cial estoppel issue has arisen, for example, where courts have found that statements made on applications for social security benefits to the effect that the plaintiff is unable to work create a presumption that the plaintiff must rebut in order to show that he or she is qualified to work.[428]

EEOC, however, disagrees with this interpretation of the law. EEOC states that its position is that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim.[429] A majority of courts agree with EEOC's interpretation.[430] For instance, in *Griffith v. Wal-Mart Stores, Inc.*, the Sixth Circuit found that statements made in an application for social security disability benefits, while relevant, do not require application of judicial estoppel, in part because such applications give no consideration to an individual's ability to work with reasonable accommodation, which is required under the ADA.[431] In *Talavera v. School Board of Palm Beach County*, the Eleventh Circuit reversed a district court's finding that an ADA plaintiff who has claimed total disability on a benefits application is *per se* estopped from claiming she could work with reasonable accommodation, because the Social Security Administration, in determining "disability," does not take into account the potential effect of reasonable accommodation on the claimant's ability to work.[432] In another case, *Smith v. Dovenmuehle Mortgage Inc.*, a district court held that the plaintiff was not judicially estopped from arguing that he was qualified under the ADA based on the reasoning that to hold otherwise would put the plaintiff "in the untenable position" of having to choose between his right to seek disability benefits and his right to seek redress for a possible violation of the ADA and that judicial estoppel would frustrate the ADA's purpose of combating discrimination against people with disabilities.[433]

Other courts, however, are interpreting the law based on a judicial estoppel analysis.[434] For instance, the Sixth Circuit, in *Shaheen v. Amsted Industries, Inc.*, found judicial estoppel the appropriate analysis to employ where claimant continues to receive disability disabilities benefits and seeks reinstatement under ADA.[435] In *McNemar v. Disney Store*, the Third Circuit held that an HIV-positive store manager who had stated on applications for disability benefits that he was totally and permanently disabled and unable to work was judicially estopped from claiming he was a qualified individual under the ADA.[436]

EEOC states that it has five purposes with this guidance. The first is to analyze the differ-

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[428] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562–563,1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a social security benefits application created a presumption that plaintiff was not a qualified person with a disability and that plaintiff provided no evidence to rebut this presumption); *see also* Shaheen v. Amsted Industries, Inc., 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997) (finding that judicial estoppel was the appropriate analysis to employ where claimant continued to receive disability benefits while seeking reinstatement under ADA).

[429] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. i.

[430] *See, e.g.* McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 7 1164 (7th Cir. 1997) (finding that statements certified to the Social Security Administration claiming inability to work do not bar ADA claims because Social Security Administration definition of disability differs from that of the ADA, making disability benefits application statements inconclusive in an ADA case); Blanton v. Inco Alloys Int'l, 123 F.3d 916, 917 (6th Cir. 1997) (finding that receipt of social security benefits does not automatically estop an ADA plaintiff from claiming he could perform his job, although it is a factor to consider); Weigel v. Target Stores, 122 F.3d 461, 466–67 (7th Cir. 1997) (holding that because the Social Security Administration's definition of disability, as well as those of most disability insurance plans, differs materially from the ADA's definition of a "qualified individual with a disability," these representations are not conclusive as to the ADA). Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (a determination of disability for Social Security Act purposes cannot be construed as a judgment that an individual cannot do a particular job).

[431] Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998).

[432] Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1220 (11th Cir. 1997).

[433] Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994).

[434] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a Social Security benefits application created a presumption that plaintiff was not a qualified person with a disability and she provided no evidence to rebut this presumption); August v. Offices Unlimited, Inc., 981 F.2d 576, 583–84 (1st Cir. 1992) (treating the plaintiff's statements regarding disability to insurance carriers as binding admissions).

[435] 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997).

[436] McNemar v. Disney Store, 91 F.3d 610, 619–21 (3rd Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). However, according to a Senior EEOC Attorney, after EEOC issued its policy guidance on the issue, the Third Circuit has called into question the *McNemar* decision. *See* NIDRR ADA Technical Assistance Program Project Directors' Meeting, Feb. 24–25, 1998, summary (OCRE files), statement of Sharon Rennert, p. 4.

ences between ADA's purposes and standards and those of other disability benefit programs.[437] The second is to discuss and analyze recent and significant court decisions that have addressed the judicial estoppel issue.[438] The third is to explain why judicial estoppel should not be used to bar ADA claims of individuals who also have applied for disability benefits.[439] The fourth purpose is to explain why EEOC's position on this issue is supported by public policy.[440] Finally, EEOC seeks to provide guidance to investigative staff in assessing what weight, if any, to give to representations made in applications for disability benefits in determining if an ADA claimant is a "qualified individual with a disability" for purposes of the ADA.

EEOC's Analysis

Fundamentally Different Purposes and Standards in ADA

The guidance opens its argument by stating that the ADA's definitions of the terms "disability" and "qualified individual with a disability" are "tailored to the broad remedial" purposes of the statute," including the elimination of barriers preventing individuals with disabilities from gaining access to the mainstream of American life, equal employment, and other opportunities.[441] As a result, the definitions of "disability" and "qualified individual with a disability" under the ADA differ from the definitions of the same or similar terms in the Social Security Act, State workers' compensation laws, disability insurance plans, and other disability benefits programs. Terms in these laws are tailored to their specific purposes just as terms in the ADA are tailored to its purposes.

The fundamentally different purposes of these laws are a key element of the guidance's argument that representations made by an individual in applying for disability benefits should not bar him or her from bringing an ADA claim. In advancing this argument, the guidance relies on several specific ways in which the ADA's requirement of a "qualified individual with a disability" differs from requirements of disability benefit schemes. First, the guidance notes, the ADA is based on the fundamental principle "that individuals who want to work and are qualified to work must have an equal opportunity to work," and the requirement for a "qualified individual with a disability" reflects this principle.[442] Second, the "qualified individual with a disability" requirement focuses on what an individual can do, as opposed to what he or she cannot do, which is the focus of the disability benefit schemes.[443] Third, a determination of whether an individual is a "qualified individual with a disability" requires an individualized assessment of a person's abilities, as opposed to an evaluation of general or group characteristics.[444] Finally, the 'qualified individual with a disability" requirement "looks at whether an individual with a disability is qualified for the specific position at issue, not at whether s/he is qualified for work in general."[445]

Determining if an individual is a "qualified individual with a disability" under the ADA must be made in keeping with these principles. This determination requires two steps: the first is to determine if the individual has the "education, training, skills, experience, and other job-related credentials for the position";[446] the second step is to determine if the individual can perform the essential functions of the job with or without reasonable accommodation. The guidance reiterates the principles on which this determination must be based, e.g., an individualized, case-by-case assessment of the specific abilities of the person and a focus on "whether a

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[437] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 2.

[438] Ibid.

[439] Ibid.

[440] Ibid., p. 3.

[441] Ibid.

[442] Ibid., pp. 4–5 (citing 42 U.S.C. § 12101(a) (9) (1994) (noting that discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.")).

[443] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

[444] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 42 U.S.C. § 12101(a) (7) (1994) (denouncing "stereotypic assumptions not truly indicative of the *individual ability* of [people with disabilities] to participate in, and contribute to, society") (emphasis added)).

[445] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5

[446] Ibid., p. 6.

particular individual with a disability is qualified for a particular position, not whether the individual or a group of individuals with a disability is qualified for a class of positions."[447]

The guidance contrasts the purposes and standards of the ADA with those of social security, workers' compensation, and disability insurance.[448] Each discussion shows clear contrasts between the purposes and standards of the various disability benefits plans and those of the ADA. For example, the guidance contrasts the ADA with the Social Security Act (SSA)[449] by noting that the latter "establishes a social insurance program designed to provide guaranteed income to individuals with disabilities when they are found to be generally incapable of gainful employment."[450] The guidance further notes that, in contrast to the ADA's definitions of "disability" and "qualified individual with a disability":

> The SSA definition of the term "disability," . . . reflects the obligation to provide benefits to people who generally are unable to work. As a result, the definition focuses on what a person cannot do and on whether s/he cannot find work in the national economy in general.[451]

Workers' compensation laws also differ significantly from the ADA—for example, they are based on general classifications of disability and ability to work.[452] Disability insurance, the guidance observes, is meant to provide partial wage replacement to employees whose health conditions prevent them from working.[453] As a result, just as with SSA and workers' compensation laws, disability insurance plans focus on what a person with a disability cannot do rather than on what he or she can do.[454]

In determining eligibility for benefits, the guidance explains, an essential requirement under the SSA is that the claimant must be unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[455] This standard is substantially different from that of the ADA in the way it describes work and the way it describes disability.

The next important difference is that the ADA focuses on an individualized assessment of a person's ability to work, while the SSA relies on a general profile.[456] The guidance further notes that the ADA distinguishes between essential and nonessential functions in determining whether an individual with a disability is qualified to work.[457] The SSA does not make this distinction, so someone who can perform essential but not all job functions may be disabled under SSA while the same individual would be a qualified individual with a disability under the ADA.[458] Finally, the guidance notes that the ADA determination is based on a consideration of whether an individual can perform essential job functions if provided with reasonable accommodation.[459] The SSA system does not consider reasonable accommodation in making its determination as to ability to work.[460]

The SSA regulations explicitly recognize that its determinations are based on social security

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[447] Ibid. (citing 29 C.F.R. pt. 1630 app. (noting in "Background" section that "the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis" and that a "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs.")).

[448] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 7.

[449] *See generally*, 42 U.S.C. §§ 301–1397f (1994).

[450] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 8.

[451] Ibid.

[452] Workers' compensation laws typically provide the following four classifications of disability: temporary partial, temporary total, permanent partial, and permanent total. Ibid., p. 14.

[453] Ibid., p. 16.

[454] Ibid.

[455] Ibid., p. 8 (citing 42 U.S.C. § 423(d) (1) (A) (1994); 20 C.F.R. § 404.1505 (1997)).

[456] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (stating "whereas the ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position, the SSA permits general presumptions about an individual's ability to work.").

[457] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 11–12.

[458] Ibid., p. 12.

[459] Ibid. (stating: "the definition of the term 'qualified individual with a disability' expressly requires consideration of whether the individual can perform essential functions with reasonable accommodation.") *See* 42 U.S.C. §§ 12111(8) (1994) (citation added).

[460] *See generally* 42 U.S.C. §§ 423(d), 1381–1383 (1994).

law and that, as the guidance notes, "a decision by any other entity about whether an individual is disabled is based on the entity's rules and may not be the same as the SSA's determination."[461]

In the section of the guidance discussing the SSA program, EEOC also argues that courts are wrongly applying the judicial estoppel analysis by explaining that although the SSA program is based on serving people with disabilities who are deemed unable to work, even the SSA recognizes that an individual may be found unable to work under its definition but still be capable of working in a particular position. The guidance explains that although the SSA program is designed to provide a guaranteed income to people who meet its eligibility requirements, it has work incentives built into it. For example, the SSA has a trial work period that allows beneficiaries to work for 9 months while still receiving benefits.[462]

EEOC provides hypothetical examples in illustration and cites caselaw to support its position. The first example involves an individual whose disability is the loss of both hands and feet. The listed impairments in SSA's regulations include the loss of both hands and feet in its musculoskeletal category of impairment. Because this is a listed impairment, an individual who has lost both hands and feet may be presumed unable to work for purposes of SSA's disability benefits determination. However, under the ADA, the same individual can be a "qualified individual with a disability" who is capable of working and performing the essential functions of a job with or without reasonable accommodation.[463]

The second hypothetical example involves an individual who is blind. Under the SSA, any claimant over 55 with a visual impairment that meets the statutory definition of blindness is presumed to be incapable of "substantial gainful activity" and deemed eligible of SSA disability benefits. There are a number of reasons why this individual might be considered qualified to work under the ADA. First, the SSA, unlike the ADA, does not consider whether there is a reasonable accommodation that might allow this individual to perform the essential functions of a particular job. Second, there are no statutory definitions of disabilities under the ADA that presume an individual incapable of working.[464]

The guidance notes several cases that support EEOC's position. For instance, in *Overton v. Reilly*,[465] the Seventh Circuit held that a determination of disability for purposes of SSA cannot be construed to mean that an individual cannot do a particular job. Another case the guidance cites is *Eback v. Chater*,[466] in which the Eighth Circuit stated that SSA's determination as to whether an individual can engage in "substantial gainful activity" is a generalized one and not based on an individualized assessment of the requirements or accommodations of a particular job.[467]

The guidance's discussion of workers' compensation and disability insurance plans points out the differences from the ADA. For example, workers' compensation laws focus on lost earning capacity, and on what the worker "can no longer do rather than on what s/he still is capable of doing with or without reasonable accommodation."[468] Also, in determining disability, workers' compensation laws do not distinguish between essential and nonessential job duties; nor do they consider reasonable accommodation. As a result, "a person may be 'totally disabled' for workers' compensation purposes and yet still be able to perform a position's essential functions with or without reasonable accommodation."[469] Like the other disability benefits plans, disability insurance plans often do not distinguish between essential and nonessential job functions;[470] and they "frequently do not make allowance for an individual's ability to work with reasonable accommodation."[471]

EEOC's subsequent legal analysis has two parts. The first is a section on how the ADA definition of "qualified individual with a disabil-

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[461] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (citing 20 C.F.R. § 404.1504 (1997)).

[462] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 9 (citing 20 C.F.R. § 404.1592(a) (1997)).

[463] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11, n. 41.

[464] Ibid., pp. 11–12, n. 41.

[465] 977 F.2d 1190, 1196 (7th Cir. 1992).

[466] 94 F.3d 410 (8th Cir. 1996).

[467] *Id.* at 412.

[468] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 13–16.

[469] Ibid., p. 15.

[470] Ibid., pp. 16–17.

[471] Ibid., p. 17.

ity" always requires an individualized assessment under the ADA, whereas the three other schemes, SSA, workers' compensation, and disability insurance plans, permit generalized inquires and presumptions.[472] The second part of the analysis discusses how the ADA definition of "qualified individual with a disability" requires consideration of reasonable accommodation whereas in the other schemes, the equivalent definition of disability does not.[473]

The analysis opens by stating the proposition developed in the earlier sections, namely, that "an individual may be 'unable to work' for purposes of a disability benefits program and yet still be able to perform the essential functions of a particular position with or without reasonable accommodation."[474] The guidance supports this statement with precedent in the caselaw.[475] For example, the guidance notes a case, *Robinson v. Neodata Services, Inc.*,[476] in which the Eighth Circuit found that SSA determinations of disability "are not synonymous with a determination of whether a plaintiff is a 'qualified' person for purposes of the ADA." In another case cited in the guidance, a court found that a finding by a State workers' compensation commission or the SSA does not automatically foreclose an ADA claim.[477]

In the analysis of the ADA's requirement of an individualized assessment in determining whether someone is a "qualified individual with a disability," the guidance states that unlike the various disability benefit schemes, the ADA never presumes that some impairments are so severe as to prevent an individual from working. In fact, the ADA presumes the opposite, that individuals with disabilities can work.[478] The guidance cites numerous cases in which courts have agreed that the ADA's requirement of an individualized assessment in determining disability and ability to work is a fundamental difference between the ADA and the various disability benefits programs, which rely on generalized classifications.[479]

This part of the analysis also addresses *McNemar v. The Disney Store, Inc.*,[480] a case that disagrees with EEOC on the judicial estoppel issue. The *McNemar* court rejected the argument that because ADA's purposes and standards are fundamentally different from those of the SSA's, their conclusions as to qualifications and ability to work may differ significantly. The guidance states that the *McNemar* court wrongly decided the case because it had "overlooked the fact that 'unable to work' for SSA purposes does not mean unable to perform the essential functions of a particular position with or without reasonable accommodation."[481]

In the second part of its analysis, the guidance emphasizes that the ADA, unlike the various disability benefits plans, requires an assessment as to whether an individual can work with a reasonable accommodation. In this discussion, the guidance further develops its argument with case precedent. For example, the guidance cites the case of *D'Aprile v. Fleet Services Corporation*,[482] in which the court found that an application for disability benefits "sheds no light" on how the plaintiff would have fared had the reasonable accommodation she had requested been made.[483] Like *D'Aprile*, the cases discussed in this part of the analysis stand for the proposition that receipt of disability benefits does not show that an individual is totally un-

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[472] *See* ibid., pp. 18–19.

[473] *See* ibid., pp. 19–23.

[474] Ibid., p. 18.

[475] Ibid. (citing Robinson v. Neodata Services, Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Pegues v. Emerson Electric Co., 913 F. Supp. 976, 980 (N.D. Miss. 1996); Palmer v. Circuit Court of Cook County, 905 F. Supp 499, 508 n.10 (N.D. Ill. 1995), *cert. denied*, 118 S. Ct. 893 (1998) ; Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994)).

[476] 94 F.3d at 502 n.2.

[477] Pegues, 913 F. Supp. at 980. The court in *Pegues* noted, however, that the substance of plaintiff's testimony and representations made in the workers' compensation and social security administration proceedings and their subsequent findings "trouble this court and pose the greatest hurdle for [plaintiff]." The court found against the plaintiff.

[478] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 19.

[479] Ibid., pp. 20–22 (citing Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Smith v. Dovenmuehle Mortgage, Inc. 859 F. Supp. 1138, 1141 (N.D. Ill. 1994); Daffron v. McDonnell Douglas Corp., 874 S.W. 2d 482, 486 (Mo. Ct. App. 1994)).

[480] 91 F.3d 610 (3rd Cir. 1996) *cert. denied*, 117 S. Ct. 958 (1997).

[481] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 21–22.

[482] 92 F.3d 1 (1st Cir. 1996).

[483] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 24 (citing 92 F.3d 1, 5 (1st Cir. 1996)).

able to work, because disability benefit plan applications do not consider whether the person could work with a reasonable accommodation.[484] In concluding this analysis, the guidance states that the cases discussed demonstrate that "an individual can meet the eligibility requirements for disability benefits and still be able to perform the essential functions of particular positions with reasonable accommodation."[485]

Role of Representations Made in Applications for Disability Benefits

The second section of the guidance sets forth EEOC's position that judicial estoppel should not be used as a bar to an ADA claim where the claimant has made previous representations on applications for disability benefits.[486] The guidance addresses the doctrine of judicial estoppel and the role of summary judgment in cases involving ADA claimants who previously have applied for disability benefits.[487] EEOC sets out several reasons why courts should not invoke judicial estoppel to bar ADA claims. First, an individual who claims that he or she is both "totally disabled" and a "qualified individual with a disability" has not necessarily made inconsistent statements.[488] Second, the guidance notes that the doctrine of judicial estoppel generally has applied only when an individual made his or her earlier inconsistent statement in a prior *judicial proceeding*. However, applications for disability benefits are made as part of an administrative determination, a wholly different process. The guidance observes "[a]ccordingly, courts that have recognized the significant differences in judicial proceedings and administrative determinations have declined to apply judicial estoppel to bar claims of disability discrimination."[489] A third argument is that several circuits have refused to recognize the doctrine of judicial estoppel, so it has not been universally accepted as a legitimate legal theory.[490]

The guidance argues that summary judgment, a judicial determination of whether a trial is necessary, should not be granted to ADA defendants on the basis that the claimant previously has filed an application for disability benefits. In this discussion, the guidance notes that a court only will grant summary judgment where it determines that there is no genuine issue of material fact.[491] The guidance argues that because an individual's representations on an application for disability benefits do not mean that he or she is incapable of performing essential functions of a job with reasonable accommodation, the application for disability benefits does not mean that there is no question as to whether the individual is a "qualified individual with a disability."[492]

The guidance notes that some weight may be given to representations made on disability benefits applications in determining whether an individual is a "qualified individual with a disability." Context and timing are the criteria for deciding how much weight is allowed. For context, the guidance states that representations made on disability benefits applications should not be viewed in a vacuum, but rather in the context of all other relevant documents and the conditions under which the individual applied for the benefits.[493] For example, the guidance cites cases where individuals who applied for disability had done so only after their employers had refused to provide reasonable accommoda-

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[484] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 23–26 (citing Eback v. Chater, 94 F.3d 410, 412 (8th Cir. 1996); D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996); Kennedy v. Applause, 90 F.3d 1477 (9th Cir. 1996); Ward v. Westvaco Corp., 859 F. Supp. 608, 615 (D.Mass. 1994)).

[485] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 26.

[486] Ibid., p. 28.

[487] Ibid.

[488] Ibid. (citing Smith v. Dovenmuehle Mortgage Co., 859 F. Supp. 1138 (N.D. Ill. 1994)).

[489] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 28 (citing Mohamed v. Marriott, 944 F.Supp. 277, 283–84 (S.D.N.Y., 1996)).

[490] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 27 citing United Mine Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993); Chrysler Credit Corp. v. County Chrysler Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)).

[491] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 29 (citing Fed. R. Civ. P. 56(c)).

[492] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 30.

[493] Ibid., p. 31.

tion.[494] Timing can be important because individuals who apply for disability benefits may become rehabilitated and capable of rejoining the workplace. The guidance provides several cases where courts have relied on the timing of the application to determine that it had no relevance to the plaintiff's current ADA suit. For example, in *Smith v. Dovenmuehle Mortgage Co.*,[495] the plaintiff, who had AIDS, claimed that his condition was improved and that he was strong enough to return to work 1 month after leaving on disability. The court found that because his condition had improved, his statements on his disability benefits application were not inconsistent with his current ADA claim.[496] In another case, *Lawrence v. United States I.C.C.*,[497] the court found that since 22 months had passed since the plaintiff's application for SSA benefits and the filing of his ADA claim, his contention that he was now able to work did not necessarily contradict his earlier statement.[498]

Overall, courts disagreeing with EEOC's position in this guidance are retreating from their earlier interpretations of ADA.[499] Currently, at least two of the Federal circuits agree with EEOC's position on the judicial estoppel issue.[500] One dramatic shift on this issue has been a recent decision of the Fifth Circuit. In the case of *Cleveland v. Policy Management Systems*,[501] the Fifth Circuit held that representations made by an ADA claimant on an application for Social Security benefits raises only a presumption that the plaintiff was not qualified to perform a job under that statute's terms.[502]

Part of the reason for this change may be EEOC's enforcement guidance on the issue.[503] The agency's own retreat from its earlier position may have helped. Originally, the agency viewed statements on disability benefit applications as completely irrelevant in determining whether an ADA claimant was a qualified individual with a disability.[504] The guidance, however, takes a more moderate approach in which it considers such statements potentially relevant, taking context and timing into account.[505]

Public Policy Reasons Supporting Conclusion

The guidance makes a public policy argument to support its conclusion that representations made in connection with an application for disability benefits never should be an automatic bar to an ADA claim. This policy discussion has two main points: first, allowing individuals to go forward with their ADA claims is critical to the ADA's goal of eradicating discrimination against people with disabilities; and second, individuals should not have to choose between applying for disability benefits and vindicating their rights under the ADA.[506] The guidance states that barring individuals who apply for disability benefits from pursuing ADA claims would "impede EEOC's enforcement of the ADA and deny individuals the right to have the court hear the merits of their claims."[507] The guidance adds "it also would permit the continuation of the invidious discrimination that the ADA is designed to eradicate."[508]

The discussion marshals U.S. Supreme Court precedent in arguing against the use of judicial estoppel in ADA cases where the plaintiff previously has applied for disability benefits. The guidance cites *McKennon v. Nashville Banner Publishing Co.*,[509] in which the Court stated equitable doctrines, which is what judicial estoppel is, should not be used as absolute bars to suits brought under Federal antidiscrimination legis-

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[494] Ibid., p. 32 (citing Anzalone v. Allstate Ins. Co., 1995 U.S. Dist. LEXIS 1272 (E.D. La. 1996), *aff'd*, 74 F.3d 1236 (5th Cir. 1995); Ward v. Westvaco Corp., 859 F. Supp. 608, 614–15 (D. Mass 1994).

[495] 859 F. Supp. 1138 (N.D. Ill. 1994).

[496] *Id.* at 1142.

[497] 629 F. Supp. 819 (E.D. Pa. 1995).

[498] *Id.* at 822.

[499] *See* David K. Fram, "Expert: More Courts Easing Position on 'Judicial Estoppel,'" *National Disability Law Reporter Highlights*, Oct. 9, 1997, pp. 3–4.

[500] *See, e.g.*, Blanton v. Inco Alloys International, Inc., 123 F.3d 916, 917 (6th Cir. 1997); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997),petition for cert. filed, 66 U.S. L.W. 3435 (U.S. Dec. 15, 1997) (No. 97–1008).

[501] 120 F.3d 513, 518 (5th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3435 (U.S. Dec. 15, 1997) (No. 97–1008).

[502] *Id.* at 518.

[503] *See* Fram, "Expert: More Courts Easing Position on 'Judicial Estoppel,'" pp. 3–4.

[504] Ibid., p. 3.

[505] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 26.

[506] Ibid., pp. 35–37.

[507] Ibid., p. 36.

[508] Ibid.

[509] 513 U.S. 352 (1995).

lation because of the important public purposes furthered by such legislation.[510] This statement supports the guidance's conclusion that "if an individual is prevented from bringing an ADA claim because s/he has applied for disability benefits, discrimination is not deterred and the plaintiff's interests are not vindicated."[511]

A second policy argument the guidance makes is that people should not have to choose between applying for disability benefits and claiming their rights under the ADA.[512] All persons have a right to be free from discrimination, and anyone who meets the eligibility requirements of a disability benefit program has the right to receive those benefits.[513] Moreover, it is fundamentally unfair to require people to choose between two independent rights. Persons applying for disability benefits are not knowingly relinquishing their ADA rights.

Instructions to Investigators

The guidance's instructions to EEOC investigative staff reiterate the conclusion that representations made on applications for disability benefits do not bar the filing of an ADA charge. In addition, such representations should not prevent an investigator from recommending a cause determination if the evidence supports it.[514] The guidance reminds investigative staff that in making the "qualified individual with a disability" determination, applying for disability benefits may be relevant, although not dispositive. It is essential to look at all of the relevant evidence.

This section of the guidance should be quite helpful to ADA investigators, because it offers very specific instructions on how to evaluate the relevance of representations made on disability benefits applications to determining whether an individual is a "qualified individual with a disability." The guidance explains that when assessing the effect of representations made on applications for disability benefits on the "qualified individual with a disability" determination, the investigator should focus on "the exact definition used by the benefits program; the precise content of the individuals' representations, and the specific circumstances surrounding the application for benefits."[515] In addition, the guidance states that it is very important to determine whether the individual maintained that he or she could accomplish the essential functions of the job, with or without reasonable accommodation, at the time of his or her application for disability benefits.[516]

The guidance closes with a number of factors for investigators to use in deciding what, if any, weight to give to a charging party's representations made in applying for disability benefits. These include the following:

(1) definitions of terms such as "disability," "permanent disability," and "inability to work";
(2) whether the representations made were in the charging party's own words;
(3) whether the representations made about the charging party's ability to work are qualified in any way;
(4) whether the charging party's physical or mental condition has changed since the representations were made;
(5) whether the charging party was working during a time referred to as a period of total disability;
(6) whether the employer suggested that the charging party seek benefits;
(7) whether the charging party was asked for and denied a reasonable accommodation that would have made it possible for him or her to continue working;
(8) when the employer learned about the representation; and finally,
(9) any other relevant factors, including advances in technology or changes in the employer's operations, that may have occurred since the representations.[517]

Title I of the ADA and Labor Issues

EEOC has set forth its position in policy on several important labor-related issues. EEOC has focused on two areas in particular. The first is the relationship between collective bargaining agreements reached under the National Labor Relations Act (NLRA) and reasonable accommodations

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[510] *Id.* at 358–59.

[511] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 36.

[512] Ibid., p. 37.

[513] Ibid.

[514] Ibid., p. 38.

[515] Ibid.

[516] Ibid.

[517] Ibid., p. 39.

required by the ADA.[518] The second is the use of mandatory binding arbitration agreements.[519]

EEOC maintains that, "where there is a conflict between the need for reasonable accommodation and the provision of a collective bargaining agreement, and no other reasonable accommodation exists, the ADA requires the employer and the union to negotiate in good faith a variance to collective bargaining agreement seniority rules in order to provide an accommodation that does not unduly burden non-disabled workers."[520] However, the ADA statute and its legislative history are ambiguous on these issues, making it difficult for EEOC to argue its position in the courts. EEOC has issued one policy statement on arbitration, but only one policy letter offering its position on issues relating to reasonable accommodation and collective bargaining agreements.

Early Attempts to Work with the National Labor Relations Board

Two years after the passage of the ADA, EEOC and the National Labor Relations Board began negotiating a memorandum of understanding (MOU) to resolve potential conflicts between title I of the ADA and the National Labor Relations Act.[521] The negotiations began in late April 1992. Some 4 months later, EEOC's Legal Counsel sent a memorandum to EEOC's Chairman and Commissioners explaining that negotiations between the two agencies had broken down and efforts to reach an agreement had been discontinued.[522]

The main area of conflict between the two agencies involved the role of collective bargaining in the employer's provision of reasonable accommodation. The issues included the extent to which the NLRA requires bargaining with the union in selecting an effective reasonable accommodation; whether an employer violates the NLRA if it negotiates directly with a bargaining unit employee, rather than a union representative, over reasonable accommodation; the limitations, if any, imposed by the confidentiality requirements of the ADA on the duty to furnish information necessary to the union for bargaining; and whether an employer can provide a "mid-term modification" of a collective bargaining agreement without the union's approval.[523] Staff from both agencies met on several occasions to discuss resolution of these issues.

The memorandum explains that NLRB staff informed EEOC staff of certain "limitations" in NLRB policy that would make it difficult to develop an MOU. The first of these limitations was the NLRB General Counsel's policy of submitting issues of first impression to the Board for determination.[524] In addition, the Board itself functions as a quasi-judicial body.[525] As such, the Board decides specific complaints of unfair labor practices submitted to it by the General Counsel.[526] The Board does not act on its own initiative or issue advisory opinions.[527]

The memorandum explains that "[b]ased on these limitations," the NLRB General Counsel declined to make definitive statements as to what actions would or would not constitute violations of the NLRA.[528] In addition, the General Counsel declined to take any position on the provision of reasonable accommodations that would invoke a midterm modification of a collective bargaining agreement.[529] Essentially, the General Counsel

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[518] *See* Thomasina V. Rogers, Legal Counsel, EEOC, memorandum to Evan J. Kemp, Chairman; R. Gaull Silberman, Vice Chairman; Joy Cherian, Commissioner; Tony E. Gallegos, Commissioner; Joyce E. Tucker, Commissioner, re: Status Report on Proposed Memorandum of Understanding with the Office of General Counsel, National Labor Relations Board, Aug. 14, 1992 (hereafter cited as Rogers, memorandum); EEOC, "Memorandum of Understanding Between the General Counsel of the National Relations Board and the Equal Employment Opportunity Commission," Nov. 16, 1993 (hereafter cited as EEOC–NLRB MOU); Ellen J. Vargyas, Legal Counsel, EEOC, letter to Berry Kearney, Associate General Counsel, National Labor Relations Board, re Memorandum of Understanding Between the Equal Employment Opportunity Commission and the National Labor Relations Board, Nov. 1, 1996 (hereafter cited as Vargyas letter).

