for the allegation that the disability poses a direct threat. Without substantial factual support that a job qualification is reasonably necessary for a particular job and cannot be reasonably accommodated, a policy that discriminates against people with disabilities violates the ADA. If the individual poses a direct threat to others because of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. The "risk can only be considered when it poses a significant risk, i.e., [a] high probability of substantial harm; a speculative or remote risk is insufficient." The employer must consider four factors: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.

In analyzing cases where an employer asserts that a disability is a direct threat, it is useful to look at the BFOQ standard set in age discrimination cases involving mandatory retirement. In Western Air Lines, the Supreme Court held that a two-part inquiry was required to resolve a BFOQ defense: (1) is the job qualification "reasonably necessary to the normal operation of the particular business" and (2) is there a substantial "factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved" or is age a "legitimate proxy for safety-related job qualifications [because] it is 'impossible or highly impractical' to deal with the older employees on an individualized basis?" As with age, disabilities vary and even the same disability may have varying effects.

Where there is a substantial factual basis for believing that all or substantially all persons with a particular disability would be unable to perform safely and efficiently the duties of the job involved, with or without reasonable accommodation, an employer may have a rule excluding individuals with that disability. For example, today no one who is legally blind would be able to drive or pilot a plane with any available accommodations. Therefore, blindness can be a disqualification from positions where driving or piloting is an essential

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94 29 C.F.R. § 1630.2(r)(1994).
95 Id.
96 Id.
97 Western Air Lines, 472 U.S. at 413 (quoting 42 U.S.C. § 623 (1988)).
98 Id. at 414 (quoting Weeks v. Southern Bell Tele. & Tele. Co., 408 F.2d 228 (5th Cir. 1969)).
99 Id.
function of the job. Viewed properly, the issue in this example is not the disability, blindness, but the lack of an essential job requirement, a valid license, which is certainly essential for a driver or pilot.

A more difficult issue is raised where an employer asserts that it is impossible or highly impractical to deal with individuals with disabilities on an individualized basis. It is crucial that disability rights attorneys present evidence that, in fact, it is possible to make individualized determinations and they must be prepared to closely cross-examine any expert witness retained by an employer. For example, if a policy bars epileptics from using heavy machinery where a seizure would have a substantial risk of endangering others, it may be possible to challenge that blanket policy and establish that there are individuals with epilepsy who do not pose a substantial risk, such as those who have auras warning of a seizure or are completely seizure-free with use of medication. Similarly, a policy barring diabetics or all insulin dependent diabetics may be illegal but a determination that a particular individual's daily hypoglycemic reactions create a risk may meet the ADA standard.

In Western Air Lines, the Supreme Court found that there was sufficient evidence to support the jury's finding that the mandatory retirement age for flight engineers was not a BFOQ. Evidence like that provided by the plaintiff's attorney in Western Air Lines may also be relevant in disability cases. The employee's evidence included policies of reputable businesses in the same industry; the employer's use of individualized testing in similar circumstances; and a determination that individualized testing is not impractical for the relevant position by the administrative agency with primary responsibility for maintaining airline safety. A BFOQ defense may also be countered if the employer does not require the qualification of other employees.

However, if technology makes it possible for blind people to see, then vision would not be a BFOQ for driving. Thus, Jordi LaForge, a blind navigator, is able to steer the Enterprise in STAR TREK: The Next Generation.

See, e.g., Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989) aff'd mem., 888 F.2d 126 (2nd Cir. 1989) (finding that plaintiff had failed to control his diabetes through diet and use of insulin and that his daily hypoglycemic reactions meant that he could not safely operate heavy and dangerous sanitation vehicles). Arguments can be made that the result in Serrapica was incorrect under the ADA in that the plaintiff should have been given an additional opportunity to control his diabetes. See discussion of reasonable accommodation infra part IV.A.1. See also Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (finding insufficient evidence to support city's requirement of controlled blood sugar levels for diabetics for building repairer position); Jackson v. Maine, 544 A.2d 291 (Me. 1988) cert. denied, 491 U.S. 904 (1989), (finding medical testimony demonstrated that insulin dependent diabetic was free from any condition that might affect his ability to drive a school bus safely).

In some cases, employers may assert that individualized determinations are impractical.\textsuperscript{105} If there is a high probability of substantial harm and individual determinations are, in fact, impractical it is unlikely that a court will hold that the employer must prove that the individual was incapable of performing the job safely. In \textit{Western Air Lines}, the Court stated:

The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case. The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound."\textsuperscript{106}

In any case where direct risk is raised, it is essential to examine closely the four factors set forth in the regulations to determine whether there is a significant risk of a direct threat on the job.\textsuperscript{107}

It is important to make comparisons to Title VII and ADEA cases. For example, in one section 504 case, the court found that a 10\% risk of a police officer developing a shoulder dislocation was significant.\textsuperscript{108} The court in that case should have looked at the risk that the police officer would dislocate his shoulder on the job in a manner that would create a significant risk to others rather than the general risk of dislocating the shoulder. Furthermore, in determining that the exclusion of fertile women from battery manufacturing jobs violated Title VII in \textit{Johnson Controls}, the Supreme Court found the fact that approximately 9\% of all fertile women become pregnant each year was insufficient to establish that substantially all of the employer's fertile women employees were incapable of doing their jobs.\textsuperscript{109} The Court, in context, seems to suggest that this potential does not create a significant risk. Thus, \textit{Johnson Controls} suggests that a 10\% risk of shoulder dislocation would not be substantial.

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\textsuperscript{105} See \textit{Davis v. Meese}, 692 F. Supp. 505 (E.D.Pa. 1988), aff'd, 865 F.2d 592 (3d Cir. 1989) (upholding exclusion of insulin-dependent diabetics from special agent and investigative specialist positions because the expert testified that most insulin-dependent diabetics could not do the job and it was impossible to predict which individuals could do the job).

\textsuperscript{106}472 U.S. at 419-20 (footnotes omitted).

\textsuperscript{107}29 C.F.R. 1630.2(r) (1994).

