A Decade of the Americans with Disabilities Act: Judicial Outcomes and Unresolved Problems*

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A decade after its enactment, the Americans with Disabilities Act (ADA) has not resulted in the substantial employment gains for individuals with disabilities that its proponents had predicted. It also has not resulted in many legal victories for disabled individuals who have challenged alleged discriminatory actions by their employers. This article briefly reviews literature on disability and work and summarizes the data on the employment of individuals with disabilities. It addresses litigation trends prior to several significant U.S. Supreme Court rulings the ADA made in 1999 and compares them with litigation trends following the issuance of these rulings. The article concludes that the law needs to be amended if it is to serve those individuals with disabilities who are capable of productive employment but whose impairments do not fit the judicially narrowed definition of disability in the ADA.

When the Americans With Disabilities Act was enacted in 1990, public reaction was mixed. Disability advocates were elated, believing that a group whose needs and rights had been ignored for centuries was finally going to achieve a form of parity in the workplace and in society (West 1991). The business press, on the other hand, was critical of the law, predicting that it would be expensive to implement, would require employers to hire unqualified workers, and would increase employers' medical benefits costs and worker's compensation payments (Janofsky 1993). One decade later it is useful to analyze whether the ADA has fulfilled any of the prophecies made in its name.

Title I of the ADA, which covers all employers with 15 or more employees, requires the employer to provide "reasonable accommodation" for a "qualified" individual with a "disability" unless so doing would result in

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"undue hardship."[1] Each of these terms is defined in the statute, as well as in the regulations and interpretive guidance promulgated by the Equal Employment Opportunity Commission (EEOC). Derived from an earlier law covering federal agencies and their contractors, the Rehabilitation Act of 1973, the ADA was designed to extend to individuals with disabilities who were able to work, often with some form of accommodation, the same right to nondiscrimination that members of racial, gender, ethnic, religious, and other minorities had been granted in the 1960s by the Civil Rights Act of 1964 and other federal civil rights laws.

Although the exclusion of individuals with disabilities from employment opportunities parallels in many respects the experience of other minority groups, there are important differences that the ADA attempts to take into account. Racial, gender, and ethnic minorities are typically defined in contrast to the white male standard; such is not the case in defining disability. The definition of disability has been problematic for social scientists and medical professionals for decades (LaPlante 1991:58), and that difficulty is reflected in the language of the ADA. Because the statute was drafted to cover individuals with a wide variety of physical and mental conditions, the definition of disability is quite general: The statute defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment" [42 U.S.C. §12102(2)]. Unlike the laws of some states that sweep any diagnosable physical or mental condition within the purview of the state nondiscrimination law,[2] the ADA's definition requires an individual with a mental or physical impairment to demonstrate that he or she is "substantially limited" in one or more "major life activity," one of which may be work, before the individual can seek the protections of the law. The law also includes within its definition an individual who is discriminated against on the basis of his or her record of a

[1] Until February 2001, judges applied the ADA to both public- and private-sector employers. However, on February 21, 2001, the U.S. Supreme Court ruled, in *Board of Trustees of the University of Alabama v. Garrett*, that state employees may not sue their employers for money damages in federal court under the ADA because these lawsuits are barred by the Constitution's Eleventh Amendment. The Court ruled that in passing the ADA, Congress did not have the power to abrogate states' Eleventh Amendment immunity from litigation in federal courts. Until Congress amends the ADA or the Supreme Court reverses itself, employees of state agencies are limited to equitable remedies in federal court, may seek to enforce their ADA rights in state court, or can file disability discrimination claims under state law.

[2] For example, the New Jersey Law Against Discrimination includes any individual "suffering from physical disability . . . or from any mental, psychological or developmental disability . . . which prevents the normal exercise of any bodily or mental function or is demonstrable . . . by accepted clinical or laboratory diagnostic techniques" [N.J.S.A. 10:5-5(q)].

disability or because the employer mistakenly believes that the employee is disabled. This definition has come to be problematic for many individuals seeking to challenge alleged employment discrimination under the ADA.

This article reviews judicial interpretations of the ADA prior to and after five significant rulings by the U.S. Supreme Court. It focuses primarily on the rulings of federal appellate courts because of their significant impact on trial judges, current and prospective plaintiffs, and defendants; their central role in the creation of ADA jurisprudence; and their potential for influencing employer behavior. Appellate court rulings are the most significant source of ADA interpretation because their rulings are binding on lower courts, their reasoning is often adopted by trial and appellate courts in other jurisdictions, and they are more numerous than Supreme Court ADA rulings. Appellate court opinions have shaped ADA jurisprudence far more significantly than Supreme Court opinions because the issues addressed by the Supreme Court in ADA cases have been relatively narrow.

