

THE AMERICANS WITH DISABILITIES ACT AND EMPLOYMENT: A NON-RETROSPECTIVE

Mark C. Weber*

I. COVERAGE: OBTAINING PROTECTION UNDER THE ADA

A. *The Sutton Trilogy*

B. *Sidestepping Sutton*

1. *Individualization Ideas*
2. *Exploring "Regarded as" Having a Disability*
3. *The Role of Social Attitudes*
 - a. *The Lower Courts' Role*
 - b. *Analogies: Rowley, Davis*

II. REMEDIES: OBTAINING DAMAGES IN ADDITION TO BACK PAY

A. *Section 1981a*

B. *Compensatory Damages*

C. *Punitive Damages*

D. *The Use of Pendent Claims*

1. *State Statutes*
2. *Common Law*
3. *Questions About Forum Choice*
4. *Preemption Issues*

III. CLAIMS: ESTABLISHING LIABILITY

A. *Discrimination Based on Psychiatric Disability*

1. *Reasonable Accommodation and Mental Impairment*
2. *Applying the EEOC Guidance*
3. *Continuing Questions Regarding Deference*

B. *Disability Harassment*

1. *Hostile Environment Claims*
2. *Common Law Claims*
3. *Future Directions*
 - a. *Harassment Claims in Other Settings*
 - b. *Application to Disability Harassment in the Workplace*

C. *Retaliation and Association*

1. *Retaliation Claims*
2. *Discrimination Based on Association*

* Professor of Law, DePaul University. B.A., Columbia 1975; J.D., Yale 1978. Thanks to Sumi Cho, Andrea Kaufman, Stephen Siegal, and Morrison Torrey for commenting on an earlier draft of this work, and to all the DePaul faculty who discussed the paper in a faculty seminar. Thanks also to the individuals who participated in the Symposium for their comments. Thanks to Janet Brewer, Victoria Napolitano, and Catherine Tetzlaff for their research assistance.

- a. *Association Claims*
- b. *Direct-Threat Defense*
- D. *Discrimination in Benefits Decisions*
 - 1. *Employee Benefits*
 - 2. *Government Benefits: Explaining the "Inconsistency"*
 - a. *Cleveland v. Policy Management Systems Corp.*
 - b. *Prevailing on the Explanation*
 - c. *Other Government Benefits Issues*
- E. *Affirmative Action and Related Matters*
 - 1. *Obligations of Federal Agencies*
 - 2. *Obligations of Federal Contractors*
 - 3. *Applying Elevated Standards*
 - 4. *The Future: Set-aside Programs to Combat Hidden Discrimination and Limits on Capacities*
 - a. *Hidden Discrimination*
 - b. *Limits on Capacities*
 - c. *The Role of Set-aside Programs*

IV. CONCLUSION

INTRODUCTION

Since the passage of the Americans with Disabilities Act ("ADA") in 1990, courts have considered an ever-widening range of employment discrimination issues. Rather than try to summarize the developments of the past ten years, in this Article I try to anticipate some of the developments of the next ten years and give my comments on them. In other words, my mission is to give a non-retrospective, a discussion of emerging issues in the law of disability discrimination in employment.

What follows is an effort—an idiosyncratic one, I confess—to pick out emerging issues from recent case law and other developments that pertain to disability discrimination in employment. I make predictions about the short-term course of the law and advance some suggestions for how the law ought to develop. Some of the suggestions concern the definition of who is a person with a disability; litigation strategies regarding damages and other relief under the disability discrimination laws; and the proper resolution of open legal questions pertaining to discrimination based on psychiatric disability, disability harassment, retaliation and related matters, benefits issues, and affirmative action requirements.

The relevant statutory framework includes not only the Americans with Disabilities Act, but also section 504 of the Rehabilitation Act of

1973.¹ Title I of the Americans with Disabilities Act² forbids various forms of employment discrimination against persons with disabilities. The employment provisions took effect with regard to larger employers in 1992,³ all but the very smallest employers have been covered since 1994.⁴ Section 504 of the Rehabilitation Act of 1973 ("Section 504")⁵ bars discrimination in employment and other fields against persons with disabilities in federally assisted activities and by federal agencies.⁶

Part I of this Article discusses matters of coverage of the ADA, specifically in light of recent precedent that makes obtaining protections of the Act more difficult. Part II discusses remedies under the ADA, damages issues, and other questions of relief that are becoming more and more important in disability discrimination litigation. Part III discusses disability discrimination causes of action, the claims by which plaintiffs may be entitled to relief. This Article pays special attention to discrimination based on psychiatric disability, disability harassment, retaliation and association claims, benefits decisions, and affirmative action and related matters.

I. COVERAGE: OBTAINING PROTECTION UNDER THE ADA

The ADA is not a general prohibition of discrimination on the basis of disability, applicable to everyone in the general population.⁷ It provides protection only to those who are covered by it.⁸ The Supreme Court has recently made plaintiffs' task of establishing coverage more difficult in a trio of cases decided in 1999. Nevertheless, I maintain that there still are avenues to obtain the protections of the ADA by sidestepping the Supreme Court's decisions.

1. 29 U.S.C. § 794 (1994).

2. 42 U.S.C. §§ 12101-12213 (1994).

3. 29 C.F.R. § 1630.2(e)(1) (1999) (providing earlier effective date for employers with 25 or more employees).

4. *Id.* (providing for coverage of employers with 15 or more employees for each of 20 or more calendar weeks in current or preceding calendar year).

5. 29 U.S.C. § 794. For a discussion of the interrelation of the two statutes, see Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995).

6. Section 501 of the Rehabilitation Act requires affirmative action in employment on behalf of persons with disabilities by federal agencies, and Section 503 places similar obligations on federal contractors. 29 U.S.C. §§ 791, 793 (1994). See generally Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 142-59 (1998) (discussing affirmative action obligations under Sections 501 and 503 of the Rehabilitation Act).

7. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477 (1999). The majority opinion was written by Justice O'Connor.

8. *Sutton*, 527 U.S. at 477.

A. The Sutton Trilogy

In three 1999 cases the Supreme Court considered the impact of mitigating measures, including appliances, medication, and the body's own compensating mechanisms, on the definition of a person with a disability covered by the legal protections of the ADA.⁹ In two of the cases, once the Court ruled that the claimants could not be considered persons whose disabilities called for coverage, it went on to discuss what the statute means by a person "regarded as having a disability," another class of individuals protected by the Act.¹⁰ The Court found that test was not satisfied by either of the claimants' showings.¹¹

In *Sutton v. United Air Lines, Inc.*, the defendant had denied employment to two pilots on the ground that their uncorrected vision fell far below the employer's usual standard of vision for commercial airline pilots.¹² If the plaintiffs used eyeglasses or contact lenses, however, they had normal vision or better.¹³ To establish that they were persons with disabilities who could pursue relief under the ADA, the plaintiffs relied on guidelines from the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice, which specify that the determination of whether an individual is "substantially limited" in a major life activity is to be made without regard to mitigating measures.¹⁴

The Court, however, rejected the interpretation of the law advanced by the plaintiffs and the government enforcement agencies.¹⁵ It gave three reasons for doing so. First, the Court said Congress intended disability to mean an impairment that currently limits a major life activity, rather than one that hypothetically or potentially could limit the activity.¹⁶ Second, as previously interpreted in *Bragdon v. Abbott*,¹⁷ the ADA requires an individualized inquiry about the person's disability, not one based on the name or diagnosis of the impairment that hypothesizes about its effects in an untreated state.¹⁸ Third, according to the Court, the ADA preamble's recitation of a figure of 43 million persons with disabilities did not demonstrate an intention to count people whose conditions con-

9. *Id.* at 475; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

10. *Sutton*, 527 U.S. at 489; *Murphy*, 527 U.S. at 525.

11. *Id.*

12. *Sutton*, 527 U.S. at 476.

13. *Id.* at 475.

14. *Id.* at 481 (citing 29 C.F.R. § 1630, app. § 1630.2(j) (1998); 28 C.F.R. § 35, app. A § 35.104 (1998); 28 C.F.R. § 36, app. B § 36.104 (1998)).

15. *Id.* at 482.

16. *Id.* (citing 42 U.S.C. § 12102(2)(A) (1994)).

17. 524 U.S. 624 (1998) (rejecting approach that would deem HIV infection a disability *per se*, but permitting asymptomatic HIV to be considered a disability based on actual effects).

18. *Sutton*, 527 U.S. at 483 (citing *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998) (requiring individualized determination of disability for person infected with HIV); 29 C.F.R. § 1630, app. § 1630.2(j)).

stitute disabilities when unmitigated.¹⁹ If merely those who need eyeglasses to see were included, there would be over 100 million covered by the Act.²⁰ The Court thus applied an approach in which corrective measures have to be considered before a person is deemed to have a disability and ruled that the plaintiffs were not protected by the Act as individuals with disabilities.²¹

The Court also concluded that the plaintiffs were not "regarded as" having a disability.²² Plaintiffs had contended that the airline regarded them as substantially limited in the life activity of working.²³ The Court said that even if one assumed that working is a major life activity, the EEOC's interpretation of the term is that being "substantially limited" in working means being excluded from a class or broad range of jobs.²⁴ Plaintiffs had not alleged that the defendant regarded them as excluded from a class of jobs, merely the single job of global airline pilot; hence the claim fell.²⁵

*Murphy v. United Parcel Service, Inc.*²⁶ applied *Sutton*'s approach to the case of a mechanic who lost his job when his employer discovered that his blood pressure exceeded the Department of Transportation standard for drivers of commercial vehicles.²⁷ His medication controlled the condition to the point where he had no limits on his daily activities except for a restriction on heavy lifting.²⁸ The Court ruled that the criteria for being a person with a disability had to be applied to him in his treated state, and the mechanic did not meet the test.²⁹ On the regarded-

19. *Id.* at 484 (citing 42 U.S.C. § 12101(a)(1) (reciting 43 million figure)).

20. *Id.* at 476 (citing NATIONAL ADVISORY EYE COUNCIL, U.S. DEPT OF HEALTH AND HUMAN SERVS., VISION RESEARCH - A NATIONAL PLAN: 1999-2003 7 (1998)).

21. *Id.*

22. *Id.*; see also 42 U.S.C. § 12102(2)(C) (defining "regarded as having such an impairment").

23. *Sutton*, 527 U.S. at 476.

24. *Id.* at 491-92 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998) (defining "substantial limitation" as being greater than inability to perform a single, particular job)).

25. *Id.* at 494. Separate opinions included a concurrence by Justice Ginsburg, in which she emphasized that Congress viewed persons with disabilities as a minority group historically discriminated against, rather than as a sprawling, amorphous class. *Id.* (Ginsburg, J., concurring). Justice Stevens dissented in an opinion joined by Justice Breyer, arguing that a definition that considered disability in the unmitigated state conformed more closely to ordinary understanding of the term, covering for example a highly skilled user of a prosthetic limb, and to Congress's intentions as expressed in the House Report, H.R. REP. NO. 101-485, pt. III, at 28, 51, (1990), and elsewhere in the legislative history. *Id.* at 495 (Stevens, J., dissenting). The Stevens dissent also noted that the majority's approach would seemingly permit an employer to refuse to hire any person with epilepsy or diabetes that is controlled by medication or any person who functions effectively with an artificial limb, and that the threat of a flood of litigation is unrealistic. *Sutton*, 527 U.S. at 495. Justice Breyer's separate dissent noted that the EEOC would have authority to narrow the interpretation of who is covered by the Act if that had been necessitated by a decision of the Court that evaluated disabilities in an unmitigated state. *Id.* at 514 (Breyer, J., dissenting).

26. 527 U.S. 516 (1999). Justice O'Connor again wrote the majority opinion.

27. *Murphy*, 527 U.S. at 520.

28. *Id.* at 521.

29. *Id.* His petition to the Supreme Court did not present the question of whether he was a person with a disability when taking his medication. See *id.*

as definition, the Court ruled that Murphy had shown only that his employer regarded him as unable to obtain Department of Transportation certification, not as disabled.³⁰ At most, the employer regarded him as unable to perform the duties of a mechanic only when the position involves driving a commercial vehicle of the type used in interstate commerce, hardly a broad class of jobs.³¹

*Albertsons, Inc. v. Kirkingburg*³² is the third case of the trilogy. The mitigating measures at issue were the plaintiff's own bodily systems. A truck driver, whose brain corrected for his weak left eye, could see normally for most purposes.³³ His employer discharged him upon learning that he failed the Department of Transportation's requirement that truck drivers have adequate visual acuity in each eye and adequate binocular vision, and it disregarded a waiver of the requirement when the plaintiff obtained one from the Department.³⁴ In reaching its disposition of the case, the Court ruled that as a matter of law the employer did not need to consider the waiver in its job standards, because the waiver program was experimental and not supported by independent evidence regarding safety.³⁵ Commenting on the issue of whether the plaintiff was a person with a disability, the Court stated that having a significant difference in the way one sees is not the same as a substantial limit or significant restriction in the activity.³⁶ It also said that there is no principled basis to distinguish between mitigation by artificial measures or medication and activities of the body's own systems.³⁷ Finally, it criticized the court of appeals for failing to apply an approach that involved an evaluation of the specific effects of the monocular vision on plaintiff as an individual.³⁸

My intention here is not to criticize these decisions. I have done that briefly in an earlier article,³⁹ and Professor Tucker's contribution to this

30. *Id.* at 521-22. Although Murphy raised a dispute as to whether certification was available through an optional temporary certification procedure, the Court said that the employer's attitude regarding certification did not constitute regarding the plaintiff as unable to perform a class of jobs. *Murphy*, 527 U.S. at 521-22.