\textsuperscript{108}\textit{Mahoney v. Ortiz}, 645 F. Supp. 22 (S.D.N.Y. 1986). Significantly, this case was decided on a motion for summary judgment. The police force offered three expert affidavits stating that a surgically repaired shoulder is likely to dislocate again. Plaintiff's own surgeon evidenced concern as to the possibility of a recurrence. This permitted the court to rule, as a matter of law, that the regulation was reasonable. \textit{Id.} at 24. (It is unclear from the decision whether the experts had been deposed.)

\textsuperscript{109}499 U.S. at 207.
In cases involving the uniformed services, courts appear to be particularly concerned about whether the risk that the person with a disability will become incapacitated in a dangerous situation constitutes a direct threat to his or her co-workers. One court upheld the firing of a Navy criminal investigator who did not meet the requirement that a person who was employed in a "hazardous position" be seizure free for two years without taking medication.\textsuperscript{110} The court noted that he was only terminated after he had a seizure during a simulated training exercise which required the immediate termination of the exercise, affecting the entire seven member team.\textsuperscript{111} The court found that the government "did determine under a real employment condition that plaintiff's handicap could in fact endanger him and his fellow agents."\textsuperscript{112} The court concluded that he was not medically qualified for the job of criminal investigator because he had seizures when he did not take his medication, and since he could not be relied on to take his medication regularly,\textsuperscript{113} he might endanger his life or others if he suffered a seizure while on duty.\textsuperscript{114}

\textbf{B. Medical Examinations}

Under the ADA, pre-employment medical examinations are prohibited before a job offer is made.\textsuperscript{115} Once an offer of employment is made, the prospective employee may be required to undergo a medical examination with employment made conditional on its results.\textsuperscript{116} Because a medical rejection can only be made after a job offer has already been made, it will be clear that the medical rejection was a "but for" cause of the decision not to hire the individual. Attorneys and advocates should carefully scrutinize any medical rejections. The ADA explicitly states that an employer may require medical examinations if all entering employees are subject to such an examination regardless of disability and the information is maintained in separate medical

\begin{itemize}
\item \textsuperscript{110}Salmon Pineiro v. Lehman, 653 F. Supp 483 (D. P.R. 1987). Although Salmon had had three seizures at the time of his physical, he never told the doctor of his health problem and in fact obtained a letter from a physician declaring that he was not suffering from epilepsy. \textit{Id.} at 486-87. The Navy first learned of his epilepsy from a background check. \textit{Id.} at 487.
\item \textsuperscript{111}\textit{Id.} at 488.
\item \textsuperscript{112}\textit{Id.} at 494.
\item \textsuperscript{113}Salmon Pineiro, 653 F. Supp. at 489. Following his first seizure, Salmon had taken dilantin sporadically and had three subsequent seizures, all when he was not taking his medication. \textit{Id.} at 487.
\item \textsuperscript{114}\textit{Id.} at 489.
\item \textsuperscript{115}42 U.S.C. § 12112(d). \textit{See generally} Feldblum, \textit{supra} n.18.
\item \textsuperscript{116}42 U.S.C. § 12112(d)(3). The medical examination may elicit voluntary medical histories and may ask about the persons ability to perform job-related functions, but may not inquire as to disabilities which are not "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4).
\end{itemize}
files and is treated as a confidential medical record. Attorneys and advocates should focus on ensuring that such records are kept confidential.

C. Facially Neutral Requirements

Advocates and attorneys should also bring disparate impact cases to challenge "neutral" requirements which have a discriminatory impact on people with disabilities. One example is a requirement that all employees have a driver's license even though driving is not a significant job task. Another "neutral" requirement is a written examination, which is commonly required for many civil service positions. Such tests may have a discriminatory impact on individuals with learning disabilities, who may score poorly on all written examinations including those that are not justified by business necessity. In Stuts v. Freeman, the court held that the Tennessee Valley Authority violated section 504 by denying an individual with dyslexia an apprenticeship solely because of a low score on the written test which did not accurately reflect the individual's ability to be a heavy equipment operator.

Many positions in both public and private employment depend upon performance on tests and medical examinations which may blatantly discriminate against people with disabilities. Courts have found that tests were invalid where they did not measure job-related skills. One possible target is

117 42 U.S.C. § 12112(d)(3). The ADA does provide that supervisors and managers may be informed regarding necessary restrictions and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and government officials investigating compliance with the ADA may be provided relevant information on request. 42 U.S.C. § 12113(d)(3)(B)(i)-(iii).

118 Outside of New York City and other major urban areas, many employers require that employees have drivers' licenses. However, many people with disabilities may be unable to drive because of their disabilities. Challenges to such rules have been successful under Section 504 where driving was not an essential requirement for the job. Thus, in Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984), the court found that a school district's policy of requiring teachers to transport students to and from school unlawfully discriminated against an individual with cerebral palsy who had been restricted from driving because of disability. The court found that the employer could reasonably accommodate the plaintiff by eliminating the responsibility for transporting pupils from the position.

119 694 F.2d 666 (11th Cir. 1983). In Pandazides v. Virginia Bd. of Educ., 946 F.2d 345 (4th Cir. 1991), the court reversed the district court's grant of summary judgment to the Virginia Board of Education, which had deemed a special education teacher who had learning disabilities unable to teach because she was unable to pass the Communication Skills portion of the National Teachers Examination (NTE). The court held that factual determinations had to be made as to whether the NTE requirements represented the essential functions of the job, whether Pandazides could perform the essential functions of the position, and whether a test waiver was a reasonable accommodation. Id. at 350.

120 See, e.g., Crane v. Dole, 617 F. Supp. 156 (D.D.C. 1985) (holding that the FAA violated the Rehabilitation Act by denying plaintiff an air controller position based on plaintiff's failure of hearing test without first considering whether plaintiff was able to perform the essential functions of the job with or without reasonable accommodation).
medical requirements such as back tests which are required by many major employers, including the airline industry, and result in the disqualification of many individuals who do not have any substantial impairment.\textsuperscript{121} Cases where employees are rejected because employers fear higher health insurance or other insurance costs should also be given a high priority.