The article first provides a brief review of the literature on disability and work and summarizes the data on the employment of individuals with disabilities. It then addresses litigation trends prior to several significant U.S. Supreme Court rulings on the ADA made in 1999,[3] as well as trends following the issuance of those rulings. Implications for employers, unions, and individuals with disabilities are discussed in the final section, together with suggestions for changes in the law and in judicial interpretation that would serve the interests of all parties.

Literature on Disability and the ADA

Much of the literature prior to the enactment of the ADA focused on the work disincentives created by public programs for individuals with disabilities (Berkowitz 1987), studies of the effect of disability on employment and earnings (Haveman and Wolfe 1989), or studies of bias against individuals with disabilities (Jones et al. 1984). Studies conducted by industrial psychologists found that raters (in laboratory studies) or supervisors (in field studies) tended to rate workers with disabilities lower than similarly qualified nondisabled workers and attributed characteristics to them such as self-pity or helplessness (Colella 1994; Makas 1988; Comer and Piliavin 1975; Johnson and Heal 1976; Florian 1978).

[3] In 1999, the U.S. Supreme Court issued rulings in four employment-related ADA cases, and the Court issued one ruling on the ADA the previous year. These rulings will be discussed in a subsequent section of this article.

Several government reports also spurred the passage of the law. In 1983, the U.S. Commission on Civil Rights released a report, "Accommodating the Spectrum of Individual Abilities," that discussed the problems faced by individuals seeking to overcome exclusion from employment or other forms of public participation because of physical or mental disorders. This report, and others that followed it (e.g., National Council on Disability 1986, 1988), concluded that "Americans with disabilities are the largest, poorest, least employed, and least educated minority in America" (West 1991:xi). The legislation that became the ADA was introduced in 1988, was passed by Congress and signed by former President George Bush in 1990, and became effective for many private-sector employers in 1992 and for the remaining employers with 15 or more employees in 1994.

The enactment of the ADA engendered a strong negative reaction from the business press and from some scholars of work and disability. For example, one journalist reported predictions of a sharp increase in the number of individuals with severe disabilities seeking jobs (Livingston 1991:40), and others argued that the law was an inappropriate incursion on employer autonomy (Janofsky 1993:A-12; Vassel 1994). Economists predicted that accommodation costs would be high (Chirikos 1991; Rosen 1991; Oi 1991; Weaver 1991). Legal scholars predicted a sharp upturn in litigation, which could discourage employers from hiring individuals with disabilities, as well as adding to the cost of doing business (Epstein 1992).

Research conducted on the cost of accommodating disabled workers, both prior to and after enactment of the ADA, has demonstrated that such direct costs are relatively low. For example, a study of accommodation costs for disabled employees of federal contractors concluded that most accommodations cost very little or nothing; 50 percent reported that accommodations cost nothing, and another 30 percent reported accommodation costs of approximately $500 (Collignon 1986). Post-ADA research on accommodation costs reached similar conclusions (Lee and Newman 1995; Blanck 1994, 1996). With respect to the influx of individuals with disabilities into the workforce, several studies have demonstrated that employment of disabled workers either has been flat or actually has declined since 1990 (Smolowe 1995:55; Holmes 1994:A18; Acemoglu and Angrist 2001; DeLeire 2000), although the trends appear to be sensitive to the disability definition used (Kirchner 1996; Schwochau and Blanck 2000, Kruse and Schur 2002).

Surveys of employers have concluded that most employers are complying with the ADA and that many have provided accommodations for applicants and employees. For example, a survey sponsored by the Society for Human Resource Management (SHRM) found that 82 percent of the respondents made existing facilities physically accessible, 79 percent applied human

resource policies flexibly as accommodations, and 67 percent restructured jobs or modified work hours as accommodations (SHRM 2000:6). Furthermore, most of the respondents in this survey reported that making accommodations for their workers was "easy"; the task reported to be most difficult was "chang[ing] co-worker or supervisor attitudes toward employees with disabilities" (SHRM 2000:10).

Despite the relatively low cost of accommodations and the apparent success of employers at making accommodations for disabled workers, the prediction that the ADA would engender substantial litigation has proved to be correct. As of September 30, 2001, 158,280 claims of disability discrimination had been filed with the EEOC (EEOC 2002), and rulings had been made in several hundred lawsuits. In the SHRM study discussed above, 17 percent of the respondents reported at least one ADA claim against them for alleged wrongful discharge, and 11 percent reported claims filed against them for alleged failure to provide reasonable accommodation (SHRM 2000:11). Studies of the outcomes of ADA lawsuits have found that plaintiffs have a very low chance of success (D'Agostino 1997; Parry 1998, Colker 1999). Although legal scholars have criticized federal court applications of the ADA's definition of disability (Burgdorf 1997; Lanctot 1997; Locke 1997), most courts have ruled for defendant employers, usually awarding summary judgment[4] and precluding the plaintiff from taking the case to a jury (Colker 1999; Lee 2001).