[519] *See* Rogers, memorandum; EEOC, "Memorandum of Understanding Between the General Counsel of the National Relations Board and the Equal Employment Opportunity Commission," Nov. 16, 1993; Vargyas letter).

[520] *See* EEOC Comments, p. 17.

[521] Rogers, memorandum.

[522] *See* ibid.

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

[527] Ibid.

[528] Ibid.

[529] Ibid.

informed EEOC that NLRB would not be willing to make unqualified statements in an MOU on which actions would be considered unfair labor practices under the NLRA.[530]

The NLRB General Counsel did, however, propose an alternative. Under this proposal, the two agencies would issue an MOU that would contain qualified statements on certain issues concerning what actions the NLRB would consider unfair labor practices under the NLRA.[531] In addition, the MOU would contain a discussion of "procedures to coordinate the issuance of policy and the resolution of charges involving Title I and the enforcement activities of the NLRB General Counsel."[532]

EEOC rejected this proposal because it did not believe such an MOU would provide sufficient guidance to employers, unions, and individuals with disabilities on how to comply with both title I of the ADA and the collective bargaining process required by the NLRA.[533] EEOC proposed instead an MOU that would definitively address those issues for which there was substantial Board precedent on which the General Counsel could base his conclusions.[534] However, the NLRB General Counsel would not agree to make sufficiently definitive statements on any of the issues raised concerning actions that NLRB would or would not consider unfair labor practices under the NLRA. EEOC's Legal Counsel informed EEOC's Commissioners that, as a result of this impasse, "we do not believe that a substantive MOU would serve any useful purpose."[535]

The Legal Counsel further stated that it was important for EEOC to articulate a policy to guide its decisionmaking process on these issues because "[c]overed entities and individuals with disabilities need comprehensive guidance concerning the interplay of accommodation and collective bargaining."[536]

For these reasons, the Legal Counsel informed the Commissioners that her staff had begun work on enforcement guidance on the role of collective bargaining in the provision of a reasonable accommodation required under title I of the ADA.[537] The Legal Counsel explained that "[t]he enforcement guidance will not guarantee that covered entities will be in compliance with the NLRA, since such a guarantee appears impossible, but it will provide guidance on the actions necessary for compliance with the ADA."[538]

NLRB–EEOC Procedural Memorandum of Understanding

The National Labor Relations Board (NLRB) and EEOC entered into a procedural Memorandum of Understanding (MOU) on November 13, 1993.[539] The MOU established procedures for coordinating the enforcement of title I of the ADA and section 8(a)(1) of the National Labor Relations Act.[540]

The memorandum of understanding outlines 10 specific procedures relating to charge filing and processing. The first requires that when a charge is filed with a regional office of NLRB alleging that the duty to bargain under section 8(a)(5), section 8(b)(3) and/or section 8(d) of the NLRA[541] was breached by either an employer or a union, and the resolution of that charge would require an interpretation of the charged party's duties under the ADA, the NLRB General Counsel, will, on completing the investigation, consult with EEOC's Office of Legal Counsel regarding applicability of the ADA.[542] The second procedure is reciprocal and requires that when EEOC

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530 Ibid.

531 Ibid.

532 Ibid.

533 Ibid.

534 Ibid.

535 Ibid. NLRB's Office of General Counsel issued a memorandum to its field personnel addressing potential conflicts between title I of the ADA and the NLRA. In particular, the memorandum discussed unions' duties of fair representation under the NLRA and obligations under the ADA and potential conflicts between the duty to bargain under the NLRA and the duty to comply with the ADA. *See* Jerry M. Hunter, General Counsel, National Labor Relations Board, memorandum to all Regional Directors, Officers-in-Charge, and Resident Officers, re: Potential Conflicts Between Title I of the ADA and the Collective Bargaining Requirements of the NLRA, Aug. 7, 1992.

536 Rogers memorandum.

537 Ibid.

538 Ibid.

539 NLRB and EEOC, MOU.

540 *See* 29 U.S.C. § 158(a) (1) (1994). Section 8(a) (1) of the National Labor Relations Act describes unfair labor practices by employers. NLRB and EEOC, MOU.

541 NLRB and EEOC, MOU. Sections 8(a) (5), 8(b) (3) of the NLRA are found at 19 U.S.C. §§ 158(a) (5), 158(b) (3) and 158(d), respectively.

542 NLRB and EEOC, MOU.

has a charge whose resolution would require an interpretation of the NLRA, that EEOC, upon completion of its investigation, consult with the NLRB's Associate General Counsel.[543]

The MOU requires that EEOC and NLRB share any information relating to the employment policies and practices of a respondent, employer or union, that may assist each agency in carrying out its responsibilities under the agreement.[544] This information might include, but is not limited to, complaints, charges, and investigative files.[545] The MOU requires that when one agency sends information to the other, the receiving agency will observe confidentiality requirements set forth under Federal civil rights law.[546] EEOC agrees to resist any requests for documents shared by NLRB during this process, except for documents already in the public domain, such as pleadings.[547] Consistent with the Freedom of Information Act, NLRB agrees not to produce affidavits or any other nonpublic documents while a case is pending.[548]

The agreement also sets out procedures to be followed if an individual with a disability files a dual complaint with NLRB and EEOC, stating that the collective bargaining representative has failed to fairly represent him or her under the NLRA and, by the same conduct, has violated the ADA.[549] The agreement also states that when an unfair labor practice charge is filed by an individual with a disability alleging that the collective bargaining representative has failed to fairly represent him or her regarding accommodating a disability in the workplace, and the individual has not filed an ADA claim with the EEOC, the NLRB will notify the individual in writing of the right to do so.[550] In addition, the MOU states that the parties to the agreement will engage in "periodic consultations" to review its implementation. Finally, the MOU states that modifications may be made at any time as long as both parties consent and the modification is in writing.

As the 1993 MOU between NLRB and EEOC was limited to procedural matters, a number of important issues were left unresolved. EEOC has taken positions with respect to these in policy guidance and *amicus curiae*.

Conflicts Between the Requirements of the ADA and Labor Practices

Medical Information Confidentiality Requirement

In November 1996, EEOC's Office of Legal Counsel responded to a "request for advice" from NLRB's Region 19/Seattle office pursuant to the 1993 MOU.[551] The issue raised by the Seattle office was whether ADA's prohibition on an employer's supplying an employee's medical information to outside parties means that an employer can refuse to supply a union with medical information that it has requested to process a grievance.[552]

The letter states the facts of the case.[553] The union and the employer are parties to a collective bargaining agreement,[554] which includes the right of individuals to bid for and receive jobs based on seniority, provided they are qualified to perform the job. The employer placed a bid for two jobs. One of the two jobs was filled by the most senior qualified bidder. According to the letter, the other was filled as a reasonable accommodation under the ADA to "John Doe," even though there were more qualified bidders with more seniority.[555]

Soon after the jobs were awarded, the second most senior bidder filed a grievance challenging Doe's selection.[556] The union took the position that the employer had violated the collective bargaining agreement by awarding the job "out of seniority." The employer stated that it awarded the job to Doe because it believed it was required to under the ADA.[557]

The union countered by arguing that the employer could have accommodated Doe in some other way and requested from the employer medical information to use in analyzing the griev-

543 Ibid.

544 Ibid.

545 Ibid.

546 Ibid. (citing 42 U.S.C. §§ 2000e–5(b), 2000e–8(e) (1994)).

547 NLRB and EEOC, MOU.

548 Ibid.

549 Ibid.

550 Ibid.

551 Vargyas letter.

552 Ibid., p. 1.

553 Ibid., pp. 1–2.

554 Ibid., p. 1.

555 Ibid.

556 Ibid., p. 2.

557 Ibid.

ance.[558] The employer responded that, after reviewing the collective bargaining agreement and the ADA, it could not release the requested information under the ADA. The union then filed a charge with the NLRB alleging that the employer had violated sections 8(a)(1) and (5) of the NLRA by refusing to provide the union with information needed to process a union grievance.[559]

EEOC frames the issue in the case as follows: does the ADA permit an employer to provide medical information about an employee's disability to a union for it to assess a grievance challenging the employer's provision of reasonable accommodation that conflicts with seniority provisions of the collective bargaining agreement?[560] EEOC's position is that because the union, like the employer, is a covered entity under the ADA, it is the union's responsibility to negotiate with the employer to change the collective bargaining agreement, providing there is no other reasonable accommodation and the proposed accommodation would not unduly burden nondisabled workers.[561] EEOC also states that the employer and the union are obligated to negotiate with each other to change the collective bargaining agreement where there is no other accommodation available and the change in the collective bargaining agreement would not provide an undue hardship.[562]

EEOC also stated that medical information may be used to determine reasonable accommodations and an employer may share this information with a third party when necessary to determine a reasonable accommodation.[563] The letter explains that "[i]n the unique setting of the unionized workplace," both the employer and the union are involved in making the reasonable accommodation determination.[564] However, medical information can only be shared on an ad hoc, need to know basis. Under these specific circumstances, the confidentiality provisions of the ADA are not violated.[565]

558 Ibid.

559 Ibid.

560 Ibid.

561 Ibid. (citing 42 U.S.C. § 12111(2) (1994); 29 C.F.R. § 1630.2(b) (1997)).

562 Vargyas letter, p. 2.

563 Ibid., p. 4.

564 Ibid.

565 Ibid.

Reasonable Accommodation and the Collective Bargaining Agreement

A key labor-related issue has been whether the ADA's requirement to provide reasonable accommodation to a qualified individual with a disability should take precedence over the provisions of a collective bargaining agreement between an employer and a union. In cases where a reasonable accommodation has created conflict with a collective bargaining agreement, EEOC has advocated for maintaining the reasonable accommodation at the expense of the collective bargaining agreement. This position is controversial in that it conflicts with the positions of several Federal appeals courts.[566]

EEOC has advanced this position in its policy guidance, such as the policy letter described above, and in *amicus curiae* briefs. For example, EEOC filed an *amicus* brief in *Eckles v. Consolidated Rail Corp.*,[567] a case in which the Seventh Circuit addressed the question of whether reasonable accommodations violate the collectively bargained, bona fide seniority rights of other employees.[568]

In its *amicus* brief in *Eckles*, EEOC stated that the ADA does not require displacement or "bumping" of another employee to accommodate a disabled individual.[569] EEOC stated that it agrees that an individual with a disability is not entitled to an accommodation requiring a change to a collective bargaining agreement if there is an alternative, effective accommodation that could be

566 *See* Kralik v. Durbin, 130 F.3d 76, 83 (3rd Cir. 1997) (even a limited infringement on seniority rights is not reasonable under the ADA); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); *cf.* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (stating: "we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."), *cert. denied*, 516 U.S. 1172 (1996); Doe v. Town of Seymour, 1998 U.S. Dist. LEXIS 676, *8 (D. Conn. 1998) (holding reassignment is not a reasonable accommodation when it interferes with seniority provisions of a collective bargaining agreement because it compromises the reasonable expectations of other employees regarding seniority).

567 94 F.3d 1041 (7th Cir. 1996), *amended and cert. denied*, 117 S. Ct. 1318 (1997).

568 *Id. at* 1051.

569 *See id.* at 1051.

provided consistent with seniority rules.[570] However, it argues that under the ADA employers and unions have a duty "to negotiate in good faith a variance to. . .seniority rules to provide an accommodation if the proposed accommodation does not unduly burden non-disabled workers."[571] In taking this position, EEOC relies on the legislative history of the ADA.[572] For example, EEOC cites the House Education and Labor Committee report stating that while a collective bargaining agreement may be relevant to a determination of whether a given accommodation is reasonable, "the agreement would not be determinative on the issue."[573]

This report also states that conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation under the ADA "may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."[574] This language seems to indicate an intent for the provisions of the ADA to outweigh the collective bargaining agreement. Regardless, the ADA's legislative history is at best somewhat ambiguous with respect to this issue.

Nonetheless, EEOC sets forth its position very clearly in its *amicus* briefs such as *Eckles*. EEOC officials have stated publicly the agency's position on the ADA and collective bargaining agreements.[575] However, EEOC has yet to issue a comprehensive policy guidance on this issue.

ADA Claims and Mandatory Arbitration

EEOC has been more active in advancing its position that arbitration proceedings in ADA cases should be voluntary and not mandatory. EEOC has supported this position in a policy statement, *amicus curiae*, and in public remarks made by EEOC officials.[576] Recent court decisions have also agreed with EEOC's position.[577]

In its policy statement on mandatory arbitration, issued July 11, 1997, EEOC states that, as the Federal agency tasked with enforcing and interpreting the Nation's employment discrimination laws, its position is that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws."[578] The policy statement argues that Federal employment discrimination laws "flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance," and the rights bestowed cannot be swept aside by mandatory arbitration.[579] The policy statement points out that arbitration should never be mandatory because the nature of the arbitral process allows—by design—for minimal, if any, public accountability

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[570] Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* at 36, *Eckles*, 94 F.3d 1041 (No. 95–2856) (citing 29 C.F.R. Pt. 1630 app. § 1630.9 (1996) (covered entity "has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide")).

[571] *Id.* at 7.

[572] *Id.* at 25 n.15.

[573] H. REP. NO. 101–485(II), at 63 (1990).

[574] *Id.* at 73 (1990).

[575] *See* "Conference Report: EEOC Outlines its Logic; Elsewhere, Agency's Approach Criticized at ABA Meeting," *Americans with Disabilities Act Newsletter (BNA)*, vol. 5, no. 7 (Apr. 11, 1996), p. 43. Addressing attendees of the Great Lakes Disability and Business Technical Assistance Center, EEOC attorney Sharon Rennert discussed the *amicus* brief filed by EEOC in *Eckles v. Consolidated Rail Corp.* Rennert stated that EEOC laid out a two-point position regarding seniority conflict EEOC used in this case. First, an alternative that does not conflict should be sought. If that fails, the union and management must negotiate to find an accommodation that does not unfairly burden any nondisabled employee. *See* Rennert interview.

See also "EEOC Officials Discuss 'Mitigating Measures,' Accommodation, Arbitration at PCEPD Conference," *Americans with Disabilities Act Newsletter (BNA)*, vol. 6, no. 11 (June 12, 1997), p. 65 (hereafter cited as "EEOC Officials Discuss"). Speaking June 4, 1997, at the 50th annual conference of the President's Committee on Employment of People with Disabilities, Peggy Mastroianni, Associate Legal Counsel at EEOC, said that although in situations where there is a collective bargaining agreement, courts generally have said that the bargaining agreement "trumps" the ADA in reasonable accommodation disputes, EEOC disagrees with this position and will continue to argue against it.

[576] *See, e.g.*, Paul Steven Miller, Commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 2; Reginald E. Jones, Commissioner, EEOC, interview in Washington, DC, Apr. 2, 1998, pp. 3–4.

[577] *See* Gibson v. Neighborhood Health Clinics Inc., 121 F.3d 1126 (7th Cir. 1997); Brisentine v. Stone & Webster Engineering Corp., 117 F.3d 519 (11th Cir. 1997); Nelson v. Cyprus Bagdad Copper Corp., 119 F. 3d 756 (9th 1997), *petition for cert. filed*, Jan. 5, 1998.

[578] EEOC, "Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment," July 11, 1997.

[579] Ibid.

of arbitrators or their decision-making; the public plays no role in an arbitrator's selection—he or she is hired by the private parties to a dispute; the arbitrator's authority is defined and conferred, not by public law, but by private agreement; because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law; and there is virtually no opportunity for meaningful scrutiny of arbitral decision-making.[580]

Several recent court decisions have supported EEOC in its position on mandatory arbitration. For example, the Seventh Circuit has refused to enforce an agreement mandating arbitration of job bias claims and relinquishing an employee's right to a jury trial.[581] Elsewhere, the Eleventh Circuit has held that an injured employee's right to file an ADA lawsuit is not subject to the compulsory arbitration clause of a collective bargaining agreement.[582] The court relied on the Supreme Court's decision in *Alexander v. Gardner-Denver Company,*[583] in which the Court found that an employee's statutory rights under title VII of the Civil Rights Act of 1964 are not waived through collective bargaining.[584]

Finally, EEOC officials have been vocal in stating their position on this issue in conferences and training around the country.[585] One agency official has described mandatory arbitration of employment disputes as the greatest threat to civil rights enforcement.[586] In setting forth the agency's position on this issue, EEOC's Legal Counsel stated that mandatory arbitration will eliminate access to the courts for employees with disabilities.[587] Further, mandatory arbitration has numerous disadvantages: review of decisions is limited; decisions are not made public; arbitrators often have no background in the law; there are limits on discovery procedures and on remedies; and litigants on both sides have to pay arbitration fees.[588]

The Family and Medical Leave Act and the ADA

Although EEOC does not enforce the Family and Medical Leave Act of 1993 (FMLA),[589] it has recognized the interplay between the ADA and the FMLA in a fact sheet developed by the Office of Legal Counsel.[590] This document provides technical assistance on commonly asked questions that have arisen about the interplay between the FMLA and two civil rights statutes, the ADA and title VII of the Civil Rights Act of 1964.[591] The 23 questions and answers about these acts appear to be the extent of EEOC's outreach and education for employers and employees about the FMLA and its relationship to statutes under EEOC jurisdiction. EEOC appears to have intended the fact sheet to be a quick information guide for those who are not

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580 Ibid.

581 Gibson v. Neighborhood Health Clinics, Inc., 121 F. 3d 1126 (7th Cir. 1997). (Finding agreement to arbitrate unenforceable as the contract did not contain adequate consideration for employee's promise).

582 Brisentine v. Stone & Webster Engineering Corp., 117 F. 3d 519 (11th Cir. 1997).

583 415 U.S. 36 (1974).

584 *Id. at* 51–52.

585 *See* "EEOC Officials Discuss,", p. 65; "Briefs," *Americans with Disabilities Act Newsletter (BNA),* vol. 6, no. 15 (Aug. 14, 1997), p. 90 (hereafter cited as "Briefs").

586 "Briefs," p. 90.

587 "EEOC Officials Discuss," p. 65.

588 Ibid.

589 29 U.S.C §§ 2601—2654 (1994).

590 This interplay may be observed, for example, by comparing the statutory language of the two acts. The ADA's requirement for an employee to show substantial limitation of a major life activity is analogous to the FMLA's requirement of a "serious health condition" that renders an employee unable to perform job duties. The overlap occurs because the employee may obtain leave as a reasonable accommodation under the ADA or an entitlement under the FMLA. According to a Washington, D.C., management attorney, "the most common issues I hear about are leave requests overlapping with FMLA and transfer requests." He also said that courts are just starting to address the overlap between the two acts, especially in intermittent leave situations for chronic physical disabilities or psychological disabilities. *See* "Headache or Harmony: What Lies Ahead for ADA Litigators?" *National Disability Law Reporter Highlights (LRP),* vol. 12, iss. 8 (Aug. 13, 1998), p. 9.

591 EEOC, "The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964" (undated) (hereafter cited as EEOC, "The Family and Medical Leave Act, the ADA and Title VII"); http://www.eeoc.gov/docs/fmlaada.txt, Sept. 26, 1997. One disability professional has recommended that similar guidelines be developed on the overlap between the ADA and the National Labor Relations Act and the overlap between the ADA and the Occupational Safety and Health Act. Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Health and Welfare Agency, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, p. 16.

familiar with the three laws and how they apply to the workplace.

Background

The need for workers to take leave from their jobs is a major concern in the workplace of the 1990s.[592] Congress sought to address this need with the FMLA. The act, which is enforced by the U.S. Department of Labor, assists employees who need leave temporarily due to their own or family member's disabilities or health problems who, before passage of the FMLA, might have lost their health insurance or even their jobs in trying to secure this leave.[593]

There are important similarities between the ADA and the FMLA. Although these laws represent two different public policies with two different objectives, they both protect employees with significant health concerns, disabilities under the ADA, and "serious health conditions" in the language of the FMLA.[594] Moreover, an individual can be both "disabled" within the meaning of the ADA and have a "serious health condition" within the meaning of the FMLA.[595] As these statutes have similar objectives, it is logical that policymakers and courts have sought to harmonize the two statutes based on the rules of statutory interpretation.[596] One example of this harmonization is the U.S. Department of Labor's FMLA regulations, which specifically mention the ADA in stating:

> Nothing in [the] FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of. . .disability. [The]. . .FMLA's legislative history explains that [the] FMLA is "not intended to modify or affect the Americans with Disabilities Act of 1990, or the regulations issued under that act. . . . An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. . . .[597]

Legislative Histories

Since the ADA was passed 3 years before the Family and Medical Leave Act,[598] its legislative history makes no direct reference to the FMLA. The ADA does, however, indicate that Congress did not intend for the ADA to be an impediment to anyone seeking a remedy for discrimination under another law:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.[599]

ADA

The ADA's legislative history addresses the leave needs of employees with disabilities.[600] In the House Education and Labor Committee report accompanying the final ADA bill, Congress stated that "reasonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer."[601] Although the Senate legislative history does not state that leave is a form of reasonable accommodation, it does not expressly preclude leave as a reasonable accommodation.[602] Unlike the FMLA, which makes leave an entitlement to those who meet its requirements, the ADA allows leave contingent on whether the leave poses an undue hardship on the employer.[603]

FMLA

Sen. Christopher J. Dodd did not introduce the bill that would become the FMLA until

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592 James Passamano, "Employee Leave Under the Americans with Disabilities Act and the Family and Medical Leave Act," *South Texas L. Review*, vol. 38 (July 1997), P. 861 (hereafter cited as Passamano, "Employee Leave Under the ADA and the FMLA").

593 *See* 29 U.S.C. §§ 2601, 2611–12 (1994). *See also* Passamano, "Employee Leave Under the ADA and the FMLA."

594 Passamano, "Employee Leave Under the ADA and the FMLA."

595 Bonnie P. Tucker and Bruce A. Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (LPR Publications Horesham, Pennsylvania) Volume II, Supplement 8 (March 1996), pp. 22:35 (hereafter cited as Tucker and Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law*).

596 CRS, ADA: *Implementation Issues.*

597 29 C.F.R. § 825.702(a) (1997).

598 The ADA was enacted in 1990 *See* 42 U.S.C. §§ 12,101—12,213 (1994). The FMLA was passed in 1993. *See* 29 U.S.C. §§ 2601–2605 (1994).

599 42 U.S.C. § 12201(b) (1994).

600 H. REP. NO. 101–485(II), at 72 (1990).

601 *Id.*

602 Passamano, "Employee Leave Under the ADA and the FMLA."

603 *See* 42 U.S.C § 12112(5) (A) (1994).

January 21, 1993.[604] However, since 1987, the Committee on Labor and Human Resources Subcommittee on Children, Family, Drugs, and Alcoholism had been hearing testimony on family and medical leave proposals.[605] Witnesses testified about the difficulties they faced in attempting to meet the needs of family life and the demands of their jobs while either they or family members were ill.[606]

S. 5 entitled employees to unpaid leave in cases involving the birth or adoption of an employee's child, or the serious health condition of an employee or of the child, spouse, or parent of an employee.[607] Employers with 50 or more employees were covered by this bill.[608] The legislative history stated that the need for this legislation was based on the congressional finding that:

> Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to place a heavy burden on families, employees, employers and the broader society. S. 5 provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.[609]

The FMLA's legislative history does not mention an interplay with the ADA.[610] However, Congress stated that nothing in the act could be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.[611] Thus, Congress recognized a potential interaction between the two laws, and expressed its concern that it should be a harmonious one.

Objectives

Each act was created to address unique objectives, but both acts affect the workplace and its employees, specifically those with disabilities. Under both acts, employers must inform employees of their rights by posting notices.[612] These postings are required for all covered employers regardless of whether or not they have employees covered under each act.[613] All public agencies, including State and local governments, are covered by each act regardless of the number of employees they have.[614]

The ADA, however, is a civil rights law while the FMLA seeks to serve a narrower purpose, namely, employee leave needs. The narrower purpose is reflected in the narrower scope of the FMLA. Under the ADA, employers with "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,"[615] must comply with the statute. However, under the FMLA, the workplace must employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."[616] An employee with a disability seeking medical leave in a company with less than 50 employees may not even be entitled to FMLA rights at all and therefore may have to rely solely on ADA provisions.

Scope and Coverage

The coverage of each act is also different. Under the FMLA, for example, requirements are less restrictive and apply to a greater number of employees. This is consistent with the FMLA's goal of addressing the basic leave needs of employees at companies of at least 50 employees.[617] Under the FMLA, employees are eligible as along as they have been: (1) employed by the employer for at least 12 months, (2) employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of leave, and (3) employed at a work site where 50 or more

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604 S. 5, 103rd Cong. (1993).

605 Passamano, "Employee Leave Under the ADA and the FMLA."

606 Ibid.

607 S. 5, 103rd Cong. § 102 (1993).

608 *Id.* § 101(4) (1993).

609 S. Rep. No. 103–3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 6.

610 *See generally id.*

611 29 U.S.C. § 2651(a) (1994).

612 Under the FMLA, notices must be in "conspicuous places where employees are employed." 29 C.F.R. § 825.300(a) (1997). Under the ADA, notices must be in "an accessible format to. . .employees." 42 U.S.C. § 12115 (1994).

613 *See* 42 U.S.C. § 12115 (1994); 29 C.F.R. § 825.300(a) (1997).

614 29 U.S.C. § 2611(4) (A) (iii) (1994); 42 U.S.C. § 12131(1) (1994).

615 42 U.S.C. § 12111(5) (A) (1994).

616 29 U.S.C. § 2611(4) (A) (I) (1994).

617 S. Rep. No. 103–3 at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 4.

employees are employed by the employer within 75 miles of that work site.[618]

Coverage under the FMLA as compared to the ADA is another important issue relating to the interplay between the two statutes. The gap between the 50 employees required for FMLA coverage and the 15 employees for ADA coverage is quite large. Many employees with disabilities may be unable to obtain necessary leave time. For example, if an employee with a disability who works for a company with 49 workers requests leave but his or her employer believes that granting the request would result in an undue hardship under the ADA, the employee does not have the benefit of the FMLA. In effect, this employee is not being granted equal treatment with an employee with a disability who works for a larger company. A disability law expert has argued that, at a minimum, Congress should lower FMLA's coverage to include employers with 15 or fewer employees to make it equitable with the ADA. Further, this expert stated that all labor relations laws should have the same coverage or employees who work for employers with fewer than 15 employees are being denied equal protection of the laws and their civil rights therefore are being violated.[619] This expert stated:

> All employees should be equally protected by the law and civil rights protection of an individual should not depend on the size of the employer. Also, there is a fundamental unfairness in a law that imposes obligation on one employer with 15 employees, but does not impose the same obligations on another employer with 14 employees. The unfairness is especially sharp when such similarly situated employers are in the same industry and may compete with one another. Also, business practices that develop in small employers do not suddenly change when the employer hires its fifteenth employee. Rather, small employers are not covered and have a license to engage in even the most offensive civil rights violations with impunity. An organization that has discriminatory employment practices will likely persist in such practices as the business grows. Uniform coverage of civil rights laws would prevent discriminatory practices from developing in small business. If Congress is concerned about the costs to small business, it may enact a cap on damages for employers from 1 to 14 employees, just as it has done for other employers in the Civil Rights Act of 1991.[620]

Leave under the FMLA is a right that is not subject to undue hardship, potentially unsuccessful reasonable accommodation, or a rigorous test to meet to show disability.[621] Under the ADA, there is no guarantee of leave, continued health insurance and benefits, or job reinstatement at an equal level.[622]

Protection under the ADA is limited to a more precisely defined group of people, those who are qualified individuals with a disability.[623] The FMLA requires that the employee have a "serious health condition."[624] An employee who seeks leave under the ADA must show that she or he is a part of this group as it has been defined under the law, its regulations, and in case precedent in the courts. The FMLA regulations state that "serious health condition" means "an illness, injury, impairment, or physical or mental condition that involves"[625] (1) inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, . . . or any subsequent treatment in connection with such inpatient care; or (2) continuing treatment by a health care provider."[626]

Leave Policies

Before leave is granted, certain circumstances must prevail under each act. EEOC's title I regulations provide for the possibility of leave under the ADA as a reasonable accommodation.[627] Based on the ADA's legislative history, the EEOC has interpreted the act to include additional unpaid leave as a form of reasonable accommodation, again subject to "undue hardship." Although the ADA does not entitle employees to leave, EEOC's title I regulations state that "accommodations could include permitting

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618 29 U.S.C. § 26311(2) (A)–(B) (1994).

619 James Passamano, Sufian & Passamano, Houston, TX, telephone interview, Oct. 27, 1997, pp. 2–3 (hereafter cited as Passamano interview).

620 Ibid., p. 3.

621 *See generally* 29 U.S.C. §§ 2601–2605 (1994).

622 *See generally* 42 U.S.C. §§ 12111–12117 (1994).

623 42 U.S.C. §§ 12111(8), 12112(a) (1994).

624 29 U.S.C. § 2612(a) (1994: An employee may also obtain leave under the FMLA to care for a newborn or recently adopted child or to care for a family member with a serious health condition). *Id.*

625 29 C.F.R. § 825. 114(a) (1997).

626 *Id.* § 825.114(a) (1997).

627 *Id.* § 1,630.2(o) (1996).

the use of accrued paid leave or providing additional unpaid leave for necessary treatment."[628]

In addressing the situation where an employer does have a leave policy, EEOC's title I interpretive guidance states that "an employer, in spite of its 'no leave' policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision would impose an undue hardship."[629] The policy of employee leave under this provision can be interpreted broadly. However, requiring an employer to consider allowing an employee with a disability leave when the company has a "no leave" policy does not guarantee the worker the time off.

The FMLA, on the other hand, does not involve reasonable accommodation.[630] Under the FMLA leave may be granted to employees for their own or a family member's illness. In addition, it specifies circumstances for which leave must be granted if requested: (1) for the birth of a child, and to care for the newborn child; (2) for placement with the employee of a child for adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; and (4) because of a serious health condition that makes the employee unable to perform the functions of the employee's job.[631]

Another important aspect of the issue of leave is the amount of time off granted under each act. With the FMLA, the amount of leave is specifically identified: "[a]n eligible employee's FMLA leave entitlement is limited to a total of 12 work weeks of leave during any 12-month period."[632] It is important to note that leave may not be paid,[633] but an employee can elect to substitute paid leave for the FMLA leave.[634] Employees using the FMLA leave do not have to use the full 12 weeks all at once. An employee found to be suffering from a "serious health condition" could elect to work a reduced leave schedule until the equivalent of the 12 work weeks of leave were used.[635]

Under the ADA, however, no limit on leave is stated, because the act itself does not expressly mention employee leave. However, as noted, the issue of leave has been interpreted to fall under the act's "reasonable accommodation" provision. An employer covered by the ADA, whether the company has an employee leave policy or not, has to make reasonable accommodations for qualified disabled employees so long as that accommodation does not impose an "undue hardship" on the company.[636] The use of accrued paid leave or providing additional unpaid leave has been included as a form of accommodation, but again, no time limit has been specified under the ADA as it has under the FMLA.[637]

The ADA's legislative history provides for part-time or modified work schedules for employees with a disability.[638] However, leave under this act has been difficult for employees to obtain. The courts have held that an "employee in need of leave is not a qualified individual with a disability as defined in the ADA."[639] Therefore, even though leave may be a form of reasonable accommodation, "the weight of reported authority makes leave practically unavailable under the ADA."[640]

Another difference between the two acts with respect to leave is the extent of employer prerogatives to grant employees' requested leave. Leave under the FMLA is an entitlement as long as the employee meets the requirements.[641] Under the ADA, however, requested medical leave must be balanced with the employer's need to avoid "undue hardship."[642] Thus, when an employee with a disability requests a leave of absence for health reasons, that request is weighed against the "undue hardship" that may be imposed upon the employer by such an absence.[643] The act defines an "undue hardship" as an action requiring significant difficulty or expense on behalf of the employer.[644] When an employer dem-

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628 *Id.* at pt. 1630 app. § 1630.2(o) (1997).