\textbf{D. Job Applications and Interviews}

The hiring process often presents untenable choices to many people with disabilities. Many job applications request information about whether an applicant has a disability.\textsuperscript{122} Many individuals with disabilities may not want to challenge or refuse to answer illegal questions on job applications or during the job interview because they believe that such challenges will result in not getting the job. Because job applicants may be reluctant to file complaints, advocacy organizations may perform a useful service by asking employers and job applicants for copies of job applications and raising problem questions with the employers without referring to a particular individual. Advocacy organizations may also offer training to employers in lawful job interview questions. It may also be useful for advocates and attorneys to provide training and educational materials to people with disabilities on permissible questions and suggestions for handling illegal questions.

Case law under Title VII is clear that a legitimate job candidate who has been the subject of unlawful discrimination in the employment process, such as unlawful questions, is entitled to an injunction against future or continued discrimination.\textsuperscript{123} However, the employer is "entitled to prove by clear and convincing evidence that the job applicant would not have been hired anyway in order to limit the job applicant's relief."\textsuperscript{124}

If an employee is terminated after an employer discovers both the employee's disability and that the employee lied on a job application, the case should be analyzed as a "mixed motive" case. The Civil Rights Act of 1991 sets forth the test to be used in Title VII cases: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment

\textsuperscript{121} Employees without substantial impairments would be considered to have a "perceived disability." 42 U.S.C. § 12102(2). A useful definition of perceived disability is set forth in 45 C.F.R. § 84.3(j)(2)(iv)(1993) supra note 34.

\textsuperscript{122} A July, 1992 report by New York Lawyers for the Public Interest, Inc. found that nearly half of the employers surveyed asked illegal questions.

\textsuperscript{123} See, e.g., King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984). The court reversed a district court's dismissal of plaintiff's Title VII sex discrimination claim which was based on Defendant TWA's refusal to hire her. At the job interview plaintiff was asked about pregnancy, childbearing, and child care even though TWA policy did not permit such questions. This evidence led to a presumption of unlawful discrimination that TWA failed to refute. Injunctive relief was ordered together with an order to reevaluate the evidence. \textit{Id.} at 260.

\textsuperscript{124} 738 F.2d at 257-58.
practice, even though other factors also motivated the practice."125 Attorneys should work to establish the principle that the use of any answer to an illegal question in making a job decision, whether or not truthful, manifests the illegal motivating factor of disability discrimination.126

However, some courts have found that plaintiffs may be disqualified from a job for misrepresentation alone, particularly in such jobs as law enforcement, where honesty is an important criterion for the position.127 Attorneys must be aware that they cannot ethically advise a client to lie where misrepresentation on a job application is a crime, as with federal job applications.128

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126The United States Supreme Court recently resolved a split in the circuits on the effect of after-acquired evidence of employee wrongdoing, such as the discovery of lies on resumes and job applications, on job discrimination claims. McKennon v. Nashville Banner Publ. Co., No. 93-1543, 1995 U.S. LEXIS 699, 63 U.S.L.W. 4104 (Jan. 23, 1995). The Supreme Court unanimously held that the discovery of after-acquired evidence is not a complete bar to recovery under the ADEA. 1995 U.S. LEXIS at 19-20. The Court found that mixed motive cases were inappropriate because the "employer could not have been motivated by knowledge [that] it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." Id. at 15. The Court concluded that after-acquired evidence does bear on the specific remedy for the illegal discrimination. Id. at 16-20. The Court held that reinstatement and front pay are generally not appropriate remedies, but that backpay may be appropriate. Id. at 18-19. The Court stated "[a]n absolute rule barring any recovery of backpay, however, would undermine the ADEA’s objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination." Id. at 20.

The Court also held that when "an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. at 20.

127In *Salmon Pineiro*, 653 F. Supp. 483, 492 the court found that plaintiff's employment application contained a false denial of his epilepsy. Pursuant to 5 U.S.C. § 3301 and 5 CFR § 731.202(b)(3), the government may deny or disqualify an employee from a federal civil service position for making an intentional false statement in the hiring process. In *Salmon Pineiro*, therefore, the court made an alternate finding that it would be "highly inequitable to require reinstatement with an accommodation where the plaintiff could be denied employment based on his falsifications." 653 F. Supp. at 492. See also *Lofgren v. Casey*, 642 F. Supp. 1076, 1077 (D. Mass. 1986) (court dismissed plaintiff employee's action after he was discharged by post office following discovery he lied in an application for disability benefits by telling the Veterans Administration that he had no employment when he was working over 60 hours per week).

128See *Model Rules of Professional Conduct* 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ... "). Indeed, an attorney should never condone perjury or encourage a client to lie.
III. EQUAL BENEFITS

There also may be significant issues arising from discrimination in benefits and wages. Health insurance is a critical benefit because many people with disabilities have serious health problems. Limitations on coverage of particular disabilities needs to be addressed. Many health insurance plans offer reduced benefits for mental illness. Others have recently lowered caps on insurance for AIDS.

Many individuals with disabilities may receive lower wages and fewer benefits because they are employed in noncompetitive civil service positions, sheltered workshops, or other positions. Precedent under section 504 clearly indicates that depriving individuals with disabilities of equal benefits is illegal.129 Given the current fiscal problems of many states and localities, cases involving denial of job benefits to people with disabilities should be given a high priority.

IV. REASONABLE ACCOMMODATIONS

Special effort should be given to enforcing the ADA's reasonable accommodations provisions. The ADA defines reasonable accommodation by listing examples of possible certain accommodations:

(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 modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.130

The ADA also defines auxiliary aids and services as including:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

129 In Allen v. Heckler, 780 F.2d 64 (D.C.Cir. 1985), the court ruled that a hospital violated Section 504 by depriving former psychiatric patients, who had been hired on a non-competitive status, of benefits available to civil servants in the same positions. See also Shirey v. Devine, 670 F.2d 1188 (D.C. Cir. 1989) (NASA violated Section 501 of the Rehabilitation Act by denying a deaf individual job protection benefits because he had been "excepted" from competitive employment where he was performing the same tasks as competitive civil service employees).