It was against this background of federal court rejection of most ADA claims and sharp criticism from legal scholars that the U.S. Supreme Court agreed to hear five ADA cases. Although only four of the five involved employment, the fifth applies to the ADA's employment provisions as well as to the other provisions of the law.[5] It is important to review the claims and the results of these lawsuits in order to understand how federal courts will interpret the ADA now that the Supreme Court has spoken.

Supreme Court Rulings on the ADA

Because the U.S. Supreme Court can only rule on the case that is before it, the Court's rulings usually do not resolve all or even most of the ambiguities in interpreting a law. Such has certainly been the case with the

[4] Prior to trial, one or both parties may file a motion asking the trial judge to rule on the merits of the case without a trial (known as a *summary judgment*). In order to grant a summary judgment, the judge must find that there are no significant factual disputes and that the party against whom the motion is made could not prevail at trial. In most ADA cases, it is the employer who files a motion for summary judgment.

[5] In addition to its employment provisions (Title I of the act), the ADA addresses access to transportation, public accommodations, and public programs.

Court's ADA decisions. Furthermore, because of the relatively small number of ADA cases that the Supreme Court has addressed, the cases may have a disproportionate impact simply because of the significance of the court that decided them, even though the issues addressed in the cases are narrow ones. Nevertheless, these decisions have shaped subsequent federal court reaction to ADA claims and thus are important to review.

Before reviewing these opinions, however, it is important to understand what an employee seeking relief under the ADA must demonstrate in order to avoid either a summary judgment for the employer or a negative jury decision. The plaintiff must demonstrate a prima facie case of disability discrimination, which consists of four parts. First, the plaintiff must demonstrate that the disorder in question meets the statutory definition of disability in that it is a physical or mental impairment that "substantially limits" one or more "major life functions." Alternatively, the plaintiff must demonstrate that he or she has a record of a disability of which the employer was aware or that the employer mistakenly regarded the plaintiff as disabled. Second, the plaintiff must demonstrate that he or she is "qualified" for the position by proving that he or she can perform the "essential functions" of the position with or without reasonable accommodation. Third, the plaintiff must show that there is an accommodation that is reasonable (in that it does not pose an "undue hardship" for the employer). And fourth, the plaintiff must demonstrate that the negative employment action was taken because of the plaintiff's disability and not for some other, nondiscriminatory reason.

The threshold issue—whether or not the employee meets the ADA definition of "disabled"—has been extremely difficult for plaintiffs to establish.[6] Some plaintiffs attempt to demonstrate that their disability substantially limits their ability to conduct daily activities, such as walking, breathing, sleeping, or caring for themselves. However, in many employment cases, plaintiffs attempt to show a substantial limitation on their ability to work. Most federal courts have interpreted the "substantial limitation" statutory language narrowly, requiring the plaintiff to show that the impairment affects not only the individual's ability to perform the job at issue (either the job the plaintiff was denied or the job from which the plaintiff was terminated) but also his or her ability to perform a wide range of jobs (e.g., *Webb v. Garelick Mfg. Co*. 1996:488). This interpretation is also consistent with the EEOC's Interpretive Guidance for the ADA.

[6] For example, a review of 267 federal appellate cases brought under the ADA found that plaintiffs in 76 (28 percent) of these cases were unable to convince the court that they met the ADA's definition of disability. The impairments of these plaintiffs included psychiatric disorders, back injuries, hypertension, asbestosis, HIV infection, alcoholism, and multiple sclerosis (Lee 2001:42–43).

In 2002, the Supreme Court issued a ruling in *Toyota Motor Manufacturing v. Williams* that narrowed the interpretation of "substantial limitation" dramatically. Rejecting the EEOC's interpretation of "substantially limited" as pertaining either to activities in one's personal life or at work, the Court stated that a "major life function" must be one that is "of central importance to most people's daily lives" and not simply an important portion of an individual's job (691). Although this ruling was issued after the review of cases discussed below, it highlights the difficulty that workers will continue to encounter in demonstrating that their impairment meets the ADA's definition of disability.