629 *Id.* at pt. 1630 app. § 1630.15(b)–(c) (1997).

630 *See generally id.* §§ 2601–2653 (1994).

631 *Id.* at § 2612(a) (1).

632 *Id.* § 825.200(a) (1997).

633 *Id.* § 825.207(a).

634 *Id.*

635 *See id.* at § 825.205(a) (1997).

636 42 U.S.C. § 12112(b) (5) (A) (1994).

637 29 C.F.R. § 1630.2(o) (1997).

638 *See* Passamano, "Employee Leave Under the ADA and the FMLA."

639 Ibid.

640 Ibid.

641 *See* 29 U.S.C. § 2612(a) (1) (1994).

642 42 U.S.C. § 12112(5) (A) (1994).

643 *Id.*

644 *Id. at* § 12111(10) (A).

onstrates that the worker's leave would impose an "undue hardship," the employer is exempt from any obligation to provide leave as a reasonable accommodation.[645]

An employee may be eligible for leave under both laws. An example of a situation in which an employee may be covered by both laws is as follows: an employee becomes paralyzed as a result of an off-the-job car accident. The employee now has a disability under the ADA. Thus, the employer must not engage in discrimination based on disability and consider reasonable accommodations, if needed, and, in addition, if the employee requests it, grant up to 12 weeks of leave under the FMLA for treatment and recovery.[646]

Medical Certification and Employee Records

A controversial issue relating to the eligibility under both laws is that of medical certification and employee records. An ADA expert calls this situation a "potential" problem.[647] Under the ADA, medical examinations and inquiries are almost universally prohibited.[648] The ADA permits exams that are job related and consistent with business necessity.[649] According to another expert, inquiries are permitted on a job-related basis, so the potential conflict is lessened.[650] It is only within the reasonable accommodation claim that an employer may require an employee with a disability to undergo medical examinations or certifications.

Under the FMLA, the employer may request certification before the leave begins, and every 30-day period of the leave.[651] The FMLA requires that the employee provide the employer "sufficient certification," which includes the following: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) a statement that the employee is unable to perform the functions of the position.[652] Any records obtained for leave under the FMLA are to be kept in accordance with the regulations of the Fair Labor Standards Act[653] and are also subject to the confidentiality requirements of the ADA.[654]

The issue of questioning the health of an employee with a disability has warranted some concern. The general concern is that requesting this information may violate the ADA's restrictions on medical inquiries.[655] This seems particularly problematic because the FMLA allows the health care provider to answer questions about the "appropriate medical facts within the knowledge of the health care provider regarding the condition."[656] This may be in violation of the ADA provision that states that an employer "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 or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[657]

To avoid any violations of either provision, the Department of Labor has issued a guideline for this circumstance. In the event that a health care practitioner must answer questions about an employee's health, those answers must be limited in scope to the health condition for which the employee is seeking leave. For instance, if an employee is seeking leave under the FMLA, the medical questions must pertain solely to the health problem causing the leave, and should not make reference to the employee's disability.[658]

Employee Health Benefits

Once all of the requests and certifications for leave are completed and granted, another issue arises for those employees who will be absent from work for an extended period of time: the issue of benefits. For instance, will an employee

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[645] *Id. at* § 12112(5) (A) (1994).

[646] *See* 29 C.F.R. § 825.702(b) (1997).*See also* James G. Frierson, *Employer's Guide to the Americans with Disabilities Act,* 2nd ed. (Washington, DC: Bureau of National Affairs, 1995) (hereafter cited as Frierson, *Employer's Guide to the ADA*).

[647] James Frierson, telephone interview, Oct. 27, 1997 (hereafter cited as Frierson interview).

[648] 42 U.S.C. §12112(d) (4) (1994).

[649] *Id.* § 12112(5) (A) (1994).

[650] Passamano interview.

[651] 29 C.F.R § 825.305(b), 825.308(a) (1997).

[652] *Id.* § 2613(b) (1994).

[653] *Id.* 825.500(a) (1997.

[654] *Id.* § 825.500(g).

[655] Frierson, *Employer's Guide to the ADA.*

[656] Ibid.

[657] 42 U.S.C. § 12112(4) (1994).

[658] *See* Frierson, *Employer's Guide to the ADA,* pp. 4–5.

with a disability who seeks leave under either act be able to retain his or her health care insurance during leave? Since leave is not addressed directly in the ADA, the issue of whether those who take leave as a reasonable accommodation are entitled to retain their benefits comes into question. It is implied in the regulatory provision that since reasonable accommodation means: "modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities"[659] that if an employee without a disability gets some type of sick leave under company policy and does not lose his or her benefits, then neither will workers with a disability. Still, there is no guarantee under the ADA that an employee with a disability will have full coverage when on leave.

However, if the disabled worker were taking leave under the FMLA, the issue of benefit retention would not arise. In the legislative history of the FMLA, Congress stated that an employer is required "to maintain health insurance benefits during period of leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave."[660] If the employee makes copayments on the insurance premiums, then these payments must be kept up while the employee is on FMLA leave.[661]

Extended Leave

What happens, however, when an employee opts to take leave under the FMLA, but is still unable to work at the end of the 12 weeks? This is a problem that often faces employees with disabilities. Unfortunately for those who are in continual need of leave, after the 12 work weeks of FMLA leave, the employee no longer has the protections of the FMLA and must look to a workers' compensation statute or the ADA for any additional relief or protections.[662] The EEOC has noted that an employee with a disability who has used all of his or her FMLA leave is entitled to additional unpaid leave under the ADA unless it imposes an "undue hardship" on the employer.[663] If an employer claims that the absence will be an "undue hardship," then the employee will not be granted leave.

To handle such situations, one expert has suggested that employers should consider each request for extended leave "on a case-by-case basis."[664] He also notes, however, that combining these two types of leave may create an "excessive leave time that is a real burden on an employer."[665]

When employees do eventually return from leave, what are their rights? Under the ADA, job restoration is not expressly required.[666] The EEOC Technical Assistance Manual, however, lists possibilities for accommodation after ADA leave as (1) job restructuring, (2) reassignment to vacant positions, and (3) modified work schedules.[667] It does not require that the positions or the pay must be equivalent to the job the employee had before the leave.[668] In fact, the employee is not even guaranteed any position.[669] The case under the FMLA is much different. On return from leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, *pay, and other terms and conditions of employment.*[670]

Continuing Need for Awareness and Education

One expert has stated that human resources departments and company managers should be more aware of the ADA and FMLA interplay for their employees who have disabilities. Employees as well are often unaware of their rights.[671] Another expert notes that employees "may

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659 29 C.F.R § 1630.2(o) (1) (iii) (1997).

660 S. Rep. No 103–3 at 31 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 33 (1893).

661 29 C.F.R. § 825.210(a) (1997).

662 *Id.* at 825.216(d) (1997).

663 Tucker and Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law.*

664 Frierson, *Employer's Guide to the ADA.*

665 Ibid.

666 *See generally* 42 U.S.C § 12111–12117 (1994).

667 EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act,* (EEOC–M–1A), January 1992, p. I–5 (hereafter cited as EEOC, *Title I Technical Assistance Manual*). *See also* Frierson, *Employer's Guide to the ADA.*

668 EEOC, *Title I Technical Assistance Manual,* p. I–5.

669 Ibid.

670 29 U.S.C. § 2614(a) (1994).

671 Frierson interview.

know about a right to leave, but not about when they become eligible or how it works. Largely, especially in the working trades or blue collar jobs where the workforce tends to not be as sophisticated, employees generally are unaware of their federal and state rights, despite postings."[672] There is a need for more education and activity on behalf of the employer for his or her employees. EEOC and DOL are responsible for providing the necessary information to employers so that they, in turn, can provide the information to their employees.

Application of ADA to Conduct Overseas and Foreign Employers in the United States

In October 1993, EEOC released a short policy guidance on the application of title VII and the ADA to American and American-controlled employers overseas and to foreign employers within the United States.[673] This guidance explains the meaning of the term "employee" as it pertains to a citizen of the United States who may be employed overseas, either with an American company or a foreign corporation controlled by an American employer. It provides examples of how the laws apply and under what circumstances.[674] The document also provides the same information on how to apply the laws to foreign employers operating within the United States. Finally, the guidance provides instruction to investigators on how to proceed with the investigation of charges of discrimination against such employers.[675]

Discrimination by Employers Abroad

The guidance explains that Congress disagreed with the U.S. Supreme Court on whether title VII and the ADA applied extraterritorially to United States employers abroad.[676] In 1991, the Supreme Court decided the companion cases of *EEOC v. Arabian American Oil Company* and *Boureslan v. Arabian American Oil Company*.[677] The Court held that title VII of the Civil Rights Act of 1964 did not apply extraterritorially to regulate the employment practices of United States employers that discriminate against United States citizens abroad.[678]

Congress responded to the *Boureslan* decision by enacting section 109 of the Civil Rights Act of 1991,[679] which amended title VII and the ADA to provide that discrimination against U.S. citizens abroad will be covered if engaged in by an American employer or by a foreign corporation controlled by an American employer.[680] Section 109 also states that neither title VII nor the ADA will apply "to the foreign operations of an employer that is a foreign person not controlled by an American employer."[681] Finally, section 109 identifies factors to be used in assessing whether an American employer controls a foreign corporation[682] and provides a defense for violations of the ADA if compliance with the ADA would "cause" a covered entity to violate the law of the foreign country in a workplace in the foreign country.[683]

The guidance states that an initial question to be addressed in investigating charges of overseas ADA discrimination is whether the company that allegedly discriminated is an American employer.[684] An investigator should look to a company's place of incorporation in determining an employer's nationality,[685] and where an employer is incorporated in the United States, it will typically be deemed an American em-

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672 Passamano interview.

673 EEOC, "Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States," (EEOC Notice 915.002), Oct. 20, 1993 (hereafter cited as EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas").

674 Ibid., pp. 1–15.

675 Ibid., pp. 16–24, 25–30.

676 Ibid., p. 2.

677 499 U.S. 244 (1991).

678 *Id. at* 259.

679 Pub. L. No. 102–166, § 109, 105 Stat. 1071, 1077–78 (The legislative history of the Civil Rights Act of 1991 makes clear that the purpose of section 109 was to respond to the *Boureslan* decision. Section 109 was intended to "extend the protections of [t]itle VII and the [ADA] to American citizens working overseas for American employers," 137 CONG. REC. S15235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy).

680 *See id. at* § 109, 105 Stat. at 1077–78 (codified at 42 U.S.C. §§ 2000e–1, 12112c (1994).

681 *See id.*

682 *See id.*

683 *See id.*

684 EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 5.

685 Ibid.

ployer.[686] Other relevant factors to consider are the company's principal place of business, the nationality of dominant shareholder or individuals holding voting control, and the nationality and location of management.[687] These factors must be considered on a case-by-case basis and no one factor is determinative.[688]

Even if an entity is not itself American, the discriminatory conduct will be covered if the entity is "controlled" by an American employer. According to the guidance, an assessment of whether there is control should include consideration of the following four factors: the interrelation of operations, the common management, the centralized control of labor relations, and the common ownership or financial control of the employer and the foreign corporation.[689] All four criteria need not be present in all cases to determine that there is control by an American employer.[690]

Under the "foreign laws defense" an employer may engage in otherwise prohibited action if compliance with the ADA would cause an employer to violate the law of the foreign country in which the workplace is located.[691] A defendant must prove three elements to establish a defense: (1) the action is taken with respect to an employee in a workplace in a foreign country, where (2) compliance with the ADA would cause the defendant to violate the law of the foreign country; (3) in which the workplace is located.[692] Under this defense, it is the employer's burden to prove that the defense is applicable and that the standards of the defense are satisfied.[693]

Discrimination by Foreign Employers Within the United States

The guidance states that ADA applies to a foreign employer if it discriminates in the United States. According to the guidance:

> By employing individuals within the United States, a foreign employer invokes the benefits and protections of U.S. law. As a result, the employer should reasonably anticipate being subjected to the title VII enforcement process should any charge of discrimination arise directly from the business the employer does in the United States.[694]

A foreign or foreign-owned employer within the United States may invoke the terms of a treaty or other international agreement that limits the applicability of U.S. antidiscrimination laws.[695] When a treaty is invoked as a defense, the guidance states that an investigator should first confirm that the identified treaty in fact exists and should ask the respondent to produce a copy of it.[696] The investigator then should determine: (1) whether the respondent is protected by the treaty; (2) if so, whether the employment practices at issue are covered by the

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[686] Ibid., pp. 5–6.

[687] Ibid., p. 6.

[688] Ibid.

[689] Ibid., p. 7 (citing 42 U.S.C. § 12112(c) (2) (C) (1994)).

[690] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 9 (citing Lavrov v. NCR Corp., 600 F. Supp. 923, 927 (S.D. Ohio 1984); EEOC, "Policy Statement on the Concepts of Integrated Enterprise and Joint Employer," No. N–915, pp. 4–5 (June 6, 1987); EEOC, "Policy Guidance: Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms," N–915.039 (Mar. 3, 1989), p. 9).

[691] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 11 (citing 42 U.S.C. § 12112(c) (1) (1994)).

[692] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 12 (citing EEOC, "Policy Guidance: Analysis of the Sec. 4(f) (1) 'Foreign Laws' Defense of the Age Discrimination in Employment Act of 1967," No. N–915.046 (Dec. 5, 1989)).

[693] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," p. 12, n.10 (citing International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, , (1991) and Mahoney v. RFE/RL, Inc., 818F. Supp. 1 (D.D.C. 1992) *rev'd on other grounds*, 47 F.3d 447 (1995).

[694] EEOC, "Enforcement Guidance on Application of Title VII and the ADA to Conduct Overseas," pp. 16–17.

[695] Ibid., p. 17.

[696] Ibid., p. 18.

treaty; and (3) if so, the impact of the treaty on the application of title VII or the ADA.[697]

Charge Processing Instructions

The guidance moves into questions intended as guidance for structuring an investigation into charges of discrimination outside the United States or by foreign employers inside the United States.[698] The guidance closes with summary statements on its main subject matter.[699]

[697] Ibid., pp. 18–19.

[698] Ibid., pp. 26–28.

[699] Ibid., p. 31.

6 Assessment of Title I Enforcement Activities: Charge Processing

One of EEOC's primary responsibilities is to receive, investigate, and resolve charges of discrimination under the ADA and other nondiscrimination in employment statutes. Persons who believe that they have been discriminated against in employment may file a charge of discrimination with EEOC or with a fair employment practices agency in their area.[1] EEOC field offices (district, area, and local offices) are the primary recipients of charges and are, in most cases, responsible for all enforcement activities, from intake to resolution.[2] EEOC Commissioners also may initiate charges of discrimination even when there is no individual charge of discrimination, often in cases where individuals may not be aware that they have been discriminated against or are unaware of their rights.[3]

After receiving a charge, EEOC investigates. At the conclusion of the investigation, EEOC issues a letter of determination of "reasonable cause" to believe that discrimination has occurred[4] or "no reasonable cause." If EEOC has found reasonable cause, it will attempt conciliation, or to arrive at an agreement between the parties under which the respondent employer agrees to voluntary compliance. If EEOC's attempts to conciliate fail, it must decide whether to go to court or to issue a right to sue notice. If EEOC determines that the case should be litigated, it files suit in Federal court on behalf of the charging party.[5] Charging parties may bring suit in Federal court once EEOC issues a right to sue notice. EEOC will issue a right to sue notice if it has dismissed a charge, if it has found no reasonable cause, or if it has found reasonable cause, conciliation efforts have failed, and EEOC has decided not to file suit itself.[6]

The Americans with Disabilities Act is a complex statute, and the vagueness and complexity of ADA concepts of "individual with a disability," "essential functions," "qualified individual," and "substantially limited" affect charge processing.[7] For example, the director of the Chicago District Office stated that the qualita-

[1] A charge of discrimination is a written document alleging discrimination by an employer in violation of the ADA or one of the other statutes enforced by EEOC. Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3201. However, individuals alleging only violations of the Equal Pay Act file "complaints," not "charges."

[2] U.S. Equal Employment Opportunity Commission (EEOC), "Organization, Mission, and Functions," p. XV–3–22. Even when complainants contact headquarters about their complaint, they are sent to the appropriate field office for disposition.

[3] Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3202.

[4] EEOC finds "reasonable cause" when it has found that "it is more likely than not" that discrimination has occurred. Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3501.

[5] U.S. General Accounting Office, *EEOC's Expanding Workload*, fig 1, p. 5.

[6] *See* Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, p. 0:3502.

[7] Kathryn Moss and Matthew C. Johnsen, "Employment Discrimination and the ADA: A Study of the Administrative Complaint Process," *Psychiatric Rehabilitation Journal*, vol. 21, no. 2 (Fall 1997) p. 118.

tive differences between the ADA and other statutes that EEOC enforces have presented difficulties. Because of the complexities of the law and its relative newness, EEOC has yet to take on some of the more serious issues, as it has with other laws. In addition, EEOC may have underestimated the difficulties staff has had with the law.[8] An investigator in the Oklahoma Area Office stated that ADA cases need more thorough investigation than charges filed under other statutes enforced by EEOC.[9] A trial attorney noted that the difference between litigating ADA cases and other cases is that the ADA is still rather new, and there are some differences across the circuits on certain issues.[10] The enforcement manager in the Los Angeles District Office stated that the ADA is not necessarily more complex than other laws, but more steps are necessary in handling an ADA case.[11]

EEOC staff believes that the agency has done a good job, overall, of enforcing the ADA.[12] Many noted that since the implementation of the Priority Charge Handling Procedures, their jobs have not necessarily changed. However, one EEOC official stated, the implementation of the new procedures has empowered staff. Investigators have more autonomy in charge processing, there is more interaction between investigators and attorneys, and there are fewer layers of review. Thus, charge processing is handled more efficiently than before.[13]

People outside of the EEOC generally appear to believe that EEOC staff is adequately trained and handling complaints properly,[14] but that the agency has too few resources to handle the large number of charges it receives.[15] For instance, the assistant commissioner of the State of Tennessee's Division of Rehabilitation Services wrote that "two EEOC investigators cannot appropriately investigate ADA complaints for two-thirds of this state (Middle and East TN) in a timely manner" and urged increased funding and staff to implement and enforce the ADA.[16] A perennial complaint about EEOC's charge processing is that it takes too long for EEOC to resolve complaints.[17] A representative of one of the National Institute on Disability and Rehabilitation Research's disability and business technical assistance centers wrote that "[t]he time period from filing to resolution is a hardship on most individuals and many give up or decide not to file because they have heard from other people that it takes a long time or have had other experiences with the process."[18] Several in-

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[8] John Rowe, District Director, Chicago District Office, EEOC, telephone interview, Apr. 16, 1998, pp. 1–2 (hereafter cited as Rowe interview).

[9] Dick Valentine, Investigator, Oklahoma Area Office, EEOC, telephone interview, Apr. 15, 1998, p. 2 (hereafter cited as Valentine interview).

[10] Toby Costas, Trial Attorney, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998, p. 2 (hereafter cited as Costas interview).

[11] Rosa Viramontes, Enforcement Manager, Los Angeles District Office, EEOC, telephone interview, Apr. 10, 1998, p. 2 (hereafter cited as Viramontes interview).

[12] *See* Spencer Lewis, District Director, New York District Office, EEOC, telephone interview, Apr. 9, 1998, p. 1 (hereafter cited as Lewis interview); Cynthia Pierre, ADR Coordinator/Deputy Director, Chicago District Office, EEOC, telephone interview, Apr. 15, 1998, p. 1 (hereafter cited as Pierre interview); Jeffrey Bannon, Regional Attorney, Dallas District Office, EEOC, telephone interview, Apr. 15, 1998, p. 1 (hereafter cited as Bannon interview).

[13] Pierre interview, p. 1.

[14] *See, e.g.*, Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, Inc., letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), Apr. 6, 1998, attachment, p. 3 (hereafter cited as Bower letter); Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 3 (hereafter cited as Ringer letter) (stating: "EEOC's field staff is performing admirably under a tremendous volume of cases. . . . Staff appear trained."); Kathy Ertola, Assistant ADA Coordinator, California Department of Social Services, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 26, 1998, p. 2 (stating: "The charge processing system in the EEOC in San Francisco has been fine.").

[15] Carl Brown, Assistant Commissioner, Division of Rehabilitation Services, Department of Human Services, State of Tennessee, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, attachment, p. 2.

[16] Ibid., attachment, p. 1.

[17] *See, e.g.*, David Eichenauer, Access to Independence and Mobility, fax to Nadja Zalokar, Director, American with Disabilities Act Project, USCCR, June 4, 1998 (hereafter cited as Eichenauer fax); Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, June 9, 1998 (hereafter cited as Suter letter); Bower letter, attachment, p. 3.

[18] Responses by National Institute on Disability and Rehabilitation Research Americans with Disabilities Act Technical Assistance Program grantees related to DOJ/EEOC Enforcement, Jan. 6, 1998, provided to the Commission by

dividuals wrote the Commission that proactive compliance reviews would be a useful addition to EEOC's ADA enforcement efforts because they would put employers "on notice that it may be their company that will be reviewed next and it will help to keep compliance as a major topic of everyday business."[19]

The Commission also received several specific criticisms of EEOC's charge processing: one that there had been a report that EEOC's Atlanta office, "under the pressure of enormous caseloads, is discouraging what may be legitimate cases if they are inartfully stated or if they seem difficult to prove or corroborate,"[20] another that the Chicago office had been accused of "dismissing valid complaints because of their heavy workload,"[21] and a third that EEOC had not been particularly helpful in resolving an employer's problem of how to maintain safety after EEOC determined that being able to subdue an assaultive patient was not an "essential function" of a psychiatric technician's job. According to a representative of the State of California's Department of Rehabilitation:

> In this situation the agency felt that EEOC did an incomplete job. They felt the situation was not investigated completely, especially since they were able to produce statistics on the numbers and kinds of injuries sustained by [psychiatric technicians] doing takedowns, and how their policy of pairing two technicians physically able to effect a takedown was a proven matter of safety.[22]

Another disability professional wrote:

> Some of the EEOC investigators our agency have dealt with were not sensitive to an. . .[individual's] need for assistance in developing a charge. They had expectations that an individual who felt they had been discriminated against should already know their rights and be able to identify the particular right which was violated. Rather, they should be working to help them identify the violations. Again, limited to the cases we have worked with or help assist in a referral to EEOC, the investigators were not as receptive to ADA complaints as their legal counterparts.[23]

Priority Charge Handling Procedures

Because of increasing workload and limited resources, the Chairman of EEOC appointed a Task Force on Charge Processing in 1994. The task force made several recommendations to streamline EEOC's charge processing procedures. Among these recommendations, the task force endorsed rescinding EEOC's unwritten policy, dating back to 1983, to conduct full investigations of every charge.[24] The full investigation process included obtaining relevant evidence or information, interviewing relevant witnesses, and verifying the accuracy and completeness of the evidence obtained.[25] The task force also recommended ending the practice of writing substantive no cause determinations for charges where no reasonable cause is found. Instead, the task force recommended that EEOC issue letters of determination using generic language for dismissing charges.

Another major recommendation of the task force was for EEOC to develop priority charge processing procedures to focus resources on charges with the most law enforcement potential.[26] The task force recommended that investi-

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David Esquith, National Institute on Disability and Rehabilitation Research (OCRE files), p. 3.

[19] Suter letter, attachment, p. 5; *see also* Eichenauer fax, p. 3.

[20] Ringer letter, attachment, p. 3.

[21] Suter letter, attachment, p. 5.

[22] Michelle Martin, Staff Services Assistant, Department of Rehabilitation, Health and Welfare Agency, State of California, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, OCRE, USCCR, May 11, 1998, attachment, p. 11.

[23] Amy Maes, Director, Client Assistance Program, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, attachment, p. 3.

[24] EEOC, "Charge Processing Task Force Report," p. 5. In 1993, EEOC reported that by law, each charge, except those involving age discrimination, is to be "fully investigated." As described in EEOC's manual of compliance standards, full investigation requires EEOC to investigate all charges and give all the same degree of attention. EEOC reported that this standard also applied to age discrimination cases, although this was not required. However, at a 1993 hearing, EEOC reported that in many instances, charges were not fully investigated. For example, in 1988, 40 to more than 80 percent of the charges from EEOC and fair employment practice agencies were not fully investigated. *See* General Accounting Office, *EEOC: An Overview*, Report to the Chairman, Subcommittee on Select Education and Civil Rights, Committee on Education and Labor, U.S. House of Representatives, July 27, 1993, pp. 2, 9 (hereafter cited as GAO, *EEOC: An Overview*).

[25] GAO, *EEOC's Expanding Workload*, p. 4.

[26] EEOC, "Charge Processing Task Force Report," pp. 4, 19.

gation of charges should be done in a timely manner for those cases that appear to be strong for enforcement, and to remove from the system those that appear to be nonmeritorious. EEOC would investigate the remaining charges as resources would permit.[27]

The purpose of these recommendations was to use less EEOC staff time on charges with little or no merit.[28] The recommendations were implemented in 1995 with the issuance of the new Priority Charge Handling Procedures. These procedures require staff to conduct determination counseling with the charging party to ensure that the charging party is informed of the reasons for EEOC's determination. The procedures also provide guidance on the limited situations when an office should consider reopening a case upon the request of the charging party.[29] The new procedures also provide a coordinated approach to case processing through investigation, conciliation, and litigation, in addition to technical assistance and public education.[30]

The focus of the new procedures is a charge prioritization system.[31] The procedures require all charges to be placed in one of three categories:

- *Category A* includes charges that that are priority charges under the National Enforcement Plan or the Local Enforcement Plan and charges that are likely to result in a cause finding, as well as charges where irreparable harm may result if processing is not expedited.
- *Category B* includes charges that require further investigation to determine whether they are likely to lead to a cause finding.
- *Category C* includes those charges where further investigation is not likely to lead to a cause finding.[32] Category C charges include: charges that fail to state a claim, those for which the agency has no jurisdiction, self-defeating charges, and allegations that are not credible (which includes charges by individuals who have filed a large number of repetitive charges).[33]

In March 1998, Acting EEOC Chairman Paul M. Igasaki testified before Congress on the effectiveness of the Priority Charge Handling Procedures. The new procedures, he said, "are designed to give [EEOC] the flexibility to immediately dismiss non-meritorious charges from the system. . .[and] have yielded dramatic results in a relatively short period of time."[34] About 29 percent of incoming charges are immediately dismissed or selected for further evaluation before classification.[35] A reduction of EEOC's backlog of charges has been attributed to the Priority Charge Handling Procedures. However, testimony before the House Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce revealed that much of the reduction in the backlog has been due the dismissal of category C charges.[36]

Generally, charge processing involves the following steps:

- *Intake:* The charging party is interviewed to determine the merits of the charge and to prepare a formal charge.
- *Categorization:* During or soon after intake, charges are categorized as A, B, or C, as defined by the Priority Charge Handling Procedures.
- *Investigation:* Charges are investigated in relation to the priority category they have been assigned.
- *Resolution/Closure:* Charges can be resolved through a "predetermination settlement" or other settlement, conciliation, or alternative dispute resolution. Cases are also resolved through litigation or closed when a notice of right to sue is issued to the charging party.

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[27] Ibid., p. 9.

[28] Ibid. p. 5.

[29] EEOC, "Priority Charge Handling Procedures," pp. 12–13.

[30] Ibid., p. 1.

[31] Ibid.

[32] Ibid., pp. 4–5; EEOC, *FY 1995 Annual Report*, p. 5.

[33] EEOC, "Priority Charge Handling Procedures," p. 5.

[34] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. (Mar. 3, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[35] Ibid.

[36] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 3, 1998) (statement of Helen Norton, Director of Legal and Public Policy, National Partnership for Women & Families) (hereafter cited as Norton testimony). Ms. Norton states that "significant additional resources" will be required to reduce the backlog further. Ibid.

Charge Intake

When individuals contact an EEOC office regarding a potential charge of discrimination, the office conducts "intake." During intake, EEOC staff informs the complainant of his or her rights under the law and obtains sufficient information from the complainant to develop a charge of discrimination (or to determine that the complaint is not jurisdictional or otherwise does not warrant a charge of discrimination). During this process, all charging parties must be informed of their right to file a charge and that they must file a charge to be able to file a private suit. Charging parties must also be informed of the possibility of retaliation by the respondent. They should be informed of what to expect during the processing of their charge.[37] They also should be given staff's "best initial assessment" of their evidence, to allow them to make an "informed decision" as to how to proceed, but they never should be discouraged from filing a charge.[38]

Charge intake is handled differently in the various EEOC field offices. Many offices have a rotation system in which investigative units take turns performing intake duties. For example, in the Charlotte District Office four investigative units rotate into intake on a weekly basis. Both investigators and supervisors are involved in intake. Attorneys are available during the intake process for consultation. If there is something that is compelling or that might have class implications, the investigators will talk to an attorney during intake. The Charlotte District Office used to have a permanent charge receipt unit, but now relies on the rotation system. According to the enforcement manager, with the rotation system it takes about the same amount of time to take charges; however, much more information is collected now than previously.[39]

Staff in the Los Angeles District Office spend approximately one-quarter of their time on intake. Investigative units rotate into intake every 6 weeks and are assigned to intake for 2 weeks.[40] Similarly, in the San Diego Area Office, intake is done by investigators on a rotational basis. Investigators are assigned to intake every 2 weeks.[41] In the Dallas District Office, units rotate into intake once every 5 weeks. Each unit has approximately six investigators and one supervisor.[42] In the Dallas office, a staff member usually investigates the charges taken by him or her at intake.[43]

The Chicago District Office has a pilot program to determine the feasibility of assigning staff permanently to do intake. A group of investigators is assigned to charge receipt for 5 to 6 months. Charges go to another unit for investigation. The district office has six investigators doing intake every day. Because only five staff members volunteered to be the permanent intake staff, each day a different investigator from other units is assigned to be the sixth person.[44]

According to the joint report of the Task Force on Priority Charge Handling Procedures and the Litigation Task Force, both models of intake have advantages. A dedicated intake unit with permanent staff "provides a level of consistency and specialization in the intake and categorization of charges."[45] Comparatively, according to the task forces, the rotation system "ensures that all investigators are well-versed in the [Priority Charge Handling Procedures] principles as applied to intake."[46] Thus, the task forces recommended that the Office of Field Programs assess the results of these two methods

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[37] This information can be provided in various formats, including videos, but must be accessible and provided in languages other than English if necessary. EEOC, "Priority Charge Handling Procedures," p. 6.