130 42 U.S.C. § 12111(9).
(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions. 131

These lists are illustrative and not exclusive.

The E.E.O.C. Technical Assistance Manual states that the employer is responsible for notifying job applicants and employees of its obligation to provide reasonable accommodations for otherwise qualified individuals with disabilities. 132 This provision will be particularly useful where an employee's performance has suffered for the lack of a reasonable accommodation and the employee never knew that he or she could have requested the accommodation.

Since the legislative history and the Appendix to the regulations 133 indicate that it is the employee’s responsibility to ask for accommodations, advocates and attorneys should provide training and assistance to employees in asking for accommodations. In many cases, accommodations will be provided following intervention by an attorney. After all, most accommodations cost less than hiring a lawyer to defend a lawsuit.

There may be particular cases that are well suited for litigation. Some employers may be well known in particular communities for being recalcitrant. For the first cases brought under the ADA, it may be useful to focus on accommodations that are inexpensive, such as flex-time or part-time work, and/or are common to particular disabilities, such as the provision of sign language interpreters and TDDs for people with hearing impairments. 134 Advocates and attorneys should also place a high priority on requiring employers to provide attendant care services.

In Nelson v. Thornburgh, a leading case on reasonable accommodations, the Third Circuit affirmed, without opinion, a district court holding that blind income maintenance workers were entitled to half-time readers on a daily basis and access to a reader as needed on an emergency basis or to an equally effective mix of accommodations. 135 The court concluded that the cost of providing the readers was modest given the total budget of the Department of Welfare. 136

131 42 U.S.C. § 12102(1).


133 29 C.F.R. app. § 1630.9 (1994).


136 In an earlier case, Coleman v. Darden, 595 F.2d 533 (10th Cir.), cert. denied, 444 U.S. 927 (1979), the court reached an opposite decision, finding that the defendant's failure to hire a blind individual as a research analyst and refusal to assign him a full-time reader did not violate the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), or Sections 501 or 504 of the Rehabilitation Act. The legislative history of the ADA demonstrates that Congress adopted the Nelson approach. Thus, the House Judiciary Committee Report states that the Committee intends to "establish a flexible approach" and then...
The court found that the ability to read unaided, while useful, was not an essential qualification for the position since the plaintiffs had performed the jobs satisfactorily by hiring readers themselves on a part-time basis. As discussed earlier, one way to overcome the doubts of a judge or jury about the abilities of individuals with disabilities is to demonstrate that people with disabilities have, in fact, performed the particular job in question without any problem.

Court-ordered modifications for the hearing impaired have included hearing aids, visual aids, TDDs, and training of fellow employees. In one case, where a deaf person was not able to benefit from the use of a hearing aid to communicate with her co-workers, the court required the following modifications: a training program to teach basic sign language to employees who would have come into frequent contact with her; the use of laminated cards or lists with frequently used phrases and questions for co-workers to read; training of fellow hearing employees to increase awareness of the mistakes commonly made by a hearing impaired person; and the use of a TDD to communicate quickly through writing.137

Some accommodations may be found to be unreasonable for a given employer. Under the ADA, the employer may raise a defense that the accommodation would impose an undue hardship on his or her business.138 In Nelson, the district court considered the total budget of the State Department of Welfare in determining that the cost of providing readers to blind employees was modest.139 Courts generally have not required employers to hire two full-time employees to perform the same exact job when one could do it.140 Advocates must work to ensure that undue hardship is a meaningful standard.

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13842 U.S.C. § 12112(S)(A). An undue hardship is defined in the ADA as that which would impose "significant difficulty or expense." 42 U.S.C. § 12111(10)(A). In determining whether an accommodation is an undue hardship, factors to be considered include the cost of the accommodation, the financial resources of the particular facility and the overall financial resources of the company, the impact of the accommodation on the operation of the business, the size of the business, the number of employees, and the type of business. 42 U.S.C. § 12111(10)(B)(i-iv).

139567 F. Supp. at 380.

140In Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983), an individual had applied for a position as a seasonal park technician a day after bypass surgery. The essential duties of the job included operating a motorboat alone, walking long distances and handling unruly park visitors. Id. at 476, n.5, 477. The court found that in order to accommodate the plaintiff, the Army Corps of Engineers would have to require other park technicians to perform many of Plaintiff's duties had he been hired. Id. at 478. Given the fact that there were only 2-4 workers available to patrol 150,000 acres, the court held that such "doubling up" would impose an undue hardship upon the employer. The court noted that the plaintiff did not rebut the showing of undue burden by offering other suggestions for possible accommodations. Id.
Furthermore, where an employer argues that a particular accommodation is an undue burden, attorneys should be prepared to offer other suggestions for possible accommodations.

The E.E.O.C. recommends that employers use a "problem solving" approach to reasonable accommodations and (1) analyze the job involved and determine its purpose and essential functions; (2) consult with the disabled individual to ascertain the job-related limitations imposed by the disability; (3) identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) consider the disabled individual’s preferences and select the accommodation most appropriate for both the employer and the employee."141 Because of the focus on a problem-solving approach, attorneys and advocates should carefully consider proposals from employers to provide reasonable accommodations. The law is clear that the employee is not necessarily entitled to the accommodation that he or she prefers.

The reasonable accommodation requirement applies to accommodations that are needed because of a person’s disability.142 Employers are not required to accommodate requests made for other reasons. Attorneys and advocates must make clear the nexus between the disability and the need for the accommodation requested.

In addition to statutory requirements, courts have taken several factors into consideration in deciding whether a modification is reasonable. First, courts examine the efforts made voluntarily by the employer to accommodate an employee. This approach is in keeping with the "problem-solving" approach. Where the employer has made significant changes on its own, a court is less likely to find additional, costly modifications to be reasonable.143

Second, courts scrutinize the employee’s actions. Where the employee with a disability failed to follow measures designed by the employer to allow him or her to work safely, courts often find against the plaintiff. Consideration of an individual’s use of medication is very troubling.144 Mind-altering medications impinge on autonomy and often have serious side effects. Mental health advocates have long fought for the right of mental health consumers to make an informed choice about medication, to be able to refuse medication,

14129 C.F.R. § 1630.9 (1994).


143See Vickers v. Veterans Admin., 549 F. Supp. 85, 89 (W.D. Wash. 1982). In Carter v. Bennett, 651 F. Supp. 1299 (D.D.C. 1987), aff’d, 840 F.2d 63 (D.C.Cir. 1988), a blind plaintiff who was terminated claimed that the Department of Education had failed to accommodate his disability. However, the court decided that the accommodations provided, which included the provision of readers, special equipment and the specialized arrangement of the plaintiff’s office, were sufficient. Id.