If the employee can satisfy the court that he or she meets the statutory definition of "disabled," then the employee must establish that he or she is qualified—able to perform the essential functions of the position. In addition to job requirements listed in written job descriptions, courts have found that regular attendance (*Tyndall v. National Education Center* 1994), ability to get along with one's supervisor (*Gaul v. Lucent Technologies* 1998), and working at the job site (*Vande Zande v. State of Wisconsin Dept. of Administration* 1995) are essential functions of most jobs. Following work rules and refraining from violence also have been found to be essential functions of jobs, even if these requirements have not appeared in job descriptions (*Adamczyk v. Chief of Police* 1998).

Because most plaintiffs cannot satisfy the first or second elements of the prima facie case, very few courts have examined the "reasonableness" of accommodations that a plaintiff has demanded. Despite the early predictions that challenges to reasonable accommodation would be based on their cost, most judicial analyses have focused on the degree to which the requested accommodation is disruptive or unduly burdensome on the employer's ability to operate the business efficiently rather than on pure cost considerations. For example, several cases have addressed whether an employer is required to reassign a disabled worker to a position for which he or she is qualified but for which he or she does not have the requisite seniority under the provisions of a collective-bargaining agreement. In most cases, the courts have ruled that requiring the employer to violate the terms of a collective-bargaining agreement is an undue hardship (*Kralik v. Durbin* 1997; Lee 1992; Schur 1998–1999).[7]

[7] The U.S. Supreme Court addressed this issue in *U.S. Airways v. Barnett* (2002), refusing to create a per se rule that violating a seniority system would be an undue hardship. Instead, the Court created a presumption that such an accommodation would be an undue hardship but stated that the presumption could be rebutted if the plaintiff could demonstrate "special circumstances" that justified an exception to the seniority system.

Because of the difficulty plaintiffs have encountered in prevailing on their ADA claims, there was great interest in the outcome of the Supreme Court ADA rulings. Unfortunately, all the cases were decided on relatively narrow grounds and provide guidance only in limited circumstances. For example, in 1998, the Court ruled in *Bragdon v. Abbott* that asymptomatic HIV disease was a disability for purposes of the law. This case involved a patient suing her dentist, who had insisted on treating her at a hospital rather than at his dental clinic when he learned that she was HIV-positive. The court agreed with the plaintiff's contention that procreation was a major life activity and that HIV-positive individuals are substantially limited in their ability to procreate because of the dangers of transmission of the disease. A second ADA case, *Cleveland v. Policy Management Systems Corp.* (1999), involved the Court in a debate over whether, if an employee had applied for Supplemental Security Disability Insurance (SSDI) benefits, which required the individual to certify that he or she was totally disabled and unable to work, that certification would preclude an ADA lawsuit (in which the plaintiff must demonstrate that he or she is capable of performing the essential functions of the position, with or without reasonable accommodation). Lower federal courts had applied a doctrine of *estoppel* that barred subsequent ADA litigation if the plaintiff had made the SSDI declaration. On the contrary, said the Court, the ADA's definition of "qualified" includes the concept of reasonable accommodation, which the SSDI's requirements do not address. Therefore, because the two laws define "total disability" differently, an individual's SSDI declaration would not be a per se bar to an ADA claim (although it could be considered by a court).

However, the three cases that garnered the most attention and had the greatest significance for subsequent ADA litigation were the *Sutton* trilogy.[8] The Court issued rulings in three ADA employment cases on the same day, stating that a plaintiff must demonstrate that he or she is substantially limited in a major life activity even when taking into consideration any mitigating measures (e.g., medication, assistive devices) that the individual might use to reduce the impact of the disorder. This result is directly contrary to the legislative history of the ADA (U.S. Senate 1989:23), as well as the EEOC's interpretation of the law [29 C.F.R. Pt. 1630, App. §1630.2(j)].

In *Sutton*, two sisters with myopia (nearsightedness) could not meet the uncorrected vision standards of United Airlines and were rejected as commercial pilots. In *Murphy* and *Kirkingberg*, the plaintiffs were unable to meet the standards of the U.S. Department of Transportation for a

[8] *Sutton v. United Air Lines Inc*., 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc*., 119 S. Ct. 2133 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).

commercial driver's license because of monocular vision (*Kirkingberg*) and hypertension (*Murphy*). The Court reasoned in all three cases that because the law (and EEOC regulations) required that the employer make an individualized determination as to whether the individual was "substantially limited," any mitigating measures used by the individual (such as medication or corrective devices) should be part of that determination. All three plaintiffs used "mitigating measures" to minimize the impact of their impairment; thus none was "substantially limited." This outcome meant that it would be far more difficult for plaintiffs to demonstrate that they were "disabled" for ADA purposes if their medication or other "mitigating measures" reduced the severity of the impairment. And although the Court stated that even an individual who uses "mitigating measures" could still demonstrate "substantial limitation" if the measure either did not control the impairment effectively or the measure created other forms of "limitation" (such as a limp occasioned by the use of an artificial limb), most commentators viewed the *Sutton* trilogy as making an already difficult task of establishing disability even more difficult.