31. *Id.* at 522. Justice Stevens's dissent, which Justice Breyer joined, repeated his view that disabilities should be evaluated in the unmitigated state and that severe hypertension falls within the core of conditions Congress intended to include. *Id.* at 525 (Stevens, J., dissenting).

32. 527 U.S. 555 (1999).

33. *Albertsons*, 527 U.S. at 565.

34. *Id.* at 562.

35. *Id.* at 571. Justices Stevens and Breyer joined in this portion of the opinion, but not in the portion discussing the evaluation of the impairment. *See id.* at 558. Justice Thomas wrote a concurring opinion expressing the view that plaintiff's failure to satisfy the unmodified Department of Transportation vision standard meant that he was not a qualified individual with a disability under the Act. *Id.* at 578-80 (Thomas, J., concurring).

36. *Albertsons*, 527 U.S. at 563-64.

37. *Id.*

38. *Id.* at 566.

39. See Mark C. Weber, *Disability Discrimination in Higher Education*, 26 J.C. & U.L. 351, 354-55 (1999); see also Paula E. Berg, *Ill/legal: Interrogating the Meaning and Function of the*

Symposium does so comprehensively, and, in my view, convincingly.⁴⁰ Instead, in keeping with my goal of suggesting ways in which ADA employment litigation might evolve, I put forward some means by which claimants might succeed in obtaining the protections of the Act despite *Sutton* and its companions.

B. Sidestepping Sutton

Ways to obtain the protection of the Act despite *Sutton*'s narrowing construction include developing the theme of individualized determination of disability and giving closer attention to what is meant by being regarded as having a disability. Moreover, I think it is an error to treat *Sutton* as a permanent feature of the disability law landscape. Changes in social attitudes could cause its eventual judicial or legislative erosion.

1. Individualization Ideas

One of the reasons that *Sutton* insisted on considering mitigating measures in determining disability is that disability should be "an individualized inquiry."⁴¹ The Court noted that in a previous case, *Bragdon v. Abbott*,⁴² it had declined to decide that HIV infection is a *per se* disability under the ADA.⁴³ *Bragdon* in fact determined that at every stage of the disease, that HIV is an impairment for purposes of the ADA, that reproduction is a major life activity within the meaning of the Act, and that the plaintiff in the case, whose HIV was asymptomatic, was a person with a disability.⁴⁴ The Court found no issue of fact with regard to the substantial limit the risk of transmitting the disease placed on her reproductive activity.⁴⁵

If the individualized approach of *Bragdon* is taken seriously, lower courts would not be able to reach many of the decisions they have made granting summary judgment against employees and job candidates based on the absence of a disabling condition.⁴⁶ Just as *Bragdon* rejected a *per*

Category of Disability in Antidiscrimination Law, 18 YALE L. & POL'Y REV. 1 (1999) (criticizing premises of *Sutton* trilogy).

40. See Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

41. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) (citing *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998)).

42. 524 U.S. 624 (1998).

43. *Sutton*, 527 U.S. at 483 (citing *Bragdon*, 524 U.S. at 641-42).

44. *Bragdon*, 524 U.S. at 635-41.

45. *Id.* at 641.

46. See, e.g., *Swain v. Hillsborough County Sch. Bd.*, 146 F.3d 855, 858 (11th Cir. 1998) (finding incontinence arising from complications of giving birth not to be disabling condition); see also *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1207 (8th Cir. 1997) (finding condition arising from neck and spine injury not to be disabling); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 199 (4th Cir. 1997) (finding lower back injury not to be disabling condition). In the *Swain*,

se approach in determining that disability was present, its individualized approach would appear to prevent courts from determining, without highly specific evidence adduced at trial, that a given plaintiff's condition is not disabling.⁴⁷

Bragdon is also important for showing that at least in some individuals' cases, the existence of a disabling condition, though a fact issue, is one that can be decided in plaintiff's favor on summary judgment.⁴⁸ The court need not hold a hearing on mitigating measures or other issues when in the particular case there can be no serious dispute about the effects of the plaintiff's condition.

As *Bragdon* further illustrates, for any given individual the major life activity that the impairment affects need not be in any way related to the discrimination at issue in the case. *Bragdon* denied Abbott dental treatment; the disability was found to be present due to a limit on reproductive activities.⁴⁹ Thus, even if the claimant in an employment case can only show that her impairment affects reproduction, sleeping, or other major life activities that have nothing to do with employment, she can establish that she is a person with a disability under the protection of the ADA.⁵⁰

Apart from *Bragdon*, but also with regard to the particular characteristics of specific ADA claims, it should also be remembered that persons without disabilities may make some types of claims under the ADA. The most obvious are retaliation and association, discussed below, but another is that of being subjected to a prohibited employment inquiry.⁵¹

Snow, and *Halperin* cases the courts considered whether the impairments affected the activity of working, but failed to give serious, individualized consideration to whether the particular claimants suffered substantial limits on other major life activities. See *infra* text accompanying note 48 (noting that disability need not be related to employment to support conclusion that employee is a person with a disability under the ADA).

47. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 132 (1999) (noting that *Bragdon* may provide basis for reversing trend of summary judgment against ADA claimants).

48. See *Bragdon*, 524 U.S. at 641 (affirming grant of summary judgment on issue). The Court, however, vacated a grant of summary judgment in favor of the plaintiff on the "direct threat to health or safety" defense, on which defendant, who arguably bore the burden of proof, presented no objective medical evidence. *Id.* at 654-55. Hence a double standard may exist concerning summary judgment against defendants, even when the defendant has the burden of proof. See Colker, *supra* note 47, at 130 (concluding that defendant bore the burden on direct-threat issue and discussing failure of Court to affirm summary judgment on it).

49. *Bragdon*, 524 U.S. at 640-41.

50. Moreover, *Bragdon* specifically held that "[n]othing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major'" with regard to limits on a major life activity. *Id.* at 638. Thus, restrictions on non-on-the-job activities can, perforce, place the claimant within the protection of the Act.

51. See, e.g., *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) (upholding claim of employee subjected to unlawful inquiry irrespective of actual disability); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998) (reversing summary judgment against non-disabled job applicant), *cert. denied*, 526 U.S. 1065 (1999); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230 (10th Cir. 1997) (affirming summary judgment against

The challenge lies in proving that adverse employment consequences of a compensable kind flowed from the prohibited conduct, but in appropriate cases, it should be possible to show that a prohibited inquiry led to adverse employment action. In general, the law forbids employers from asking applicants or employees whether they have disabilities or about the severity or nature of the disability unless the inquiry is shown to be job-related and is consistent with business necessity; the same rule applies to medical examinations.⁵²

Some employees or applicants who, under the Supreme Court's view, neither have nor are regarded as having a disability, will come under the protection of the Act because they were subjected to adverse action on account of knowledge the employer gained from a prohibited inquiry. For example, in the *Sutton* case, it is unclear how the employer learned about the plaintiffs' inability to see without their glasses,⁵³ but if the ability to see without glasses is indeed unrelated to performance of the piloting job, the ADA prohibits the employer from asking about it or examining for it.⁵⁴ Thus, the employer violated the ADA by making the inquiry or the examination.⁵⁵ The employer bears the burden of proof on whether the examination or inquiry is necessary.⁵⁶

2. Exploring "Regarded as" Having a Disability⁵⁷

The Supreme Court has made it more difficult for plaintiffs to estab-

employer whose policy requiring disclosure of employee's prescription drugs violated the ADA); *Gonzales v. Sandoval County*, 2 F. Supp. 2d 1442, 1445-46 (D.N.M. 1998) (entering jury verdict on basis of prohibited inquiry, finding no need to establish disability). *But see* *Armstrong v. Turner Indus.*, 141 F.3d 554, 559 (5th Cir. 1998) (finding no remediable injury for job applicant subjected to prohibited inquiry).

The relevant provisions of the Act use the language "job applicant" and "employee" rather than "qualified individual with a disability." Compare 42 U.S.C. § 12112(d) (1994) (medical examinations and inquiries) with 42 U.S.C. § 12112(b)(5) (reasonable accommodation). See generally Natalie R. Azinger, Comment, *Too Healthy to Sue Under the ADA? The Controversy over Pre-Offer Medical Inquiries and Tests*, 25 J. CORP. L. 193 (1999) (questioning interpretation of law in *Armstrong*).

52. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13-14 (1999).

53. See generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475-78 (1999).

54. 42 U.S.C. § 12112(d)(4)(A).

55. This argument has less force in the *Murphy* and *Albertsons* cases, for the information the employers used was apparently required by government certification requirements, and the Court treated the employer's obtaining of a waiver of the requirements as optional.

56. 42 U.S.C. § 12112(d)(4)(A) ("A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity.").

57. Professor Tucker's paper for this Symposium develops arguments based on the "having a record of" prong of the disability definition, a potential mechanism to render *Sutton* irrelevant in many cases, including perhaps, those with facts identical to *Sutton* itself. Although the topic will not be discussed here, it does provide an additional avenue of relief for those with mitigated impairments who were discriminated against on account of their disability in its (previously) unmitigated state.

lish that they are covered by the Act on the basis of being "regarded as" having a disability. In particular, *Sutton* and *Murphy* follow the EEOC interpretation that in order to be regarded as having a disability with respect to the major life activity of working, the employer has to consider the employee unable to work in a broad range of jobs.⁵⁸

However, the trilogy did not consider the idea of a person being regarded as having a disability with respect to other major life activities, such as seeing, breathing, walking, and the like. If courts can be made to focus on these other, more particular, life activities, the "regarded-as" prong of the definition might retain vitality. In *Bragdon*, for example, impairment of the major life activity of reproduction was the basis for coverage under the ADA.⁵⁹ The asymptomatic nature of the infection would have foreclosed the likelihood of coverage under various broader categories of life activities. Once an affected major life activity is identified, the "substantially limits" hurdle should not be difficult to get over. For activities other than working, all that the regulation requires is that the individual be viewed as being significantly restricted "as to the condition, manner or duration" of the individual's performance of the activity in comparison to that of the "average person in the general population."⁶⁰

Hence, plaintiffs' lawyers conducting depositions would be well advised to probe employers' representatives about the employer's attitude towards particular aspects of the plaintiff's impairment. The goal should be that of showing that the employer regarded the plaintiff as significantly limited in walking, seeing, breathing, learning, and so on, rather than the herculean task of proving that the employer regarded the plaintiff as unable to do a broad class of jobs. Success in a number of cases turning on these factual matters might open a door to coverage that the *Sutton* trilogy appears to close.

3. *The Role of Social Attitudes*

I have long maintained that the success or failure of civil rights claims turns less on the rules of statutory interpretation and more on the courts' beliefs about social realities.⁶¹ If judges are persuaded that dis-

58. *Sutton*, 527 U.S. at 492; *Murphy*, 527 U.S. at 523.

59. *Bragdon*, 524 U.S. at 635-41.

60. 29 C.F.R. § 1630.2(j)(1)(ii) (1999). By contrast, the regulation defining what "substantially limits" means with regard to working requires a significant restriction of "the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* § 1630.2(j)(3)(i). The regulation goes on to say that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.*

61. See Mark C. Weber, *The Burger Court, the Rehnquist Court, and the Civil Rights Cases of 1989*, DEPAUL L. MAG., Fall 1989, at 5-7.

crimination is widespread and deeply harmful, they will develop legal rules and approaches to the facts of particular cases that will result in more liability. If they believe that discrimination has largely been eliminated or that it is not a serious matter when it occurs, the legal and factual approaches they apply will rarely permit a plaintiff to prove his or her case. With regard to disability discrimination law, there appears to be something of a pattern in which the Supreme Court, a prisoner, I believe, of its own attitudes, adopts a narrow construction of a federal statute, but then lower courts, somewhat more favorably disposed to claimants' positions, limit the application of the narrowed construction. With a right to a jury trial in employment cases under the ADA, it is not even the judges' attitudes that are most important, but those of the people at large.

a. The Lower Courts' Role

The role of the district courts is particularly crucial in employment discrimination cases concerning disability. If the judge simply entertains the idea that a plaintiff could be considered to have a disability and the employer's conduct may have constituted discrimination, the case will go before the jury. The jury is a trier of fact whose life experience will include, in comparison to that of the judge (much less the justices of the Supreme Court), a far wider exposure to nonprofessional employment at the employee, rather than the manager, end.

Any lawyer who follows the case law cannot help but observe that the vast majority of the reported cases are on defendants' motions for summary judgment.⁶² Given the high proportion of cases that settle, it is a reasonable inference that the cases that survive summary judgment settle on terms that are sufficiently favorable to plaintiffs to make them forego their right to a jury trial. These settlements should work their expected deterrent effect on employers who might otherwise engage in discrimination in the future. In other words, by simply being more skeptical of defendants' positions in summary judgment motions, district courts could dramatically change employers' calculus of how much effort it is worth to keep managers from engaging in conduct that could be found discriminatory. Reasonable accommodation is generally inexpensive⁶³ and much cheaper than damages judgments.