[38] Ibid., p. 7.

[39] Michael Witlow, Enforcement Manager, Charlotte District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Witlow interview).

[40] Viramontes interview, p. 3.

[41] Raul Greene, Investigator, San Diego Area Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Greene interview).

[42] Lillie Wilson, Investigator, Dallas District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Wilson interview).

[43] Jim Wallace, Enforcement Supervisor, Dallas District Office, EEOC, telephone interview, Apr. 14, 1998, p. 3 (hereafter cited as Wallace interview).

[44] Cheryl Mabry-Thomas, Investigator, Chicago District Office, EEOC, telephone interview, Apr. 14, 1998 (hereafter cited as Mabry-Thomas interview).

[45] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 42.

[46] Ibid.

and share the information from the assessment with the field offices.[47]

Intake varies in other ways as well. The coordination of interviews, information provided, and time spent with charging parties differs among field offices. In Dallas, people who come to the office are handled on a first come, first served basis. Charges are not taken over the phone. Sometimes potential charging parties can make an appointment if the office is very busy, but the wait is usually only 15 to 20 minutes. However, a charging party is usually interviewed as soon as he or she has filled out the paperwork. Interviews may also be scheduled in advance. During the intake interview, the investigator reviews the questionnaire that the charging party has completed (form 283).[48]

In Charlotte, potential charging parties also are served on a first come, first served basis. The office does telephone interviews for charging parties who cannot go to the office. Potential parties fill out a preinterview form and are interviewed by a supervisor before meeting with an investigator for an indepth interview. Investigators try to find out as much as possible during the interview. What is asked depends on the issues and bases the potential charging party raises during the interview.[49]

In Chicago, potential charging parties are shown a videotape while they wait for their interview. When they meet with the investigator, the investigator describes the intake and investigation processes and informs the charging parties of their rights. The investigator will assess the strengths and weaknesses of the case and informs the charging party of what will happen if EEOC takes the charge.[50] A videotape is also shown in the Los Angeles District Office, which has no appointment system. Charging parties sign in and are given an information package that describes the interview, the investigation process, their rights, and the mediation program. After the charging party has completed a questionnaire, he or she is interviewed.[51] The New York District Office has an appointment system for intake interviews, but generally, approximately 30 people come to the office daily who have not made an appointment. However, previously there was no appointment system so persons coming in to file a charge often had a long wait before their interview.[52] The New York office also receives approximately 70 phone calls per day. An investigator in this office stated that much prescreening is done over the telephone.[53]

In the Boston Area Office, a potential charging party is given a questionnaire to complete before the intake interview. The investigator reviews the questionnaire before talking to the charging party. An investigator in this office said that individuals often do not know what EEOC does, so investigators describe the mission of EEOC and the laws it enforces. They then discuss the issue in more detail. If there are sufficient facts a charge will be drafted along with an affidavit, a copy of which will be sent to the employer.[54]

An investigator in the Oklahoma Area Office stated that during an investigative unit's (comprised of three investigators) 2-week intake period, 60 appointments are scheduled, although only about 30 appointments are kept. In addition, about 120 phone calls per investigator are received, approximately one-quarter of which result in charges of discrimination. Other telephone callers ask about their rights, EEOC's responsibilities, and time limits to file claims under various statutes. Other individuals seek clarification on the statutes enforced by EEOC. Many of the callers present issues outside of EEOC's jurisdiction. Most telephone inquiries last between 2 to 30 minutes. During each intake period, staff also receives more than 40 letters from prospective charging parties. Investigators mail a questionnaire to the 8–10 indi-

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[47] Ibid.

[48] Wilson interview.

[49] Witlow interview.

[50] Mabry-Thomas interview.

[51] Viramontes interview, p. 4.

[52] Kevin Berry, Enforcement Manager, New York District Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Berry interview).

[53] Rachel Fleming, Investigator, New York District Office, EEOC, telephone interview, Apr. 9, 1998 (hereafter cited as Fleming interview).

[54] Devika Dubey, Investigator, Boston Area Office, EEOC, telephone interview, Apr. 9, 1998 (hereafter cited as Dubey interview).

viduals whose letters raise issues that might result in charges under the ADA.[55]

The March 1998 joint task force report recommended that the Office of Field Programs coordinate the information provided to charging parties. All videos, foreign language materials, and brochures should be made available to all offices. The report further recommended that the Office of Field Programs, the Office of General Counsel, and the Office of Communications and Legislative Affairs assess information needs and determine what should be developed centrally for distribution to field offices.[56]

Staff interviewed by the Commission said that intake of ADA charges does not differ greatly from intake of charges filed under other statutes; however, there are some differences. An enforcement supervisor in Dallas stated that if a person has a disability that is not apparent, staff gives that person the "ADA Letter" which tells the charging party that EEOC must receive written medical information from a physician that explains what the disability is and how it rises to the level of a disability that substantially limits a major life activity. The charging party is given 30 days to provide this information. Such cases are usually categorized as B cases, pending the receipt of medical information. It is the responsibility of the charging party to provide that information. EEOC will dismiss the case if the information is not received.[57]

An investigator in the Chicago District Office stated that with an ADA case, staff must first determine if the person's disability falls under the ADA. Staff asks charging parties to sign medical release forms to get more information on the disability. Thus, the decision of whether the person is covered under the ADA usually is not made during the intake interview.[58] Similarly, an interviewer in the Charlotte office stated that medical information and/or verification might be required, and that the investigator would have to establish the essential functions of the job during the investigation.[59] The enforcement manager in the New York District Office said that sometimes a disability is apparent (such as when a person is in a wheelchair), but in other cases further research may be needed. For example, the investigator may wish to interview witnesses to determine the nature of the disability.[60]

Charge Categorization

A, B, and C Charges

The Priority Charge Handling Procedures empowered front-line employees to categorize charges, with supervisory review.[61] During the intake interview, EEOC staff makes a determination of whether the charge falls under category A, B, or C. In addition, the joint report of the Priority Charge Handling Task Force and the Litigation Task Force identifies two categories of A cases. An A–1 case is a potential litigation vehicle. An A–2 case is one in which the investigation will likely reveal a cause finding, but the case probably will not be litigated by EEOC.[62]

Many field offices have categorized A, B, and C cases even further. For example, the Charlotte District Office has two categories for each priority level. According the enforcement manager, A–1 charges are cases in which there has been a egregious violation of the law or that raise class issues or Local Enforcement Plan issues. A–2 charges are cases in which there is enough information to determine that there likely is a violation, but do not raise "impact" issues as do A–1 charges. Charges where the information provided is insufficient to determine whether or not a violation has occurred are labeled B–4 cases; B–5 charges are those that are candidates for alternative dispute resolution. Cases in which it is obvious that there has been no violation of the law are labeled as C–6 charges. Cases in which it appears

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[55] Valentine interview, p. 2. *See also* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the EEOC, p. 2 (hereafter cited as EEOC Comments, July 17, 1998).

[56] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 42.

[57] Wallace interview.

[58] Mabry-Thomas interview.

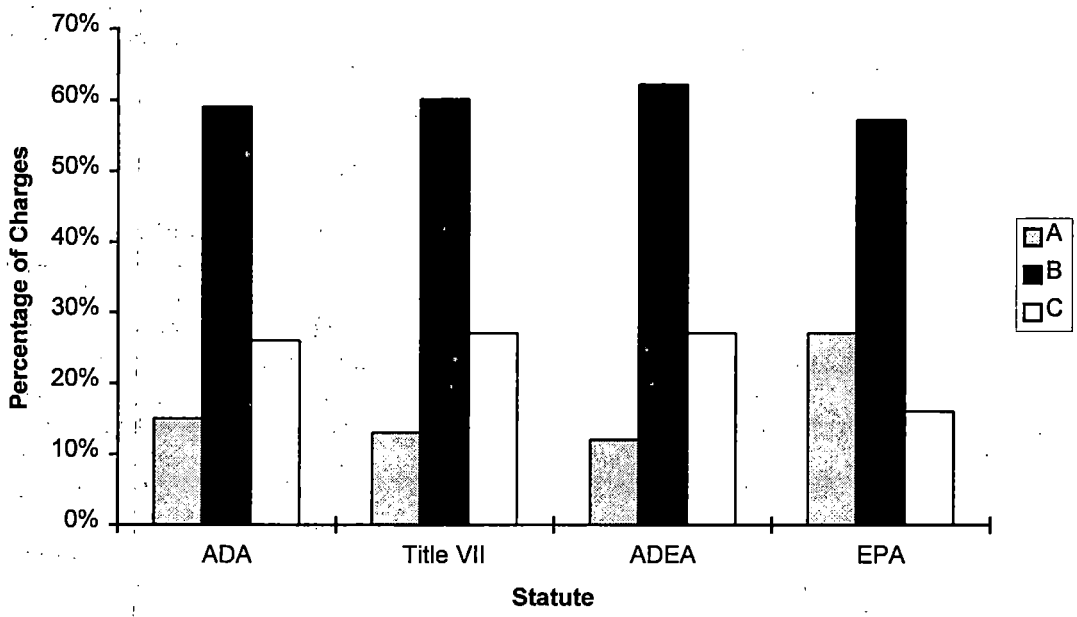
[59] Tiara Jackson, Investigator, Charlotte District Office, EEOC, telephone interview, Apr. 16, 1998 (hereafter cited as Jackson interview).

[60] Berry interview.

[61] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 44.

[62] Ibid., p. 46.

FIGURE 6.1
Processing Category by Statute



Source: EEOC, Charge Data System.

unlikely that a violation occurred, although the charging party has presented sufficient information to file a charge, are labeled C–7.[63]

Essentially, charges for which charging parties provide only partial information (so that investigators are not sure if it is likely that a violation took place) are categorized as B charges.[64] B cases are investigated until enough information is gathered so that they can be reclassified as A or C.[65] There is no need to investigate C charges. Before the new procedures, such cases had to be investigated, even though staff knew these charges had no merit.[66] In Dallas, for C cases that are dismissed during intake, the charging party is given a right to sue letter during the interview.[67]

Many staff indicated that under the new procedures there is better screening of charges, and staff can be honest with charging parties about the prospects and validity of their cases.[68] An enforcement manager in the Charlotte District Office stated that since the new procedures were implemented, staff can act more expeditiously on cases and can identify cases with potential to begin working on them more quickly than before.[69] According to the Chicago district director, charge prioritization is not new to that office, which began categorizing charges as priority "1," "2," or "3" in June 1994. The Chicago office focused on thorough interviews to enable staff to determine the merit of the charge. Both before and after the introduction of the Priority Charge Handling Procedures, staff spent between 2 and 3 hours in intake interviews. However, the district director stated

[63] Witlow interview, p. 5.

[64] *See* Wilson interview, p. 3.

[65] Viramontes interview, p. 5.

[66] Ibid.

[67] Wilson interview.

[68] *See* Berry interview; Greene interview; Thelma Taylor, District Director, Los Angeles District Office, EEOC, telephone interview, Apr. 16, 1998.

[69] Witlow interview, p. 1.

that he is not comfortable stating that staff are capable of making a determination of the priority of a charge. Thus, supervisors also are involved in charge categorization.[70]

The March 1998 joint task force report noted some problems with charge categorization. For example, the Charge Data System data indicate that C charges are not always dismissed at intake. The report stated that sometimes investigators think they need additional information before they can categorize charges as C charges. The task forces also noted an imbalance in the identification and processing of B cases. According to the report:

> Despite innovative approaches taken by some offices to ensure that B charges are recategorized in a timely manner, many offices do not have a system of case management or processing procedures in place to ensure the continuous movement, development and/or resolution of the aging B cases. One factor contributing to the build-up of the B inventory in some offices is a hesitancy on the part of investigators to recategorize a case as a C or as an A.[71]

To resolve these problems, the task forces recommended that C cases be disposed of as soon as possible, and that those offices with an aging B case inventory implement measures to ensure the movement of B cases through the investigative process. The task forces also recommended that field offices develop standard operating procedures for processing B cases.[72]

Differences in categorization of cases by statute are shown below in figure 6.1. For all four statutes enforced by EEOC, close to 60 percent of the charges are placed in category B. Category A and category C charges are distributed similarly for the ADA, title VII, and Age Discrimination in Employment Act (ADEA). Twenty-six percent of ADA charges and 27 percent of both title VII and ADEA charges are placed in category C. Only 16 percent of Equal Pay Act (EPA) charges are categorized as C. Category A charges account for 15 percent of ADA charges, 13 percent of title VII charges, 12 percent of ADEA charges, and 27 percent of EPA charges.

Data from EEOC's Charge Data System suggest that the Priority Charge Handling Procedures have been implemented differently across EEOC's field offices. Table 6.1 shows that the offices vary greatly in the percentage of charges classified as A, B, and C. For example, the percentage of the categorized charges assigned category A varies from 6.2 percent in the Birmingham and San Antonio District Offices to 46.4 percent in the New Orleans District Office. Only 2.9 percent of the cases handled by the El Paso Area Office are category A charges. Similarly, category C charges range from 4.9 percent of the categorized charges in the Indianapolis District Office to 48.1 percent of the categorized charges in the Dallas District Office. In most offices, more than two-thirds of the categorized charges are B charges.

The categorization of charges has received criticism. The director of Golden State University's Employment Rights Clinic stated that practitioners do not understand clearly the prioritization system and do not know if they can influence the decision process. Further, the director stated that categorizing cases at intake is problematic because charging parties may not know how to frame their charge so that the important legal facts are made clear. Similarly, intake personnel may not be able to determine if there are bases for discrimination other than as described by the charging party.[73]

Commissioner Charges

The *EEOC Compliance Manual* provides for the investigation of Commissioner charges in which "[r]espondents may be identified and scheduled for investigation either in the absence of an individual charge or when the bases/issues to be investigated are not adequately covered by a pending charge."[74] According to the manual:

> While the principal means for implementing Commission policy is the investigation of individual charges, EEOC initiated investigations are a necessary part of the enforcement process. Discrimination victims are

[70] Rowe interview, pp. 2–3.

[71] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 48.

[72] Ibid., pp. 44, 48.

[73] "EEOC Officials, Attorneys See Improvements With Charge, Litigation Processing Changes," *Daily Labor Report*, Bureau of National Affairs, Mar. 30, 1998, p. C–1.

[74] EEOC, *EEOC Compliance Manual*, published by the Bureau of National Affairs, § 8.1, p. 8:0001 (hereafter cited as EEOC, *Compliance Manual*).

TABLE 6.1
Priority Charge Processing, by Office

Office	Number of charges A	B	C	Total charges	Percentage of charges A	B	C
Albuquerque	153	703	200	1,056	14.5	66.6	18.9
Atlanta	412	1,641	444	2,497	16.5	65.7	17.8
Savannah	41	238	62	341	12.0	69.8	18.2
Baltimore	405	559	351	1,315	30.8	42.5	26.7
Norfolk	149	256	91	496	30.0	51.6	18.3
Richmond	179	416	295	890	20.1	46.7	33.1
Birmingham	105	1,071	527	1,703	6.2	62.9	30.9
Jackson	116	411	248	775	15.0	53.0	32.0
Charlotte	515	898	472	1,885	27.3	47.6	25.0
Raleigh	125	333	176	634	19.7	52.5	27.8
Greensboro	98	164	126	388	25.3	42.3	32.5
Greenville	88	124	54	266	33.1	46.6	20.3
Chicago	494	2,855	436	3,785	13.1	75.4	11.5
Cleveland	290	830	1,178	2,298	12.6	36.1	51.3
Cincinnati	145	657	248	1,050	13.8	62.6	23.6
Dallas	469	867	1,236	2,572	18.2	33.7	48.1
Oklahoma	102	519	491	1,112	9.2	46.7	44.2
Denver	313	1,370	932	2,615	12.0	52.4	35.6
Detroit	274	1,112	1,142	2,528	10.8	44.0	45.2
Houston	458	1,915	627	3,000	15.3	63.8	20.9
Indianapolis	399	3,269	187	3,855	10.4	84.8	4.9
Louisville	129	877	140	1,146	11.3	76.5	12.2
Los Angeles	254	796	714	1,764	14.4	45.1	40.5
San Diego	80	972	462	1,514	5.3	64.2	30.5
Memphis	167	648	210	1,025	16.3	63.2	20.5
Little Rock	183	812	296	1,291	14.2	62.9	22.9
Miami	463	2,251	700	3,414	13.6	65.9	20.5
Tampa	284	1,263	600	2,147	13.2	58.8	27.9
Milwaukee	142	1,605	492	2,239	6.3	71.7	22.0
Minneapolis	89	1,097	377	1,563	5.7	70.2	24.1
Nashville	175	1,075	327	1,577	11.1	68.2	20.7
New Orleans	490	434	132	1,056	46.4	41.1	12.5
New York	251	1,109	711	2,071	12.1	53.5	34.3
Boston	116	774	561	1,451	8.0	53.3	38.7
Buffalo	203	634	169	1,006	20.2	63.0	16.8
Philadelphia	776	1,346	426	2,548	30.5	52.8	16.7
Newark	189	610	123	922	20.5	66.2	13.3
Pittsburgh	505	1,693	70	2,268	22.3	74.6	3.1
Phoenix	655	1,095	874	2,624	25.0	41.7	33.3
St. Louis	146	915	605	1,666	8.8	54.9	36.3
Kansas City	155	835	389	1,379	11.2	60.6	28.2
San Antonio	126	1,607	303	2,036	6.2	78.9	14.9
El Paso	27	824	77	928	2.9	88.8	8.3

TABLE 6.1 (continued)
Priority Charge Processing, by Office

Office	Number of charges A	B	C	Total charges	Percentage of charges A	B	C
San Francisco	195	753	494	1,442	13.5	52.2	34.3
Fresno	21	209	88	318	6.6	65.7	27.7
Oakland	60	234	529	823	7.3	28.4	64.3
San Jose	65	178	155	398	16.3	44.7	38.9
Honolulu	40	100	44	184	21.7	54.3	23.9
Seattle	254	579	386	1,219	20.8	47.5	31.7
Washington	230	476	386	1,092	21.1	43.6	35.3
Headquarters	2	136	6	144	1.4	94.4	4.2
FEPA/Other	44	271	27	342	12.9	79.2	7.9
Totals	11,846	46,416	20,396	78,658	15.1	59.0	25.9

Source: EEOC, Charge Data System

often either unaware of their rights or unaware of discriminatory practices. While this is typically so in cases of systemic discrimination, it is also true in cases where discrimination is less pervasive. Field offices should not hesitate to recommend commissioner charges or initiate directed investigations as a complement to individual charge investigations when such action will fulfill EEOC's law enforcement mission.[75]

The Priority Charge Handling Procedures stress that Commissioner charges are an essential component of EEOC's law enforcement strategy.[76] The procedures state that "some types and incidents of illegal discrimination will not be the subject of individual charges but, nonetheless, constitute serious violations of the laws that should be the subject of enforcement action" and offer examples of such instances.[77] The procedures for Commissioner charges allow field offices to submit proposed charges directly to the Commission, rather than seeking approval from the Office of Program Operations (now called the Office of Field Operations) and to investigate these charges without headquarters supervision.[78]

Commissioner charges may also be proposed by outside organizations and/or individuals.[79] In response to an information request for this report, the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities provided an example of a request for a Commissioner charge. In the request, the general counsel for the State agency said that he was asking for a Commissioner charge because the agency did not have the authority to investigate without a specific request from an individual, nor did it have jurisdiction beyond the State border. The request further stated that "the information provided to the EEOC may lead to the conclusion that the issues are national in scope and dimension, and not unique to one State or EEOC."[80]

Acting Chairman Igasaki has stated that Commissioner charges are an important tool for eliminating discrimination. These charges can be used in cases where there are witnesses but no formal charge filed, or where there is fear of reprisal. According to Acting Chairman Igasaki,

[75] Ibid., § 8.1 (a), p. 8:0001.

[76] The procedures also apply to "directed investigations;" which are investigations initiated by EEOC staff under the Age Discrimination in Employment Act or the Equal Pay Act. EEOC, "Priority Charge Handling Procedures," p. 17.

[77] Ibid.

[78] Ibid., p. 19.

[79] EEOC, *Compliance Manual*, § 8.2, p. 8:0001.

[80] Lawrence Berliner, General Counsel, State of Connecticut, Office of Protection and Advocacy for Persons with Disabilities, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 20, 1998, enclosure.

Commissioners are restrained with the charges because they have to sign them.[81] Commissioner Reginald E. Jones stated that he only signs a Commissioner charge if he believes that there is a good reason for an investigation. He noted that a Commissioner charge triggers only an investigation.[82] Commissioner Paul Steven Miller indicated that Commissioner charges are a necessary part of strategic enforcement; EEOC must choose cases that will have national impact.[83]

Commissioner charges also have received support from the National Partnership for Women and Families. Speaking before the House Subcommittee on Employer-Employee Relations, the director of Legal and Public Policy stated that Commissioner charges are an important tool. Victims of discrimination may be afraid to file a charge with EEOC, or may not even realize they are being treated unfairly because they have no basis of comparison. Thus, Commissioner charges "can help ferret out egregious discrimination that would otherwise go unremedied."[84]

Others have questioned the use of Commissioner charges. For example, in testimony before the House Subcommittee on Employer-Employee Relations, House Speaker Newt Gingrich asked, "Why go out seeking discrimination haphazardly when it can be said that it is sitting on your doorstep?" Although the Speaker acknowledged that Commissioner charges are not necessarily "frivolous and unworthy of support," he stated that there are other obvious cases of discrimination that must be addressed.[85]

Commissioner charges account for only a small proportion of all charges filed with EEOC. Data received from EEOC indicate that only 99 ADA charges have been commissioner charges. Of all charges filed between October 1989 and September 1997, 559 were Commissioner charges, less than 1 percent of the total.

Charge Investigation

Investigations

The investigation of a charge is designed to give EEOC the information necessary to determine if there is reasonable cause to believe that discrimination has occurred. EEOC's investigative staff generally issues a request for information to the respondent employer. Once a response has been obtained from the employer, EEOC's staff decides how to proceed. EEOC can go onsite to investigate employers, during which EEOC's investigative staff can examine the employer's records and interview witnesses. EEOC has the authority to issue a subpoena to obtain access to the information necessary for reaching a determination on a charge.[86] During the investigation, an EEOC investigator can help the parties reach a settlement, although the investigator must remain neutral during the parties' negotiations.[87]

According to the Director of the Office of Field Programs, a case gets as much investigation as is needed. The investigation is completed when a cause finding is found or when the investigator determines that additional information will not lead to a cause finding.[88] All cases in category A are investigated. The Priority Charge Handling Procedures specify that "the investigation to be made in each case should be appropriate to the particular charge, taking into account the EEOC's resources."[89] EEOC field offices are to "develop a flexible process" to ensure that charges that have little merit are not "over investigated." The procedures direct investigators to decide, as soon as possible after receiving a response to their request for information from the respondent, whether to dismiss the charge, to investigate further, or pursue a settlement. The Priority Charge Handling Procedures emphasize that investigators should continually

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[81] Paul M. Igasaki, Acting Chairman, EEOC, interview, Apr. 7, 1998, p. 2 (hereafter cited as Igasaki interview).

[82] Reginald E. Jones, Commissioner, EEOC, interview, Apr. 1, 1998, p. 3 (hereafter cited as Jones interview).

[83] Paul Steven Miller, Commissioner, EEOC, interview, Apr. 2, 1998, p. 3 (hereafter cited as Miller interview).

[84] Norton testimony, p. 3.

[85] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 4 (Mar. 3, 1998) (statement of Newt Gingrich, Speaker of the House, U.S. House of Representatives) (hereafter cited as Gingrich testimony).

[86] Bureau of National Affairs, *EEOC Compliance Manual*, vol. 1, "Overview" section, pp. 0:3302–0:3307.

[87] Ibid., p. 0:3501.

[88] Elizabeth Thornton, Director, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 3.

[89] EEOC, "Priority Charge Handling Procedures," p. 9.

reassess and recategorize charges as they gather more information.[90]

The Priority Charge Handling Procedures offer "management options" for reducing the backlog of cases and for improving the coordination between investigators and attorneys. The procedures offer a number of suggestions as to what field offices can do, at their discretion, to reduce their backlogs. For instance, the procedures suggest that field offices may give backlogged charges priority or devote an entire week to older cases.[91]

The new procedures also stress the need for attorneys to be involved in the classification and investigation stages and suggest organizing investigator-attorney teams or "other collaborative arrangements" to accomplish this.[92] This need has been identified by those outside of EEOC as well. For example, the Chairman of the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce stated that attorneys should provide greater supervision over intake and investigation.[93] Similarly, the Speaker of the House stated at the same hearing that lawyers must be more involved in intake and investigation and less involved in litigation.[94]

The joint report of the Priority Charge Handling Task Force and the Litigation Task Force noted the importance of cooperation between investigative and legal units. The report stated:

> Prior to the implementation of the PCHP [Priority Charge Handling Procedures], the NEP and the LEPs, there was often considerable pressure on investigators to focus on case closure at the expense of cause development and litigation. In addition, approximately 85% of the agency's litigation docket consisted of cases on individual charges. While individual cases should be part of a diversified docket, the limited scope of these charges meant that they could not be developed into cases that would advance the law, affect broad discriminatory patterns or practices or provide relief in cases involving large numbers of people.[95]

However, attorney involvement in investigations continues to vary among the field offices. According to the joint task force report:

> in some offices, there still exists a culture where finger-pointing is the response to concerns about office enforcement results. . .we heard from some staff that the investigations unit was to blame for the lack of litigation because investigators need training and focus primarily on resolutions, or that legal does not adequately support the investigation of cause cases and does not respect the work of investigators.[96]

The Director of the Office of Field Programs stated that investigators and attorneys are working well together; the form of coordination depends on the office culture.[97] However, in his March 19, 1998, report to the EEOC Commissioners, the General Counsel stated that improvement in attorney-investigator relations was needed.[98]

Field offices have experimented with different forms of attorney-investigator interaction. Several offices have developed "hybrid" units that have both investigative and legal staff. In some offices, investigators and attorneys report to the same supervisor. In other offices, an attorney is assigned to an investigative unit to assist in investigations.[99] The Director of Field Management Programs stated that the requirement of greater coordination between investigators and attorneys is an "ongoing process."[100]

Several EEOC staff members provided examples of legal staff involvement in investigations. A trial attorney in the Dallas District Office stated that she reviews charges that have been categorized as A or B charges, but usually does

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[90] Ibid., pp. 9–10.

[91] Ibid., pp. 15–16.

[92] Ibid., pp. 15–16.

[93] *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. (Mar. 3, 1998) (statement of Harris W. Falwell, Chairman, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce, U.S. House of Representatives).

[94] Gingrich testimony.

[95] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 13.

[96] Ibid., p. 14.

[97] Thornton interview, p. 2.

[98] Report on EEOC Commission Meeting, Mar. 19, 1998, p. 3.

[99] Ibid., p. 1. *See* EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 46.

[100] Godfrey Dudley, Director, Field Management Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 7, 1998, p. 2.

not review C charges.[101] A trial attorney in Charlotte stated that since the implementation of the Priority Charge Handling Procedures, she works more closely with investigators, and at an earlier stage. She is assigned to an investigative unit to provide advice as needed. Legal staff in the Charlotte District Office review all A charges and some B charges.[102] In the New York District Office, attorneys are assigned to work with each investigative unit in the office and the area offices they serve (Boston and Buffalo). They coordinate their efforts with the supervisors of the investigative units and help to identify the cases to which they want to give the highest priority. Trial attorneys review category A charges and some category B charges if they find that the number of A charges is low and they believe there may be more.[103]

According to the enforcement manager in Charlotte, investigations in that office are done by two enforcement units, with varying participation by legal staff. The A–1 enforcement group is comprised of teams: the A–1 team, a class team, and a South Carolina team. Each team has attorneys who are involved in the investigation from beginning to end. These teams investigate charges that have potential litigation and some A–2 charges. In the A–2 enforcement group, which investigates A–2 charges and B charges, attorneys are available as counselors, but are only involved at the end of an investigation.[104]

Processing time also varies from office to office. The enforcement manager in the Charlotte District Office stated that A cases normally are assigned to investigators within 3 to 4 weeks. B cases may take up to 6 weeks to become an active investigation.[105] An investigator in the Boston Area Office stated that an investigation begins about 2 months after the intake interview occurs.[106] An investigator in the San Diego Area Office also stated that it takes about 2 months for active investigation of a case to begin. He explained that the delay is due to the backlog of cases. Each investigator has approximately 70 charges from the backlog to resolve.[107]

Throughout the investigation, charging parties are kept informed of the progress of the case in a variety of ways. Investigators may contact the charging party at certain points, when they wish to review certain information, or when more information is needed. Charging parties also may call the investigator for an update on the status of the case.[108] Respondents are provided a copy of the charge to which they can respond, but neither the charging party nor the respondent is provided access to the investigative file.[109]

In a review of EEOC's charge processing efforts, one researcher noted problems with the investigative process. The researcher charged, "There has been an incentive for investigators to find that 'there is not reasonable cause to believe that a charge is true.'" The researcher noted that during her review (September 1995 to September 1996), investigators were rated on the number of cases they closed, not the quality of their investigations.[110] The researcher also found that onsite investigations and in-person interviews were rarely done because of time and resource limitations, "boilerplate" request for information letters were commonly used, and information from respondents was not verified.[111]

EEOC investigators interviewed for this report only partially confirm these allegations. Investigators stated that there are standardized requests for information, although many investigators do modify them to apply to a particular charge.[112] Investigators also noted that information received from respondents is confirmed with supporting documentation or through inter-

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[101] Costas interview, p. 1.

[102] Lynette Barnes, Trial Attorney, Charlotte District Office, EEOC, telephone interview, Apr. 15, 1998, pp. 2–3.

[103] James Lee, Regional Attorney, New York District Office, EEOC, telephone interview, Apr. 8, 1998, p. 2.

[104] Witlow interview.

[105] Ibid., p. 6.

[106] Dubey interview, p. 4.

[107] Greene interview.

[108] *See* Wallace interview, pp. 4–5.

[109] Ibid., p. 5; Mabry-Thomas interview, p. 5; Dubey interview, pp. 4–5.

[110] Kathryn Moss, "Psychiatric Disabilities, Employment Discrimination Charges, and the ADA," report prepared for U.S. Department of Education, Office of Special Education and Rehabilitative Services, National Institute on Disability and Rehabilitative Research, Sept. 30, 1995—Sept. 28, 1996, pp. 19–20.