The Supreme Court's requirement that an individual's disability be considered in its mitigated state for ADA coverage purposes creates a paradox for individuals who seek the law's protection (Schur 1999). After the *Sutton* trilogy, an individual will not be considered "disabled" under the law if the disorder is mitigated to the extent that it does not substantially limit a major life function. However, an employer may evaluate an individual with a disability in its unmitigated state and may determine that the individual's disability is too severe be reasonably accommodated. This paradox seems contrary to the intent of the framers of the ADA, even though the "plain meaning" of the ADA's definition of disability permits the interpretation favored by the Court.

The Court addressed another portion of the definition of disability that had been seldom used by plaintiffs in pre-*Sutton* litigation. The ADA's definition of disability includes an individual with a record of a disability and an individual who is regarded as disabled. This latter definition was included to provide protection to individuals who had no impairment at all but who were incorrectly regarded as such by an employer and subjected to bias as a consequence. It also was included to cover individuals who did have an impairment but whose impairment was not substantially limiting (Simmons 2000:31). The Court's attention to this prong of the disability definition suggested that plaintiffs might be more successful in convincing lower federal courts that although they could not meet the very high threshold of actual disability, they could demonstrate that, nevertheless, their employer *treated* them as though they were disabled, and thus they were still protected by the act.

"Regarded as" Claims after the *Sutton* Trilogy

Congress included the concept of "regarded as disabled" in the ADA's definition of "disabled" in order to provide a remedy for employees whose jobs were negatively affected by employer bias or stereotyping but who were not sufficiently impaired to be able to state a claim of actual disability. The U.S. Supreme Court's decision in *School Board of Nassau County v. Arline* (1987), a case brought under the Rehabilitation Act of 1973, addressed the need to protect employees from bias or stereotyping that could interfere with their employment opportunities as seriously as an actual disability could. Noting that the Rehabilitation Act also included a "regarded as disabled" prong in its definition, the *Arline* Court noted that "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment" (*School Board of Nassau County v. Arline* 1987:284).

The Interpretive Guidance to the EEOC regulations state that the "regarded as disabled" prong of the definition requires the plaintiff to establish one or more of the following:

1. [T]he individual may have an impairment which is not substantially limiting but is perceived by the employer . . . as constituting a substantially limiting impairment;

2. [T]he individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment;

3. [T]he individual may have no impairment at all but is regarded by the employer . . . as having a substantially limiting impairment [29 C.F.R. Pt. 1630, §1630.2(1) (1997)].

An example of the first type of "regarded as disabled" discrimination would be an employee with hypertension that is controlled by medication but who is denied a job or an assignment because the employer erroneously believes that the hypertension substantially limits that individual from working. An example of the second type of "regarded as disabled" discrimination would be conditions such as facial disfigurement or involuntary muscular twitches that do not limit the employee's ability to work but which are the source of bias or derision by others. The third type of "regarded as disabled" discrimination could involve an individual who is erroneously believed to suffer from some disease or disorder that he or she in fact does not have but is treated by the employer as though he or she is substantially limited.

Federal courts have disagreed about several issues with respect to individuals who seek protection under the "regarded as disabled" prong of the ADA's definition. First, some courts have taken the position, albeit a minority view, that a plaintiff must demonstrate an *actual* substantial limitation in the ability to work in order to make a "regarded as disabled" claim (*Ivy v. Jones* 1999; *Welsh v. City of Tulsa* 1992; *Bridges v. City of Bossier* 1996), despite the fact that the EEOC regulations make it very clear that the individual need not have an actual impairment. Commentators have been very critical of this line of cases (see, for example, Mayerson 1997:597). Other courts have ruled that the plaintiff must prove that the employer erroneously believed that the plaintiff was substantially limited when in fact the plaintiff was not in order to prevail (*Redlich v. Albany Law School* 1995; *Deane v. Pocono Medical Center* 1998).

The courts have ruled favorably for employers who have been able to demonstrate that they either did not regard the plaintiff as disabled (because they continued to assign the plaintiff to work) (e.g., *Hilburn v. Murata Electronics North America* 1999) or who had established job-related mental or physical criteria that the plaintiff could not meet (*Chandler v. City of Dallas* 1993). They also have ruled that an employer has no legal duty to accommodate a perceived disability because the employee is not "substantially limited" (an employee who was "substantially limited" actually would be disabled, not simply perceived as disabled) (*Deane v. Pocono Medical Center* 1998; *Cannizzaro v. Neiman Marcus* 1997). While some commentators agree with this latter line of cases (Dudley 1999), others have argued that if the employer perceives an individual as substantially limited, then the accommodation requirement is triggered (Moberly 1996). In some cases, the employer's refusal to grant an employee's accommodation request was viewed by the court as proof that the employer did not regard the individual as disabled (e.g., *Duff v. Lobdell-Emery Manufacturing Co.* 1996).