62. A more scientific basis for this conclusion is explored in Colker, *supra* note 47.

63. See PETER DAVID BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: A CASE REPORT ON SEARS, ROEBUCK & CO. 12 (1994) (reporting that of 436 accommodations at Sears, 69% had no cost and 28% cost less than \$100).

b. *Analogies: Rowley, Davis*

In two previous cases concerning disability issues the Supreme Court issued opinions that initially appeared to restrict claimants' rights significantly, but the subsequent development of the law did not justify the dire predictions the cases aroused. In *Board of Education v. Rowley*,⁶⁴ the Court ruled that the law that is now the Individuals with Disabilities Education Act⁶⁵ required schools to do no more than provide meaningful access to children with disabilities; schools did not have to provide services that maximized their educational potential in proportion to the maximization of the potential of other children.⁶⁶ Critics predicted severe cutbacks in required services,⁶⁷ but courts continued to force school districts to provide extensive services in a wide range of cases.⁶⁸ Similarly, in *Southeastern Community College v. Davis*,⁶⁹ the Court held that Section 504 of the Rehabilitation Act required only the most modest accommodations to meet the needs of a deaf student in a nurse training program.⁷⁰ Later decisions of the Supreme Court and other courts moved away from the narrow construction of the provision,⁷¹ and Congress embodied the broader interpretations in the Americans with Disabilities Act.⁷²

Given this pattern of retrenchment and expansion, advocates would be wise to continue to press their claims on behalf of individuals whose impairments are on the borderline of correctability. Over time, and with careful exposition of the reality of disability discrimination, the courts may be persuaded to apply the law in a more protective fashion.

II. REMEDIES: OBTAINING DAMAGES IN ADDITION TO BACK PAY

It is no secret that even before the *Sutton* trilogy, only a small proportion of ADA employment cases were successful.⁷³ The trilogy may drive this number even lower as plaintiffs struggle to show that they are disabled enough to satisfy the Supreme Court's disability standards while also showing that they are able enough to satisfy the "qualified"

64. 458 U.S. 176 (1982).

65. 20 U.S.C. §§ 1400-1487 (1994).

66. *Rowley*, 458 U.S. at 203.

67. See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 374-77 (1990) (collecting sources).

68. *Id.* at 377-410 (collecting cases).

69. 442 U.S. 397 (1979).

70. *Davis*, 442 U.S. at 414.

71. Weber, *supra* note 5, at 1113-15 (collecting cases).

72. See *id.* at 1115-16 (discussing legislative history of ADA).

73. See Colker, *supra* note 47, at 108-09 (1999) (citing empirical data establishing that overwhelming proportion of ADA Title I claims are decided in favor of defendants).

requirement found in the law. One way in which to preserve the deterrent effects of the ADA,⁷⁴ even if fewer cases are successful, is to obtain larger recoveries in the cases that prevail. Back pay or front pay awards are often small, given the obligation of plaintiffs to mitigate damages by obtaining other employment and the deduction of some classes of benefits from the judgments. Section 1981a of the Civil Rights Act of 1991, governing both compensatory and punitive damages, establishes rules for damages claims under the employment provisions of the ADA.⁷⁵ Compensatory and punitive damages can make plaintiffs whole for real emotional harm, while at the same time providing additional deterrence for employers who discriminate unlawfully. Damages of both types will be an emerging issue in the next decade.⁷⁶ Moreover, another basis for damages, state law claims not controlled by section 1981a, may also come to prominence.

A. Section 1981a

Civil rights damages other than equitable restitution (back or front pay)⁷⁷ generally require a showing of intentional wrongdoing.⁷⁸ Section 1981a imposes an intentional-conduct requirement for damages claims under Title I of the ADA.⁷⁹ Essentially, this means that the compensatory awards are not available in cases that rely on the disparate impact theory of discrimination.⁸⁰

74. The ADA's success depends on the deterrence effect of its provisions for monetary recovery by victims of discrimination. See Mark C. Weber, *Comment on Casper, Seasons of Change, The Americans with Disabilities Act: Implementation in the Work Place*, 17 J. REHABILITATION ADMIN. 135 (1993).

75. 42 U.S.C. § 1981a(b) (1994).

76. A damages issue that will come to the fore sooner, rather than later, is whether monetary relief may be awarded against state governmental agencies under Title II of the ADA, or whether the Eleventh Amendment to the United States Constitution bars monetary relief against the states under the ADA. Because that issue is explored at length elsewhere in this Symposium, it will not be discussed here. See also Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000) (discussing issue); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity from Private Damages Suits After Boerne*, 24 N.Y.U. REV. L. & SOC. CHANGE 481 (1998) (same); James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651 (1999) (same); Mark C. Weber, *supra* note 39, at 366-69 (same).

77. Equitable restitution includes items such as back pay awards and other relief specified in section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1994). Regarding the computation of back pay and applicable offsets, see *Meling v. St. Francis College*, 3 F. Supp. 2d 267, 275-77 (E.D.N.Y. 1998) (determining, *inter alia*, that Teachers Insurance Annuity Association sickness benefits should not be deducted from back pay award).

78. 42 U.S.C. § 1981a(a).

79. 42 U.S.C. § 1981a(a)(2). In reasonable accommodations cases, these damages are not to be awarded when the defendant demonstrates good faith efforts, in consultation with the person with a disability, to identify and make a reasonable accommodation. § 1981a(a)(3).

80. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (describing limit of compensatory and punitive damages to cases that "do not rely on the 'disparate impact' theory of discrimination.").

B. Compensatory Damages

Although it may seem like old news to discuss a requirement that intentional conduct be shown in order to support an award for damages that are more than back or front pay, some development of the topic can be expected in the near future. I predict further exploration into what types of evidence can support an inference of intentional conduct sufficient to justify a compensatory damages award. One recent case of note is a non-employment-related case brought under Section 504, in which the court overturned an award of compensatory damages to a student with partial paraplegia who was not given accommodations he had been promised in an auto-body repair training program.⁸¹ Although the court held that the jury should have been instructed that intentional discrimination must be shown before an award of compensatory damages is permitted,⁸² the court stated that intentional discrimination could "be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights" and therefore remanded the case.⁸³

C. Punitive Damages

In a sex discrimination case brought pursuant to title VII of the Civil Rights Act of 1964 ("Title VII"), the Supreme Court recently clarified what plaintiffs need to show to receive punitive damages under section 1981a.⁸⁴ The plaintiff in *Kolstad* failed to receive a promotion; she presented evidence at trial that the promotion selection process was a sham and the person with ultimate responsibility for the decision told sexually offensive jokes and had referred to prominent professional women in derogatory terms.⁸⁵ The Court ruled that the appropriateness of punitive damages depends on the employer's state of mind.⁸⁶ The malice or reckless indifference that must be shown pertains to the employer's knowledge that it may be acting in violation of federal law: "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."⁸⁷ Egregious or outrageous acts may be evidence of the state of mind, but are not a requisite for punitive damages relief.⁸⁸ The Court also held that traditional principles of agency law apply when determining when to

81. *Powers v. MJB Acquisition Corp., Inc.*, 184 F.3d 1147 (10th Cir. 1999).

82. *Powers*, 184 F.3d at 1152-53 (relying on, e.g., *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992)).

83. *Id.*

84. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

85. *Kolstad*, 527 U.S. at 531.

86. *Id.* at 535.

87. *Id.* at 536.

88. *See id.* at 538.

ples of agency law apply when determining when to impute the state of mind to the employer, but that the employer will not be vicariously liable in punitive damages for the discriminatory employment decisions of managerial agents if the decisions are contrary to the employer's good faith efforts to comply with the law.⁸⁹ The Court vacated and remanded the court of appeals' decision in the case, which had reversed the trial court's denial of a requested instruction on punitive damages.⁹⁰

In one of the first disability decisions applying the *Kolstad* standard, the Tenth Circuit in *EEOC v. Wal-Mart Stores*⁹¹ affirmed an award of \$75,000 punitive damages and \$3,527.79 in compensatory damages.⁹² The employee, a receiving associate who was hearing impaired, refused to attend a training session in which a video tape without captioning or interpretation was to be played.⁹³ Upon the refusal, his supervisors not only refused to provide an interpreter, they transferred the employee to a less desirable position as a janitor.⁹⁴ In a subsequent meeting (again without a translator) to discuss the transfer, they suspended him.⁹⁵ They finally did provide a translator at another meeting, but only to inform him that he was fired.⁹⁶ The store manager, who had final responsibility for the suspension, testified that he was familiar with the accommodation and anti-retaliation requirements of the ADA.⁹⁷ The court found that a reasonable jury could have concluded that the discrimination was intentional, in the face of a perceived risk that the action would violate federal law.⁹⁸ The supervisors acted with the authority of the company in suspending and terminating the employee.⁹⁹ Moreover, although Wal-Mart had a written policy of non-discrimination, that fact did not demonstrate an implemented good-faith policy to comply with the law in light of the company's failure to provide any ADA training to the employee's supervisor or the store's personnel manager.¹⁰⁰

Punitive awards in disability discrimination cases can be even larger than the one in the *Wal-Mart* case. *Meling v. St. Francis College*¹⁰¹ involved a physical education teacher who was fired after being injured in a car accident. The court affirmed a jury award of \$150,000 in punitive damages, ruling that the jury had evidence on which to find that the de-

89. *Id.* at 545.

90. *Kolstad*, 527 U.S. at 546.

91. 187 F.3d 1241 (10th Cir. 1999).

92. *Wal-Mart Stores*, 187 F.3d at 1249.

93. *Id.* at 1243.

94. *Id.* at 1243-44.

95. *Id.*

96. *Id.* at 1244.

97. *Wal-Mart Stores*, 187 F.3d at 1246.

98. *Id.*

99. *Id.* at 1248.

100. *Id.* at 1248-49.

101. 3 F. Supp. 2d 267 (E.D.N.Y. 1998).

fendant college "engaged in a discriminatory practice . . . with malice or with reckless indifference to [plaintiff's] federally protected rights."¹⁰² The college did not take any affirmative steps to comply with the ADA or to consider whether the plaintiff's disabilities had any real effect on her capacity to work: "It decided that since Meling had physical limitations, it would rather hire someone else."¹⁰³

D. The Use of Pendent Claims

The discussion thus far has focused on compensatory and punitive damages under the ADA. Non-ADA claims, particularly state-law claims that may be asserted as pendent claims in federal ADA suits, may also provide means of obtaining compensatory and punitive damages. What is more, the liability they provide is not limited in amount, unlike ADA employment discrimination damages, which are subject to the caps provided by section 1981a.¹⁰⁴ Emerging issues with respect to these claims include the reach of state statutory liability, liability under state common law causes of action, questions about whether federal courts are the better forum for a plaintiff to choose in an action relying on a state-law claim, and preemption problems.

1. State Statutes

State disability discrimination statutes may allow for compensatory damages.¹⁰⁵ These state statutory claims may be added as pendent claims in federal actions under the ADA or Section 504.¹⁰⁶ In some cases, state civil rights laws of this type may preempt state common law claims; in others, they may be pleaded as additional counts with state common law claims.¹⁰⁷

2. Common Law

Some jurisdictions have common law actions for damages for wrongful discharge, typically requiring that the termination of employment violate an important public policy before the action lies.¹⁰⁸ Retaliation for the exercise of protected rights may be the basis for this sort of

102. *Meling*, 3 F. Supp. 2d at 274 (quoting 42 U.S.C. § 1981a(b)(1) (1994)).

103. *Id.* at 275. See also *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (finding awards of \$50,000 for emotional damages and \$150,000 punitive damages not excessive).

104. 42 U.S.C. § 1981a.

105. See, e.g., *Obas v. Kiley*, 149 A.D.2d 422 (N.Y. App. Div. 1989).

106. See 28 U.S.C. § 1367 (1994) (providing for federal supplemental jurisdiction).

107. Kimberly C. Simmons, Annotation, *Pre-emption of Wrongful Discharge Cause of Action by Civil Rights Laws*, 21 A.L.R. 5th 1 (1994) (collecting cases).

108. DAN B. DOBBS, *THE LAW OF TORTS* § 454, at 1292 (2000).

violation of public policy.¹⁰⁹ State-law claims for wrongful discharge can be appended to federal civil rights claims.¹¹⁰ Moreover, in some states the fact of discharge itself may constitute intentional infliction of emotional distress,¹¹¹ a claim supporting compensatory and, in some jurisdictions, punitive damages.¹¹²

3. Questions About Forum Choice

Although jurisdiction will ordinarily exist to assert state law claims in federal court as pendent to claims brought under the ADA or Section 504 (provided the claims all arise out of a common nucleus of operative fact),¹¹³ difficulties may arise in assertion of the state claims. Some federal courts have interpreted state common law doctrines narrowly in employment discrimination cases, sometimes telling litigants that if they want a more venturesome approach, they should be suing in state court.¹¹⁴ In other instances, federal courts have severed the state law claims,¹¹⁵ forcing the litigants to straddle two forums.

An ADA or Section 504 claim may, of course, be brought in state court, and any state common law or statutory claims joined as separate counts.¹¹⁶ Although such a case will be subject to removal unless the plaintiff deliberately forgoes pleading the federal claim,¹¹⁷ some plaintiffs may well want to explore the possibilities of the state courts as a forum. An additional reason the forum may be attractive to plaintiffs is that many state courts are far more reluctant than their federal counterparts to keep cases from juries by granting summary judgment.¹¹⁸

109. The classic situation of this type is when the employer retaliates for the employee's filing of a workers' compensation claim. *See, e.g., Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998).

110. *See* 28 U.S.C. § 1367 (providing for supplemental jurisdiction).

111. *See, e.g., Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C-3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997) (denying summary judgment in intentional infliction claim based on termination of employee with a condition that led to high-risk pregnancy).

112. *See id. But see Knierim v. Izzo*, 174 N.E.2d 157, 165 (Ill. 1961) (disallowing punitive damages in an intentional infliction claim).

113. *See* 28 U.S.C. § 1367.