[111] Ibid., pp. 18–19.

[112] *See* Wilson interview, p. 4; Witlow interview, p. 6; Taylor interview, p. 4; Valentine, p. 5.

views.[113] However, one investigator noted that unless there is reason to question the credibility of respondent-provided information, an investigator will continue the investigation assuming what each side has told and provided to EEOC is true.[114] Further, the enforcement manager in the Dallas District Office stated that onsite investigations often are not done at respondent's sites outside of the Dallas area, due to the large geographical area covered by the office and a limited travel budget.[115]

Determinations

The Priority Charge Handling Procedures state that substantive no cause determinations will no longer be issued. Charging parties will be provided a "short-form" determination stating that the investigation failed to disclose a violation, using the standard language:

> Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge.[116]

The procedures state that because the determination no longer explains in detail the disposition of the charge, determination counseling is critical. The procedures provide four options for communicating the reasons for the determination to the charging party: in-person interview, telephone or conference call, written statement, and referrals to a private attorney, civil rights organization, or advocacy organization. Offices are free to adapt the options or develop alternative ways of communicating the reasons for the determination.[117]

Most offices attempt to inform the charging party by telephone when a no cause determination is made. In the Charlotte District Office, the charging party is given 5 days to provide additional information; then the case is dismissed.[118] The regional attorney for the Los Angeles District Office stated that issuing a "no cause" finding would be misleading because it would suggest that EEOC had investigated. Thus, a standard letter of determination is issued. However, the charging party is notified of the reasons for the determination either by telephone or in writing. The regional attorney added that the Los Angeles District Director is quite open to reconsidering cases because they do not do a full investigation, and thus there is room for error.[119]

The 1998 joint task force report noted that some offices do not consistently do determination counseling to inform charging parties of the reasons for a determination. The task forces recommended that field offices should improve communications with charging parties and respondents and "work towards the agency's goal of open and full disclosure of [its] procedures and decisions."[120] Further, the task forces recommended that "[f]ield offices should continue to exhibit independence and creativity in their Determination Interview techniques, as long as these techniques are consistent with the mandate of the [Priority Charge Handling Procedures]."[121]

There are no formal procedures for charging parties to request reconsideration of their cases.[122] However, the Priority Charge Handling Procedures state that although EEOC has no statutory requirements to reconsider determinations, district office directors may consider such requests if the charging party presents new evidence or a persuasive argument that the decision was wrong. The procedures state that offices should reconsider determinations only if one of three conditions has been met: misconduct by EEOC staff, presentation of substantial new evidence, or an error in interpretation of the law.[123]

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[113] *See* Wilson interview, p. 4; Dubey interview, p. 4.

[114] Mabry-Thomas interview, p. 5.

[115] Wallace interview, p. 4.

[116] EEOC, "Priority Charge Handling Procedures," p. 11.

[117] Ibid., p. 12.

[118] Witlow interview.

[119] Pamela Thomason, Regional Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 14, 1998, p. 4 (hereafter cited as Thomason interview).

[120] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 49.

[121] Ibid.

[122] EEOC, "Priority Charge Handling Procedures," p. 12. *See also* Rowe interview.

[123] EEOC, "Priority Charge Handling Procedures," pp. 12–13.

Charge Resolutions and Closures

Settlements and Conciliations

The Priority Charge Handling Procedures state that settlement is "an important enforcement option."[124] A predetermination settlement is the process of resolving a case before EEOC determines if discrimination occurred.[125] The procedures outline different principles for determining whether to settle a case, depending on the category of the charge. Charges in category A that do not fall within the NEP or the relevant LEP may be settled at any time by the investigators, with or without consulting the legal staff. Category A charges that do fall under the NEP or LEP may be settled at any time in consultation with the regional attorney. Category C charges will not be settled by EEOC.[126]

EEOC's Charge Processing Task Force recommended rescinding EEOC's former policy, "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," which was issued in 1985. To encourage settlements, the task force called for giving field offices the discretion to determine appropriate relief for each charge.[127] In April 1995, the Commission approved this recommendation by adopting a motion permitting EEOC to accept settlements providing "substantial relief" in cases where a violation likely occurred and "appropriate relief" at an earlier stage in the investigation.[128] The Priority Charge Handling Procedures encourage settlement where "amicable resolution" is possible, but caution against imposing a settlement merely to close a case.[129]

When a cause determination is made, the investigator attempts to conciliate the case. The regional attorney in the San Francisco District Office stated that respondents have the opportunity to conciliate a claim at any point in the investigative process, but once EEOC decides to litigate, conciliation is not an option. The director of the Women's Employment Rights Clinic at Golden State University stated that conciliation is difficult because respondents are not provided access to EEOC's investigative file.[130] EEOC considers the investigative file to be confidential, although staff has indicated that respondents are given the information they need to respond to a charge of discrimination.[131]

The March 1998 joint task force report states that after implementation of the Priority Charge Handling Procedures the number of predetermination settlements decreased, while the monetary relief acquired from such settlements increased. Comparatively, both the number of conciliations and the dollar amount acquired in conciliations increased.[132] The report also noted that although most field offices have accepted the focus on settlements, some offices have acknowledged that their focus has been on developing A cases and reducing the inventory. Thus, the task forces recommended that "[f]ield offices should initiate settlement discussions at all appropriate stages of the investigative enforcement process to resolve cases."[133]

Alternative Dispute Resolution

Alternative dispute resolution (ADR) has been touted as one way to improve EEOC's charge processing, particularly by reducing the time it takes for EEOC to resolve complaints. For instance, the associate director of the State of Illinois Department of Rehabilitation Services wrote:

> Alternative Dispute Resolution (ADR) could dramatically change the way that ADA complaints are dealt with and the time frame involved. By setting up Alternative Dispute Resolution Centers in each state (more than one in larger states), the time frames could be lowered and become more acceptable. The present method of investigating each complaint and then issuing right to sue letters is ineffective and does not work. If the federal government gave [persons with disabili-

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[124] Ibid., p. 10.

[125] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 49. A "mediated settlement" is the result of a case that has been mediated through the alternative dispute resolution (ADR) program. Ibid. Cases referred to the ADR program are not investigated.

[126] EEOC, "Priority Charge Handling Procedures," p. 11.

[127] EEOC, "Charge Processing Task Force Report," p. 7.

[128] *See* EEOC, "Priority Charge Handling Procedures," p. 3.

[129] Ibid., p. 10.

[130] "EEOC Officials, Attorneys See Improvements with Charge, Litigation Processing Changes," *Daily Labor Report*, Bureau of National Affairs, Mar. 30, 1998, p. C–1.

[131] *See* Wallace interview, p. 5; Mabry-Thomas interview, p. 5; Dubey interview, pp. 4–5.

[132] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 50.

[133] Ibid.

ties] a choice of waiting for two years while EEOC. . .investigated their complaint or having ADR, [more persons with disabilities] would choose ADR.[134]

The Task Force on Alternative Dispute Resolution was assigned the responsibility of assessing whether alternative dispute resolution should be used at the agency.[135] Under an ADR program, mediation would take place after charge assessment and before any further investigation is performed.[136] Mediation is defined as:

> a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties *themselves* reach what they consider to be a workable solution.[137]

The difference between the settlement negotiations and conciliation EEOC has used traditionally and mediation under the ADR is that in mediation, EEOC has made no determination. Mediation allows the involved parties to develop solutions, without having a third party impose a solution. The ADR Task Force proposed a mediation model whereby the charging party and respondent meet with a neutral third party to resolve their differences.[138] Under the task force proposal, once the mediator determines the nature and scope of the dispute, the mediator can work with the involved parties to reach an acceptable resolution. If an agreement is reached, the mediator draws up the terms of the agreement. However, if a resolution cannot be reached, the mediator is to notify EEOC, and the complaint is processed through the traditional investigative enforcement channels.[139]

In 1994, before the release of the task force report, EEOC completed implementation of an ADR pilot program.[140] The program was designed to determine if charges of employment discrimination could be resolved more quickly and effectively using mediation than by relying solely on investigations.[141] In the pilot program, which was conducted in four district offices, mediation was offered to the parties as an alternative for resolving charges of discrimination. The program showed that, in appropriate circumstances, mediation was an effective method of early resolution for some types of charges.[142] The task force concluded that ADR works better (both parties are receptive) when there is an ongoing relationship between the parties (the charging party has not been terminated).[143]

The ADR task force emphasized that for mediation to work, all mediators would need to undergo EEOC training. The task force also recommended that each field office be given a new supervisory ADR administrator position at the GS–13 level. The ADR administrator would oversee the office's mediation program, including recruiting and training mediators. The task force emphasized that the credibility of the program would depend on the qualifications and training of the mediators.[144]

In 1995, at a symposium on civil rights, Rosalie Gaull Silberman, then EEOC Commissioner and Vice Chairman and one of the members of the task force, spoke on the use of alternative dispute resolution in ADA charges:[145]

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[134] Suter letter, attachment, p. 3.

[135] EEOC, "Task Force on Alternative Dispute Resolution: Report to Chairman Gilbert F. Casellas," Mar. 5, 1995, p. 2 (hereafter cited as EEOC, "Task Force on Alternative Dispute Resolution Report"). Chairman Casellas appointed three task forces to "chart a course" for the EEOC.

[136] Ibid., p. 6.

[137] Colquitt Meacham, "The Use of Mediation to Resolve Employment Discrimination Complaints," *Boston Bar Journal*, vol. 28, (May/June 1984), p. 22 (citing Cormick, "Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective," *Resolve* (Winter 1982)), as cited in EEOC, "Task Force on Alternative Dispute Report," p. 7.

[138] EEOC, "Task Force on Alternative Dispute Resolution Report," p. 7.

[139] Ibid., pp. 7–8.

[140] The pilot program began in 1992 in four district offices. In the program, more than one-half of the charges mediated were resolved, and the mediations were completed in an average of 67 days. In cases where the charging party was still employed, 48 percent of the respondents chose mediation. Where the charging party was terminated, 39 percent chose mediation. Ibid., p. 5.

[141] EEOC, *FY 1994 Annual Report*, p. 4.

[142] EEOC, *FY 1995 Annual Report*, p. 12.

[143] EEOC, "Task Force on Alternative Dispute Resolution Report," p. 5.

[144] Ibid., pp. 16–18.

[145] *Symposium for the Next Millennium: Evolution of Employment Discrimination Under the Americans with Disabilities Act: The Interaction of the Americans with Disabili-*

The reasonable accommodation aspects, make ADA disputes particularly appropriate for alternative dispute resolution. Proponents envision reasonable accommodation as an interactive process in which employer and employee come together, reaching a conclusion as to what reasonable accommodation would meet the employee's needs within the construct of the employer's ability to provide that reasonable accommodation. The success enjoyed thus far with ADA can be enhanced by more widespread use of ADR by employers and employees at the Commission.[146]

In April 1995, the Commission adopted the recommendations of the Task Force on Alternative Dispute Resolution for using mediation-based alternative dispute resolution to promote earlier and quicker dispute resolution of charges,[147] and in July 1995, the Commission issued its Policy Statement on Alternative Dispute Resolution which confirmed the EEOC's commitment to use voluntary alternative methods for resolving disputes in all of its activities, including all aspects of the enforcement process.[148]

The EEOC policy statement on ADR identifies four core principles. First, the ADR program must further the mission of the agency. Second, it must ensure fairness for both charging parties and respondents. Thus, the program must be voluntary for the parties involved, a neutral third party must facilitate the process, confidentiality must be maintained, and any agreement reached must be enforceable.[149] Third, the agency's ADR program is to be flexible so that it can respond to the differing challenges faced by the agency and its individual offices. Workload, geographic, and cultural differences must be taken into account. Further, the ADR program must provide for training and evaluation.[150]

The ADR program was to be instituted in EEOC offices nationwide during 1997.[151] The Director of the EEOC St. Louis District Office predicted that about 70 percent of the charges filed with her office would be handled through alternative dispute resolution.[152] She expected that by using ADR, EEOC would resolve discrimination charges more quickly, despite the agency's decreasing resources. The St. Louis office planned to use volunteers who have experience mediating employment discrimination complaints as mediators, since the alternative dispute resolution program does not require that the mediators be attorneys. The office also planned to organize a local advisory panel to make certain that the ADR program is successful.[153] However, the director admitted that EEOC's past experience has been that charging parties are more interested than companies in mediating disputes. She said that companies would have to be convinced to participate in mediation early in the process as an alternative to litigation.[154] She said that with ADR, EEOC would be able to investigate more effectively with the current number of investigators and that persons' rights will not be shortchanged under the new procedures.[155]

Given resource limitations, field offices have been given the freedom to develop their own ADR programs. According to the Director of Field Management Programs, some offices use their own staff as mediators. Some offices are using *pro bono* mediators, for whom EEOC has done training. Still other offices refer to the FEPAs for mediators. A few offices are using law students or students who are earning advanced degrees in ADR. In some offices requests for mediators are referred to a contractor and the employer and/or charging party pay for the mediation. In all cases, charging parties and respondents are informed of the options and are assured that mediation is voluntary.[156]

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ties Act and Alternative Dispute Resolution, Johns J.L. Comm., vol. 10 (Summer 1995), p. 573.

[146] Ibid., p. 586.

[147] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 5.

[148] EEOC, "National Enforcement Plan," p. 9.

[149] EEOC, "EEOC Policy Statement on Alternative Dispute Resolution," July 17, 1995.

[150] Ibid.

[151] EEOC, "Strategic Plan," p. 12.

[152] "EEOC Office Ready to Implement ADR By End of July, District Director Says," Bureau of National Affairs, *Employment Discrimination Report*, vol. 9 (July 23, 1997), p. 115.

[153] Ibid., p. 116.

[154] Ibid., p. 115.

[155] Ibid., p. 116.

[156] Thornton interview. *See also* Paula Choate, Director, Field Coordination Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998 (hereafter cited as Choate interview).

In Los Angeles, for example, charging parties are informed about the ADR program during the intake interview. Most charging parties make a decision about using ADR at the time of intake. The Los Angeles District Office uses four internal mediators and several associations of professional mediators. The office is expanding to use more outside mediation associations. Outside mediators must sign a confidentiality agreement. The outside mediator, the charging party, and the respondent make arrangements to pay the fees associated with mediation, if any; EEOC is not involved in the monetary aspects. Outside mediators are professional mediators with a minimum of 2 years experience. Before they are allowed to mediate EEOC cases, they are given an orientation. All of the investigators in the Los Angeles District Office went to a formal certified mediation training course. In addition, support staff have gone through at least basic mediation training and most of them advanced training.[157]

To ensure confidentiality and neutrality, EEOC staff who are mediators in the Los Angeles District Office are assigned full time to the ADR unit. Although they carried over some cases, they cannot mediate those cases, and after they have completed those cases, they will no longer investigate charges. Further, mediators are not given access to the investigative files of the cases they are mediating. The mediator only receives the information that the respondent and the charging party provide during the mediation, and then that information is destroyed. The investigative file goes to investigators initially. If a case is undergoing mediation, the file is pulled and sequestered, so that an investigation will not take place. The mediator does not communicate with the investigator; they are physically segregated in the office.[158]

The ADR coordinator in Los Angeles said that a respondent or a charging party who has any concerns about integrity can use a private mediator. However, most employers and charging parties use EEOC's program rather than a private program, because the EEOC staff in the Los Angeles District Office are well trained. To ensure that outside mediators are unbiased, the ADR coordinator ensures that the mediators he uses are highly experienced; they have had extensive mediation training and settlement experience. They get additional training on the particular form of mediation EEOC does.[159]

The New York District Office worked with Cornell University to train volunteer mediators. The volunteers are primarily attorneys, professional mediators, and instructors. The 2-day training course covered what EEOC does, the laws EEOC enforces, the charge processing procedures, sample cases, and previous cases and remedies. Approximately 20 volunteer mediators work with the New York District Office, and an additional 19 volunteer mediators work with the Buffalo Area Office.[160] To ensure confidentiality, all parties in the mediation sign confidentiality agreements. Further, investigative files are color coded to alert staff that the case is in the ADR unit.[161]

Charges that are categorized as A or B charges are considered for mediation; C charges are not submitted to mediation. However, some A charges, such as class cases with all parties identified, and charges raising national issues that need to be investigated and decided, also are excluded from the mediation process. For example, a charge of discrimination involving English-only rules or a novel issue relating to immigrants would not be eligible for mediation.[162]

EEOC officials noted that it is often difficult to get employers to use mediation, which leads to a low participation rate. The Los Angeles District Office, for example, has a respondents' acceptance rate of 36 percent.[163] Employers have a variety of reasons why they do not want to use mediation. Some may feel that the charge is meritless; others may not want to spend the time; or others do not understand the process.[164]

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[157] Doug Herrera, Program Analyst, Los Angeles District Office, EEOC, telephone interview, Apr. 13, 1998 (hereafter cited as Herrera interview).

[158] Ibid.

[159] Ibid.

[160] Michael Bertty, ADR Coordinator, New York District Office, EEOC, telephone interview, Apr. 8, 1998 (hereafter cited as Bertty interview).

[161] Bertty interview.

[162] Herrera interview. *See also* Bertty interview; Wallace interview.

[163] That is, of those charging parties who agreed to use ADR, only 36 percent of respondents agreed. Herrera interview.

[164] Ibid.

It is difficult and resource intensive to educate employers and unions about ADR. Unions are just as opposed to mediation as employers are. According to the ADR coordinator in Los Angeles, with additional resources to educate people, there would be more success with ADR. On average, employers must be contacted five times before they say yes or no. Thus, it takes twice as much time to set up a mediation as it takes to complete it.[165]

According to the ADR coordinator, the ADR program in the Los Angeles District Office is advanced relative to those in most other district offices. It is unusual for a district office to have four investigators assigned full-time to the ADR program. In addition, the office can call upon 170 private mediators. Because Los Angeles District Office is understaffed in a number of areas, some people question why the office has four investigators in the ADR unit. According to the ADR coordinator, that would be less of a concern if there was specific funding to support the ADR program.[166]

The average time to mediate and close a charge is about 171 days, less time than it takes to investigate and close a charge. EEOC officials stated that approximately 50 percent of the cases that have gone through mediation have been successful.[167] If mediation is successful, an agreement between the charging party and the respondent is signed. The cases that are successful are usually those in which the employee is still employed. These often involve issues of terms and conditions, failure to promote, or salary. Mediation is less successful when an employee is no longer employed by the company.[168] The Director of Field Coordination Programs noted that ADR may be more successful with the ADA than with other statutes that EEOC enforces because the ADA is a new law, and as employers learn about the ADA and potential violations, they may be willing to resolve issues through voluntary compliance.[169]

The new Priority Charge Handling Procedures and the use of alternative dispute resolution are reinforced in the agency's National Enforcement Plan.[170] The President's fiscal year 1999 budget request to Congress also has embraced the use of alternative dispute resolution by EEOC. The President has requested $13 million to enhance EEOC's ADR program by allowing the agency to hire contract mediators. The President's request notes that EEOC has been forced to use trained investigators as mediators, taking away "scarce investigative resources"[171] from cases that require investigation, and stresses that "EEOC will need to use more experienced and credible mediators in the future."[172] An increase in EEOC's budget for ADR has also received support from Congress. The Speaker of the House stated that increased funding should be provided to EEOC in return for reforms in six areas, including an expanded use of ADR.[173]

In his April 1998 statement before a subcommittee of the House Committee on Appropriations, Acting Chairman Igasaki noted that "[t]his modest effort is receiving praise from employees and employers who have chosen to participate. Participants are impressed with both the efficiency and the quality of the process."[174] He said that given the increase in the number of charges mediated and the benefits received in mediated cases, "a substantive increase in resources will yield significant results and improvements in service."[175]

Experts have noted that ADA disputes are a significant portion of all issues mediated through ADR. Issues such as reasonable accommodation are conducive to the ADR process.[176] Mediation

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165 Ibid.

166 Ibid.

167 Thornton interview. *See also* Choate interview.

168 Wallace interview.

169 Choate interview.

170 EEOC, "National Enforcement Plan," p. 9.

171 "Excerpts from Analytical Perspectives on Federal Budget for Fiscal 1999," released Feb. 2, 1998, as published in Bureau of National Affairs, *Daily Labor Report*, Feb. 3, 1998, p. E–5.

172 Ibid.

173 Gingrich testimony.

174 *Hearing Before the Subcomm. On Commerce, Justice, State, the Judiciary and Related Agencies of the House Comm. On Appropriations*, 105th Cong. 2 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

175 Ibid.

176 Gary Phelan, Garrison, Phelan, Levin-Epstein & Penzel, P.C., "Plaintiff's Analysis of ADA Cases," presentation at The National Employment Law Institute, *Americans with*

allows the parties to present their issues and identify their resolution objectives in a nonlegal environment, affording the opportunity to develop a creative, voluntary solution.[177] In addition, mediation is less expensive than litigation or other types of settlements.[178] However, because charging parties and respondents often are not familiar with ADR, it is one of the most underutilized processes related to the ADA.

Litigation

If conciliation or any other resolution is not achieved with a charge, remedy can be sought through litigation. EEOC also can participate in a civil action in an *amicus curiae* capacity. As of September 1997, EEOC reported 98 active ADA or ADA-related cases,[179] 142 resolved cases,[180] 6 appeals, and participation as *amicus curiae* in 57 cases on issues relative to the ADA, the Rehabilitation Act of 1973, or State civil rights laws on to disability.[181]

In the past, EEOC has been criticized for failing to litigate more cases. For example, a 1993 GAO study reported that of the total charges received each year, EEOC litigates less than 1 percent. In GAO's report, EEOC stated that it had no plans to increase either staff in the Office of General Counsel or litigation efforts.[182] The Charge Processing Task Force recommended that EEOC not be required to litigate every case where reasonable cause had been found because of limited resources. It recommended discretion to choose those cases that support the National and Local Enforcement Plans.[183] The task force recommended that the field offices be given discretion to distinguish between "reasonable cause" cases and cases that are "litigation worthy" and decide whether to litigate a case. The task force further recommended that the Commission only review litigation decisions for certain types of cases. Cases recommended for such reviews included ADA cases, cases involving major expenditure of resources, and cases identified as raising novel legal issues or having the potential for adverse publicity. All other decisions to file litigation should be delegated to the General Counsel or the designee(s).[184]

In addition, EEOC and the Department of Justice (DOJ) do not coordinate their ADA litigation activities very well. This is particularly true with regard to employment issues under title II (State and local employers). DOJ only litigates a small portion of its State and local employment cases. Part of the problem is that there is not much employment expertise at DOJ.

Under the National Enforcement Plan, the General Counsel is delegated the authority to make the decision to commence or intervene in all litigation except cases involving a major expenditure of resources; cases where the EEOC has not adopted a position through regulation, policy guidance, decision, or compliance manuals; cases where the likelihood of controversy may warrant Commissioners' consideration; and all recommendations in favor of agency participation as *amicus curiae*.[185] Under title VII and the ADA, EEOC must seek the court's permission to intervene in a case by certifying that the case is of general public importance.[186]

In the NEP, the Commissioners delegated to the General Counsel the authority to refer public sector title VII and ADA cases that fail conciliation to the Department of Justice, as well as to redelegate this authority to regional attor

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Disabilities Act Briefing, Washington, DC, Apr. 30, 1998, p. 2 (hereafter cited as Phelan presentation).

177 Ibid., pp. 5–6.

178 Ibid.; and David K. Fram, Director, ADA and EEOC Services, National Employment Law Institute, "Update on Who is an 'Individual with a Disability' Under the ADA," presentation at The National Employment Law Institute, *Americans with Disabilities Act Briefing*, Washington, DC, Apr. 30, 1998 (hereafter cited as Fram presentation).

179 EEOC, "Docket of Americans with Disabilities Act (ADA) Litigation, As of September 30, 1997," p. 7 n.1 (hereafter cited as EEOC, "ADA Docket").

180 Ibid., p. 30 n.2.

181 Ibid., p. 73 n.3. Appellate cases are currently under appeal or have been decided on appeal. The docket lists 22 issues, including accessibility, disability benefits, harassment, health insurance coverage, promotion, reasonable accommodation and record keeping. Ibid., Table of Contents.

182 GAO, *EEOC: An Overview*, p. 12.

183 EEOC, "Charge Processing Task Force Report," p. 21.

184 Ibid., pp. 21–2.

185 EEOC, "National Enforcement Plan," p. 8.

186 EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 19. *See* 42 U.S.C. § 2000e–5(f)(1)(1994).

TABLE 6.2
EEOC Involvement in Cases by Issue

Issue	*Number of cases*		
	Trial docket	Appellate docket	*Amicus curiae*
Accessibility	1	1	0
Arbitration	0	0	1
Association	2	0	0
Confidentiality	16	0	0
Demotion	2	0	1
Disability benefits	6	1	3
Disability-related inquiries	41	1	3
Dual filing	0	0	1
Forced leave	9	0	0
Harassment/hostile work environment	8	0	0
Health insurance coverage	17	0	3
Hiring	61	1	3
Limiting, segregating, and/or classifying	10	0	0
Post and/or keep posted EEOC notices	1	0	0
Promotion	4	0	1
Qualified individual with a disability/disability	0	0	28
Reasonable accommodation	81	3	13
Record keeping	6	0	1
Reinstatement	13	0	0
Retaliation	12	0	0
Termination	113	2	18
Terms and conditions	24	0	0
Total*	427	9	76

* Because many cases involve more than one issue, the total number of cases in the table does not equal the total number of cases in which EEOC has been involved.

Source: EEOC Charge Data System.

neys.[187] The NEP also gives the General Counsel the authority to redelegate to regional attorneys the authority to start litigation.[188] However, the General Counsel did not redelegate litigation authority for ADA cases. According to an Assistant General Counsel in Litigation Management Services, regional attorneys recommend ADA cases for litigation to the General Counsel, who approves the case or forwards it to the Commissioners for approval.[189] If the case is approved for litigation, the trial attorney files the case and handles the case like any other.[190] The joint report of the task forces on litigation and priority charge handling procedures recommended that 5 years of experience with the ADA was sufficient for regional attorneys to be able to make litigation decisions on ADA cases.[191]

EEOC has litigated cases, or participated as *amicus curiae*, on a variety of ADA issues. Trial cases are handled primarily by trial attorneys in the field offices, with the exception of cases litigated by the Systemic Litigation Services unit of the Office of General Counsel (OGC). Appeals cases are handled by attorneys in OGC's Appel

[187] EEOC, "National Enforcement Plan," p. 8.

[188] Ibid.

[189] Jerome Scanlan, Assistant General Counsel, Litigation Management Services, Office of General Counsel, EEOC, interview, Apr. 6, 1998.

[190] Katherine Bissel, Trial Attorney, New York District Office, EEOC, telephone interview, Apr. 16, 1998. *See also* Lee interview.

[191] EEOC, *Priority Charge Handling Task Force/Litigation Task Force Report*, March 1998, p. 18.

TABLE 6.3
EEOC Involvement in Cases by Impairment

	Number of cases		
Impairment	**Trial docket**	**Appellate docket**	***Amicus curiae***
Arm/shoulder/hand	10	0	1
Asthma	3	0	1
Back impairments	32	0	5
Blood disorders	1	0	1
Cancer	16	0	2
Cardiovascular/heart	8	0	2
Cumulative trauma disorder/ carpal tunnel syndrome	9	0	2
Diabetes	12	0	0
Emotional/psychiatric impairments	11	2	1
Epilepsy/seizures	12	1	6
Hearing impairments	16	0	2
HIV/AIDS	36	0	5
Knee/leg	7	0	0
Mental retardation	1	0	0
Mobility	7	1	1
Neck/head	1	0	0
Obesity	2	0	1
Paralysis	6	0	0
Speech	3	0	0
Spinal	7	0	2
Substance abuse	5	0	1
Visual impairments	6	0	1
Other	36	1	6
Total*	247	5	40

* Because some cases involve more than one impairment, the total number of cases in the table does not equal the total number of cases in which EEOC has been involved.

Source: EEOC, Charge Data System.

late Services unit who also prepare *amicus curiae* briefs. Table 6.2 describes EEOC's involvement in litigation by the issues involved. The issues EEOC has litigated the most are termination (113 cases litigated), reasonable accommodation (81 cases), and hiring (61 cases). Appeals cases have involved the issues of accessibility, disability benefits, hiring, reasonable accommodation, termination, and the definition of disability and whether a person is a qualified individual with a disability.[192] EEOC also has written a number of *amicus* briefs on the definition of disability/qualified individual with a disability (28 briefs), termination (18 briefs) and reasonable accommodation (13 briefs).[193]

EEOC also tracks its litigation by the disability or impairment involved in the case, as shown in table 6.3. EEOC has litigated 36 cases

[192] According to EEOC, this issue: "encompasses cases where the issue is whether the individual is substantially limited in a major life activity, i.e., is the person an individual with a disability, and also where the issue is whether the individual can be considered a qualified individual with a disability because, for example, s/he stated in another forum for purposes of obtaining disability benefits that s/he was unable to work because of a disability. The latter issue often overlaps with the issue of judicial estoppel." EEOC, "ADA Docket," p. 119.

[193] Data derived from EEOC, "ADA Docket," pp. 105–41.

involving HIV/AIDS. EEOC has also been involved in a number of cases involving back impairments (32 cases litigated) and cancer (16 cases litigated). Appellate cases have involved emotional/psychiatric impairments (2 cases), epilepsy/seizures (1 case), and mobility impairments (1 case). EEOC's *amicus curiae* participation has focused on a number of impairments, including emotional/psychiatric impairments (6 briefs), HIV/AIDS (5 briefs), back impairments (5 briefs), and cancer (2 briefs).[194]

According to an Assistant General Counsel in Appellate Services, the decision to appeal a case is made based on the chances of success, in light of how the case has progressed.[195] Similarly, in deciding whether to file an *amicus* brief, EEOC looks at cases at the appeals level that might resolve unsettled issues of law. The Assistant General Counsel stated that *amicus* participation is an important part of policy because often there are questions about the existing regulations or guidance. Such documents cannot always address the many applications of the policy, nor can they anticipate all of the issues that might be related. Further, if EEOC's position has not been accepted in one court and an issue is up for trial in another court, EEOC might get involved in an attempt to influence the outcome.[196]

Data from the Charge Data System show that the district offices vary by the number of ADA cases they have litigated, as shown in table 6.4. The EEOC District Offices in Detroit, Memphis, Philadelphia, and Miami have litigated the most ADA cases with 23, 16, 15, and 13 cases, respectively. The Baltimore, Chicago, and Indianapolis District Offices have each litigated 12 ADA cases, while Phoenix has been involved in 11 ADA cases. The remaining district offices have been involved in 9 or less ADA cases.[197]

TABLE 6.4
ADA Cases Litigated by EEOC District Offices

District office	No. of ADA cases
Atlanta, GA	3
Baltimore, MD	12
Birmingham, AL	6
Charlotte, NC	5
Chicago, IL	12
Cleveland, OH	4
Dallas, TX	7
Denver, CO	1
Detroit, MI	23
Houston, TX	9
Indianapolis, IN	12
Los Angeles, CA	5
Memphis, TN	16
Miami, FL	13
Milwaukee, WI	6
New Orleans, LA	2
New York, NY	8
Philadelphia, PA	15
Phoenix, AZ	11
San Francisco, CA	5
Seattle, WA	8
St. Louis, MO	6

Source: EEOC, Charge Data System.