The U.S. Supreme Court decisions in the *Sutton* trilogy did little to resolve the lower courts' disagreements concerning how the "regarded as disabled" claim was to be made by plaintiffs or defended against by employers. The Court did say that plaintiffs relying on this prong of the definition must show that the employer regarded them as substantially limited in working at a broad class of jobs, not simply unable to perform their own job. It did not, however, address the issue of whether the plaintiffs must demonstrate that they have some impairment or whether the employer is required to accommodate perceived (but not actual) impairments.

As noted earlier, plaintiffs prior to the issuance of the *Sutton* trilogy had great difficulty establishing that their impairment met the "substantially limited" test of the first prong of the ADA's definition of disability. Various

TABLE 1

Disposition of 168,699* ADA Charges Filed with the Equal Employment Opportunity Commission, July 26 1992–September 30, 2001

	Number	Percent
Partially or totally favorable outcome for employee		
Settlements	9,908	5.9
Withdrawal of claim with benefits paid by employer	8,364	5.0
EEOC finding of reasonable cause to believe ADA violated	10,347	6.1
Findings of no reasonable cause to believe ADA violated	89,480	53.0
Case closed administratively† (no ruling on the merits)	50,600	30.0
	168,699	100

*Although 158,280 ADA charges were filed with the EEOC in the indicated time period, the EEOC resolved 168,699 charges in the same time period. These resolutions include ADA charges originally filed with state fair employment practice agencies and later referred to the EEOC, as well as charges filed concurrently under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act. For that reason, the sum of charges resolved exceeds the number of charges received.

†Includes failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, charged because of the outcome of related litigation, or charging party requests withdrawal of a charge before resolution of the issue (e.g., requesting right-to-sue letter).

Source: EEOC, "Americans with Disabilities Act of 1990 (ADA) Charges, FY1992–FY2001"; available at *http://www/eeoc.gov/stats/ada-charges.html*.

analyses of pre-*Sutton* cases have found that plaintiffs were overwhelmingly unsuccessful (D'Agostino 1997; Parry 1998; National Disability Law Reporter 1997). Two more systematic analyses of pre-*Sutton* litigation found that employers prevailed 94 percent (Colker 1999) and 96 percent (Lee 2001) of the time[9] and that trial judges were disposing of the majority of these cases through summary judgment. Moreover, as displayed in Table 1, EEOC data demonstrate that only 17 percent of individuals whose employment-related discrimination claims under the ADA were resolved between 1992 and September 2001 received a positive outcome (defined as withdrawal of the claim with benefits paid by the employer, settlements of the claims, or an EEOC finding of reasonable cause to believe that the ADA had been violated) (EEOC 2002).[10]

[9] Colker notes that because unpublished decisions are generally unavailable to researchers and these unpublished decisions tend to be dismissals of plaintiffs' claims, the data understate the number of plaintiffs who have lost ADA cases (Colker 1999:105).

[10] These findings are not unexpected in the context of employment discrimination claims generally. For example, a study by Clermont and Eisenberg (in press) found that plaintiffs in federal civil trials completed between 1988 and 1997 won at trial level 43 percent of the time but were reversed on appeal 33 percent of the time. However, when the data were disaggregated and only federal employment discrimination cases were analyzed, plaintiffs' trial victories were reversed on appeal 44 percent of the time, whereas trial rulings for employers were reversed only 6 percent of the time. The data were not disaggregated by type of employment discrimination claim, which suggests that plaintiffs fare better in Title VII or ADEA claims than they do in ADA claims and that ADA claim results contributed to the lower overall success rate of employment discrimination claims.

TABLE 2

STUDIES OF OUTCOMES OF ADA LITIGATION

Author	Number and Source of Cases	Rate of Employer Success
National Disability Law Reporter	261 opinions of federal appellate courts 1994–1997 (includes nonemployment cases)	80 percent
D'Agostino (1997)	170 federal and state court opinions brought under the ADA that determined whether plaintiff was disabled	89 percent
Parry (1998)	1200 federal court opinions in ADA cases brought under Title I published 1992–3/31/98	92 percent
Colker (1999)	475 opinions of federal appellate courts in ADA employment discrimination cases between 7/26/92 and July 1998	94 percent
Parry (2000)	434 opinions of federal courts (trial, appellate and Supreme Court) decided in 1999 under Title I of ADA and summarized in the *Mental and Physical Disability Law Reporter* during that year	96 percent
Lee (2001)	267 opinions of federal appellate courts ruling on ADA employment discrimination claims from 7/26/92–7/26/98	96 percent

Table 2 summarizes several studies of the outcomes of ADA cases decided prior to the *Sutton* trilogy. Although the studies are not consistent in whether they include nonemployment cases, include state court as well as federal court rulings, or occurred in the period of time covered by the study, their findings are quite similar: Employers prevail in between 80 and 96 percent of the cases.