114. *See Martinez v. Monaco/Viola, Inc.*, No. 96-C-4163, 1996 WL 547258, at *2 (N.D. Ill. Sept. 18, 1996). This approach seems at odds with the general principle of the *Erie* doctrine that the federal court applying state law is to predict precisely what the state court would do with the cause of action and act likewise. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

115. *See Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1236 (10th Cir. 1997) (holding that novel state law privacy claim should have been remanded to state court in challenge to requirement that employees report all prescription drug use to employer).

116. *See, e.g., Weaver v. New Mexico Human Servs. Dep't*, 945 P.2d 70, 71 (N.M. 1997).

117. 28 U.S.C. § 1441 (1994).

118. *See, e.g., Fruzyina v. Walter C. Curlson Assocs.*, 398 N.E.2d 60 (Ill. App. 1979) (cautioning against use of summary judgment). *See generally* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury*, 19 REV. LITIG. 574, 574-76 (concluding, a basis of study, that juries would decide more cases in favor of plaintiffs than judges would, but attributing summary judgment use to poor presentation of claims).

4. Preemption Issues

Neither the ADA nor section 1981a is drafted in such a way as to preempt claims brought under other statutes or the common law. By its own terms, the ADA is not to be taken "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 for the rights of individuals with disabilities than are afforded" under the ADA.¹¹⁹ Section 1981a does not even cover non-employment related claims brought under the ADA or Section 504.¹²⁰ Nevertheless, there may be other barriers to the assertion of state claims. Some courts have found common law claims against employers are preempted by state anti-discrimination statutes¹²¹ or worker compensation laws.¹²² The state anti-discrimination or worker compensation statutes, in turn, may be enforceable solely through an administrative process or may carry limits on damages that may be awarded.¹²³

III. CLAIMS: ESTABLISHING LIABILITY

Issues regarding the disability discrimination cause of action are the last and most extensive set of topics for this discussion of emerging issues in employment discrimination litigation under the ADA. Several claims qualify for discussion in light of recent developments: discrimination based on psychiatric disability; disability harassment; retaliation and association causes of action; benefits claims; and affirmative action and related matters.

A. Discrimination Based on Psychiatric Disability

In the EEOC's 1997 statistics about disability discrimination com-

119. 42 U.S.C. § 12201(b) (1994).

120. *Id.* § 1981a.

121. See *Haswell v. Marshall Field & Co.*, 16 F. Supp. 2d 952, 965 (N.D. Ill. 1998) (finding intentional infliction claim preempted by Illinois Human Rights Act). But see *Compton v. Chinn Enter., Inc.*, 936 F. Supp. 480, 486 (N.D. Ill. 1996) (finding no preemption). Under Illinois law, claims for assault, battery, and false imprisonment related to sexual harassment are not preempted by the Human Rights Act. See *Maksimovic v. Tsogalis*, 687 N.E.2d 21, 24 (Ill. 1997).

122. See *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1111-12 (S.D. Ga. 1995) (finding claims for battery and intentional infliction of emotional distress barred by Georgia's Workers' Compensation Act). But see *McKay v. Town & Country Cadillac, Inc.*, 991 F. Supp. 966, 971 (N.D. Ill. 1997) (ruling that intentional infliction action against former employer was not barred by Illinois' Workers' Compensation Act).

123. See *Haswell v. Marshall Field & Co.*, 16 F. Supp. 2d 952 (N.D. Ill. 1998) (administrative process); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092 (S.D. Ga. 1995) (damages limits under Workers' Compensation Act).

plaints, the most common disabling condition listed was emotional/psychiatric disability.¹²⁴ It does not take much foresight to predict that mental health issues will continue to be a major source of legal development in the disability discrimination field. Three considerations of special relevance to mental health discrimination are application of the duty to provide reasonable accommodations, the interpretation of the Psychiatric Disability Guidance promulgated by the EEOC, and continuing issues concerning the deference that courts owe to the EEOC's Guidance.

1. Reasonable Accommodation and Mental Impairment

The current case law manifests some insistence on the part of courts that employers make ad hoc exceptions to general policies in order to accommodate employees with psychiatric disabilities who can perform the essential functions of the job.¹²⁵ Scheduling is one area in which such accommodations have been required.¹²⁶ In addition, the case law shows that reasonable accommodation of mental disability may require modifications in the very process of working out accommodations.¹²⁷

In a leading case concerning work schedules and mental illness, *Ralph v. Lucent Technologies*,¹²⁸ the court required the employer to permit a carpenter who had had a nervous breakdown and suffered from depression to return to work on a part-time schedule for four weeks. The court described the transition period of part-time work as "eminently reasonable; so reasonable, in fact, that we are puzzled that Lucent has drawn a line in the sand at this point."¹²⁹

Many courts have been less demanding of employers concerning the creation of exceptions to general workplace rules. One case involved an employee whose seizure disorder and consequent need for medication that left him drowsy caused him to be unable to drive at night.¹³⁰ Public

124. Geanne Rosenberg, *When the Mind is the Matter*, N.Y. TIMES, Nov. 7, 1998, at C1 (analyzing EEOC statistics and combining neurological and mental illness-related categories). Cases disproportionately involve long-term employees, many of them performing extremely well in highly responsible positions until specific events, such as a change in supervisors or workplace conditions, occurred. See Susan Stefan, "You'd Have to Be Crazy to Work Here": *Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 796-99 (1998) (collecting cases).

125. Professor Rothstein has commented on an aspect of this phenomenon, specifically the need to excuse some performance deficiencies in order to afford a worker a second chance. See Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 983-84 (1997) (collecting and analyzing cases).

126. See *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982).

127. See, e.g., *Bultemeyer v. Fort Wayne Community Schs.*, 100 F.3d 1281 (7th Cir. 1996).

128. 135 F.3d 166 (1st Cir. 1998) (affirming preliminary injunction).

129. *Ralph*, 135 F.3d at 172.

130. *Pattison v. Meijer, Inc.*, 897 F. Supp. 1002 (W.D. Mich. 1995).

transportation was not available for second- and third-shift positions, so the employee requested assignment to the day shift.¹³¹ The employer countered that the assignment would violate the seniority rights of other workers under the collective bargaining agreement.¹³² Without even considering whether the employer might have obtained a waiver of the provision without undue hardship, the court rejected the employee's position, reasoning that reasonable accommodations must not conflict with a collective bargaining agreement.¹³³ However, in reaching its decision, the court ignored the fact that the union, like the employer, is bound by the ADA to afford reasonable accommodations to individuals with disabilities and thus would have special reason to grant a waiver.¹³⁴

Normally, an employee has a duty to advise the employer of conditions that give rise to the need for accommodations and engage in a dialogue with the employer about what type of reasonable accommodations would enable the employee to perform the essential functions of the job.¹³⁵ Once the employer is on notice of the need for some kind of accommodation, however, an employee with a mental illness should not be charged with naming and negotiating for specific steps if doing so is unrealistic.¹³⁶ The employer takes the employee as it finds that person, and should not necessarily expect the employee to have the communication skills that a person with no cognitive impairment might have. The Seventh Circuit recognized this reality in *Bultemeyer v. Fort Wayne Community Schools*,¹³⁷ which Professor Rothstein views as "[o]ne of the more enlightened opinions relating to mental illness and . . . accommodations."¹³⁸ In *Bultemeyer*, the Seventh Circuit considered the situation of a school custodian who had a bipolar disorder, anxiety attacks, and paranoid schizophrenia, and whose psychiatrist suggested that he be assigned to a school less busy than the one to which he had been assigned.¹³⁹ Though the court conceded that the employee has obligations to engage in the interactive process, it emphasized that the employer may need to suggest a particular accommodation, particularly when it appears that the employee may clearly need it but is unable to ask for

131. *Pattison*, 897 F. Supp. at 1006.

132. *Id.* at 1008-09.

133. *Id.* at 1007-08.

134. See 42 U.S.C. § 12111(2) (1994) (providing for coverage of unions). The presence of these ADA obligations on the part of unions distinguishes cases decided under the ADA from earlier Rehabilitation Act cases concerning collective bargaining agreements. The Rehabilitation Act does not place obligations on unions that are not themselves federal grantees. See, e.g., *Taylor v. Garrett*, 820 F. Supp. 933 (E.D. Pa. 1993).

135. See UNITED STATES EEOC, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § I-3.6 (1992).

136. See Rothstein, *supra* note 125, at 947.

137. 100 F.3d 1281 (7th Cir. 1996).

138. Rothstein, *supra* note 125, at 947.

139. *Bultemeyer*, 100 F.3d at 1281-82.

it.¹⁴⁰

2. Applying the EEOC Guidance

In 1997, the EEOC promulgated an extensive enforcement guidance on the ADA [hereinafter "Guidance"] and how it relates to "psychiatric disabilities."¹⁴¹ The EEOC Guidance reinforces the lesson from the case law that changes to ordinary practices will be required as a matter of reasonable accommodation. It provides that "[a]ccommodations for individuals with psychiatric disabilities may involve changes to workplace policies, procedures, or practices."¹⁴² It goes on to state "[f]or example, it would be a reasonable accommodation to allow an individual with a disability, who has difficulty concentrating due to the disability, to take detailed notes during client presentations even though company policy discourages employees from taking extensive notes during such sessions."¹⁴³ Another example is permitting an employee who has dry-mouth side effects from medication to drink beverages at a work station where it would otherwise be prohibited; alternatively, the employer may provide additional breaks for the employee to take in liquids away from the station.¹⁴⁴ Other suggested accommodations include time off, modified work schedules, or sound barriers to enhance concentration.¹⁴⁵

Supervisory methods are a candidate for modification in some circumstances. Use of different methods of communication (perhaps more written or more verbal instructions) may be a reasonable accommodation, as may be an increase in daily evaluation of performance on particular tasks.¹⁴⁶ The employer may also be under an obligation to provide a temporary job coach or permit the use of a long-term job coach provided by an outside entity, both reasonable means to enable employees with impairments to perform the essential functions of their jobs.¹⁴⁷

140. *Id.* at 1285-86.

141. EEOC ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES (1997). The term "psychiatric disabilities" may mislead some into concluding that a psychiatrist must be involved before the Guidance becomes relevant, but the Guidance's text makes it clear that the Guidance is simply referring to what the Act and other sources term mental impairments. See John W. Parry, *Executive Summary and Analysis*, 21 MENTAL & PHYSICAL DIS. L. REP. 284, 286 (1997) (discussing Guidance's terminology); see also GUIDANCE, "What is a Psychiatric Disability Under the ADA?"

142. GUIDANCE, *supra* note 141, Question 23, at 23.

143. *Id.*, Question 25, at 25.

144. *Id.*, Question 25, at 25-26.

145. *Id.*, Questions 23-24, at 24-25.

146. *Id.*, Question 26, at 26-27.

147. GUIDANCE, *supra* note 141, Question 27, at 27. Supported employment, which permits individuals with severe disabilities to take jobs in competitive employment, makes extensive use of professional job coaches, who typically assist a group of several individuals with mental disabilities to perform complicated jobs at a rate and quality sufficient to meet the industrial standard. See *id.* at n.63 (citing 29 C.F.R. pt. 1630 app. § 1630.9 (1999)).

Conduct standards that are job-related and consistent with business necessity are permitted, but many workplaces have rules that are simply there as rules, with no close relationship to any production requirement. These rules, if not modified, can constitute disparate impact discrimination when they are not related to the essential functions of the employee's job and are not required by business necessity.¹⁴⁸ Even rules that are job-related and justified by business necessity must bend when necessary to accommodate a person with mental illness, if the exception to the rule is reasonable and does not impose an undue hardship on the employer.¹⁴⁹

A further example in the Guidance is instructive.¹⁵⁰ It takes the case of an employee with a mental impairment who works in a warehouse loading boxes for shipping. There is no customer contact and little regular contact with co-workers. He is disheveled, and frequently rude to workers in casual conversation, but his work is satisfactory. Though the company handbook states that employees should always have a neat appearance and be courteous to each other, those rules are not job-related for the employee's position and consistent with business necessity. "Therefore, rigid application of these rules to this employee would violate the ADA."¹⁵¹

The Guidance is useful in many other respects. For example, on the topic of what the employee must do to notify the employer of the disability and request accommodations, the Guidance, which was issued after *Bultemeyer*, echoes that case's warning that special allowances must be made for persons with cognitive disabilities in the negotiation of accommodations, and, specifically, that the employer must be receptive to requests for accommodations made by others on the employee's behalf.¹⁵² The Guidance endorses the position of the courts in two previous cases, which either assumed or determined that a doctor could make a request for an accommodation on behalf of an employee, even when

148. Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 723 & n.136 (1997) (citing 29 C.F.R. 1630 app. § 1630.2(n) (1999)).

149. Miller, *supra* note 148, at 724 ("If the conduct of an individual is causally related to her disability, the employer should be required to attempt to accommodate that conduct or show that accommodating such conduct would be an undue hardship. Allowing employers to discharge employees with psychiatric disabilities on the basis of behavior caused by the disability would run contrary to the purposes of the ADA.") (footnote omitted).

150. The description in the sentences that follow is found in GUIDANCE, Question 30, at 29-30.

151. *Id.* at 30.

152. See GUIDANCE, *supra* note 141, Question 18, at 20-21 n.49. The GUIDANCE states:

May someone other than the employee request a reasonable accommodation on behalf of an individual with a disability?

Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability. Of course, an employee may refuse to accept an accommodation that is not needed.