Top EEOC officials agree that litigation is one way that EEOC can have an impact. Acting Chairman Igasaki has stated that the mission of EEOC is to eliminate discrimination, not just to handle cases. Therefore, litigation and other tools, such as Commissioner charges, are important activities.[198] Similarly, Commissioner Miller stated that as a small, underfunded agency, EEOC must focus its resources on cases that will have a wide impact.[199] According to the General Counsel, it is important for EEOC to get involved in cases where it can advance the public interest. In cases of egregious violations of the law, EEOC involvement in a lawsuit shows that the agency is serious about enforcing the law.[200]

[194] Data derived from EEOC, "ADA Docket," pp. 142–63.

[195] Vincent Blackwood, Assistant General Counsel and Robert Gregory, Senior Attorney, Appellate Services, Office of General Counsel, EEOC, interview in Washington, DC, Apr. 2, 1998, pp. 1–2 (hereafter cited as Blackwood interview).

[196] Blackwood interview, p. 2.

[197] EEOC, Charge Data System, data from October 1, 1989, to September 30, 1997, prepared March 9–11, 1998, by the Charge Data System Division, Office of Information Resources Management Services (hereafter cited as EEOC, Charge Data System).

[198] Igasaki interview.

[199] Miller interview.

[200] EEOC Commission Meeting, Mar. 19, 1998.

Charges of Discrimination

In addition to ADA charges, charging parties may file charges of discrimination with EEOC under title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Age Discrimination in Employment Act. Charge intake and investigation are essentially the same for the four laws. EEOC and FEPA staff enter data on charges into the Charge Data System (CDS) after charge intake. (FEPAs are required to enter data into the system within 5 days of accepting a charge.[201]) The CDS is maintained by the Charge Data System Division in EEOC's Office of Information Resources Management Systems. The database maintained by the CDS Division is updated daily by the field offices as staff process charges. The field offices and FEPAs electronically transmit updates to the database. Every quarter the Program, Planning, and Analysis Division of the Office of Research, Information, and Planning reconciles the data and produces reports. Errors found during the data "cleaning" process are reported to the appropriate field office and corrections are requested.[202]

Data from the CDS are used for internal and external reports. Data are also used in workload planning and monitoring of FEPA contracts.[203] The Program, Planning, and Analysis Division uses the data to prepare reports on charge processing, including quarterly and annual reports and responses to information requests from outside researchers.[204]

The Director of the Program, Planning, and Analysis Division stated that CDS is a more powerful system than the previous system, the Complaint Statistical Report System (CSRS). The CSRS was designed for use by field staff and did not meet the needs of all EEOC staff.[205] However, the Director noted that one improvement needed in the system is a better way of tracking bases and issues. Because charges can be filed concurrently under more than one statute, and because several bases and issues can be identified, it is not possible to distinguish benefits, bases, and issues for one statute from those of another statute. In addition, because of multiple bases, statutes, and issues, the total number of charges appears to be greater than the actual number. Staff and other researchers have experimented with different ways of reporting data on bases and issues, but the problem remains unresolved.[206]

The Director of the Program, Planning, and Analysis Division noted that the CDS does a good job of meeting the needs of headquarters staff, given that EEOC never received additional funding to develop it. The system could be improved in several ways, such as in improving the reports generated from the system.[207] Constant updating and programming is needed to keep the reconciled data up to date with the data in the national database; however, EEOC has done this only twice in the past several years. Similarly, programmers are not available to create new reports and expand the information contained in the database. For example, currently there is no report to track charges reclassified from one priority category to another.[208] Additional programming is also needed to add new data categories to the automated report used to reconcile data. EEOC is planning to update the system into an integrated management system, but has not begun the design phase of the project.[209]

Technology limitations may also affect the usefulness of the CDS. Both EEOC and outside commentators have noted that EEOC needs to upgrade its computer systems.[210] For example, the EEOC task force report on FEPAs noted that FEPAs were using computers that could not

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201 EEOC, FEPA Task Force, "EEOC's State and Local Program and Relationship with Fair Employment Practice Agencies," Mar. 15, 1995, p. XII–1 (hereafter cited as EEOC, "FEPA Task Force Report").

202 James Goldweber, Director, Program, Planning, and Analysis Division, Office of Research, Information, and Planning, EEOC, interview in Washington, DC, Apr. 1, 1998, p. 2 (hereafter cited as Goldweber interview).

203 EEOC, "FEPA Task Force Report," p. XII–1.

204 Goldweber interview, p. 1.

205 Ibid., p. 2.

206 Ibid., pp. 2–3.

207 Ibid., p. 2.

208 Ibid., p. 3.

209 Ibid., p. 2.

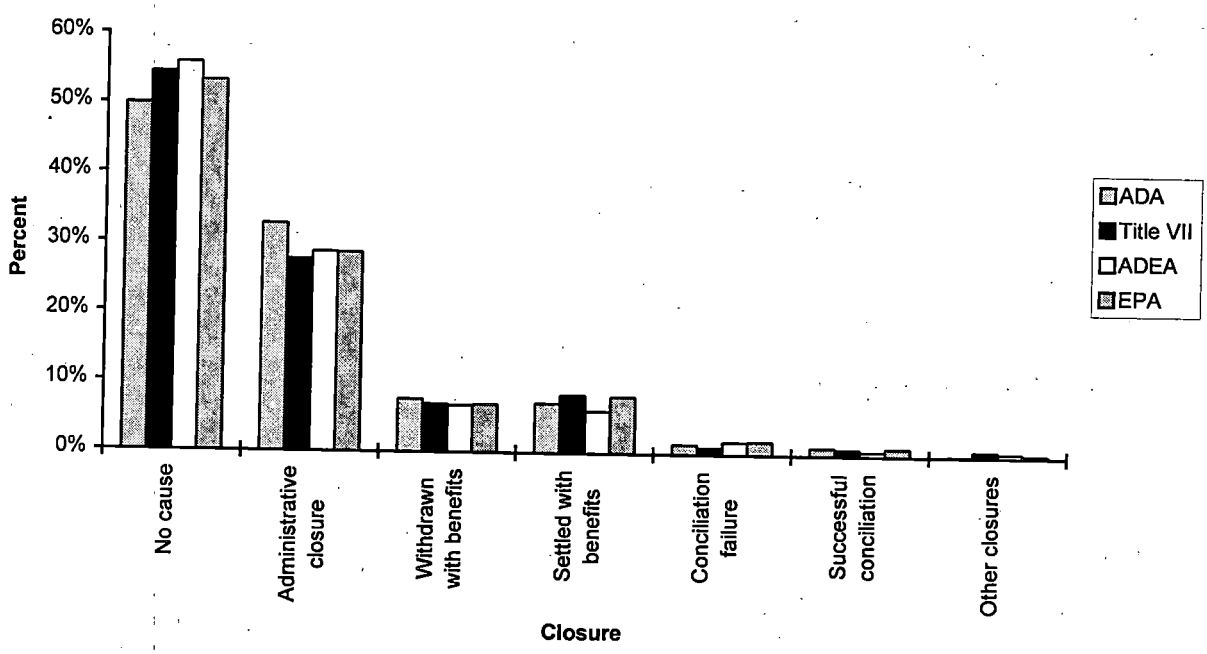
210 *The Future Direction of the Equal Employment Opportunity Commission: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce*, 105th Cong. 5 (Mar. 3, 1998) (statement of David A. Cathcart, Esq., Gibson, Dunn, & Crutcher). *See also* Igasaki interview.

TABLE 6.5
Characteristics of Charging Parties, by Statute

	ADA	Title VII	ADEA	EPA
Total number of charges	172,553	885,823	241,508	11,587
Race				
Asian or Pacific Islander	0.9	1.8	1.2	0.6
Black	16.3	46.9	13.0	14.8
American Indian or Alaskan Native	0.6	0.7	0.4	0.4
White	60.7	18.1	23.9	14.9
Other/Not specified	21.6	32.5	61.5	69.3
National origin				
East Indian	0.2	0.4	0.4	0.2
Hispanic	4.8	7.1	4.7	3.9
Mexican	1.2	2.1	1.2	0.8
Other/not specified	93.8	90.3	93.7	95.1
Sex				
Female	45.5	59.0	40.1	91.2
Male	54.2	40.6	59.4	8.1
Not specified	0.3	0.3	0.4	0.7

Note: Data based on charges received between October 1, 1989, and September 30, 1997. Charges for each statute include those filed only under the statute and those filed jointly under other statutes.
Source: EEOC, Charge Data System.

FIGURE 6.2
Closures by Statute



Source: EEOC Charge Data System.

handle the large volume of charges. Further, FEPAs had data transmission problems due to modem or phone line deficiencies and some staff were not sufficiently trained on the operation of the system. These problems lead to inaccurate and incomplete data.[211]

In regards to technology, Commissioner Miller stated that EEOC staff has no e-mail capability, no access at their desks to the Internet or legal research tools, and no easy access to the CDS.[212] Similarly, at a congressional oversight hearing, Acting Chairman Igasaki stated, "Unfortunately, the Commission has never had the resources to make the necessary investment to modernize its outdated and overburdened information systems, or build an adequate communications infrastructure."[213] He also noted that a significant portion of the proposed $37 million increase in EEOC's budget will go toward improved technology.[214]

The U.S. Commission on Civil Rights obtained data for this report from the CDS Division. Thus, the data reported below are from the national database, not the reconciled database prepared by the Program, Planning, and Analysis Division. Because these data have not been through the data "cleaning" process, some charges with incomplete or erroneously entered information were not included in the analyses.[215]

Charges Under All Statutes

Charging party characteristics vary by the statute under which the claim is filed. Charging parties may identify up to eight issues on employment policies and practices involved in discrimination charges. Issues involve various employment practices, including benefits, disciplinary measures, and wages. The majority of all EEOC charges involves involuntary termination of employment (discharge). For example, in fiscal year 1996, almost half (47.5 percent) of all EEOC charges received identified discharges. EEOC also receives many charges on the denial or inequitable application of rules, privileges, or benefits.[216] The basis for the charge must also be identified. Charging parties must state the reason, or basis, they believe they were discriminated against. Bases vary by statute and include religion, gender, national origin, race, and disability.

Table 6.5 shows that the demographic characteristics of charging parties varies by statute. Persons filing charges under the ADA are more likely to be white (60.7 percent) than persons filing charges under the other statutes (approximately 18 percent, 24 percent, and 15 percent for title VII, ADEA, and EPA, respectively). However, ADA charges are more evenly spread between males (54.2 percent) and females (45.5 percent), unlike the other statutes. There are relatively few differences among charging parties by national origin and statute.[217]

Charges differ not only in demographic characteristics of the charging party, issues involved, and bases for discrimination, but in the ways they are closed as well. EEOC identifies several closure types:

- settlement
- withdrawal with benefits
- conciliation
- unsuccessful conciliation
- no cause finding
- administrative closures
- remands[218]

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211 EEOC, "FEPA Task Force Report," pp. XII–1—XII–8.

212 Miller interview, p. 6.

213 *Hearing Before the Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations,* 105th Cong. 4 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

214 Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Education and the Workforce, 105th Cong. 8 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

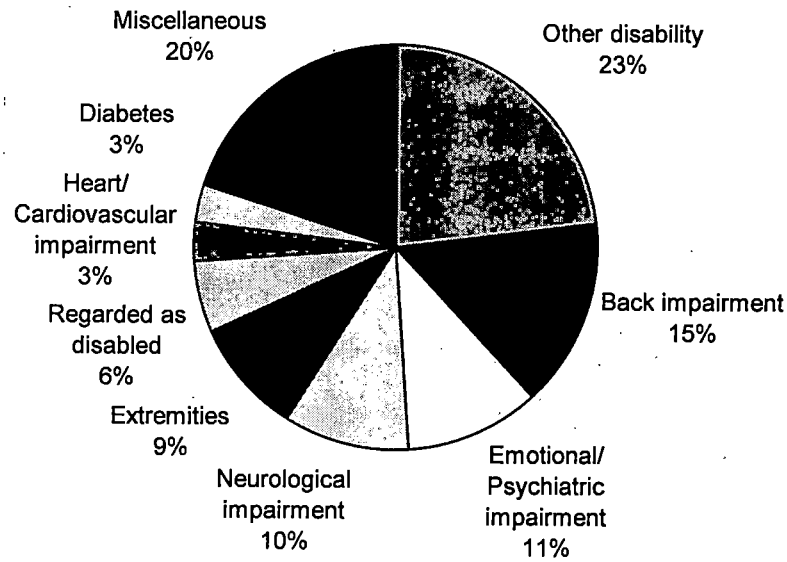
215 All data presented in this report are based on charges received by EEOC and FEPAs between October 1, 1989, and September 30, 1997. ADA charges were identified by selecting all charges which indicated ADA as the statute involved and are not date-constrained. Charges for each statute include both those filed only under the statute and those filed jointly under other statutes.

216 EEOC, National Database Automatic Reporting Facility, "EEOC Receipts, FY—1993," Oct. 26,. 1997. *See also,* EEOC, *Charge Data System (CDS) Codes,* March 1997 (hereafter cited as EEOC, *CDS Codebook*), pp. 70–75.

217 EEOC, Charge Data System.

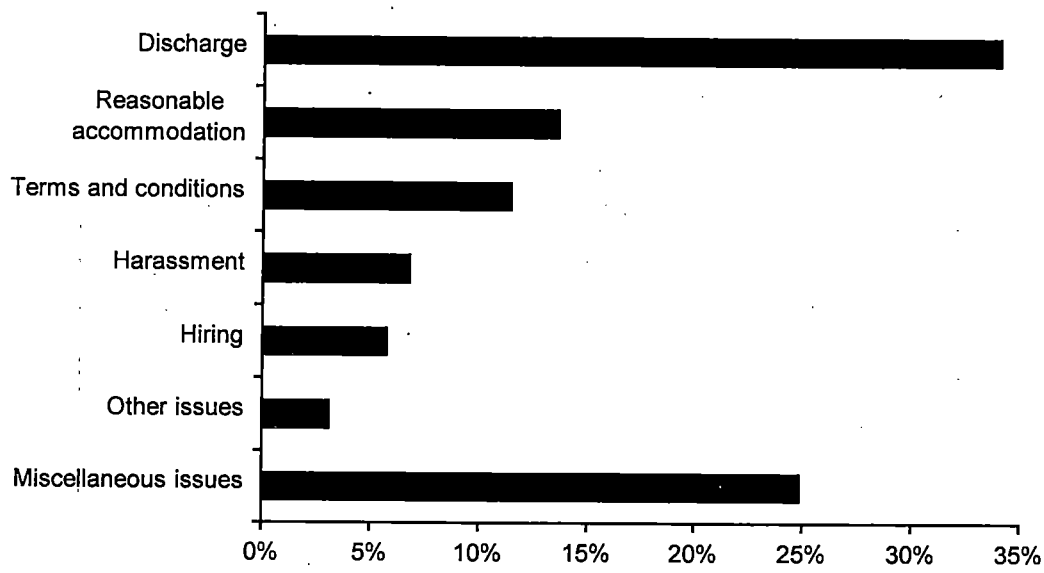
218 Remands are a small proportion of all closures. Thus, they are included with "Other Closures" in figure 6.2. Other Closures also includes cases closed by a FEPA determination, hearings discrimination finding, cases settled by the legal unit, open charges settled by the legal unit, and hearing class accepted. EEOC, *CDS Codebook,* pp. 16–40.

FIGURE 6.3
ADA Charges by Basis



Source: EEOC, Charge Data System.

FIGURE 6.4
ADA Charges by Issue



Source: EEOC, Charge Data System.

The four statutes EEOC enforces differ little by type of closure. As shown in figure 6.2, most closures result from no cause findings. Over 50 percent of charges under the EPA, ADEA, and title VII, and just under 50 percent of all ADA cases, result in no cause findings. Close to 30 percent of all closures are administrative closures, which includes notice of right to sue requested by the charging party, no jurisdiction, withdrawal without benefits, and charging party's failure to cooperate.[219] Approximately 15 percent of all charges are closed due to the charging party withdrawing the charge after receiving benefits or settling with benefits. Successful conciliations and conciliation failures are each only about 1 percent of all closures.[220] It is not clear under which closure category ADR closures would fall.

A no cause finding is issued when a full investigation fails to support the allegations.[221] However, the large number of no cause findings suggests that either many charging parties file nonmeritorious claims that waste EEOC staff time and resources, or EEOC needs to reevaluate its charge processing procedures to ensure that charges are being properly evaluated and investigated.

Charges Under the ADA

Bases

As shown in figure 6.3, ADA charges can identify a number of disabilities as the basis for the alleged discrimination. For example, between fiscal year 1992 and fiscal year 1997, one-fifth of the charges citing the ADA involved "miscellaneous" disabilities, such as mental retardation, allergies, speech impairments, etc., which, when considered individually, are each less than 3 percent of all ADA charges.[222] "Other" disabilities, disabilities not specifically identified in the EEOC charge data system, account for 23 percent of all ADA charges.

Back impairments, emotional/psychiatric disabilities, and neurological impairments account for 15 percent, 11 percent, and 10 percent of all ADA charges, respectively. Disabilities involving the extremities (such as missing digits/limbs, arthritis, and other inability to move or use certain body parts) account for 9 percent of all ADA charges.[223] ADA charges by all disabilities are presented in appendix A. Being regarded as disabled is the basis for 6 percent of all ADA charges. Having a record of a disability and having a relationship or association with an individual with a disability, respectively, account for almost 2 percent and less than 1 percent of all ADA charges. Other higher profile[224] impairments, such as drug addiction, alcoholism, and HIV/AIDS, each accounts for less than 2 percent of all ADA charges.[225]

The category "other" has changed over the years. According to the Director of the Program, Planning, and Analysis Division, when EEOC was given jurisdiction over the ADA, a committee did outreach and worked with outside groups to develop the bases to be used in writing charges. When the ADA first went into effect, the Program, Planning, and Analysis Division monitored the reporting trends closely. The categories changed as EEOC learned about what types of complaints were being filed. For instance, at first many ADA charges identified "other disability" as the basis. Thus, the list of disabilities was expanded to include more specific disabilities. Similarly, repetitive motion injury was added later after staff noted a rise in charges based on repetitive motion disorders.[226]

Issues

Charging parties may identify up to eight issues in their charge of discrimination. As

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[219] EEOC, National Database Automatic Reporting Facility, "EEOC Closures, FY—1996," Oct. 26, 1997. *See also*, EEOC, *CDS Codebook*, pp. 42–54.

[220] EEOC, Charge Data System.

[221] EEOC, *CDS Codebook*, p. 31.

[222] EEOC, Charge Data System. Impairments identified in the Charge Data System, but represented as Miscellaneous in figure 6.3 are: hearing impairment, vision impairment, cancer, alcoholism, record of disability, asthma, HIV, drug addiction, gastrointestinal impairment, other blood disorder, respiratory/pulmonary disorder, speech impairment, allergies, relationship/association with an individual with a disability, kidney impairment, mental retardation, chemical sensitivities, disfigurement, and dwarfism. *See* app. A.

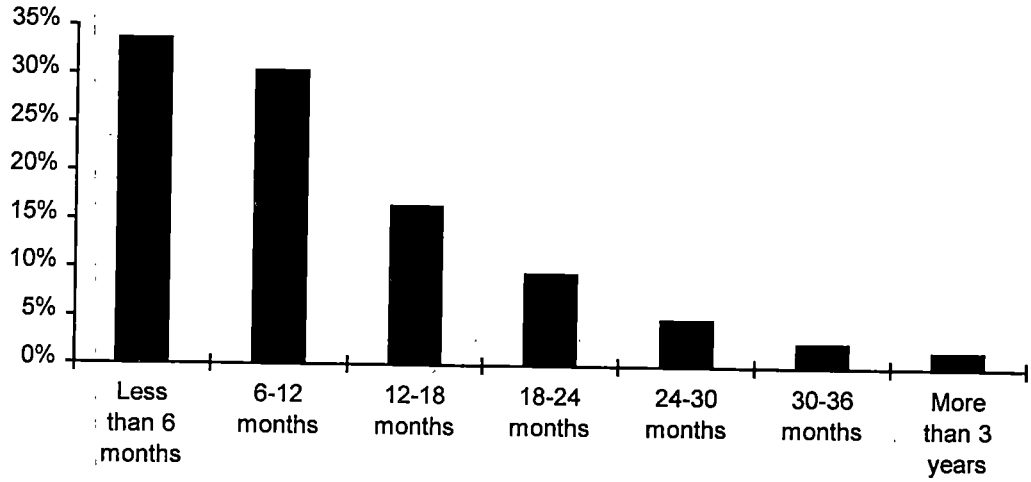
[223] EEOC, Charge Data System.

[224] See chaps. 4 and 5 for discussion of disagreements within the courts concerning the applicability of the ADA to certain disabilities and impairments.

[225] EEOC, Charge Data System. *See* app. A.

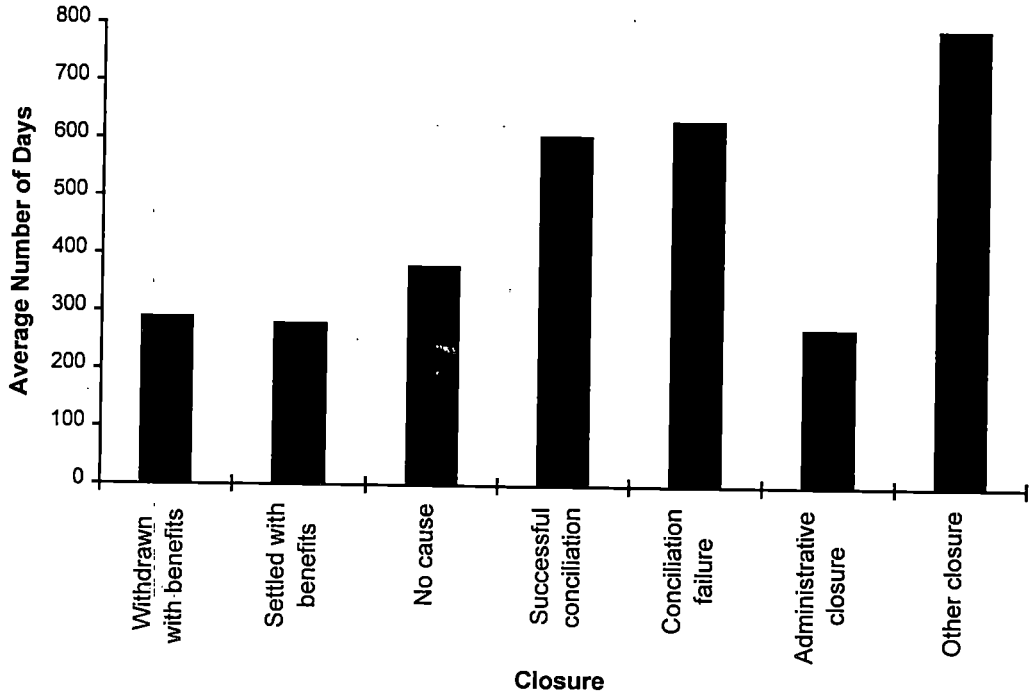
[226] Goldweber interview, p. 2.

FIGURE 6.5
Processing Time: ADA Charges



Source: EEOC, Charge Data System.

FIGURE 6.6
Average Number of Days to Close ADA Charges



Source: EEOC, Charge Data System.

TABLE 6.6
Months to Close Charge, by Processing Time

Months to close charge	Percentage of charges					
	Category A charges		Category B charges		Category C charges	
	All charges	ADA charges	All charges	ADA charges	All charges	ADA charges
0-6	22.8	22.7	31.3	30.1	44.2	45.4
6-12	26.2	26.4	27.7	27.8	20.8	21.1
12-18	16.7	16.4	16.8	17.0	16.1	15.6
18-24	11.9	12.5	11.5	12.4	10.1	9.7
24-30	8.7	9.4	6.9	6.8	5.6	5.4
30-36	7.9	6.4	2.4	3.6	1.2	1.9
36 or more	5.8	6.1	3.5	2.3	2.0	0.8

Source: EEOC, Charge Data System.

shown in figure 6.4, over one-third of ADA charges involve the issue of discharge, or involuntary termination of employment. Another 14 percent involve the failure of an employer to provide reasonable accommodation. Terms and conditions are identified in almost 12 percent of ADA charges. This issue relates to the "denial or inequitable application of rules relating to general working conditions or the job environment and employment privileges which cannot be reduced to monetary value."[227] Harassment, hiring, and other issues not defined by EEOC account for approximately 7 percent, 6 percent, and 3 percent, respectively, of ADA charges.[228]

Several issues, separately, each accounts for less than 3 percent of all ADA issues. However, jointly they are almost 25 percent of the issues identified in ADA charges. These include promotion (2.34 percent of ADA issues), benefits (1.23 percent), and prohibited medication inquiries or exams (0.28 percent). All issues appear in appendix B.[229]

Processing Time

By the close of fiscal year 1997, EEOC had closed 142,743 charges, approximately 83 percent of the total number of ADA charges it has received.[230] Another 19,890 charges (11.5 percent) remained open at the end of the fiscal year.[231] Almost two-thirds of all ADA charges that have been closed were processed within 12 months, as shown in figure 6.5. Slightly more than 9 percent of all ADA charges took more than 2 years to be closed, with 1.8 percent requiring 3 years or more to be closed.

However, as shown in figure 6.6, the number of days to close an ADA charge depends on the type of closure.[232] On average, it takes 281 days to close a charge in cases where the charging party settles with benefits. In contrast, it takes an average of 608 days to conciliate a case, for those cases with successful conciliations. Unsuccessful conciliations have required slightly more time—635 days.

As seen in table 6.6 and figure 6.7, among cases that have been prioritized as A, B, or C under the Priority Charge Handling Procedures, processing time for ADA charges is similar to that of all charges filed with EEOC.

[227] EEOC, *CDS Codebook*, p. 76.

[228] EEOC, Charge Data System.

[229] Ibid.

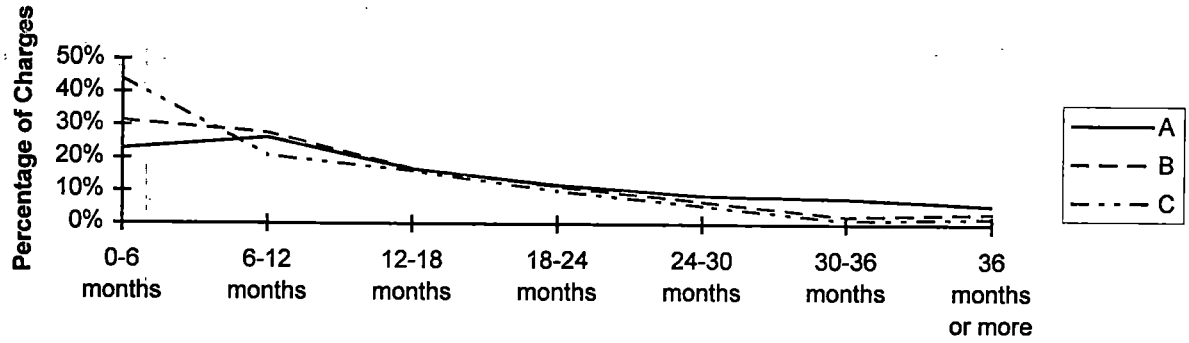
[230] 83,664 of these charges were handled by EEOC, the rest were handled by FEPAs. *See* EEOC Comments, July 17, 1998, p. 3.

[231] An additional 9,920 charges included in the database provided to the Commission for this report had missing or incorrect data. Thus, the length of time charges were open or the length of time to close such charges could not be determined.

[232] This is shown in more detail in app. C.