144See Salmon Pineiro, 653 F. Supp. 483 (rejecting plaintiff's proposed reasonable accommodation because, among other reasons, he had been unreliable in taking medication).
and to have their choice respected.\textsuperscript{145} Parents have fought for the right of their children to receive a free appropriate education without medication like ritalin.\textsuperscript{146} Advocates should fight to ensure that the right to choose is preserved in the context of employment.

One issue that may arise is whether employers may request that employees seek vocational rehabilitation funds to pay for accommodations. Given the limitations on vocational rehabilitation funds, it may be more equitable if those funds are focused on assisting employees of smaller employers for whom accommodations are burdensome. However, an employee may prefer receiving an accommodation from a vocational rehabilitation agency. If a device such as a computer is purchased by the vocational rehabilitation agency, it then belongs to the employee rather than the employer.

\textbf{A. Job Restructuring}

Job restructuring is a very important accommodation because there are many jobs which have tasks that cannot be performed by people with certain disabilities. The ADA strongly supports modified work schedules and transfers, where possible, as reasonable accommodations. The legislative history of the bill explained that:

\textit{Part-time or modified work schedules can provide useful accommodations. Some people with disabilities are denied employment opportunities because they cannot work a standard schedule.... Allowing constant shifts or modified work schedules provide ways of accommodating an individual with a disability to allow him or her to do the same job as a nondisabled individual.\textsuperscript{147}}

At least one court has held that job restructuring is not required to eliminate an essential job function.\textsuperscript{148} Advocates should focus on ensuring that job restructuring is required where feasible.

\textbf{B. Architectural Barriers and Other Workplace Modifications}

The elimination of architectural barriers and other workplace modifications may be required by the ADA. One principle to be established is that employers are required to comply with American National Standards Institute

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\textsuperscript{148}Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985). In this case, the plaintiff, who had strabismus (a condition where eyes are mildly crossed), suffered persistent headaches from his employment on a mail sorting machine. The court held that Jasany was not otherwise qualified because he could not perform the essential functions of his job.
\end{flushright}
[hereinafter ANSI] standards at a minimum unless such standards pose an undue burden.\textsuperscript{149} Such a standard would often enable individuals with disabilities to prevail on summary judgment motions because the factual question of whether ANSI standards were met would be undisputed in most cases. Without such a standard, litigation will be extremely time-consuming and difficult. The difficulties are demonstrated by Conlon v. City of Long Beach.\textsuperscript{150} In that case, an employee who used a wheelchair sued to make the City Hall restroom accessible and for damages that he incurred when the bathroom stall collapsed on him. The court denied a motion for summary judgment finding that, because the plaintiff had used the lavatories at least on occasion, there was a factual question as to whether the lavatories were merely inconvenient or unsafe or completely inaccessible. Where architectural barriers are at issue, consideration should be given to adding claims under the ADA's public services (Title II) or public accommodation provisions, if appropriate.\textsuperscript{151}

\textbf{C. Leaves of Absence, Part-time Work and Other Accommodations in Time and Attendance Requirements}

Many people with disabilities may need to take leave of absence for medical treatments or other reasons while others may need accommodations in time and attendance requirements in order to maintain their jobs. Leaves of absence may be particularly appealing because of their low cost to employers. One court found that a policy of summarily terminating employees who were on "injured on duty" status for over a year violated section 504 and stated that "[w]ithout an individualized determination, this policy has a disparate and unjust impact on employees who sustain the worst injuries."\textsuperscript{152} The evidence demonstrated that keeping the plaintiff's position open was not a hardship as her job was not filled until more than a year later.\textsuperscript{153}

People with disabilities, like their fellow employees, may be entitled to twelve weeks of leave in a twelve-month period under the Family and Medical Leave Act of 1993 [hereinafter FMLA] if they have "a serious health condition that makes the employee[s] unable to perform the functions of the position."\textsuperscript{154} A serious health condition is defined as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a

\textsuperscript{149}See Kroll v. St. Charles County, 766 F. Supp. 744 (E.D. Mo. 1991)(courthouse, government building and administration building violated ANSI standards and, therefore, violated Section 504).

\textsuperscript{150}676 F. Supp. 1289 (E.D.N.Y. 1987).

\textsuperscript{151}Id. In Conlon, the City Hall was clearly a public service under Title II.

\textsuperscript{152}Perez, 677 F. Supp. at 361.

\textsuperscript{153}Id.

\textsuperscript{154}29 U.S.C.A. § 2612(a)(1)(D).
health care provider."\textsuperscript{155} The FMLA applies only to employees who have worked for at least 12 months for at least 1,250 hours\textsuperscript{156} for an employer of more than 50 individuals.\textsuperscript{157}

Although the coverage of the FMLA is limited to "serious health conditions," a strong argument can be made that the FMLA demonstrates that a three month leave is reasonable absent an undue hardship for an employer. In evaluating whether a leave of absence would create an undue hardship for an employer, it is important to examine whether other similarly situated employees who need leaves are allowed to take leaves. For example, if an employer provides all pregnant employees with a six month maternity leave, it is clear that a six month leave is not an undue hardship.\textsuperscript{158} Even where there is a valid termination because it would be an undue hardship for an employer to leave a position unfilled or use a temporary substitute for a lengthy period of time, at a minimum, an employer should be required to offer that employee the first available position that is similar to his or her previous job.