Id. (footnote omitted).

the employee granted no special authorization to the doctor.¹⁵³

The combination of the emerging case law and the Guidance's terms and tenor suggests something that may serve as an underlying theme of disability discrimination law: a duty of tolerance by society at large, based on the recognition that standard operating procedure is not always necessary operating procedure.¹⁵⁴ Developments in the law in the near future could go far in developing this obligation and awareness.

3. Continuing Questions Regarding Deference

For the Guidance to have an impact, however, the courts have to give it deference as an interpretation of the ADA. Under established law, courts must give deference to the views of the agency that Congress directs to issue implementing regulations, render technical assistance, and otherwise enforce a law.¹⁵⁵ In *Bragdon v. Abbott*,¹⁵⁶ the Court deferred to a Department of Justice interpretation of Title III of the ADA embodied in an administrative guidance, noting that Justice was the agency that Congress gave regulatory, technical assistance, and enforcement responsibility, and hence "the Department's views are entitled to deference."¹⁵⁷ In *Sutton v. United Air Lines, Inc.*,¹⁵⁸ however, the Court refused to follow guidances issued by the EEOC and the Department of Justice regarding the definition of a person with a disability.¹⁵⁹ Although the Court contended that neither agency had been given specific authority to interpret general provisions of the Act found outside the main titles, it concluded that it had no need to decide what level of deference was due, stating that the agencies' interpretation of the Act, which ignored mitigating measures, was not a permissible interpretation.¹⁶⁰

Sutton does not undermine the conclusion that the Psychiatric Dis-

153. *Id.* (discussing *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996), and *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994)).

154. See Mark C. Weber, *Foreword: A Symposium on Individual Rights and Reasonable Accommodations Under the Americans with Disabilities Act*, 46 DEPAUL L. REV. 871, 872 (1997) (discussing the ADA's potential impact on social practices and attitudes regarding people with disabilities).

155. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (stating that interpretations of statutes by such an agency are entitled to deference); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (stating that EEOC guidelines lack force and effect of law or regulations, but are entitled to consideration by courts). For an illuminating discussion of the deference issue, see Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 73-76 (2000).

156. 524 U.S. 624 (1998).

157. *Bragdon*, 524 U.S. at 646.

158. 527 U.S. 471 (1999).

159. *Sutton*, 527 U.S. at 479-80.

160. *Id.*

abilities Guidance is entitled to a high degree of deference. In the first place, it is clear that Congress gave the EEOC the power to regulate, provide technical assistance, and enforce, with respect to Title I of the ADA,¹⁶¹ which contains the reasonable accommodation provisions discussed above.¹⁶² In the second place, *Sutton* was willing to follow an EEOC interpretive guidance concerning the meaning of being regarded as having a disability, specifically being regarded as unable to work.¹⁶³ In the third and most important place, the whole question comes down to whether the EEOC's Psychiatric Disabilities Guidance applies permissible interpretations of the duty of reasonable accommodation. Unlike *Sutton*, there is no textual indication that Congress meant to give a meaning to the statutory term different from the one the EEOC provided. Reasonable accommodation obviously has a range of possible meanings, but the one embodied in the Guidance does not conflict with the general approach of the ADA, which entails looking at current, actual, and individual, rather than hypothetical, disability.¹⁶⁴ Nor is there any conflict between the EEOC's interpretation and the Act's preamble; instead, the Guidance has extensive reference to legislative history and other indications of congressional intent.¹⁶⁵

B. Disability Harassment

Disability discrimination arises from attitudes of fear and paternalism that the general culture reproduces and reinforces daily.¹⁶⁶ Expressions of hostility, condescension, and stereotyping can make school or work a hellish experience for individuals with disabilities.¹⁶⁷ What passes for humor on television programs such as "Saturday Night Live"

161. 42 U.S.C. § 12116 (1994) (granting authority to promulgate regulations to EEOC); *Id.* § 12206(c) (granting power to agency that promulgates regulations to issue technical assistance as well). See also *Sutton*, 527 U.S. at 478 (noting EEOC's powers regarding Title I).

162. 42 U.S.C. § 12112(b)(5) (requiring reasonable accommodations).

163. *Sutton*, 527 U.S. at 491-92 (discussing EEOC guidance considering limits on working in relation to being regarded as having a disability).

164. *Id.* at 482-84.

165. *Id.* at 484-89.

166. See, e.g., Sara D. Watson, *Apply Theory to Practice: A Prospective and Prescriptive Analysis of the Implementation of the Americans with Disabilities Act*, 5 J. DIS. POL'Y STUD. 1, 7 (1994) (collecting studies on attitudes); see also Weber, *supra* note 6, at 131-34 (collecting examples of hostility and stereotyping); but cf. *Alexander v. Choate*, 469 U.S. 287, 295 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference . . ."). See also Hugh Gregory Gallagher, "Slapping Up Spastics": *The Persistence of Social Attitudes Toward People with Disabilities*, 10 ISSUES L. & MED. 401 (1995) (discussing negative social attitudes towards persons with disabilities).

167. Professor Stefan has commented that many discrimination cases involving psychiatric disabilities concern employees whose disabilities arose from or were exacerbated by hostile work environments. Stefan, *supra* note 124, at 806-17. As she points out, abusive environments have a disparate impact on individuals with psychiatric disabilities, *id.* at 837-39, and there is no excuse, much less a business necessity, for such an environment.

often consists of the presentation of demeaning stereotypes of children and adults with mental retardation and other disabling conditions. Though change in popular culture may be beyond the immediate reach of disability advocates, the ADA may at least provide a tool to combat disability harassment in the workplace. Under existing legal theories, plaintiffs can assert claims for hostile environment discrimination¹⁶⁸ and for violation of common law obligations, such as refraining from inflicting emotional distress.

1. Hostile Environment Claims

Courts have taken as axiomatic that the ADA creates a remedy for an employer's creation or toleration of a work environment hostile to persons with disabilities.¹⁶⁹ Drawing analogies to sexual harassment cases premised on the existence of a hostile work environment, they have generally required a showing of five elements:

(1) [that the] plaintiff is a qualified individual with a disability under the ADA; (2) [that the] plaintiff was subject[ed] to unwelcome harassment in [the workplace]; (3) [that] the harassment was based on . . . [the] disability or a request for an accommodation; (4) [that] the harassment was sufficiently severe or pervasive to alter the conditions of [the] plaintiff's employment and to create an abusive working environment; and (5) [that the] defendant knew or should have known of the harassment and failed to take prompt effective remedial action.¹⁷⁰

In a number of cases, courts have ruled that what claimants alleged amounted to actionable disability harassment. A leading decision is *Haysman v. Food Lion, Inc.*,¹⁷¹ involving a store employee who suffered a back and knee injury on the job. He had "a pre-existing emotional dis-

168. See Eric Matuszewitch, *Courts Are Recognizing Claims for Hostile Work Environment Under ADA*, ANDREWS EMP. LITIG. REP., March 24, 1998, at 3 (discussing nature of claim). See generally Gallagher, *supra* note 166 (discussing negative social attitudes toward people with disabilities).

169. The circuits are in agreement on this point. See, e.g., *Walton v. Mental Health Ass'n*, 168 F.3d 661, 666-67 n.2 (3d Cir. 1999) ("Indeed, we have not discovered any case holding that the claim cannot be asserted under the ADA."); see also *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998); *Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998); *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1997). Various district court cases are cited *infra* notes 170-209. The EEOC regulations also interpret the ADA to include protection from disability harassment. 29 C.F.R. § 1630.12 (1999) ("It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this part.")

170. *Fosburg v. Lehigh Univ.*, No. Civ. A. 98-CV-864, 1999 WL 124458, at *6 (E.D. Pa. Mar. 4, 1999) (citing *Roche v. Supervalu, Inc.*, No. CIV A. 97-2753, 1999 WL 46226, at *10 (E.D. Pa. Jan. 15, 1999)).

171. 893 F. Supp. 1092 (S.D. Ga. 1995).

order which was aggravated by the accident."¹⁷² According to his account, about ten months after he returned to work in a part-time job with easier duties, the manager and assistant manager began a pattern of harassment.¹⁷³ The store manager berated him before other employees and accused him of "snowballing" the company with his disability.¹⁷⁴ The assistant manager told him he would "ride him" until he quit and that he had to work every minute of his shift regardless of the pain.¹⁷⁵ The assistant manager also used extreme profanity towards him and allegedly would strike or kick him on injured parts of his body.¹⁷⁶ Also, his shift was changed to the night shift without good reason.¹⁷⁷

The court concluded that a reasonable jury could "construe any or all of this behavior as hostile, intimidating or threatening" and that it could be considered "severe and pervasive enough to create an objectively hostile work environment."¹⁷⁸ The court emphasized that the alleged mistreatment was based on disability:

The fact that there are no allegations that Haysman was called slurs such as "cripple" . . . is not dispositive . . . [A] jury could infer that Food Lion personnel engaged in negative stereotyping of the disabled as people who overstate complaints, do not want to work, and "milk" or "snowball" their employers for benefits. A jury could find that [the manager and assistant manager] acted on this stereotype in deciding to "ride" Haysman until he quit. Based on this possible inference, a reasonable jury could find that Haysman was harassed because of his disability.¹⁷⁹

Even if the employer believes that the employee is not able to perform the essential functions of the job with reasonable accommodation, its option is to terminate the employee, not to engage in harassment until the employee quits:

Assuming that Haysman's absences and alleged complaints were the legitimate and direct result of a disability, Food Lion was free to fire Haysman if those problems prevented him from performing (with or without reasonable accommodation) the essential functions of the light duty position. However, if the necessary and foreseeable consequences of Haysman's disabilities did not disqualify him from the job, then Food Lion is not free to

172. *Haysman*, 893 F. Supp. at 1097.

173. *Id.* at 1097-98.

174. *Id.* at 1098.

175. *Id.*

176. *Id.*

177. *Haysman*, 893 F. Supp. at 1098.

178. *Id.* at 1108.

179. *Id.* at 1108-09.

harass Haysman in an attempt to get him to quit, solely because of those same consequences. If the individual is "qualified" despite his disability and its consequences, then the employer must attempt to accommodate the individual's disability, not harass him because of it.¹⁸⁰

Accusations that a disability is feigned or not so severe as the employee claims have furnished the basis for a number of other cases in which courts have found allegations of harassment actionable. In *Hudson v. Loretex Corp.*,¹⁸¹ a worker with epilepsy suffered a seizure and later received a reassignment to the day shift pursuant to his doctor's recommendation.¹⁸² The general manager then told the plaintiff, in a voice loud enough for other employees to hear the words doubting the existence of the condition, that he should be grateful for getting a transfer for being "supposedly sick."¹⁸³ The other workers subsequently accused the plaintiff of receiving preferential treatment for a fake condition.¹⁸⁴ The general manager continued to refer to the plaintiff's epilepsy during a dispute over a broken machine piece.¹⁸⁵ The court found that the events constituted a pattern of harassment that, if proven, would state a claim under the ADA.¹⁸⁶ *Hendler v. Intelcom USA, Inc.*¹⁸⁷ involved a managerial employee with chronic asthma who suffered severe breathing difficulties from tobacco smoke.¹⁸⁸ Over a period of four months, the company president and various co-workers made comments and jokes about the plaintiff's supposedly exaggerated sensitivity to tobacco, and his insistence that others not smoke where the smoke could affect him.¹⁸⁹ The court noted that the effect on the work environment could be shown to be hostile, even if the comments were meant to be funny or inoffensive:

A reasonable juror could conclude that the comments made were pervasive and severe, and further, that they were related to the fact that [plaintiff] had difficulty breathing. For example, an employee confined to a wheelchair who is chided about not being able to climb the stairs is being harassed on the basis of his disability regardless of the fact that the comments are directed at the environment or his ability to function under the working at-

180. *Id.* at 1109.

181. No. 95-CV-844 (RSP/RWS), 1997 WL 159282 (N.D.N.Y. Apr. 2, 1997).

182. *Hudson*, 1997 WL 159282, at *1.

183. *Id.*

184. *Id.* at *3.

185. *Id.* at *1.

186. *Id.* at *3.

187. 963 F. Supp. 200 (E.D.N.Y. 1997).

188. *Hendler*, 963 F. Supp. at 201.

189. *Id.* at 202.

mosphere. Furthermore, because plaintiff perceived that a comment was meant to be a joke does not necessarily negate its offensiveness or the fact that the comment was unwelcome.¹⁹⁰

Accordingly, the court denied summary judgment and set the matter for trial.¹⁹¹

Other cases concern comments, pranks, and simple unequal treatment directed at individuals with disabilities whose severity was undisputed, or even exaggerated, by the employer. In *Davis v. York International*,¹⁹² the plaintiff, who had multiple sclerosis, received special equipment and various other work accommodations.¹⁹³ Nevertheless, her supervisor mimicked and ridiculed her speech and gait; furthermore, the supervisor made comments in the presence of co-workers that denigrated the plaintiff's performance and aroused resentment and pity towards her.¹⁹⁴ The supervisor also blamed her for errors she had not made and hovered over her.¹⁹⁵ The court found the facts sufficient to state a claim for disability harassment.¹⁹⁶

An HIV-positive employee sued his employer in *Disanto v. McGraw-Hill, Inc.*,¹⁹⁷ alleging that after he told his supervisor of his status, he was given the options of transferring to another job within the company, finding a job outside the company, or going on short-term leave.¹⁹⁸ After returning from leave, he was assigned a smaller office with no ventilation or window.¹⁹⁹ His supervisor skipped meetings with him and failed to provide him with the agenda for meetings.²⁰⁰ Someone tampered with his computer.²⁰¹ He was also assigned a smaller sales territory, and a second salesperson was assigned to his territory.²⁰² The court ruled that a claim could be asserted for disability harassment under the ADA and denied summary judgment on the basis of the facts alleged.²⁰³

In *Easley v. West*,²⁰⁴ a Rehabilitation Act case involving federal employment, a court denied summary judgment and ruled that the conduct of two co-employees could constitute actionable hostile-environment

190. *Id.* at 209.