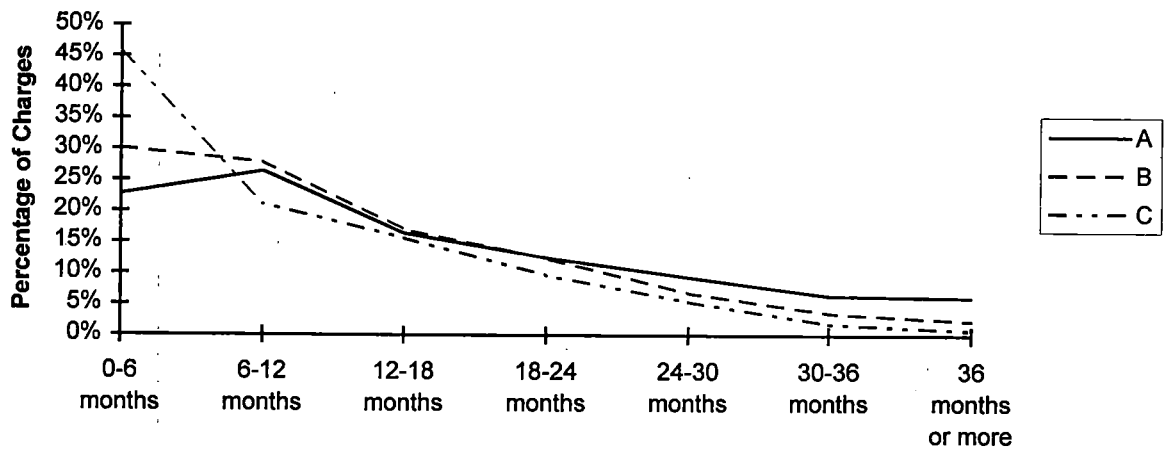
FIGURE 6.7
Processing Time by Priority

6.7a. All EEOC Charges



Completion Time

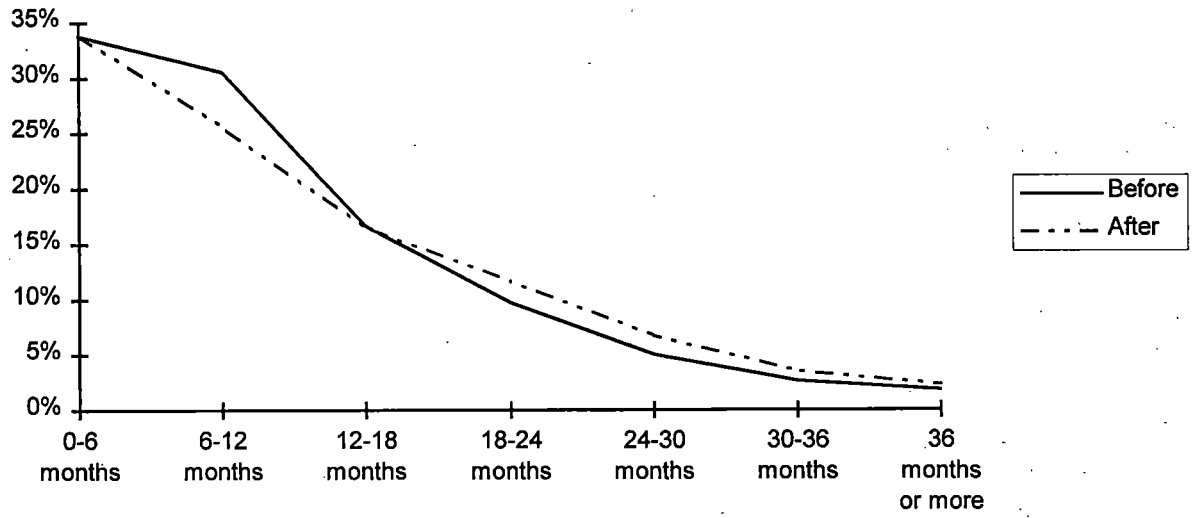
6.7b. ADA Charges



Completion Time

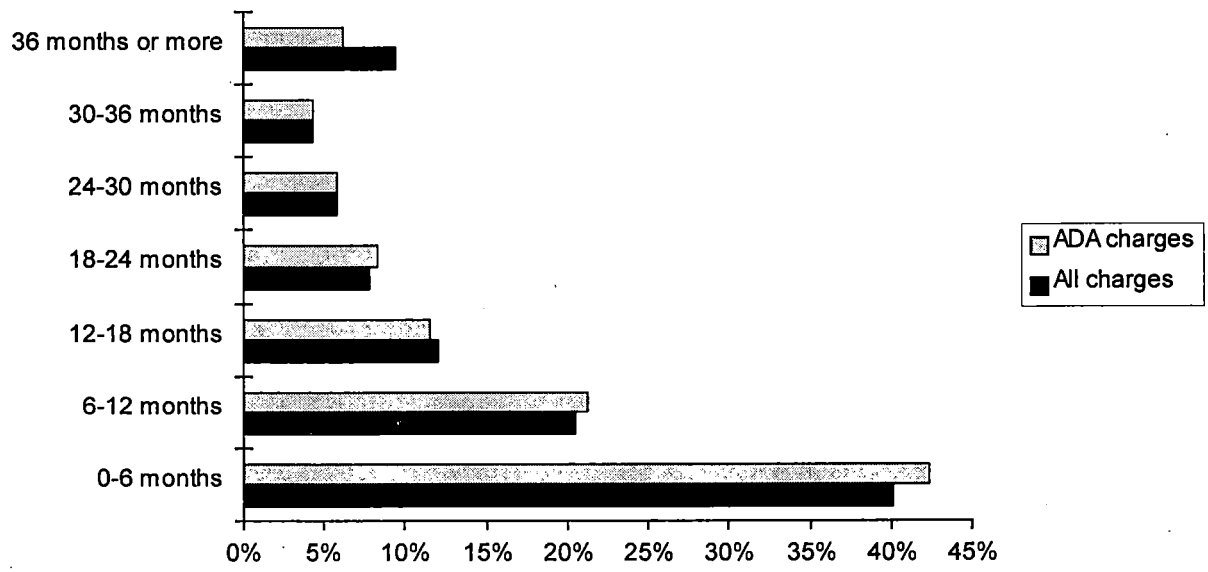
Source: EEOC, Charge Data System.

FIGURE 6.8
Charge Processing Time Before and After Priority Charge Handling Procedures



Source: EEOC, Charge Data System.

FIGURE 6.9
Status of Open Charges



Source: EEOC, Charge Data System.

Processing time has changed little since the introduction of the Priority Charge Handling Procedures. As shown in figure 6.8, before charges were prioritized, 33.8 percent of all charges were closed within 6 months, and another 30.5 percent were closed between 6 and 12 months of receipt of the charge. Similarly, among the charges that have been categorized since 1995, 33.9 percent have been closed after 6 months, while 25.6 percent have been closed between 6 and 12 months of receipt. Overall, the percentage of cases that takes more than 2 years to close has risen slightly, from 9.4 percent before the implementation of the Priority Charge Handling Procedures to 12.5 percent under the new procedures.

In figure 6.9, ADA charges are compared to all charges filed under title VII, ADEA, and EPA. Open ADA charges differ only slightly from all EEOC charges, and differences may reflect the relative ages of the various civil rights laws. For example, 17 percent of open ADA charges have been open for 2 years or more, compared to 20 percent of all open charges received by EEOC.

Benefits

Of all ADA charges, approximately 16 percent receive benefits of some form. Of those receiving benefits, almost half (48.1 percent) receive direct monetary benefits, such as restored pay, fringe benefits, compensatory damages, or punitive damages.[233] Another 14.4 percent of ADA charges receive indirect monetary benefits such as promotion, reinstatement/recall, or new hire. The remaining 37.5 percent of charging parties who receive benefits in relation to their ADA charges receive nonmonetary benefits.[234] These benefits include policy change, training/apprenticeship, seniority, job referral, union membership, EEO notices, and reasonable accommodation.[235]

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[233] Those receiving monetary benefits account for 7.5 percent of all ADA charges. EEOC, Charge Data System.

[234] 5.8 percent of all ADA charges receive nonmonetary benefits. EEOC, Charge Data System.

[235] EEOC, *CDS Codebook*, p. 55.

7 Assessment of EEOC's Outreach, Education, and Technical Assistance

The U.S. Equal Employment Opportunity Commission does outreach and provides technical assistance to the public on rights and obligations under the laws that the agency enforces through presentations to professional organizations, business owners, advocacy groups, and Federal and private employers and employees. Presentations have included workshops, conferences, and announcements on radio and television, as well as technical assistance and training documents disseminated to the public.

EEOC staff provided outreach and education on the ADA before and during its first full year of ADA enforcement.[1] The Office of Legal Counsel established an ADA speakers bureau to provide speakers from headquarters and field offices for public presentations on the ADA.[2] During 1991–92, the Commission established a toll-free ADA "helpline" and developed several informational booklets for employers and persons with disabilities, explaining ADA requirements in "simple, practical language and responding to frequently asked questions."[3]

Because of its limited resources for outreach and related activities, EEOC requested legislation that would create funds for outreach and technical assistance programs.[4] The EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992[5] created a revolving fund to pay for the cost of providing education, technical assistance, and training relating to the laws administered by the Commission.[6] The revolving fund is supported by fees charged to recipients for technical assistance and training services.[7] Although many medium-size employers participate in the technical assistance seminars, a significant proportion of the recipients of technical assistance under the revolving fund are major or large employers.[8]

EEOC is required, as part of its enforcement responsibilities, to provide technical assistance to employers and interested individuals and organizations on their rights and obligations under the

[1] U.S. Equal Employment Opportunity Commission (EEOC), *Fiscal Years 1991 and 1992: Combined Annual Report*, p. 13 (hereafter cited as EEOC, *FYs 1991 and 1992 Annual Report*); EEOC, *Annual Report 1993*, p. 13 (hereafter cited as EEOC, *FY 1993 Annual Report*).

[2] EEOC, *FYs 1991 and 1992 Annual Report*, p. 13. From October 1991 through October 1992, the Office of Legal Counsel staff made 263 of 300 public presentations on the ADA to a wide range of organizations, including employer groups, disability advocacy organizations, and legal associations.

[3] Ibid., pp. 13–14.

[4] *See* Budget of the United States Government, Fiscal Year 1992, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1992 Budget), p. Part Four–1095.

[5] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4(k) (1994)).

[6] *Id. See also* Budget of the United States Government, Fiscal Year 1995, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1995 Budget).

[7] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4(k) (1994)).

[8] Budget of the United States Government, Fiscal Year 1992, Equal Employment Opportunity Commission (hereafter cited as EEOC Fiscal Year 1992 Budget).

ADA.[9] The Attorney General is required to develop a plan, in consultation with the EEOC and other agencies with ADA enforcement responsibilities, to assist covered entities in understanding and carrying out their responsibilities under the act. EEOC and the Attorney General implement the plan for title I.[10] The ADA also required EEOC to develop and publish a technical assistance manual to help employers comply with title I of the ADA within 6 months after publication of the final implementing regulations.[11]

EEOC prepared an ADA technical assistance manual and three question and answer brochures, all of which were widely distributed.[12] The technical assistance manual has been widely praised by the disability community. For instance, one disability professional wrote, "The technical assistance manuals are very helpful. . . ."[13] Another wrote, "The TA manuals from both entities [EEOC and DOJ] are excellent. The EEOC's is the best because it uses many examples to illustrate almost every point it makes. They are written in plain, simple, easy to understand language, which is quite an accomplishment, considering the complexity of some of the topics involved."[14] In addition, the Office of Legal Counsel staff made 100 public presentations to a variety of organizations representing employers, management and human resources professionals, public safety occupations, legal professionals, and disability and medical groups.[15] The Office of Legal Counsel also delivered training on ADA policy guidance and other ADA issues, and its ADA staff provided legal and policy interpretations to approximately 200 callers weekly throughout the fiscal year.[16] Informal assistance and guidance on the ADA were also provided in response to several hundred written inquiries about the act.

During fiscal year 1993, the Office of Legal Counsel provided technical assistance for the public on requirements of EEOC-enforced laws, with the major emphasis on ADA requirements. The Office of Legal Counsel also provided assistance to other Federal agencies on the ADA through seminars sponsored under the revolving fund.[17] In 1995, the revolving fund helped finance 49 technical assistance program seminars (TAPS), which were attended by more than 5,700 managers, human resource specialists, legal and other officials, and employers nationwide. The seminars provided information on rights and obligations under laws enforced by the Commission.[18]

Each field office now delivers at least two TAPS programs every year. In 1997, EEOC offices held 66 TAPS programs, which were attended by 8,629 participants.[19] Field offices are also aware of the need to reach small businesses and have developed different ways to do so, including offering half-day TAPS programs.[20] Further, there is a recognized need to develop outreach programs targeted toward underserved populations. In fact, the joint report of the priority charge handling and litigation task forces recommended that outreach efforts should focus on reaching under-

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[9] *See* 42 U.S.C. § 12206 (c)(2) (1994). *See also* EEOC, "Policy Guidance: Provisions of the Americans with Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability," (EEOC Notice 915–055), Aug. 14, 1990, p. 11 (hereafter cited as EEOC, "Policy Guidance: Provisions of the ADA"); EEOC, *FYs 1991 and 1992 Annual Reports*, p. 13.

[10] EEOC, "Policy Guidance: Provisions of the ADA," p. 11.

[11] Ibid.

[12] *See* EEOC FY 1993 Annual Report, p. 13; *See also* Peggy R. Mastroianni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation (OCRE), U.S. Commission on Civil Rights (USCCR), July 9, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 19 (hereafter cited as EEOC Comments).

[13] Joyce R. Ringer, Executive Director, Georgia Advocacy Office, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 1, 1998, attachment, p. 4 (hereafter cited as Ringer letter).

[14] Michelle Martin, Staff Services Analyst, Department of Rehabilitation, State of California Department of Rehabilitation, letter to Nadja Zalokar, Director, Americans with Disabilities Act Project, USCCR, May 11, 1998, attachment, pp. 14–15 (hereafter cited as Martin letter).

[15] EEOC, *FY 1993 Annual Report*, p. 13.

[16] Ibid.

[17] Ibid.

[18] EEOC, Office of Program Operations, *FY 1995 Annual Report*, p. 15 (hereafter cited as EEOC, Office of Program Operations, *FY 1995 Annual Report*).

[19] EEOC, *March 1998 Task Force Report*, p. 38.

[20] Elizabeth Thornton, Director, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 1, 1998 (hereafter cited as Thornton interview).

served populations and "filling gaps in LEP implementation and case development."[21]

Besides revolving fund programs for which a fee is charged, each district office has undertaken various outreach and stakeholder activities that are free to the participants. These activities involve community groups, various organizations and the public as targeted by each district office's Local Enforcement Plan. As outreach funds have become available, these programs were significantly expanded in 1997 and 1998.[22]

As of October 1997, EEOC had prepared eight technical assistance documents to be used by employers, persons with disabilities, and the general public. The documents cover employment questions, rights of individuals with disabilities, employer responsibilities, disability and service retirement plans, and general information and technical assistance. Most of the technical assistance documents are fact sheets presented in question and answer format. EEOC and the Department of Justice's (DOJ's) Civil Rights Division jointly prepared the technical assistance document, "Americans with Disabilities Act: Questions and Answers."[23] EEOC has stated that technical assistance and outreach and education are a critical part of the agency's mission. According to Commissioner Paul Steven Miller, the purpose of outreach and education is to eliminate discrimination by helping employees know their rights and providing information to employers.[24] EEOC continues to do outreach, technical assistance, and training to inform and assist the public in understanding and applying the ADA. EEOC has broadened its contact with print and electronic media, disability rights organizations, small business trade associations, and the Small Business Administration field offices.[25]

When the Americans with Disabilities Act was signed into law on July 26, 1990,[26] certain responsible Federal agencies were mandated to provide technical assistance as an integral part of the pre- and post-implementation phases. Section 506 required that the DOJ, in consultation with EEOC, the Department of Transportation, the Architectural and Transportation Barriers Compliance Board, and the Federal Communications Commission, develop a technical assistance plan within 180 days of enactment to assist entities covered by the ADA and other Federal agencies in understanding their responsibilities under the new law.[27] For the first time, a Federal civil rights statute required that the Federal agencies charged with implementing the law provide technical assistance to entities with responsibilities and individuals with rights so that each could better understand the law and ensure more effective enforcement and compliance.

As required by the ADA, DOJ published a technical assistance plan in the *Federal Register* on December 5, 1990.[28] This was done in consultation with the responsible agencies, including EEOC.[29] The plan covered the period through fiscal year 1994. Because of the heavy workload that the agencies were experiencing with the implementation process, a final plan never was published.[30]

The ADA recognized the importance of technical assistance and outreach to covered entities and individuals, but the law also provided that no covered entity could use failure to receive technical assistance as a reason for noncompliance with the statute. The ADA specifically stated in section 506:

> An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter be-

[21] EEOC, *Priority Charge Handling Task Force, Litigation Task Force Report*" March 1998, p. 40.

[22] Peggy R. Mastrioanni, Associate Legal Counsel, EEOC, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, July 17, 1998, Comments of the U.S. Equal Employment Opportunity Commission, p. 4 (hereafter cited as EEOC Comments, July 17, 1998).

[23] EEOC and U.S. Department of Justice, Civil Rights Division, "Americans with Disabilities Act: Questions and Answers," (undated brochure).

[24] Miller interview, p. 5.

[25] EEOC, *Fiscal Year 1994 Annual Report*, p. 29 (hereafter cited as EEOC, *FY 1994 Annual Report*).

[26] Pub. L. No. 101–336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (1994)).

[27] *See* 42 U.S.C. § 12206(a) (1994).

[28] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. 50,237 (1990).

[29] *See* 42 U.S.C. § 12206 (a) (2) (1994).

[30] Ruth Lusher, ADA Technical Assistance Program Manager, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, interview in Washington, DC, Feb. 23, 1998 (hereafter cited as Lusher February 1998 interview).

cause of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.[31]

ADA Technical Assistance Plan

EEOC, as one of the four implementing agencies, was given primary responsibility for carrying out major portions of the Federal Government's technical assistance efforts for implementation of the ADA.[32] The statute authorized these four agencies, within their respective spheres of responsibility under the ADA, to provide technical manuals to institutions and individuals that have duties or rights under the ADA.[33] The agencies were further required to publish regulations within 1 year of the signing of the ADA for their respective areas.[34]

EEOC worked closely with DOJ in formulating the governmentwide technical assistance plan. EEOC's portion of the plan included a wide range of activities to provide information and to promote voluntary compliance with the law.[35] Technical assistance was defined in the plan as "the provision of expert advice, and both general and specific information and assistance, to the public and to entities covered by the ADA."[36] The purpose of the plan's technical assistance program was "to inform the public (including individuals with rights protected under the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance."[37]

Based on the Federal Government's experience with implementing section 504 of the Rehabilitation Act of 1973, the four implementing agencies believed that once the covered entities were given information on how to comply with the ADA, they would comply voluntarily. That experience had demonstrated that a "publicized, readily available, comprehensive technical assistance program"[38] that was responsive to the problems and needs of the covered entities offered many advantages. These included such benefits as a reduction of misunderstandings about rights and responsibilities, facilitation of voluntary compliance, promotion of the exchange of information, and the development of more effective, and less costly, methods to address compliance issues. The technical assistance program also sought to avoid an unnecessary reliance on enforcement and litigation to achieve compliance by the covered entities.[39]

The proposed technical assistance program included virtually all forms of communication. Agencies were expected to use publications, exhibits, videotapes and audiotapes, public service announcements, and electronic bulletin boards. As an essential component of the technical assistance program, materials were to be developed and disseminated in alternative formats which were accessible to individuals with disabilities. In addition, the agencies were expected to make presentations at conferences, workshops and training programs, and provide advice to individuals on specific topics through such mechanisms as a telephone hotline, information clearinghouse, and onsite experts.[40]

The four agencies also were expected to create a clearinghouse function "to benefit from the experiences of covered entities and individuals with disabilities in complying with the ADA."[41] The agencies were to exchange information "to enhance the development, assessment, and replication of new and improved compliance methods and techniques."[42] The technical assistance plan provided for the extensive use of the skills, knowledge, and experience of various groups concerned with disability rights. Such groups included trade associations, advocacy groups, and other similar organizations that communicate and have credibility with covered entities

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31 42 U.S.C. § 12206(e) (1994).

32 *See* Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

33 42 U.S.C. § 12206(c)(3) (1994).

34 *See id.* §§ 12116, 12134(a), 12143(b), 12149(a), 12164, 12204(a) (1994); 47 U.S.C. § 225(d)(1) (1994).

35 EEOC, "EEOC's Implementation of Title I of the Americans with Disabilities Act of 1990," January 1993, p. 9 (hereafter cited as EEOC, "EEOC's Implementation of Title I of the ADA").

36 Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

37 Ibid.

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

and individuals with disabilities. The input of these groups was intended to maximize the resources of Federal agencies devoted to technical assistance. The goal was to build the capacity of these organizations to provide technical assistance to their constituencies after the period covered by the technical assistance plan and for as long as was necessary in the future.[43]

Outreach in the Development of Implementing Regulations

EEOC was responsible for issuing regulations for title I of the ADA.[44] The development of "clear and concise regulations, policies and procedures" was part of EEOC's enforcement strategy for implementing title I of the ADA. EEOC did extensive outreach in soliciting feedback in the development of the regulations beginning with the publication of the advance notice of public rulemaking in the *Federal Register* on August 1, 1990.[45] In response, comments were received from 138 disability rights organizations, employer groups, and individuals.[46] Also, EEOC's field offices throughout the country held 62 ADA input meetings that were attended by more than 2,400 representatives from disability rights organizations and employer groups.[47]

Before issuing a notice of proposed rulemaking, EEOC held briefings for congressional staff, representatives of disability rights groups, employer organizations, and the media. The notice was published, with an interpretive appendix, in February 1991. Comments were received from 697 interested groups and individuals. EEOC revised and clarified the final regulations and interpretive guidance based on the feedback received. Since publication, the agency has distributed tens of thousands of copies of the final regulations, which also have been made available in such alternative formats as Braille and large print, and on audio cassette and computer diskette.[48]

[43] Ibid.

[44] 42 U.S.C. § 12116 (1994).

[45] Advance Notice of Proposed Rulemaking, 55 Fed. Reg. 31,192 (1990).

[46] Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (1991).

[47] EEOC, "Implementation of Title I," p. 2.

[48] Ibid., p. 3.

Technical Assistance Manual

EEOC, along with the other implementing agencies, also was required to publish a technical assistance manual no later than 6 months after the publication of the final regulations.[49] EEOC published a comprehensive technical assistance manual in January 1992, which included an explanation of the legal requirements of the ADA and the regulations as they applied to specific employment practices.[50] The manual also included examples of reasonable accommodation and other key aspects of compliance, along with an extensive directory of technical assistance resources.[51] Single copies were made available without cost. Additional copies were available from the Government Printing Office for $25. As of January 1993, EEOC had distributed more than 180,000 copies of the manual.[52] In May 1994, at a briefing on the Americans with Disabilities Act at the U.S. Commission on Civil Rights, Peggy Mastroianni, then Director of the ADA Policy Division at EEOC, said that the ADA technical assistance manual was the most important part of the agency's educational effort on the ADA. She stated that the manual was not written by a lawyer, and information was presented very clearly. The response the manual received was favorable.[53]

Interagency Coordination

The 1990 ADA technical assistance plan stated that the Federal agencies involved in the implementation efforts recognized the importance of coordinating their efforts to avoid overlap or duplication of efforts. Further, the agencies recognized the need to share information and evaluate the effectiveness of their respective technical assistance activities.[54] EEOC worked closely with DOJ on several outreach and educa-

[49] 42 U.S.C. § 12206(c)(3) (1994).

[50] EEOC, A *Technical Assistance Manual on Employment Provisions (Title I) of the Americans with Disabilities Act*, (EEOC–MA–1A), January 1992 (hereafter cited as EEOC, *ADA Technical Assistance Manual*).

[51] EEOC, "Implementation of Title I," p. 9.

[52] Ibid., pp. 9–10.

[53] USCCR, Briefing on the Americans with Disabilities Act, May 6, 1994, p. 7.

[54] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

tion efforts. With funding provided by the National Institute on Disability Rehabilitation Research (NIDRR), the two Federal entities published two editions of the "The Americans with Disabilities Act Questions and Answers." This booklet was designed to answer the most commonly asked questions about the ADA.[55] It was made available in Spanish and alternative formats (Braille, audiotape, large print, and computer diskette).

In conjunction with DOJ, EEOC held a training program in fiscal year 1992 to develop a national network of individuals who would provide training and facilitate other ADA implementation in their local communities promoting voluntary compliance.[56] In Phase I, a 1-week training course on disability rights under the ADA was conducted in Houston, Denver, San Francisco, St. Louis, and Washington, D.C., for 400 disabled persons. After the training was completed, each of the trainees was required to provide ADA training and technical assistance to persons with disabilities, employers, and other covered groups.[57] In phase II, a select group of 100 of the 400 initial trainees was chosen to receive advanced training in title I and alternative dispute resolution. When the advanced training was completed at the end of 1992, the trainees were available to assist EEOC offices and employers in providing technical assistance and in resolving ADA disputes.[58]

In conjunction with its ADA implementation responsibilities, EEOC coordinated regulatory development with other Federal agencies. The agency developed and issued coordinated regulations with the Department of Labor in January 1992, "to avoid duplication of effort and inconsistent standards in processing complaints falling within the overlapping jurisdiction of title I of the ADA and Section 503 of the Rehabilitation Act of 1973."[59] DOJ and EEOC developed a similar joint regulation addressing complaints falling within the jurisdiction of the ADA and section 504 of the Rehabilitation Act. The joint regulation was published in the *Federal Register* in April 1992 for public comment.[60] The final regulation was published in August 1994,[61] "following extensive coordination with DOJ and 25 Federal agencies with Section 504 enforcement responsibilities."[62] EEOC also reviewed existing Federal agency regulations to identify provisions that might conflict with the ADA. For example, several agencies had issued regulations that established physical qualification standards for certain categories of employment that appeared to conflict with ADA requirements.[63]

One national disability organization official has expressed concern that there was inadequate coordination between EEOC and DOJ on the ADA technical assistance program.[64] However, both agencies have worked together on two interagency ADA technical assistance committees. EEOC established an ADA title I technical assistance coordinating group, chaired by EEOC. The other member agencies were: DOJ, the President's Committee on Employment of People with Disabilities, National Institute on Disability and Rehabilitation Research, and the Rehabilitation Services Administration.[65] EEOC also participates in the interagency ADA Technical Assistance Coordinating Committee (originally the ADA Technical Assistance Working Group).[66] The 22-member committee, chaired by DOJ, meets every 3 to 4 months to exchange information on technical assistance and to coordinate outreach efforts and deal with technical assistance issues that arise.[67]

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[55] EEOC, "Implementation of Title I," p. 9.

[56] EEOC, *FYs 1991 and 1992 Annual Report*, p. 13.

[57] EEOC, "Implementation of Title I," p. 11.

[58] Ibid.

[59] EEOC, *FYs 1991 and 1992 Annual Report*, p. 12.

[60] Coordination Procedures for Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans With Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 57 Fed. Reg. 14,630 (1992) (proposed Apr. 21, 1992).

[61] *See* 29 C.F.R. pt. 1640 (1997).

[62] EEOC, *FY 1994 Annual Report,*, p. 25.

[63] EEOC, "Implementation of Title I," p. 4.

[64] Andrew Imparato, General Counsel and Director of Policy, National Council on Disability, telephone interview, Nov. 25, 1997.

[65] EEOC, *FYs 1991 and 1992 Annual Report*, p. 24.

[66] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,239.

[67] Roster of ADA Technical Assistance Coordinating Committee, dated Feb. 3, 1998.

Technical Assistance Plan

The technical assistance plan proposed for EEOC to reach out to a wide range of organizations and associations representing employers, other covered entities, and individuals with disabilities at the national and local levels. The purpose was to explore ways in which their established information channels could be used to provide general and specific information on the employment provisions of the ADA. The organizations were to be asked to identify specific technical assistance needs of their respective constituencies so that EEOC could direct its efforts better to meet those needs.[68]

Before passage of the ADA, in March 1990, EEOC initiated a survey of the fair employment practice agencies to learn what their experiences had been in enforcing State employment discrimination laws similar to the ADA and to assist in developing information on the estimated impact on EEOC's enforcement program. Later in 1990, EEOC staff held informal consultations with national organizations representing employers and individuals with disabilities to solicit suggestions for the technical assistance program and the technical assistance manual.[69] The agency staff also held informal meetings in all 23 district offices and in Washington, D.C., seeking feedback on ADA title I regulations from the employer and disability communities. More than 2,400 representatives from disability rights organizations and employer groups participated in these meetings.[70] In early 1991, the staff held briefings for congressional staff and representatives from disability rights organizations, employer groups, and the media to announce the publication of the agency's title I notice of proposed rulemaking.[71] In May 1991, EEOC sponsored focus groups to learn what employers wanted to know about the ADA and in what format they would like to receive the information.[72]

The technical assistance plan also stated that employers and other covered organizations would be actively encouraged to seek information and assistance to maximize their voluntary compliance. Assurances were given that EEOC's program would be separate and distinct from its enforcement responsibilities.[73] The plan stated that employers and others who participate in training conducted by the agency or who request information or assistance in regard to a particular aspect of compliance would not be subject to investigation or other enforcement activity on the basis of such participation or inquiries.[74]

ADA Technical Assistance Program

Phase I

The proposed 1990 technical assistance plan was linked to the implementation of the ADA and issuance of the title I regulations by EEOC. The first phase of the outreach and assistance program, covering the period ending July 26, 1992 (when the act first took effect), was intended to inform covered entities and individuals with disabilities about their obligations and rights. During this phase, general information would be provided on rights and responsibilities in employment under the ADA and specific information on the application of ADA nondiscrimination requirements to a range of employment practices. In addition, guidance would be provided to employers on complying with the law's reasonable accommodation provisions.[75]

To ensure that the proposed activities would be carried out within the tight mandatory target dates established in the statute, EEOC created a new Americans with Disabilities Act Services Unit (ADAS) in the Office of Legal Counsel. More than 2 years after the ADA was enacted, EEOC dissolved ADAS and integrated its functions into those offices already responsible for providing policy guidance and technical assistance under all of the statutes that the agency enforces.[76] The technical assistance functions were dispersed to the Office of Communications and Legislative Affairs, the Office of Legal

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[68] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,240.

[69] EEOC, *FYs 1991 and 1992 Annual Report*, p. 23.

[70] Ibid.

[71] Ibid., p. 24.

[72] Ibid.

[73] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,240.

[74] Ibid.

[75] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

[76] EEOC, "EEOC's Implementation of Title I of the ADA," p. 2.

Counsel, and the Office of Field Programs (formerly Office of Program Operations).

The initial focus of EEOC's implementation efforts was "the development of clear and concise regulations, policies and procedures."[77] When the ADA was passed, only a small portion of the agency's staff had experience with disability law,[78] so EEOC also focused on training staff.[79] In fiscal year 1990, the Office of Legal counsel provided initial training on the ADA to EEOC district offices and headquarters managers and supervisors.[80] Subsequently, an intensive 1-day training program, "ADA Into the Twentieth Century," was developed and delivered to 2,600 staff members in all of the agency's field offices between November 1991 through February 1992.[81] Both training programs were videotaped and made available to all EEOC offices.[82] In fiscal year 1992, approximately 80 percent of the agency's training activities focused on implementation of the ADA and the Civil Rights Act of 1991. During June 1992, EEOC held intensive week-long training sessions on both laws for 1,400 field managers, supervisors, attorneys, and investigators in preparation for the ADA effective date of July 26, 1992.[83]

In its implementation document, EEOC also stated that it would develop and implement a significant outreach and public education program.[84] This would include development of a wide range of informational materials, including pamphlets and brochures on the basic statutory requirements. The target audience of this information would be both employers and disabled job applicants and employees. These informational materials would also be available in alternative formats to make them accessible to individuals with disabilities.[85]

EEOC proposed to disseminate the information to public media and to specialized communications media of employer and disability rights-oriented organizations. The plan also stated that EEOC staff would provide information on the ADA through participation in conferences, workshops, and meetings of these organizations throughout the country. The agency planned to create an exhibit for display at conferences and conventions. EEOC also planned to respond to individual inquiries about the other statutes it enforces through expansion of its existing system. The agency would use the existing toll-free telephone number to provide basic ADA information. Questions that could not be answered by recorded information would be transferred to the nearest field office for a personal response. EEOC staff would be trained to provide accurate and responsive information and also be equipped to refer employers and others to appropriate specialized sources of information. This information could provide assistance in making accommodations and in meeting other compliance requirements.[86]

After the title I implementing regulations were issued in July 1991, EEOC stated in the technical assistance plan that information and outreach programs for employers and individuals with disabilities would be expanded. The required technical assistance manual was to be one source of such increased guidance on the ADA.[87]

EEOC conducted a comprehensive outreach and public information and education program. The ADA speakers bureau provided, on request, trained speakers from headquarters and the field offices to explain the ADA. From July 1990 through September 1992, EEOC staff made more than 1,675 presentations to a wide range of business and trade associations and disability rights organizations. In fiscal year 1992, Office of Legal Counsel staff made more than 250 presentations on the ADA to a wide range of organizations.[88] In fiscal year 1991, the field offices made 305 presentations on the ADA. During fiscal year 1992, field office staff made 1,061 ADA

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[77] Ibid.

[78] Ibid., p. 4.

[79] See chap. 3 for a detailed discussion of staff training.

[80] EEOC, *FYs 1991 and 1992 Annual Report.*

[81] Ibid. p. 25.

[82] EEOC, *FY 1990 Annual Report*, p. 8; EEOC, *FYs 1991 and 1992 Annual Report*, p. 12.