In an analogous case, a court held that an absenteeism policy which had a disparate impact on women violated Title VII.\textsuperscript{159} The court found that the employer's policy that required all employees to work at least one year before becoming eligible for sick leave discriminated against pregnant first year employees in violation of Title VII, as amended by the Pregnancy Discrimination Act of 1978.\textsuperscript{160} Finding that there was no evidence to support its policy, and in fact no one in management even knew the reason for the policy, the court held that the policy did not serve, in a significant way, any legitimate employment goal.\textsuperscript{161}

Similarly, a restrictive absenteeism policy may have a disparate impact on individuals with disabilities that require leave. The E.E.O.C.'s Technical Assistance Manual takes the position that the disparate impact theory does not


\textsuperscript{156}29 U.S.C.A. § 2611(2)(A).

\textsuperscript{157}29 U.S.C.A. § 2611(4).

\textsuperscript{158}See Maddox v. Grandview Care Ctr., 607 F. Supp. 1404 (M. D. Ga. 1985), aff'd, 780 F.2d 987 (11th Cir. 1986), where the court found that "Defendant's leave policy, . . . was discriminatory on its face. It expressly stated '[m]aternity leave is limited to three months per employee' while a leave of absence for 'illness' could be granted for an indefinite duration." Id. at 1406 (alteration in original). The court supplemented its conclusion by observing that plaintiff "was ineligible for a leave of absence for the duration of her pregnancy, even though an absence of similar length was available to male employees for other health reasons." Id.


\textsuperscript{160}Id.

\textsuperscript{161}Id. at 655. The employer had contended, due to high employee turnover, that sick leave was a reward for employees who continued with the company for more than a year. The evidence indicated that 77% of the turnover occurred in the first 90 days of employment. Id.
apply to time and attendance policies. The Manual states that "a uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability."\textsuperscript{162} The Manual goes on to say that if the individual with a disability requests a modification of a uniform policy as a reasonable accommodation, the employer may be required to provide it unless it would impose an undue hardship.\textsuperscript{163} A strong argument can be made that the Technical Assistance Manual's position is contrary to the statute.

Where an employer has an extremely restrictive absence policy, such as prohibiting use of sick leave for the first year of employment, an argument may be made that such restrictive policy has a disparate impact on people with disabilities. In the analogous situation of pregnancy, a court recently upheld a determination by the New York City Human Rights Commission that an employer's failure to provide maternity disability leave of six weeks violated the New York City Human Rights Law.\textsuperscript{164}

Absenteeism is also frequently an issue in termination cases. In a recent case, the Second Circuit held that an employee's absenteeism record, if a manifestation of disability, is not sufficient to demonstrate a non-discriminatory reason that would justify shifting the burden back to the employee to demonstrate that the reason was pretextual.\textsuperscript{165} The court remanded the case to determine whether the absenteeism was caused by the disability.\textsuperscript{166}

Unpaid leave as an accommodation was supported in the House Committee on Education and Labor Report which explained that "[r]easonable accommodation may also include providing additional unpaid leave days."\textsuperscript{167} However, if the absences become excessive, the person may no longer be considered qualified for the position.

Courts have been less receptive to requiring employers to accommodate erratic absences and tardiness, finding that punctuality and attendance are essential parts of the job.\textsuperscript{168} There have been some cases under section 504

\textsuperscript{162}E.E.O.C. TECHNICAL ASSISTANCE MANUAL, supra note 29, at VII-10.

\textsuperscript{163}Id.


\textsuperscript{165}Teahan v. Metro North, 951 F.2d 511 (2d Cir. 1991), cert. denied, 113 S. Ct. 54 (1992). See also Walker v. Weinberger, 600 F. Supp. 757, 762 (D.D.C. 1985) (court held that a reasonable accommodation of an alcoholic required forgiveness of his pre-treatment absenteeism record where the employee was willing to undergo treatment and responded well to treatment).

\textsuperscript{166}Teahan, 951 F.2d at 520.


which found that leaves of absence were reasonable accommodations to the needs of a worker with a disability where the absences do not stand in the way of adequate job performance. As an alternative, courts have stated that a leave of absence to enable the individual to cure the problem of absenteeism may be a reasonable accommodation.

There is no clear determination of what constitutes a reasonable number of absences. One court found absences to be unreasonable when they exceeded the number of sick days allowed in an employer’s personnel policy. Courts have found that frequent absences make it impossible for the person to perform the job in a reasonable manner. Where the issue is tardiness or absenteeism, one question in terms of reasonable accommodation is whether the individual with the disability is willing and able to make up the missed time.

Some people with disabilities will be placed at a considerable disadvantage if employers consider time and attendance records in making promotion decisions. Such policies should be attacked as unlawful under the ADA unless the employer can demonstrate that good time and attendance records are essential functions of the position.

Where the accommodation sought involves modification of time and attendance policies, it is essential to bring cases with compelling fact situations to set precedents because of the difficulties inherent in these cases. For example, a person with cancer who needs a reduced time schedule or a leave of absence for a specific period of time in order to undergo chemotherapy may present a

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169 Cf Fisher v. Superior Court, 223 Cal. Rptr. 203 (Ct. App. 1986) This action was brought pursuant to Cal. Govt. Code § 12940, a provision similar to 504. In its ruling as to certain discovery issues the court stated in dicta that absences for medical appointments may be a reasonable accommodation for worker with lymphosarcoma. Id. at 205.

170 See, Lemere v. Burney, 683 F. Supp. 275, 278 (D.D.C. 1988) (reasonable accommodations had been provided, including two extended leaves of absence to enable the plaintiff, who was an alcoholic, to receive inpatient treatment, as well as a third leave of absence).


172 See, e.g., Silk v. Huck Installation & Equip. Div., 486 N.Y.S.2d 406, 407 (App. Div. 1985) (court upheld termination of plaintiff with erratic attendance following her return to work from a leave of absence). See Walders, 765 F. Supp. 303, 305-306 (plaintiff had been absent more than four weeks per year over and above full annual and sick leave and most of her absenteeism was random; her supervisors could not count on her attendance or predict her absences); See also Santiago, 739 F. Supp. 974, 976-77 (plaintiff had an inability to work with any predictability).

compelling fact situation. Unpredictable absences and tardiness may be harder to accommodate than scheduled absences and late arrival.