191. *Id.*

192. Civ. A. No. HAR 92-3545, 1993 WL 524761 (D. Md. Nov. 22, 1993).

193. *Davis*, 1993 WL 524761, at *2-4.

194. *Id.* at *10.

195. *Id.*

196. *Id.*

197. No. 97 Civ. 1090 JGK, 1998 WL 474136 (S.D.N.Y. Aug. 11, 1998).

198. *Disanto*, 1998 WL 474136, at *2.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Disanto*, 1998 WL 474136, at *5.

204. Civ. A. No. 93-6751, 1994 WL 702904 (E.D. Pa. Dec. 13, 1994).

discrimination against a worker with visual impairments.²⁰⁵ One individual allegedly made disparaging comments to the plaintiff and her co-workers about the plaintiff's condition, did not delegate her the work she was assigned to do, hid documents she needed for work and then, after she complained, supplied her with illegible papers.²⁰⁶ The other individual, plaintiff's supervisor, allegedly engaged in similar conduct after she complained.²⁰⁷ The court said that the behavior of either employee, if proven, would be sufficient to establish pervasive, regular conduct that would have a detrimental effect on a reasonable person.²⁰⁸

These cases demonstrate that courts are willing to take seriously the discriminatory results of comments and actions that supervisors and others direct towards workers with disabilities on account of their conditions. The activity need not go on for years. It might even be subjectively intended as light-hearted or a joke. If, however, the environment is hostile based on the objective conditions perceived by a reasonable person with a disability, the plaintiff has an actionable claim.²⁰⁹ Even the record of failure of many hostile-environment claims²¹⁰ should not discourage advocates in other disability harassment cases.²¹¹ Frequently,

205. *Easley*, 1994 WL 702904, at *7-8.

206. *Id.* at *1.

207. *Id.*

208. *Id.* at *7. See also *Taylor v. Garrett*, 820 F. Supp. 933, 939-40 (E.D. Pa. 1993) (denying summary judgment on Rehabilitation Act claim of employee with disability that he was harassed to induce him to quit).

209. *Easley*, 1994 WL 702904, at *7.

210. See, e.g., *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723 (8th Cir. 1999) (reversing damages award on ground that knowledge of disability did not motivate offensive conduct); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661 (3d Cir. 1999) (finding conduct not pervasive or severe enough to meet standard for liability); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681 (8th Cir. 1998) (finding incidents isolated and not severe or pervasive); *Keever v. City of Middletown*, 145 F.3d 809 (6th Cir. 1998) (affirming summary judgment based on failure to allege facts to establish severity); *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558 (5th Cir. 1998) (affirming summary judgment on ground that conduct lacked sufficient severity); *Ward v. Massachusetts Health Research Inst.*, 48 F. Supp. 2d 72 (D. Mass. 1999) (granting summary judgment on ground of lack of severity and official knowledge); *Schwartzfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (granting summary judgment on ground environment not shown to be objectively abusive); *Fosburg v. Lehigh Univ.*, No. Civ. A. 98-CV-864, 1999 WL 124458, *6 (E.D. Pa. Mar. 4, 1999) (finding on allegations of complaint that harassment did not reach level of hostility or pervasiveness needed to state claim); *Pomilio v. Wachtell Lipton Rosen & Katz*, No. 97 Civ. 2230 (MBM), 1999 WL 9843, at *6 (S.D.N.Y. Jan. 11, 1999) (granting summary judgment on ground that comments were isolated); *Hoffman v. Brown*, No. 1:96CV225-C, 1997 WL 827526, at *7 (W.D.N.C. Oct. 24, 1997) (granting summary judgment due to absence of evidence of impact of utterances on work environment); *Rodriguez v. Loctite P.R., Inc.*, 967 F. Supp. 653 (D.P.R. 1997) (granting summary judgment on basis of absence of evidence of pervasive hostility); *Gray v. Ameritech Corp.*, 937 F. Supp. 762 (N.D. Ill. 1996) (granting summary judgment on ground of defendant's lack of knowledge of conduct). All of the cases assume that a cause of action exists under the ADA for a hostile work environment.

211. Any survey of reported cases may mislead, for many cases are decided without a published opinion. Moreover, a judge is probably somewhat more likely to draft a full opinion worthy of reporting when the decision is one that ends the case, such as a grant of summary judgment, than when the decision simply permits the case to proceed. If summary judgment is denied, there is a high likelihood that the case will settle before trial and never make it into the reports at all. Nevertheless, surveys of reported and unreported cases indicate a low rate of success for ADA

the early cases, brought on novel theories of liability, fail on the merits as litigants learn, literally by trial and error, how best to present their claims.²¹² Only over time do win rates increase.²¹³

2. Common Law Claims

Early work on sex harassment as a form of employment discrimination drew parallels to tort actions based on harassing conduct.²¹⁴ Though common law tort was deemed inadequate to provide protection against sex harassment at work,²¹⁵ common law actions served as precedent for the later development of statutory claims based on harassment of a sexual²¹⁶ and racial²¹⁷ nature.²¹⁸ Common law tort actions, particularly the action of intentional infliction of emotional distress, are highly appropriate in situations of disability harassment. The actions might be brought as additional claims in ADA cases, and their presentation might give insight into the nature of disability harassment that will inform the development of ADA law.²¹⁹

3. Future Directions

I expect that the most extensive development of this claim in the near future will take place with regard to non-employment cases,²²⁰ such as those arising from teacher and peer harassment of students with disabilities in the schools. The ideas developed in those cases will then be

claims in general. See *supra* note 73 and accompanying text.

212. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (discussing asbestos and similar novel product liability litigation).

213. See McGovern, *supra* note 212. See also CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 59 (1979) ("The first women to complain that sexual harassment is sex discrimination . . . were all unsuccessful in the lower courts.").

214. See MACKINNON, *supra* note 213, at 164-74 (discussing tort law's application to sexual harassment).

215. *Id.* at 165 ("[T]ort law is . . . partially helpful, but is fundamentally insufficient as a legal approach to sexual harassment.").

216. See, e.g., *Skousen v. Nidy*, 367 P.2d 248 (Ariz. 1961) (assault and battery action).

217. See, e.g., *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970) (action for intentional infliction of emotional distress).

218. MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 825-28 (6th ed. 1996) (discussing common law and statutory racial and sexual harassment claims).

219. See, e.g., *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C-3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997) (upholding claim for intentional infliction of emotional distress); *Martinez v. Monaco/Viola, Inc.*, No. 96-C-4163, 1996 WL 547258 (N.D. Ill. Sept. 18, 1996) (same); *Dutson v. Farmers Ins. Exch.*, 815 F. Supp. 349, 354 (D. Or. 1993) (same).

220. Significant recent development has also occurred with regard to workplace harassment based on sex. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding that an employer can be vicariously liable for discrimination caused by a supervisor); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (holding that an employee who suffers no adverse job consequences as a result of his refusal of a supervisor's sexual advances may recover against the employer); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding same-sex sexual harassment claims actionable under Title VII).

applied in the workplace. As was the case in the confirmation hearings of Justice Clarence Thomas, particular claims of harassment may not succeed in the forum in which they are brought. Nevertheless, their continued presentation in highly visible settings will induce people to come forward with their own accounts of mistreatment, and may induce a willingness to impose liability. Sexual harassment in schools has received intense attention recently and served as the subject of two Supreme Court cases in 1998 and 1999. Ideas from those cases might migrate from sex to disability and from school to work settings.

a. Harassment Claims in Other Settings

The two recent Supreme Court cases were decided under Title IX of the Education Amendments of 1972,²²¹ a statute whose wording parallels that of Section 504.²²² In *Gebser v. Lago Vista Independent School District*,²²³ the Court ruled that school districts face damages liability when they are deliberately indifferent to known acts of teacher-student harassment.²²⁴ A year later, in *Davis v. Monroe County Board of Education*,²²⁵ the Court applied similar principles to student-student harassment.²²⁶ It held that the district will be liable if it is deliberately indifferent to known acts of peer harassment, as long as the behavior is sufficiently severe, pervasive, and objectively offensive that it denies the victims equal access to education.²²⁷ Deliberate indifference occurs whenever the school's actions or inactions in response to the harassment are clearly unreasonable in light of known circumstances.²²⁸

b. Application to Disability Harassment in the Workplace

To characterize the institutions in which people with disabilities learn or work as deliberately indifferent to known harassment would be charitable. School districts are vulnerable to liability: courts have already recognized the possibility of valid disability harassment claims made by students against universities.²²⁹ Enhanced visibility of harassment in schools and the likelihood of additional judicial development in

221. 20 U.S.C. § 1681(a) (1994).

222. Compare 20 U.S.C. § 1681(a) (Title IX) with 29 U.S.C. § 794 (1994).

223. 524 U.S. 274 (1998).

224. *Gebser*, 524 U.S. at 277.

225. 526 U.S. 629 (1999).

226. *Davis*, 526 U.S. at 632-33.

227. *Id.* at 633.

228. See *id.* at 648.

229. *Pell v. Trustees of Columbia Univ.*, No. 97 Civ. 0193(SS), 1998 WL 19989 (S.D.N.Y. Jan. 21, 1998); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306 (D. Mass. 1997).

that field will increase the chances that more employees will draw the analogy from school to work and pursue claims for disability harassment.

C. *Retaliation and Association*

Another emerging area of disability rights litigation involves retaliation against persons who assert their rights or advocate on behalf of other people. Closely related are claims asserting that employees or applicants have been discriminated against by employers because of their association with persons with disabilities.

1. *Retaliation Claims*

It is a fairly safe prediction that claims based on retaliation will increase, if for no other reason than that the Supreme Court's restrictive view of who is a person with a disability will induce employees and applicants who have been treated badly by employers to try to find facts on the basis of which they can assert claims that do not require them to be persons with disabilities. Retaliation is such a claim.²³⁰

As I have noted in another recent article,²³¹ in analyzing ADA retaliation claims, courts frequently apply a form of the burden-shifting framework developed in Title VII litigation, holding that the plaintiff must show (1) the plaintiff engaged in an activity protected by the statute, (2) the defendant took an adverse action against the plaintiff, and (3) there is an adequate causal connection between the adverse action and the protected activity.²³² Once the plaintiff puts forward this prima facie case, the burden shifts to the defendant to put forward a legitimate, nondiscriminatory reason for its action.²³³ The plaintiff can overcome the defendant's showing by advancing evidence of pretext.²³⁴

Plaintiffs have been successful in asserting these claims,²³⁵ but the results are hardly uniform.²³⁶ A recent case decided against the plaintiff

230. *Muller v. Costello*, 187 F.3d 298, 311 (2d Cir. 1999).

231. See Weber, *supra* note 39 (collecting recent cases pertaining to higher education).

232. *Id.* at 376.

233. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing framework).

234. *Green*, 411 U.S. at 804.

235. See, e.g., *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322 (11th Cir. 1999) (reversing grant of summary judgment to employer); *Stafne v. Unicare Homes, Inc.*, No. 97-470, 1999 WL 1068490 (D. Minn. Mar. 3, 1999) (denying summary judgment to employer). In a recent case decided under Section 504 and outside the employment context, the Eighth Circuit reversed a grant of summary judgment, holding that a medical student with obsessive-compulsive disorder could make out a case that he was retaliated against for filing a grievance and then suing over being excluded from a clinical program. *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1025-27 (8th Cir. 1999) (noting possibility that application of grading system was pretextual).

236. See, e.g., *Vass v. Riester & Thesmacher Co.*, 79 F. Supp. 2d 853 (N.D. Ohio 2000) (granting summary judgment to employer).

illustrates how difficult it can be to prevail when relying on a retaliation theory. In *Flemmings v. Howard University*,²³⁷ the court considered the situation of an administrative assistant who had Meniere's disease and requested modified hours because she could no longer drive herself to and from work.²³⁸ The court granted summary judgment on the retaliation claim, stating that the plaintiff had not produced adequate proof that the defendant's inquiries and requests for documentation were pretextual rather than legitimate, that the assignment of late work to plaintiff was anything but a legitimate aspect of the job and not evidence of retaliation, that cancellation of leave was due to anything other than the press of business, and that the ultimate termination of employment preceded the point where plaintiff was completely unable to continue working.²³⁹ Without access to the precise details of the evidentiary record, one cannot judge if the decision was appropriate.

2. *Discrimination Based on Association*

Claims based on association are more unusual than those based on retaliation, but given the new difficulty with showing coverage under other provisions of the Act, plaintiffs will certainly be paying this theory more attention. Both the claim itself and the possibility of an affirmative defense to it merit discussion.

a. *Association Claims*

The ADA specifically provides that it is illegal to exclude or otherwise deny equal treatment to any individual because of the known disability of someone with whom the individual is known to have a relationship or association.²⁴⁰ The regulations list family, business, social, and other relationships as the types of connections that are included.²⁴¹ The EEOC Technical Assistance Manual adds examples, stating that it is unlawful to refuse to hire an applicant, or to terminate an employee, or to treat an employee differently, because the person has a spouse, child, or other dependent with a disability.²⁴² The employer is not permitted to act on an assumption that the employee will be unreliable or have to be

237. No. 97-2137 (SS), 1998 U.S. Dist. LEXIS 21421 (D.D.C. Dec. 21, 1998).

238. *Flemmings*, 1998 U.S. Dist. LEXIS 21421, at *2.