Most of the claims included in the analyses noted above involved "prong one" definitions of disability—that the individual had to demonstrate an actual impairment that "substantially limited" a major life activity. Prior to the issuance of the *Sutton* trilogy, only 59 trial and 34 appellate court opinions addressed a "prong three," or "regarded as," claim on its merits over a period of nearly 7 years (Cohn 2000). The cases identified by Cohn were read and categorized for this article. Of the 59 published opinions at the trial level, summary judgment was awarded to the defendant 75 percent of the time, and the judge dismissed the plaintiff's claim in another 5 percent of the cases. No plaintiffs prevailed outright, although 20 percent were allowed to proceed to trial, having survived a defense motion for dismissal or summary judgment.

TABLE 3

Comparison of Disposition of Pre-*Sutton* Outcomes in ADA Cases

Claims‡ Disposition	Colker (1999)* (in percent)	Lee (2001)† (in percent)	"Regarded as" (in percent)
Affirmed summary judgment for employer	79.4 percent	72 percent	76 percent
Affirmed judgment for employer	1.6 percent	5 percent	12 percent
Reversed summary judgment for employer or dismissal; ordered trial	13.8 percent	17 percent	9 percent
Reversed judgment for plaintiff	1.9 percent	2 percent	3 percent
Affirmed judgment for plaintiff	3 percent	4 percent	0 percent

*In Colker study, $N = 471$ cases decided by a federal appellate court (including unpublished cases not available from LEXIS or Westlaw.)
†In Lee study, $N = 267$ cases decided by a federal appellate court (using only cases included in LEXIS).
‡Calculated from Cohn (2000), $N = 34$.

At the appellate level, the outcome of pre-*Sutton* cases involving a "regarded as" claim looked very much like the outcome of "prong one" cases. Table 3 compares the outcomes of pre-*Sutton* appellate court rulings on "regarded as disabled" claims with overall plaintiff success rates under all three prongs of the ADA definition in two other studies.

Despite the facts that each study analyzed a different number of cases and that the number of pre-*Sutton* cases involving "regarded as disabled" claims was so small, the results of the three studies are remarkably similar. Employers prevailed on appeal between 83 and 91 percent of the time, whereas plaintiffs won outright in between 0 and 4 percent of the cases. A summary judgment award for the employer was reversed in between 9 and 17 percent of the cases, and the case was remanded for a trial on the merits (while a procedural victory for the plaintiff, this is not a ruling on the merits). Overall, plaintiffs were even less successful in their "regarded as disabled" claims prior to *Sutton* than they were in their "prong one" claims of actual disability.

Given the Supreme Court's narrowing of the "prong one" definition of disability in the *Sutton* trilogy, it seemed plausible that ADA plaintiffs might focus more intently on the "regarded as disabled" portion of the definition. In order to ascertain whether this event had occurred, all cases decided by the federal appellate courts contained in the LEXIS database, from those issued the day after the issuance of the *Sutton* trilogy through June 22, 2000, were identified, read, and categorized. Table 4 compares the number and disposition of "regarded as disabled" claims at the federal appellate level before and after *Sutton*.

With respect to the number of cases involving such claims, the effect of the *Sutton* trilogy is dramatic. Nearly twice the number of such cases were decided in approximately 1 year after *Sutton* than the number of these cases

TABLE 4

COMPARISON OF DISPOSITION OF "REGARDED AS DISABLED" CASE BY FEDERAL APPELLATE COURTS BEFORE AND AFTER *SUTTON* TRILOGY

Disposition	Before *Sutton**	After *Sutton*†
Affirmed summary judgment for employer	76 percent	72 percent
Affirmed judgment for employer	12 percent	7 percent
Reversed summary judgment for employer or dismissal; ordered trial	9 percent	12 percent
Reversed judgment for plaintiff	3 percent	5 percent
Affirmed judgment for plaintiff	0 percent	3.5 percent

*Cases decided between July 26 1992 and June 22 1999, $N = 34$.
†Cases decided between June 23 1999 and June 22, 2000 and appearing in LEXIS as of July 28, 2000, $N = 52$.

decided in nearly 7 years before *Sutton*. Although several of these cases were heard (but not decided) prior to the issuance of the *Sutton* trilogy, the impact of *Sutton* on the judges is evident in that they spent considerable time addressing "regarded as" claims, whereas they often disposed of these claims with little comment prior to *Sutton*.