There are some disabilities which inevitably result in the inability to work. While a person with a disability may want to work as long as possible in order to maximize insurance benefits, it may be difficult for an employer to have an employee who often does not come to work or who is out on indefinite leave. The difficult question is drawing the line between accommodations that are reasonable and unreasonable. The twelve weeks provided by the Family and Medical Care Leave Act provide a realistic baseline for defining reasonable leave where a company does not have a more generous policy. Personnel policies may offer protections for employees who need leaves of absence or other time and attendance accommodations.

The statute clearly states that part-time work may be a reasonable accommodation. Under section 504, courts have found part-time work to be a reasonable accommodation.174

D. Documentation of the Need for Accommodation

One significant issue that will need to be explored is whether an employer may require documentation to support a request for an accommodation. Since reasonable accommodation is only required for people with disabilities, employers may seek to require documentation of a disability. While most employers would not ask for documentation when a person with a mobility impairment seeks removal of architectural barriers, employers may seek documentation to excuse a lengthy absence or to support an expensive accommodation for a person with an invisible disability such as a learning disability.

The E.E.O.C. Technical Assistance Manual takes the position that the "employer may request documentation of the individual's functional limitations to support the request," "[i]f an applicant or employee requests an accommodation and the need for the accommodation is not obvious, or if the employer does not believe that the accommodation is needed."175 Since any employer can say that he or she "does not believe that the accommodation is needed," the Manual appears to allow any employer to require documentation to support requests for reasonable accommodation.

Documentation requirements raise serious confidentiality concerns. For example, a person with a substance abuse problem or a psychiatric disability may need a leave of absence for several months, yet fear stigma if the reason for the leave of absence is disclosed. If the employer requires medical documentation for a leave of absence for all employees in order to verify the

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174 Carter v. Casa Central, 849 F.2d 1048, 1054, 1066 (7th Cir. 1988) (employer violated Section 504 by refusing to reinstate a woman with multiple sclerosis as Director of Nursing on a part-time basis where her doctor had recommended that she start back to part-time work); Perez, 577 F. Supp. at 360 (failure to accommodate plaintiff when she returned to work violated Rehabilitation Act).

need for the leave, it may be difficult to argue that the employee is entitled to confidentiality. In one case, an administrative law judge found that medical information relating to a complainant's disability was required to be disclosed. The court reasoned that the complainant had put her disability in dispute by filing a disability discrimination complaint.176

E. Collective Bargaining Agreements

There is likely to be much litigation when requests for job modifications and transfers conflict with collective bargaining agreements.177 This may be an area in which the ADA is more expansive of individual rights concerning persons with disabilities than previous court interpretations of section 504. While the present section 504 regulations provide that "a recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party,"178 courts have given deference to collective bargaining agreements where seniority and related rights are concerned.179 The courts' deference to such agreements, has caused disabled workers who required a modified work schedule to be precluded from obtaining such a schedule. For example, in one case, an individual with asthma had been denied a request for assignment to permanent light duty when he could not perform his job as a custodian due to the exertion and dust.180 The employer argued that the employee was not eligible for permanent light duty according to the collective bargaining agreement as he had been with the Postal Service for less than 5 years. The court ultimately found for the employer, stating that "[t]he Postal Service was not under an obligation to 'accommodate' him by assigning him to permanent light duty."181 The court decided that "an employer is not required to find alternative employment for an employee who cannot perform his job unless the employer normally provides such alternative employment under its existing policies."182


178 45 C.F.R. 84.11(c) (1993).


180 Carter v. Tisch, 822 F.2d 465, 466 (4th Cir. 1987).

181 Id. at 467.

182 Id. at 467. See also Daubert v. United States Postal Serv., 733 F.2d 1367 (10th Cir. 1984)(Failure to assign plaintiff to permanent light duty due to her degenerative spinal disease found to be legitimate under a collective bargaining agreement which barred such a transfer); Hurst v. United States Postal Serv., 653 F. Supp. 259 (N.D. Ga. 1986)(Plaintiff with orthopedic disabilities found ineligible for vacant position in Rural Carrier Craft due to provisions in collective bargaining agreement); Bey v. Bolger, 540
There is strong support for the proposition that these cases should be decided differently under the ADA.\textsuperscript{183} A review of the statute indicates Congress' intent was to make a collective bargaining agreement only one of many factors considered in determining whether an accommodation was reasonable. Therefore, a plaintiff's claim would not be automatically barred by such an agreement. Under the ADA, an employer may not use a collective bargaining agreement to bypass the statutory requirements. This is clarified in the legislative history which reveals the specific role of collective bargaining agreements as relating to the ADA. The House Committee on Education and Labor stated that:

The collective bargaining agreement could be relevant...in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job.\textsuperscript{184}

Thus, while collective bargaining agreements will be given some weight under the ADA, it is clear that the bargaining agreement is not dispositive.

In some cases, particularly where the rights of members with disabilities may conflict with rights of other union members, unions may be unwilling to assist people with disabilities. However, unions are subject to the ADA and are, therefore, required to make reasonable accommodations.\textsuperscript{185} Where an employee is a union member and the union has either failed to assist the employee, or has refused to modify a collective bargaining agreement to enable the employer to provide a reasonable accommodation, consideration should be given to naming the union as a co-defendant.

V. ENFORCEMENT AND REMEDIES

The ADA provides that remedies for violation of the ADA are the same as the procedures and remedies under Title VII.\textsuperscript{186} Title VII has established that, as a general rule, individuals are required to file charges with the E.E.O.C. before filing a lawsuit and may obtain a right-to-sue letter only after the charge has been pending with the E.E.O.C. for 180 days.\textsuperscript{187}

\textsuperscript{183}See Arlene Mayerson, \textit{Title I - Employment Provisions of the Americans with Disabilities Act}, 64 TEMPLE L. REV. 499, 515 (1991) (an employer cannot use a collective bargaining agreement to undermine the ADA).


\textsuperscript{185}42 U.S.C. § 12111(2).