239. *Id.* at *13-*15. In two other cases, the Eastern District of New York found that retaliation claims had been inadequately pled, but permitted amendment to correct the deficiencies. *Sacay v. Research Found. of City Univ.*, 44 F. Supp. 2d 496 (E.D.N.Y. 1999); *Sacay v. Research Found. of City Univ.*, 44 F. Supp. 2d 505 (E.D.N.Y. 1999).

240. 42 U.S.C. § 12112(b)(4) (1994).

241. 29 C.F.R. § 1630.8 (1999).

242. See UNITED STATES EEOC, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § I-7.4 (1992).

away from work to care for the family member with a disability.²⁴³ The employer must not refuse to hire based on projections of future health insurance costs with regard to the family member or refuse to insure or apply different terms or conditions of insurance, solely because the family member has a disability.²⁴⁴

b. Direct-Threat Defense

Despite the absolute nature of the prohibition against firing an individual because that person has a child who has a disability, one court has upheld the firing of a parent of a child with a mental impairment on the ground that the child posed a direct threat to the health or safety of other individuals in the workplace.²⁴⁵ In *Den Hartog v. Wasatch Academy*, the court affirmed a grant of summary judgment, holding that even if the employer could not show that the employee's presence posed a direct threat to the workplace in any way, the child's violence and threats to people at the academy were a direct threat, and the direct threat provision provided an affirmative defense to a charge of discrimination based on association.²⁴⁶

The court's decision can be criticized on a number of grounds. First, and most obvious, it is difficult to understand how a court could grant summary judgment in favor of the party who has the burden of proof on the factual question concerning whether a child who has committed one assault and one threat continues to be a significant risk that cannot be eliminated by reasonable accommodation.²⁴⁷

Second, despite the court's effort to show that Congress intended that the direct-threat defense apply to persons other than the actual employee, it was unable to put forward anything but the most tenuous of arguments. The court asserted that failing to provide protection to employers from dangerous associates of employees would be an odd result when Congress did grant protection from dangerous employees and customers under various provisions of the Act.²⁴⁸ A more likely conclusion would be that when Congress specified particular classes in a statute, it meant to exclude other classes, under the *inclusio unius*,

243. See *id.*; see also *Abdel-Khalek v. Ernst & Young LLP*, No. 97-CIV-4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (denying summary judgment in claim over failure to hire employee of acquired company whose daughter had severe medical problems). Despite the strictness of the law's requirements, the general run of the case law is not favorable to claimants. See, e.g., *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220 (11th Cir. 1999); *Rocky v. Columbia Lawnwood Reg'l Med. Ctr.*, 54 F. Supp. 2d 1159 (S.D. Fla. 1999); *Moresi v. AMR Corp.*, No. 3:98-CV-1518-R, 1999 WL 680210 (N.D. Tex. Aug. 31, 1999).

244. See UNITED STATES EEOC, ADA TITLE I TECHNICAL ASSISTANCE MANUAL § I-7.4 (1992).

245. *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1077 (10th Cir. 1997).

246. *Den Hartog*, 129 F.3d at 1090-92.

247. Cf. 42 U.S.C. § 12111(3) (1994) (defining direct threat).

248. See *Den Hartog*, 129 F.3d at 1090-91.

meant to exclude other classes, under the *inclusio unius, exclusio alterius* principle. The court ignored the fact that the direct-threat provision states merely that employers may include in their "qualification standards" the requirement that the individual not pose a direct threat.²⁴⁹ That language does not justify a qualification standard that someone else not pose a direct threat.

Third, it is actually the maintenance of qualification standards that is the defense under the ADA, and the defense is only to the charge that the application of the standards screen out or tend to screen out individuals with disabilities without a showing of job relation and business necessity.²⁵⁰ In other words, direct-threat is a defense to disparate impact discrimination under section 12112(b)(4) of Title 42, not association discrimination under section 12112(b)(4).

Apart from its weakness as an interpretation of the statutory language, there is something else that seems fundamentally unfair about the *Den Hartog* decision. It is "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."²⁵¹ For this reason alone, if for no other, the interpretation should be resisted.²⁵²

D. Discrimination in Benefits Decisions

Emerging ADA employment issues also include benefits considerations, both employee benefits and government benefits. The issue on employee benefits arises when employer policies constitute discrimination. The issue on government benefits arises when application for or receipt of the benefits undermines the claim that the applicant or employee is qualified for the job.

1. Employee Benefits

Although employee benefits has become a huge topic, only preemption issues and some trends in the discrimination claim case law will be

249. 42 U.S.C. § 12113(a)-(b).

250. See *id.* § 12113(a). The provision defining "direct threat" simply says that it is a permissible qualification standard, not that it is a defense standing by itself. See *id.* § 12113(b).

251. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

252. The principle, of course, applies to governmental, rather than private action. Nevertheless, the entire point of anti-discrimination legislation is to require the targeted entities to treat people more fairly, and the whole purpose of the ADA is to impose on private actors the obligations that government and its grantees have already borne. See, e.g., Charles D. Goldman, *Americans with Disabilities Act: Dispelling the Myths*, 27 U. RICH. L. REV. 73, 76 (1992) ("The ADA, like the Civil Rights Act of 1964, but unlike Title V of the Rehabilitation Act, bans discrimination regardless of whether the employer . . . receives any federal financial assistance, or has a federal contract or federal financial nexus.").

noted here.²⁵³ In *Ralph v. Lucent Technologies, Inc.*,²⁵⁴ the court found that the Employee Retirement Income Security Act ("ERISA") did not preempt an ADA claim for extension of time to apply for various employee benefits and to be moved temporarily to part-time work.²⁵⁵ The result is hardly surprising given the disparity of underlying purposes in the statutes, not to mention the fact that the ADA came later in time than ERISA. Nevertheless, preemption is so common an issue in state law benefits cases that misapplication of the doctrine will likely remain a threat in ADA cases. Citation to the *Ralph* case may preempt the preemption problem.

As for the merits of benefits discrimination cases under the ADA, so far few challenges to employer health benefits policies have been successful. More or less typical of the lot is *Tenbrink v. Federal Home Loan Bank*,²⁵⁶ in which an individual with chronic fatigue syndrome returned to work part-time after an unpaid leave.²⁵⁷ She requested health care benefits, but the employer refused to modify its policy of providing benefits only to employees working thirty or more hours a week.²⁵⁸ The court found that permitting part-time employment was accommodation enough and did not require the Bank to provide medical benefits as well.²⁵⁹ Leave policies and related matters have yielded a higher rate of success by claimants, as demonstrated by the *Ralph* case itself, in which the court found that refusal to extend a leave violated the reasonable accommodation duty.²⁶⁰ Even on somewhat similar facts, however, some courts have granted summary judgment to employers.²⁶¹

253. One current issue that this Article sets to the side is the eligibility of a former employee who is no longer able to work to make a claim under the ADA for wrongfully denied benefits. Some courts have held that such an individual is no longer a "qualified" person with a disability, for he or she can no longer perform the essential functions of the job and thus cannot sue for the benefits under Title I of the ADA. See *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996); *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523 (11th Cir. 1996). Other courts have held that the former employees may sue, reasoning that the language of Title I is ambiguous and would subvert clear congressional intentions if suit were barred. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998); *Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998). See generally Stephan F. Befort, *Mental Illness and Long-Term Disability Plans Under the Americans with Disabilities Act*, 2 U. PA. J. LAB. & EMP. L. 287, 292-94 (1999) (discussing circuit split); Austin L. McMullen, Note, *Disabled Former Employees Under the ADA: Unprincipled Decisions and Unpalatable Results*, 52 VAND. L. REV. 769 (1999) (same). The Supreme Court has recently rejected a literal reading of unambiguous language in the Food and Drug Act that would have enailed the Food and Drug Administration to regulate tobacco products, reasoning that general evidence of congressional intent called for a different result. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297 (2000).

254. 135 F.3d 166 (1st Cir. 1998).

255. *Ralph*, 135 F.3d at 171.

256. 920 F. Supp. 1156 (D. Kan. 1996).

257. *Tenbrink*, 920 F. Supp. at 1160.

258. *Id.* at 1159-60.

259. See *id.* at 1164.

260. *Ralph*, 135 F.3d at 172 (affirming preliminary injunction).

261. See *Walton v. Mental Health Ass'n*, 168 F.3d 661, 671 (3d Cir. 1999) (finding that con-

2. Government Benefits: Explaining the "Inconsistency"

Government benefits provide income support to people with long-term disabling conditions that prevent them from working. People with severe disabilities who lose a job—for reasons of discrimination or otherwise—are likely to pursue Social Security Disability or Supplemental Security Income benefits as a means of survival. Nevertheless, in order to maintain an employment discrimination claim under the ADA, the plaintiff must show that he or she is qualified, that is, capable of doing the essential functions of the job, with or without reasonable accommodations. If the individual has certified in an application for government benefits that he or she is totally disabled, that statement might be taken as some form of estoppel against the claim of ability to do the essential functions of the job.

a. *Cleveland v. Policy Management Systems Corp.*

The Supreme Court, in *Cleveland v. Policy Management Systems Corp.*,²⁶² ruled that the issue is not that simple. The Court noted that there is no necessary conflict between claiming the ability to do a particular job with reasonable accommodations and claiming the inability to do work that exists in significant numbers in the national economy.²⁶³ The Social Security standard does not consider reasonable accommodations,²⁶⁴ nor does it necessarily pay attention to the individual characteristics of the applicant as opposed to the presumptive effects of the applicant's medical condition.²⁶⁵ The former employee's condition at the time of application for the benefits may not be what it was when the employer engaged in the challenged conduct; Social Security even permits recipients of benefits whose medical conditions have improved to remain eligible while they attempt to work.²⁶⁶ Moreover, the legal system permits incompatible, alternative assertions in various proceedings.²⁶⁷ The Court held that if an apparent conflict exists between the claim that the person is qualified for the job and claims the person made to apply for benefits, the trial court should require an explanation of the inconsistency, one that would be sufficient to permit a reasonable juror to conclude that the plaintiff could perform the essential functions of the job with or without reasonable accommodation.²⁶⁸

tinuation of unpaid leave would impose undue burden on employer).

262. 526 U.S. 795 (1999).

263. *Cleveland*, 526 U.S. at 803-05.

264. *Id.* at 803.

265. *See id.* at 804.

266. *See id.* at 805.

267. *Id.*

268. *Cleveland*, 526 U.S. at 807.

b. *Prevailing on the Explanation*

Litigation on the supposed inconsistency and its explanation should be expected to be common in the next few years as courts and litigants probe different approaches. Some cases have already considered the issue. Predictably, the results turn on the possibility that the statements and claims could possibly be consistent. The court in *Devine v. City of Dallas*²⁶⁹ refused to grant summary judgment against an ADA claim brought by a paramedic-firefighter who sustained a back injury that grew progressively more incapacitating.²⁷⁰ Although the plaintiff, as of September 28, 1995, claimed total disability on his application for Social Security benefits, an issue of fact existed whether the defendant could have accommodated him by placing him in the sedentary position of dispatcher.²⁷¹ The time periods overlapped, but the court relied on the idea that the plaintiff might in good faith have asserted he was totally disabled, for his employer failed to provide him the reasonable accommodation he needed to continue working prior to and after September 28, 1995.²⁷² In the court's words, he maintained that "he became totally disabled . . . due to the City's failure to accommodate him."²⁷³

By contrast, in *Feldman v. American Memorial Life Insurance Co.*,²⁷⁴ the plaintiff in the ADA action swore to specific facts that undermined her claim to be a qualified individual with respect to the exact same time period.²⁷⁵ The averments included declarations that she could "barely move," could not "work a six to eight hour day," and could not carry a briefcase or drive long distances, each an essential functions of her job as a traveling salesman.²⁷⁶ The court held that summary judgment was properly granted.²⁷⁷

Not every case seems entirely faithful to the Supreme Court's man-

269. No. 3:97-CV-2990-BC, 2000 WL 21326 (N.D. Tex. Jan. 11, 2000).

270. *Devine*, 2000 WL 21326, at *16.

271. *Id.* at *14-*15.

272. *Id.*

273. *Id.*; see also *Matz v. Sisters of Providence in Oregon*, No. CIV. 98-1598-JO, 1999 WL 1201682 (D. Or. Dec. 8, 1999) (denying summary judgment, noting that insurer required application to Social Security, that application failed, and that part-time work was involved); *Bonano v. Reagan Equip. Co.*, No. Civ. A. 99-1028, 1999 WL 1072547 (E.D. La. Nov. 23, 1999) (denying summary judgment on basis of explanation that employer failed to provide reasonable accommodations); *Vera v. Williams Hospitality Group Inc.*, 73 F. Supp. 2d 161 (D.P.R. 1999) (contending time periods did not completely overlap and that reasonable accommodations were not provided).

274. 196 F.3d 783 (7th Cir. 1999).

275. *Feldman*, 196 F.3d at 791.