The data from post-*Sutton* cases suggests that plaintiffs have been slightly (but very slightly) more successful in making these claims. The appellate courts are somewhat less likely to affirm a summary judgment or verdict for the employer. The number of cases is too small to comment on whether plaintiffs are more successful in prevailing on the merits. One year past *Sutton*, it still appears that plaintiffs have great difficulty prevailing in ADA claims, even using the "regarded as disabled" theory.

Implications for Workers, Employers, and Employment Policy

Although the outcome data for plaintiffs in ADA cases appear grim, they must be interpreted with caution. Aggregating case results obscures differences in factual circumstances and in the relative merits of individual claims. Some of the ADA cases reviewed appear to be frivolous (Colker 1999), whereas others demonstrate a lack of understanding on the part of employees as to the nature of the law's protection. An additional reason for the low success rate, according to one team of scholars, is the poor legal strategy and insufficient development of the factual record by plaintiffs' attorneys (Van Detta and Gallipeau 2000). Furthermore, it is possible that employers are providing accommodations to at least some workers with disabilities—particularly those who can be accommodated relatively easily and inexpensively—and thus the litigation data are skewed by the overrepresentation of individuals

whose disabilities cannot be accommodated as easily. While this speculation cannot be verified (there are no data on lawsuits that were not filed, for example), the litigation data send a clear message that filing an ADA lawsuit is not a productive strategy for most workers with disabilities.

Implications for Employers. While employers may view the litigation outcomes with some relief, their duty to comply with the ADA has not abated. Those who can demonstrate (and document) that they have responded to a request for accommodation and that either the accommodation was unreasonable or it still did not enable the individual to perform the essential functions of the job should be able to avoid litigation or to defend it easily if it occurs. Particularly in the "regarded as disabled" cases, offering to accommodate an individual in his or her current job or to transfer the individual to a vacant job is viewed favorably by courts and occasionally is viewed as evidence that the employer did not regard the individual as disabled. Those employers who avoid actions that suggest a perception of disability (refusing to allow the employee to try to do the job if the employee believes that he or she can, for example, or referring an employee who requests an accommodation to a doctor or an employee assistance program) also may either avoid litigation or help the employer prevail if it occurs.

Implications for Employees. Several of the employees in the litigation reviewed for this article could not perform all the essential functions of their jobs, whereas other employees had attendance or behavioral problems that resulted in termination or discipline. The courts have been virtually unanimous in backing employers who discipline or discharge employees for misconduct or poor attendance, even if those behaviors are related to a disorder of which the employer is aware. Plaintiffs who have presented evidence, particularly through the use of vocational rehabilitation experts, suggesting ways in which they can perform essential functions of their job (or a vacant one to which they can be transferred) have been more successful than those who have argued that the employer should be required to eliminate elements of the job they can no longer perform. And it is up to the plaintiff to demonstrate that the disability disqualifies him or her from a wide range of jobs; otherwise, the court will rule that the individual is not "substantially limited" in his or her ability to work and thus is not disabled for ADA purposes.[11]

[11] For example, one appellate court ruled that "the ADA requires a plaintiff . . . to produce some evidence of the number and types of jobs in the local employment market in order to show that he is disqualified from a substantial class or broad range of such jobs" (*Duncan v. Washington Metropolitan Area Transit Authority* 2001:1115–1116). The majority opinion in this case notes that testimony by a vocational expert on this matter "might be very persuasive" (p. 1117).

Implications for Policymakers. Given the outcome of the Supreme Court and appellate court rulings and the near unanimity of legal scholars' criticisms concerning the courts' interpretation of the ADA's definition of disability, it appears that the law needs to be amended. As a result of the Supreme Court's *Garrett* decision, employees of state agencies are barred from seeking money damages in federal court for alleged ADA violations, whether or not their claims are meritorious. Furthermore, the definition of disability is vague enough to allow courts to interpret "disability" in ways that exclude many serious disorders from coverage and run counter to the act's purpose. An alternative approach would be to establish a relatively low threshold for "disability" by defining it as a recognized physical or mental impairment, for example, and then focus judicial attention on the law's requirement that the individual be qualified—able to perform the essential functions of the position, with or without reasonable accommodation. Amending a civil rights law is risky because other portions of the law could be altered at the same time. However, until and unless the definition of "disabled" is amended, individuals with genuine disorders who are capable of productive employment will be excluded from work on the grounds that they are not disabled enough to be protected by the ADA but are too impaired to function without accommodation.

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