\textsuperscript{187}F. Supp. 910, 927 (E.D. Pa. 1982)(court upheld requirement of five year minimum employment for light duty status as a term of the collective bargaining agreement which barred plaintiff, who suffered from uncontrolled hypertension, from reinstatement into a light duty position).
Under Title VII, a complaining party can sue for injunctive relief, back pay, and attorneys fees. The Civil Rights Act of 1991 provides that where the defendant has practiced unlawful intentional discrimination in violation of the ADA, the complaining party may also receive compensatory and punitive damages. The amount of compensatory damages is set by a schedule based on the total number of employees which ranges from $50,000 to $300,000. However, the statute also provides that damages cannot be awarded where the covered entity demonstrates good faith efforts, in consultation with the plaintiff, to identify and make a reasonable accommodation that would provide an equally effective opportunity to the employee.

The Civil Rights Act also places a duty on employees. For example, litigants under employment discrimination laws are required to mitigate their damages. Thus, an employee who remains unemployed after a discriminatory termination and does not make any effort to look for work is not entitled to back pay. Attorneys and advocates should advise clients of their duty to mitigate damages and urge that they keep records of all efforts to find work.

Persons with disabilities who file discrimination claims may find themselves in a "Catch-22" situation with respect to their claims for back pay if they collect disability payments during the period when they are out of work based on their representation that they are unable to work. Although Supplemental Security Income [hereinafter SSI] and Social Security Disability recipients

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188 42 U.S.C. § 2000e-5(g)(1). (A plaintiff can receive back pay going back until two years before he or she filed the charge with the E.E.O.C.); 42 U.S.C. § 2000e-5(k) (court may grant reasonable attorney's fees).

189 42 U.S.C. § 1981a(b)(3) (Supp. IV 1992). Respondents with more than 14 and less than 101 employees have a maximum liability of $50,000 whereas those with in excess of 500 employees are subject to damages of up to $300,000.


191 Title VII, as amended by the Civil Rights Act of 1991, provides "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. Section 2000e-5(g)(1).


193 Overton v. Reilly, 977 F.2d 1190, 1196 (reversing and remanding judgment for employer, finding that the Social Security Administration's determination that the employee was entitled to disability benefits could not be construed as a judgment that the employee could not do his job).
whose disabilities meet the listings, such as individuals who are blind, may have no problems in attaining back pay, difficulties may arise for those individuals who must demonstrate that they are functionally unable to work in order to get benefits. Attorneys and advocates must work hard to establish that receipt of disability benefits does not demonstrate inability to work. One court has found that the Social Security Administration inquiry into work in the national economy is generalized, and a determination that a claimant is unlikely to find a job does not necessarily mean that there is no work that a claimant can do. A vocational expert can be employed to testify that there are no ADA covered employers who, as a matter of course, provide the types of accommodations that the employee would need. The expert testimony would establish that an individual who receives benefits because of a severe disability should still be eligible for back pay if a court finds that the employer violated the ADA. In such cases, a record of the employee's efforts to obtain work would be very useful in demonstrating the unavailability of positions where reasonable accommodation is provided.

VI. CONCLUSION

Despite its flaws and limitations, the ADA has much potential to dismantle many of the barriers that have excluded people with disabilities from equal opportunity in the workplace. There is also much room for disappointment. Simply changing the law does not automatically change behavior. As I tell my clients, the simple fact that the law requires drivers to stop at red lights does not mean that all drivers stop at red lights. Whether people obey the law often depends on whether the law is enforced. It is no coincidence that the average speed of cars on highways drops dramatically when a police car is in sight. Whether the ADA makes a meaningful change in the work lives of people with disabilities will depend on the work of disability rights attorneys and advocates in implementing and enforcing the law.

In order to fully realize the potential of the ADA, disability rights attorneys and advocates should develop a concerted strategy to implement the ADA. The disability rights movement can learn a lot from the successes and failures of the civil rights and women's rights movements. There is much truth to the maxim that bad cases make bad law. By focusing first on the most blatant discrimination and cases that fall squarely within the ADA's statutory bars, precedents can be set that can be used to later expand the ADA's protections.

Three priority areas for litigation are hiring practices, benefits, and reasonable accommodations. First, with nearly two-thirds of adults with

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194 Id. at 1196 (stating that "the SSA may award disability benefits on a finding that the claimant meets the criteria for a listed disability, without inquiring into his ability to find work within the economy").

195 Id. at 1196.

196 Also, attorneys and advocates must fight attempts to use the ADA to make it harder for people with disabilities who are unable to work or to find work to qualify for benefits.
disabilities unemployed due in large part to discriminatory barriers, dismantling discriminatory hiring practices is vital. Second, because people with disabilities are disproportionately affected by limitations on health insurance and other benefits, benefits are an important area of focus. Finally, because many people with disabilities need alterations in the workplace in order to have equal opportunity, reasonable accommodation cases must be given a high priority.

Because of prevalent stereotypes about people with disabilities that focus on disabilities rather than abilities, much of the discrimination will be blatant. The ADA's requirement that medical examinations and inquiries be made only after a job has been offered will assist in revealing discriminatory motives. Lawyers will, therefore, be able to focus on the substantive issue of whether discrimination was unlawful, making such clearcut issues much easier to litigate in spite of the recent Supreme Court jurisprudence making it more difficult to infer discrimination.

Stereotypes about people with disabilities will need to be dispelled giving specific factual evidence that people with disabilities are able to do the job. Evidence that the plaintiff or others with the same disability have done the job will be very persuasive. Expert evidence may also be very useful. It is also crucial to rigorously examine the reason behind the employer's decision. In many instances, employers base their decisions on preconceptions about people with disabilities rather than individualized assessments of job applicants and employees. The failure to make such an individualized assessment violates the ADA.

In enacting the ADA, Congress made clear that discrimination against people with disabilities is unacceptable, just as discrimination on the basis of race or sex is unacceptable under Title VII. In analyzing a disability discrimination case, it is very helpful to ask whether similar discrimination would be legal if the issue was gender, not disability. Ostensibly benevolent efforts to protect people with disabilities from themselves—and decent jobs—must be fought with the same vigor that the women's rights movement uses to fight paternalistic employers.