276. *Id.*

277. *Id.* at 793 (affirming summary judgment on grounds other than those relied on by district court). See also *Motley v. New Jersey State Police*, 196 F.3d 160, 166 (3d Cir. 1999) (affirming summary judgment when worker had claimed he suffered intense backaches when sitting for more than twenty minutes and offered no explanation); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1 (2d Cir. 1999) (affirming summary judgment when worker had specifically averred in a previous proceeding that he was unable to walk or stand for significant portion of work day).

date, however. *Pyrzcz v. Bradford College*²⁷⁸ purported to apply *Cleveland* to a state law disability discrimination claim but distinguished the *Cleveland* case on the ground that Pyrcz had not made any claim of reasonable accommodation and the time periods overlapped.²⁷⁹ The court did not evaluate the specifics of the plaintiff's statements or take into account any other possible basis on which to reconcile the claims.

c. Other Government Benefits Issues

Other government benefits issues can also be expected to be of importance in the upcoming decade, if only because of the fact that disability is what it sounds like: for many, the inability to perform the functions of a job that would provide adequate income for self-support. These issues are beyond the scope of this Article, but they are crucial to those with severe disabilities. They include such matters as the nature and degree of disability needed to qualify for benefits, the level and scope of benefits, ancillary services (such as rehabilitation), and the implementation of work incentive initiatives.²⁸⁰

E. Affirmative Action and Related Matters

Affirmative action is an issue more frequently associated with race and sex discrimination than disability discrimination, but that situation is one that I, for one, would like to see change during the next decade. In past writing, I have proposed two affirmative action-related steps: enforcement of the special obligations of federal agencies and federal contractors to engage in affirmative action in the hiring and promotion of people with disabilities, followed by expansion of those obligations to cover other employers; and enactment of job set-asides applicable to public and private employers to require them to hire specified percentages of persons with disabilities for their work forces.²⁸¹ It is my hope that case law and statutory developments may make these matters into emerging issues regarding employment of people with disabilities in the near future.

278. 10 Mass. L. Rep. 419 (Mass. Super.1999).

279. *Pyrzcz*, 10 Mass. L. Rep. at 420.

280. See generally Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. (forthcoming) (discussing disability and government benefits issues).

281. See Weber, *supra* note 6, at 142-74. Compare Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 232-37 (1994) (proposing quotas and market mechanism for exchange of credits by employers who meet or fail to meet standards) with Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997) (criticizing set-asides as paternalistic).

1. *Obligations of Federal Agencies*

The better reasoned cases concerning the obligations of federal agencies require that they follow the applicable statute, section 501 of the Rehabilitation Act²⁸² and take affirmative action to hire and promote individuals with disabilities, all as part of the federal government's role as the "model employer" of persons with disabilities.²⁸³ In cases such as *Taylor v. Garrett*,²⁸⁴ courts have required that federal agencies provide accommodations that would not be required of other employers under Section 504 or the ADA.²⁸⁵ These decisions follow directly from Supreme Court precedent holding that section 501 enacts a higher standard of accommodation than Section 504 or, by extension, the ADA.²⁸⁶ These obligations of federal agencies could be strengthened if additional courts fell into line with this interpretation.²⁸⁷ They could be strengthened still more if federal agencies were obliged to adopt goals and timetables for hiring of people with disabilities, as federal agencies have for race and sex classifications under title VII of the Civil Rights Act.²⁸⁸

2. *Obligations of Federal Contractors*

Federal contractors are bound by the same affirmative-action obligations that federal agencies are, but courts have found that there is no private right of action to enforce these obligations.²⁸⁹ It is my contention that Congress should overrule these decisions. A private right of action would be no less workable than the comparable right that currently exists vis-a-vis federal agencies. It would aid in enforcing obligations that Congress has already imposed and that the contractors are being paid in their contracts to bear.²⁹⁰

3. *Applying Elevated Standards*

Elevated standards and, in particular, goals and timetables, are

282. 29 U.S.C. § 791(b) (1994).

283. 29 C.F.R. § 1614.203 (1999).

284. 820 F. Supp. 933 (E.D. Pa. 1993).

285. See, e.g., *Branson v. West*, 100 Fed. Equal Opp. Rep. 5023 (N.D. Ill. 1999) (granting partial summary judgment to plaintiff in case involving doctor with paraplegia seeking to use service animal); *Johnson v. Brown*, 26 F. Supp. 2d 147 (D.D.C. 1998) (denying defendant's motion for summary judgment in case concerning janitor with herniated disk seeking continuation of employment in light duty position).

286. *Southeastern Community College v. Davis*, 442 U.S. 397, 410-13 (1979).

287. See *Weber*, *supra* note 6, at 156-59 (collecting cases employing affirmative-action approach and those failing to do so).

288. See *id.* at 160-61 (drawing comparison to goals and timetables promulgated to enforce Title VII of Civil Rights Act of 1964).

289. See, e.g., *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980).

290. See generally *Weber*, *supra* note 6, at 161-62 (presenting argument at greater length).

workable. As noted below, numerical employment standards for hiring people with severe disabilities are an ordinary part of doing business in Europe and Japan.²⁹¹ Setting the initial numbers presents some difficulties, but as with goals and timetables for hiring members of minorities, the numbers of qualified individuals in the relevant labor market furnishes a starting point.²⁹² Although there is a risk of featherbedding, it will be in the employer's interest to maximize the economic return from everyone who is on the job. New methods of accommodation will emerge to enable that change to occur. Backlash is also a risk, but significant risks are worth being taken to achieve real progress in integrating people with disabilities into the working economy.²⁹³

4. *The Future: Set-aside Programs to Combat Hidden Discrimination and Limits on Capacities*

As a topic of discussion, affirmative action is frequently linked to the idea of quotas for hiring and promotion.²⁹⁴ Somehow, with regard to disability discrimination, numerical goals and targets have never made it into public discussion. They should, for they would be beneficial both as remedial measures to combat hidden discrimination and in their own right as non-remedial set-asides to make up for the competitive disadvantage to employment that severe disability represents.

a. *Hidden Discrimination*

Authorities generally acknowledge that discrimination against persons with disabilities frequently is not obvious or accompanied with vocal expressions of hostility.²⁹⁵ More often, it is motivated by stereotypes or desires to keep disability out of sight and mind.²⁹⁶ For this reason, disability discrimination is usually hidden. The job candidate with

291. See *infra* text accompanying notes 304-11.

292. See Russell Baker, Note, *Affirmative Action Toward Hiring Qualified Handicapped Individuals*, 49 S. CAL. L. REV. 785, 817-26 (1976) (describing operation of proposed goals and timetable regulations). But see Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1456 (1986) (questioning practicality of set-asides).

293. See Weber, *supra* note 6, at 171-72 (responding to backlash and featherbedding arguments).

294. The various constitutional objections to "reverse discrimination" in relation to affirmative action programs are inapplicable to affirmative action on behalf of persons with disabilities. Although racial discrimination against anyone, of whatever race, is evaluated under strict scrutiny, discrimination on the basis of disability, or lack of disability, is evaluated under a rational basis test. See *id.* at 147 (collecting sources). On the general topic of backlash against the ADA, see Symposium, *Backlash Against The ADA*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

295. See Weber, *supra* note 6, at 131-34 (collecting sources).

296. See Marta W. Casper, *Seasons of Change, The Americans with Disabilities Act: Implementation in the Work Place*, 17 J. REHABILITATION ADMIN. 129, 132 (1993) (describing attitudinal barriers to hiring of people with disabilities).

an obvious disability is not taken seriously, and never receives a call back, or receives a letter stating that the job has been filled without ever learning of the discrimination behind the decision. Something more than conventional anti-discrimination law is needed to remedy this condition.

b. Limits on Capacities

Moreover, some, perhaps most, disabilities impose limits on the marginal economic contribution that the person with the disability can make, even if the individual is qualified and is provided reasonable accommodation.²⁹⁷ Disability means an inability to do something that others can do, and that inability cannot help but disadvantage many people with severe disabilities in the competition for the scarce commodity of employment.²⁹⁸ As a result, the person with a disability will frequently be a less competitive job candidate than a comparable person without the disability or will not be able to work as many hours or command as high a wage as a person without the disability.²⁹⁹ Thus, even when there is neither hidden nor apparent discrimination occurring, job candidates with disabilities will be at a disadvantage.³⁰⁰ Conventional anti-discrimination law cannot fix that problem.

c. The Role of Set-aside Programs

From these observations, I reach the conclusion that although the ADA is an important, positive step in integrating people with disabilities into the workday world, it is just a first step. There is no reason to expect that the law, as written, will be effective against hidden discrimination, and despite the multitude of cases brought, it has not been. Moreover, even if all discrimination were eliminated, the stubborn obstacle of disability itself remains. The results of hidden discrimination and functional-capacity limits are telling: The poverty rate for adults with disabilities is three times that of the rest of the population.³⁰¹ Only 29% of

297. See *id.* at 134-35 (collecting sources).

298. See Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 40 (Jan. 1997).

299. See Baldwin, *supra* note 298, at 42. ("[T]he functional limitations that cause a disability also reduce worker productivity in many jobs.")

300. Dr. Baldwin's research supports the conclusion that both discrimination and limits on functional capacity depress the earnings of people with disabilities, but that discrimination has the more important effect of the two. See Marjorie L. Baldwin, *Estimating Wage Discrimination Against Workers with Disabilities*, 3 CORNELL J.L. & PUB. POL'Y 276, 288-90 (1994).

301. Mitchell P. LaPlante et al., *Disability and Employment - #11*, DISABILITIES STUDIES ABSTRACT, Sept. 8, 1997 (reporting on 1995 Census Bureau data establishing poverty rates at 30.0% for people with work disabilities and 10.2% for those without work disabilities). Even people with disabilities who work full time have a poverty rate three times that of full-time workers without disabilities. *Id.*

working-age people with a severe disability are employed, as opposed to 79% of comparable individuals without disabilities.³⁰² Of people with disabilities who are not working, 72% want to work.³⁰³

Something more than the ADA, something even more than the Rehabilitation Act's obligation of affirmative action by federal agencies and grantees, is needed to get the bulk of the population of people with severe disabilities into ordinary employment and out of poverty. Jobs are what is lacking, and only employers have jobs to provide.

A job set-aside requirement is not a radical or extravagant proposal. The United States is unique among economically advanced nations in not having such a program. Set-asides for persons with severe disabilities range from 4% of the work force of employers with more than 25 employees in Austria³⁰⁴ to 10% for firms with more than ten employees in France.³⁰⁵ Germany has a hiring quota of 6% for all employers.³⁰⁶ The Netherlands has negotiated set-asides of 3 to 7%,³⁰⁷ while Japan has a 1.5% requirement.³⁰⁸ Spain, Malta, and Greece all have 2% rules.³⁰⁹

The existence of these provisions in Europe and Japan demonstrates that they are workable³¹⁰ and operate as a logical response both to dis-

302. Great Lakes Disability and Business Technical Assistance Center, *Harris Poll Results*, REGION V NEWS, Spring/Summer 1998, at 1.

303. *Id.*

304. WORLD HEALTH ORGANIZATION, *IS THE LAW FAIR TO THE DISABLED? A EUROPEAN SURVEY 17* (Genevieve Pinet ed. 1990).

305. *Id.* at 84; see also Eric A. Besner, Comment, *Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act?*, 16 COMP. LAB. L.J. 399, 403 (1995).

306. Besner, *supra* note 305, at 403. See also Richard V. Burkhauser, *Lessons from the West German Approach to Disability Policy*, in *DISABILITY AND WORK*, 85, 86 (Carolyn L. Weaver ed. 1991); Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 ARIZ. J. INT'L & COMP. L. 283, 299 (1992).

307. WORLD HEALTH ORGANIZATION, *supra* note 304, at 208.

308. Dong W. Cho, *Japanese Model Factory Employment of Handicapped Persons*, 5 EVALUATION REV. 427, 429 (1981) (reporting slightly higher quota for nonprofits and public entities).

309. Bernard Gutow, *Survey of Rights of Workers with Disabilities: Comparison of the United States with European Community*, 11 N.Y. INT'L L. REV. 101, 120 (1998). See also Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62, 62-63 (1996) (describing quota programs as near-universal in Europe, except for Scandinavia).

310. Enforcement problems have arisen in some countries. The German and French systems are viewed as the most effective, while those in many other European countries lack strong penalties for noncompliance and have relatively loose exemption schemes. See Gutow, *supra* note 309, at 119-21. The German experience is revealing, for although the 6% standard has not been met, a percentage of 4.7 has been achieved. See *id.* at 125 n.175. Similarly, French employment is about 60% of the quota, *id.*, not ideal, but far higher than would be the case if the market were left to regulate itself. Gutow concludes:

It is doubtful whether a quota system would find favor in the United States, but the potential benefits to be derived from a quota system are too substantial to dismiss without serious consideration. Perhaps a quota system in conjunction with the legislative force of the ADA can provide protection against disability discrimination, and ensure proportionate employment of workers with disabilities compared to the population as a whole.

crimination and the inevitable competitive disadvantage to employment that disability frequently represents. Although Britain recently repealed its set-asides, it replaced them with an elaborate system of wage subsidies for workers with disabilities.³¹¹ Subsidies can achieve some of the goals of set-asides, but they put a burden on the general tax system and do not offer as effective an incentive to employers to maximize the productivity of covered workers when they are on the job.

IV. CONCLUSION

This tour of the current disability-discrimination-in-employment horizon is, of course, far from complete. Nevertheless, it is my hope that it gives some material for thought on a number of emerging issues, from the law's coverage, to its remedies, to new developments regarding claims. The basic conclusion I would draw is that disability discrimination litigation itself is only part of a broader employment policy for people with disabilities, and that more aggressive action will be needed if deep levels of unemployment and poverty are to be remedied in our lifetimes.

Id. at 125.

311. See Howard Bradley, *New Eligibility Rules for Incapacity Benefit in the United Kingdom*, 59 SOC. SEC. BULL. 78, 78 (1996).