[83] EEOC, "EEOC's Implementation of Title I of the ADA," p. 6.

[84] Ibid., p. 7.

[85] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

[86] Ibid.

[87] Ibid.

[88] EEOC, "Implementation of Title I," pp. 10, 12.

presentations before 150,000 people, while headquarters staff made 250 ADA presentations before 30,750 people. The field office personnel also held briefings and other meetings with employers and community groups to educate them and establish contact.[89]

EEOC also published a resource guide, "Library Resources on the Employment of Individuals with Disabilities." This guide described ADA materials (books, periodicals, videos) that had been collected and made available in EEOC's library in November 1990.[90] EEOC also upgraded its toll-free telephone system to deal with the 30 percent increase in the monthly average to 6,500 calls.[91] Calls through EEOC's toll-free system to the caller's nearest EEOC field office increased from a monthly average of 11,000 to an average of 15,000 calls per month. The toll-free service continues to play a significant role in helping employers, employees, and job applicants obtain information on their responsibilities and rights under the laws enforced by EEOC, including the ADA.[92] From October 1991 to October 1992, EEOC established a special ADA helpline as part of its toll-free service.[93] In addition, EEOC's Office of Communications and Legislative Affairs recorded 14,824 ADA-related calls for information during the second quarter of fiscal year 1992. During the same period, the agency received approximately 5,100 mail requests for ADA materials.[94]

Callers to the helpline have had mixed experiences. One disability professional wrote, "EEOC hotline staff is generally friendly and informative if you can wait long enough for them to get back to you."[95] Another wrote, "Our staff have used the EEOC . . . hotline but found the process to be very slow and cumbersome, placed on hold waiting for assistance."[96]

During this period, the Office of Legal Counsel's attorney-of-the-day service provided legal and policy advice to an increasing number of callers. The service handled about 200 calls weekly, and two-thirds concerned the ADA. In the 2 years of the initial implementation phase, the Office of Legal Counsel responded to approximately 2,000 inquiries from a variety of sources, including private attorneys, counsel for State and local governments, law enforcement agencies, public interest law groups, universities, and national, State, and local legislators.[97]

Because of an overwhelming volume of requests for technical assistance and educational materials, most related to the ADA, EEOC's Office of Legislation and Communication Affairs established an EEOC Publications and Distribution Center to provide distribution services for these materials.[98] Before establishing the center, EEOC had used a number of distribution sources including the Department of Education-funded disability business and technical assistance centers (DBTACs), but these resources were insufficient to meet the demand for publications and ADA informational materials. Therefore, the agency entered into an interagency agreement with the Environmental Protection Agency (EPA) for warehouse facilities and for distribution of EEOC informational materials.[99] The agency was able to improve its distribution response on publication requests from a 1-week turnaround to 48 hours guaranteed. The Acting Director of the Office of Communications and Legislative Affairs stated that staff periodically test the efficiency of the distribution system, and the average response rate to a telephone publication request actually is 24 hours. Since the Publications and Distribution Center was estab-

[89] Ibid.,. p. 7.

[90] EEOC, *Library Resources on the Employment of Individuals with Disabilities, 2nd edition, December 1991.*

[91] EEOC, *FY 1990 Annual Report,* p. 11.

[92] EEOC, "Implementation of Title I," p. 8.

[93] Ibid., pp. 7–8, 10.

[94] Ibid., p. 7.

[95] Carl Suter, Associate Director, Office of Rehabilitation Services, Illinois Department of Human Services, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, June 9, 1998, attachment, p. 6.

[96] Amy Maes, Director, Client Assistance Program, Michigan Protection and Advocacy Service, letter to Frederick D. Isler, Assistant Staff Director, OCRE, USCCR, Apr. 30, 1998, attachment, p. 5.

[97] EEOC, "Implementation of Title I," pp. 7,10.

[98] Ibid., p. 8.

[99] William White, Acting Director, Office of Communications and Legislative Affairs, EEOC, interview in Washington, DC, Dec. 5, 1997 (hereafter cited as White interview).

lished, it has distributed more than 2 million documents on ADA.[100]

Early in fiscal year 1992, EEOC opened a new training center in headquarters to accommodate training activities and special events for up to 180 individuals or provide space for four simultaneous events. The center was mandated by a provision in the Civil Rights Act of 1991,[101] but it has been used extensively for ADA training.[102] EEOC staff also aided the ADA technical assistance efforts of many other Federal agencies and private organizations. EEOC staff worked closely with the ADA Technical Assistance Working Group, which was chaired by DOJ. EEOC staff reviewed training modules for the Rehabilitation Services Administration, which were designed to train rehabilitation and independent living professionals on the ADA and its effect on vocational rehabilitation, client assistance, and independent living programs. Ongoing technical assistance and/or onsite training was provided to Federal employees at the Small Business Administration, the Centers for Disease Control, the Department of Health and Human Services' National AIDS Program Office, the Department of Education's Office for Civil Rights, and the Department of Labor's Office of Federal Contract Compliance Programs.[103]

In April 1992, EEOC headquarters staff held three briefing sessions for congressional staff on responding to constituent requests for information on the ADA. In July 1992, the agency distributed an ADA information kit to more than 2,000 congressional offices on guidance and information to assist staff in responding to constituent inquiries on the ADA. Included in the information kit were a copy of the ADA technical assistance manual, the ADA handbook, and other ADA-related EEOC publications.[104] Further, in June 1992, EEOC distributed an insert on ADA in the Internal Revenue Service's quarterly mailing to approximately 6 million employers. The insert informed employers of the effective dates and basic requirements of the ADA and the availability of the ADA technical assistance manual.[105] EEOC also made mass mailings to the major civil rights groups to inform them about the ADA.[106]

In fiscal year 1992, EEOC conducted, with professional assistance, a nationwide needs assessment to develop a comprehensive technical assistance plan.[107] The needs assessment focused on the statutes that EEOC enforces, including the ADA. The resulting technical assistance and outreach plan included:

- defining target audiences, objectives, barriers (cultural, legal and economic) and tactics that overcome such barriers;
- unifying messages and themes that support EEOC's enforcement intent;
- recommending the mix of sustained outreach vehicles and products and dissemination models, including analysis of the utility of existing training and education materials;
- establishing a strategy for national, regional, and local collaboration activities with business, trade, and community-based organizations representing the cultural and social interests of potential charging parties, thus leveraging additional resources for national educational and technical assistance activities; and
- developing evaluation criteria.[108]

The goal of the needs assessment was to improve the effectiveness of EEOC's educational and outreach efforts and the technical assistance program.[109]

In its proposed technical assistance plan, EEOC stated that it would develop a public service announcement (PSA) on the ADA to be distributed to radio and television stations.[110] However, the Acting Director of the Office of Communications and Legislative Affairs said that EEOC did not, in fact, produce a PSA. The office researched the feasibility of a national multimedia PSA campaign on the ADA but found that funds were not available to meet the

[100] Ibid.

[101] *See* 42 U.S.C. § 2000 e–4 (1994).

[102] EEOC, "Implementation of Title I," p. 6.

[103] Ibid., pp. 10–11.

[104] Ibid., p. 12.

[105] Ibid., p. 11.

[106] White interview.

[107] EEOC, "Implementation of Title I," p. 12.

[108] Ibid., p. 13.

[109] Ibid., p. 12.

[110] Technical Assistance Plan for the Americans with Disabilities Act of 1990, 55 Fed. Reg. at 50,241.

anticipated $400,000 cost.[111] Disability professionals contend that increased use of PSAs is necessary to inform the general public about the ADA. For instance, one disability professional wrote: "the need for public knowledge continues to be an issue. The use of media should be increased for public announcements, to all agencies and the general public. This is an area that needs work, because the discrimination complaints based on disabilities are still there."[112] Another wrote, "The dissemination of information has been excellent. However, some businesses, employers and members of the general public are still not aware of the ADA and its provisions. Simple and informative public service announcements might be helpful as well as presentations or booths at certain employer or human resources conventions."[113]

The intensive work necessary to prepare for implementing the ADA without additional staffing resources placed a substantial burden on EEOC. The statutory mandate to provide technical assistance for the implementation of the ADA required a tremendous effort by EEOC staff responsible for providing guidance and coordination under the agency's other legal authorities.[114]

After the ADA became effective, the legal policy function for the ADA was placed in the Office of Legal Counsel. The technical assistance function was moved to what is now the Office of Field Programs (the former Office of Program Operations). The plan was to train the Office of Field Programs staff on the ADA so that they could do outreach at the local level. A series of training programs was held for field personnel on ADA. The first was in December 1991 and the most recent was completed in the summer of 1997.[115] Other offices were also responsible for parts of EEOC's technical assistance program, including the Office of Communications and Legislative Affairs, which was responsible for the toll-free information helpline and the publications and distribution center. That continues to be how the technical assistance functions are organized within EEOC.[116]

Funding

EEOC officials said that funding for technical assistance for the implementation of the ADA was limited. However, in fiscal year 1991, the agency was appropriated $1,000,000 to begin the statutorily required preparations for implementing section 506 of the ADA, which mandated the technical assistance program. Further, EEOC received a 1-year supplemental appropriation of $3,630,000 in fiscal year 1991. In fiscal year 1992, EEOC was appropriated $4,044,000 and 32 additional staff persons for ADA implementation, as well as a supplemental appropriation of $1,000,000 which was available through fiscal year 1993. Despite additional funding in fiscal year 1992, EEOC stated that it experienced a fiscal crisis due to years of underfunding in the 1980s and the enactment of the Civil Rights Act of 1991, for which no additional implementation funds were appropriated that year.[117]

To deal with the implementation demands of both new laws, EEOC stated that it "was forced to reallocate its resources."[118] Since 90 percent of its funding was allocated to such nondiscretionary costs as salaries, rent, communications, and utilities, only 10 percent of the funding was available for discretionary costs, such as litigation support, travel, and training.[119] However, EEOC was able to establish the new program initiatives in headquarters "by streamlining certain headquarters functions and shifting slots from those programs that the agency considered to be duplicative."[120] The shift of slots permitted EEOC to support such initiatives as the staffing of the ADA Services Unit.[121]

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[111] White interview.

[112] Kathy Ertola, Assistant ADA Coordinator, California Department of Social Services, letter to Nadja Zalokar, Americans with Disabilities Act Project, Director, USCCR, May 26, 1998, p. 2 (hereafter cited as Ertola letter).

[113] Ringer letter, attachment, p. 2.

[114] EEOC, "Implementation of Title I," p. 4.

[115] Linda Lawson, Operations and Policy Specialist, Office of Field Programs, EEOC, interview in Washington, DC, Dec. 23, 1997 (hereafter cited as Lawson interview).

[116] White interview.

[117] EEOC, "Implementation of Title I," p. 16.

[118] Ibid.

[119] Ibid.

[120] Ibid., p. 17.

[121] Ibid.

Technical Assistance Revolving Fund and the TAPS Program

In October 1992, the EEOC Education, Technical Assistance and Training Revolving Fund Act of 1992 was signed into law.[122] The new law amended title VII of the Civil Rights Act of 1964 to establish a revolving fund for use by the EEOC in providing technical assistance, training, and education to the public on the laws it enforces.[123] Initial startup funding was provided by a one-time transfer of $1 million from EEOC's salaries and expenses account to the fund. The fund subsequently was supported, like other governmental revolving funds, by collections and payments from recipients of technical assistance training and materials.[124]

The fund supports the technical assistance program seminars (TAPS), which are conducted primarily by field office personnel.[125] Generally, the TAPS programs consist of 1-day seminars for groups that can afford to reimburse the government. Thus, the audience usually is employer groups. EEOC officials stated that these seminars are not at the expense of "no cost" training and technical assistance that the agency has been doing on ADA; EEOC's revolving fund activities have amounted to approximately $4 million over the life of the program thus far.[126]

Although the fund is not self-sustaining, it generates sufficient funds to reimburse EEOC for staff time required to do ADA training. During the last 2 years, the fund has become increasingly self-sustaining. With the additional funds, the Office of Field Programs has been able to fund travel, printing, and supplies for outreach to groups who cannot afford to pay for the training. The additional funding also permits the Office of Field Programs to send staff to locations farther from field offices to do training on ADA.[127]

EEOC hired a business consultant to advise it on how to manage and market the TAPS programs. Focus groups were convened, and 20,000 letters were sent to various groups and individuals to determine what type of technical assistance and outreach programs the agency's stakeholders wanted and needed. The priority need for the respondents was training videos with leader and participant guides.[128]

TAPS training has no set agenda; the programs can cover any of the laws that EEOC enforces. A staff inventory of all of the TAPS seminars had more than 7½ pages of ADA topics, making it the most covered specific topic. The field staff does more TAPS programs on the ADA than any other specific topic or law that EEOC enforces.[129]

The current cost of a full-day TAPS program is $199 per person.[130] The seminar must have a minimum of 100 participants to reach the break-even point. Those attending the seminars also receive resource books providing them with the relevant information on the topic of the seminar.[131] Half-day seminars cost $75 or $50, depending on the amount of materials or resource books furnished to the participants.[132] More recently, the field staff has been holding TAPS seminars at employers' worksites.[133] Several disability professionals noted that the cost of the TAPS programs was high relative to their agencies' budgets. For instance, a representative of the Department of Social Services for the State of California wrote, "[t]he chief of our EEOC office has attended seminars conducted by EEOC and feels they are very informative. Unfortunately, the fee tends to be costly (approx. $200) a person, and it is impossible to send all EEOC investigators, which would be ideal."[134]

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[122] Pub. L. No. 102–411, 106 Stat. 2102 (codified at 42 U.S.C. § 2000e–4 (k) (1994)).

[123] *Id.*

[124] EEOC, "Implementation of Title I," p. 13.

[125] Lawson interview.

[126] White interview.

[127] Paula Choate, Director, Field Coordination Programs, Office of Field Programs, EEOC, interview in Washington, DC, Apr. 2, 1998 (hereafter cited as Choate interview).

[128] Ibid.

[129] Ibid.

[130] EEOC, Cost of Technical Assistance Program Seminars (TAPS), prepared January 1998.

[131] Choate interview.

[132] EEOC, Cost of Technical Assistance Program Seminars (TAPS), prepared January 1998.

[133] Choate interview.

[134] Ertola letter, p. 3. Ms. Ertola also indicated that the costs of EEOC brochures were high for State agencies. She indicated that "[w]hen calling the local EEOC, we were informed that a brochure is available, and the fee for the materials is $75.00. State agencies don't always have the funds available for materials, and it is disappointing that some kind of tax dollar should cover this for state agencies." Ibid. Another

Many disability advocates and professionals say that small businesses are not informed of their obligations under the ADA. For example, one disability professional wrote, "Large companies may know something about the ADA, but small businesses know very little. . . ."[135] Recently, the Office of Field Programs has made efforts to conduct TAPS training programs so that they are more affordable for small employers. The Office of Field Programs has used the half-day seminars or has held programs for smaller groups, offsetting the costs with larger seminars for other groups. EEOC also gives the participants of the half-day seminars a full set of the resource books, which helps them to gain the information on ADA and the other laws that EEOC enforces. Outreach to small business employers initially was not as great as it should have been, EEOC staff acknowledges, and[136] the field office staff is trying to remedy that now with more innovative use of the TAPS program.

The TAPS seminars are evaluated for effectiveness. Participants are asked to fill out an evaluation form at the conclusion of each seminar. On the forms, participants are asked, among other things, what technical assistance products would be helpful to them. If a participant is attending a second seminar, he or she is asked what information was helpful at the previous seminar.[137] This information is used to gauge the effectiveness of the presentations by Office of Field Programs staff and staff in the district office that presents the TAPS program.[138] The revolving fund's business plan will outline additional products and services that will address the needs of smaller employers.[139]

ADA Outreach, Education, and Technical Assistance—Fiscal Year 1993 to Present

After the ADA was implemented in July 1992, the ADA technical assistance functions were dispersed to the Office of Communications and Legislative Affairs, the Office of Legal Counsel, and the Office of Field Programs. After 1992, there was less emphasis on the ADA as a separate component of EEOC's overall technical assistance program, and field office staff became the group primarily responsible for technical assistance at EEOC.[140] However, ADA still was the most frequently requested topic in the education and outreach programs conducted by staff,[141] although it is declining. In fiscal year 1992, the ADA represented 49 percent of the topics covered in technical assistance programs. In fiscal year 1993, ADA represented 32 percent of the topics discussed, and by fiscal year 1994 the ADA had declined to only 24 percent of the topics. In fiscal year 1995, the ADA represented 22 percent of the topics, and the ADA represented only 12 percent and 11 percent, respectively, in fiscal years 1996 and 1997. A staff member said that although the percentage of ADA presentations had declined in this period, she thought that, in the last 18 months, the field staff were doing substantially more presentations, so that the actual number on ADA had remained the same or increased.[142]

In fiscal year 1993, the first full year of ADA's enforcement, EEOC staff provided extensive education and technical assistance in support of the ADA.[143] That same year, the Office of Legal Counsel issued interim enforcement guidance interpreting ADA's application to disability-based provisions in employer health plans. As a result, Office of Legal Counsel staff provided extensive information about and interpretation of these ADA provisions and other parts of the law in response to hundreds of written and telephonic inquiries. Staff also made speeches and other presentations on ADA throughout the year. The Office of Legal Counsel made over 100 public presentations on the ADA to a diverse

disability professional wrote, "To my knowledge, we have been invited to only one seminar and although I have forgotten the price, the amount seemed expensive per person." Kayla A. Bower, Executive Director, Oklahoma Disability Law Center, letter to Frederick D. Isler, Assistant Staff Director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Apr. 6, 1998, attachment, p. 3.

[135]Martin letter, attachment, p. 7.

[136] Choate interview.

[137] Ibid.

[138] Julie Bowman, Enforcement Supervisor, Chicago District Office, EEOC, telephone interview, Apr. 8, 1998.

[139] *See* EEOC Comments, July 17, 1998, p. 5.

[140] Lawson interview.

[141] Choate interview.

[142] Lawson interview.

[143] EEOC, *FY 1993 Annual Report,* p. v.

group of organizations representing private and public employers, management and human resources professionals, attorneys, the disability community, and medical and many other specialized groups. Through its attorney-of-the-day service and ADA staff, the Office of Legal Counsel provided legal and policy interpretations on the ADA to an average of 200 callers weekly. The staff also provided ongoing support and technical assistance to the DBTACs and to staff in other Federal agencies, such as the Department of Health and Human Services, Small Business Administration, Centers for Disease Control, and others.[144] Fiscal year 1993 was the first year of operation of the Publications Distribution Center, which distributed almost 1.6 million publications.[145] In addition, according to a 1995 EEOC report, because of concerns expressed by certain groups, Congress mandated in the agency's fiscal year 1992 appropriation law that it conduct outreach and education to historically underserved groups such as Hispanic Americans, Asian/Pacific Islander Americans and Native Americans.[146]

Most of the outreach and education efforts are done by EEOC's field offices. Selected field offices began a pilot program in fiscal year 1993 to institutionalize and coordinate comprehensive technical assistance, outreach, and education programs; to establish a standardized approach to internal development and delivery of training to EEOC staff and the general public; and to provide a specific point of internal coordination of special activities throughout the field.[147] Six districts participated in the pilot program, and a new position of program analyst was created to work with the district director on it. The pilot program was successful and has been extended to all of the district offices.[148] In fiscal year 1993, ADA was the most frequently presented topic at the field outreach and education activities. An overview of EEOC's enforcement program, including the ADA, was the most frequent agenda item for the presentations.[149]

A focus of EEOC's outreach program in fiscal year 1994 was an effort to alert the public and the media of the expanded coverage of the ADA, which took place on July 26, 1994. Employers with 15 to 24 employees were now covered under the statute.[150] EEOC increased contact with both the print and the electronic media, disability rights organizations, small business trade associations, and Small Business Administration field offices. The Publications Distribution Center mailed 509,721 ADA-related publications.[151] In addition, Office of Legal Counsel staff made over 90 presentations on title I of the ADA at conferences and seminars sponsored by a broad range of organizations, associations, and governmental agencies, including many disability rights groups.[152] ADA continued to be the single most frequently addressed topic in the field outreach activities.[153]

By fiscal year 1995, the ADA technical assistance program was integrated into the agency's overall technical assistance and outreach efforts. In the field, ADA continued to be the single topic most frequently addressed.[154] Field staff made presentations to more than 65,000 people who attended over 1,100 presentations. Almost 40 percent of EEOC's presentations were made to professional organizations for attorneys, human resources professionals, business owners, and employers. Staff in the Office of Legal Counsel also made presentations to various groups on a number of topics, including the ADA. The ADA Division held monthly meetings with attorneys

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144 Ibid., p. *13.*

145 Ibid., p. 16.

146 EEOC, *Technical Assistance and Education in EEOC, The Role of the Office of Program Operations*, Report to the Commission, Jan. 10, 1995, p. 4.

147 Ibid., pp. 1–2.

148 Ibid., pp. 2–5.

149 EEOC, FY 1993 & FY 1994 Outreach Activities, Pie Charts.

150 For the preceding 2 years, employers with fewer than 25 employees were not covered under the ADA. *See* 42 U.S.C. § 12111 (5) (A) (1994).

151 EEOC, *FY 1994 Annual Report*, p. 29.

152 Elizabeth M. Thornton, Deputy Legal Counsel, Office of Legal Counsel, EEOC, memorandum to Cynthia Clark Matthews, Director, Office of Equal Employment Opportunity, re: Accomplishments of the Office of Legal Counsel Regarding Individuals with Disabilities for FY 1994, Dec. 21, 1994.

153 EEOC, FY 1993 & FY 1994 Outreach Activities, Pie Charts.

154 EEOC, Office of Program Operations, *FY 1995 Annual Report*; Education, Technical Assistance and Outreach, p. 15.

from the Departments of Justice, Labor, Education, and Health and Human Services to facilitate discussion on the ADA. Further, when attorneys from the Office of Legal Counsel go to the field to hold a TAPS seminar, they try to arrange either to give training to the staff in the field office or arrange to give a free seminar to a group in the same locale who cannot afford to pay for a TAPS seminar. This permits Office of Legal Counsel staff to maximize the agency's limited resources for technical assistance.[155]

Concerns about the effectiveness of EEOC's education, outreach, and technical assistance efforts were raised in a 1995 congressional oversight hearing. In testimony before the Committee on Labor and Human Resources of the United States Senate, a General Accounting Office representative stated that EEOC "has direct contact with a small portion of the millions of workplaces and workers in the United States,"[156] and noted that EEOC devoted relatively few resources to outreach and technical assistance activities.[157]

Local Enforcement Plans

In July 1996, the National Enforcement Plan was implemented, and it required each field office to develop a technical assistance and outreach component as part of its Local Enforcement Plan (LEP). Most of the LEPs identify specific ADA outreach and technical assistance programs; however, a few do not specifically target the ADA. For example, the Seattle District Office will focus on reasonable accommodation of persons with disabilities. Also, disabilities such as diabetes and multiple sclerosis (MS) and the impact of rotating shift work, overtime, and the need for frequent snacks or breaks are areas to be addressed, because there is a high incidence of MS in the North Western States.[158] The Philadelphia District Office agreed to do four programs for "Inside Government," a radio program in Philadelphia that covers Federal agencies and the services they provide. Two shows were to be on ADA.[159] The New York District Office planned to hold a seminar on the ADA and reasonable accommodation for EEO officials, personnel specialists, and human resource managers, to provide a greater awareness of ways to employ individuals with disabilities by providing effective reasonable accommodations.[160]

The Memphis District Office stated that outreach efforts would be directed toward educating employers on their responsibilities in the areas of reasonable accommodation and questions involving terminal illness.[161] The Los Angeles District Office LEP noted that of the 8.8 million people in the County of Los Angeles, approximately 19 percent, or 1.6 million, are individuals with disabilities. The office planned to organize an educational focus group to develop an action plan.[162] The plan for the Dallas District Office stated that the feasibility of developing and producing videotapes for very small employers on disability accommodations, among other topics, would be explored.[163]

The Indianapolis District Office identified two employment practices related to ADA that were the subject of recurrent charges of discrimination. The first dealt with applicants being disqualified for employment after post-offer medical examinations and the other involved speculative predictions of harm as a result of prior existing medical conditions or asymptomatic predispositions to possible future impairments. The LEP noted that respondents had relied on advice from occupational medical specialists unaccustomed to the requirements of the ADA. The office stated that it planned to contact

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155 Kathleen Courtney, Office of Legal Counsel, Coordination and Guidance Programs/ADA, interview in Washington, DC, Dec. 5, 1997.

156 *Hearing before the Senate Comm. on Labor and Human Resources*, 104th Cong. 36 (May 23, 1995) (statement of Linda G. Morra, Director, Education and Human Resources Division, GAO).

157 Ibid.

158 EEOC, Seattle District Office, "Local Enforcement Plan for Fiscal Years 1996 & 1997," August 1996, p. 3.

159 EEOC, Philadelphia District Office, "Local Enforcement Plan," section A, p. 5.

160 EEOC, New York District Office, "Local Enforcement Plan," August 1996, p. 14.

161 EEOC, Memphis District Office, "Local Enforcement Plan," July 1996, p. 5.

162 EEOC, Los Angeles District Office, "Local Enforcement Plan," First Edition 1996–1997, p. 9.

163 EEOC, Dallas District Office, "Local Enforcement Plan," May 1996-September 1997," p. 11 (hereafter cited as EEOC, Dallas District Office LEP).

associations of occupational medical personnel and offer to conduct training on the ADA.[164]

The Detroit District Office established an ongoing working relationship with the Michigan Protection and Advocacy Service to discuss potential charges of discrimination. The staff also actively participated in the conference of the President's Committee on Employment of People with Disabilities, which was held in Detroit in May 1996.[165] The Charlotte District Office noted that the ADA was:

> without a doubt the least understood statute administered by EEOC. The concept of a disability, the requirements concerning medical exams and records, the duty to provide a reasonable accommodation and the treatment of communicable diseases are widely misunderstood.[166]

The LEP further noted that there were serious differences between the South Carolina disability law and title I of the ADA, which led to a misunderstanding of the Federal law. The LEP planned to address these issues through TAPS programs and through providing speakers, when requested, to employer and professional groups.[167]

The San Antonio District Office identified disability discrimination, especially cases involving terminal or degenerating illnesses, egregious discriminatory conduct, and reasonable accommodation as focal topics of its training program. These were identified by a review of the inventory of cases and feedback from stakeholders. However, the LEP did not identify specific outreach efforts to deal with this issue.[168] The Milwaukee District Office said that it and the Minneapolis Area Office take in a higher percentage of disability charges than most EEOC offices, but most of the charges are from disabled persons in metropolitan areas. The office stated that it wanted to be sure that employment opportunities are available to all citizens within its jurisdiction regardless of where they live.[169] Specific ADA-related outreach efforts included a series of speeches in Wisconsin and Minnesota.[170]

Education and technical assistance to diverse disability groups has been an integral part of the Miami District Office's outreach program since 1993. Its LEP noted that the office had worked jointly with many groups from the disabled community to provide information about the ADA to employers and the public. The LEP proposed to establish a stakeholder committee for the disabled to enhance the office's outreach activities.[171] The Albuquerque District Office identified persons with disabilities among its targeted populations for outreach. During the second quarter of fiscal year 1997, the office planned one outreach activity related to ADA, a seminar with all department heads at New Mexico State University in Las Cruces.[172] Individuals with disabilities were also identified as a targeted population by the Phoenix District Office. A number of strategies for addressing its outreach program were described in the Local Enforcement Plan, but only one was described as an ADA-related effort—working with advocacy organizations, e.g., the Arizona Center for Disability Law, to coordinate training activities.[173]

Headquarters and Field Office Management of ADA Technical Assistance Programs

The management and functions of EEOC's technical assistance programs are diffused throughout EEOC. Two offices are primarily responsible for EEOC's technical assistance programs: the Office of Communications and Legislative Affairs, which is responsible for the publications and distribution operations and the toll-free information line, and the Office of Field

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[164] EEOC, Indianapolis District Office, "Local Enforcement Plan," June 28, 1996, Section A.

[165] EEOC, Detroit District Office, "Local Enforcement Plan," pp. 7–8.

[166] EEOC, Charlotte District Office, "Local Enforcement Plan," section A, Outreach, p. 10.

[167] Ibid., section A, Outreach, pp. 6, 10.

[168] EEOC, San Antonio District Office, "Local Enforcement Plan," section A, pp. 4–5.

[169] EEOC, Milwaukee District Office, "Local Enforcement Plan," July 1, 1996, p. 4 (hereafter cited as EEOC, Milwaukee District Office LEP).

[170] Ibid., pp. 8–9.

[171] EEOC, Miami District Office, "Local Enforcement Plan", p. 7 (hereafter cited as EEOC, Miami District Office LEP).

[172] EEOC, Albuquerque District Office, "Local Enforcement Plan," section A.

[173] EEOC, Phoenix District Office, "Local Enforcement Plan," section A, pp. 2, 4.

Programs, which is responsible for the local technical assistance and outreach programs, including the TAPS seminars funded by the revolving fund. In addition, some other aspects of the agency's technical assistance program are carried out by other offices such as the library, which is responsible for EEOC's Web site. In interviews, staff acknowledged that there is no technical assistance staff in EEOC that is comparable to the unit in DOJ's Disability Rights Section,[174] where the Department's ADA technical assistance function is consolidated.

EEOC's Commissioners acknowledge the importance of the technical assistance efforts to the successful implementation of the ADA. Former Chairman Gilbert Casellas cited technical assistance as one of the three ADA areas in which EEOC has had significant accomplishments. He noted that EEOC had increased the number of technical assistance seminars in fiscal year 1997 to approximately 70, a 50 percent increase from the previous year.[175]

In a 1998 statement before Congress, Acting Chairman Igasaki said that while EEOC has been able to devote only a small portion of its budget to outreach and education activities, the agency has found that these programs have been invaluable in communicating what and who is covered by Federal equal employment laws. In order to get the most from its limited funds, EEOC has actively sought ways to expand its outreach activities through creative and cost-efficient strategies and techniques. For example, he said, to get information to small businesses, which are not always able to purchase information-based products or to attend seminars, EEOC created a special Web site with information targeted for the small business owner. The Acting Chairman said that EEOC's free and fee-paid outreach programs were attended by almost 100,000 individuals in fiscal year 1997. He noted that there were plans for the future development of direct sale items to reach those who cannot afford to access EEOC's technical assistance programs and for expanded activities for underserved groups and communities.[176]

Commissioner Reginald Jones said that he thought that outreach and technical assistance are important for all statutes. In fact, he noted that in the EEOC strategic plan, outreach and education have the same priority as litigation. Commissioner Jones also stated that the EEOC conducted a lot of outreach programs to educate the public about the ADA.[177]

Commissioner Paul Stephen Miller said that technical assistance, outreach, and education are critical to EEOC's mission. He said that discrimination cannot be eradicated simply by enforcement and processing charges. In his opinion, EEOC must provide training to give employers a network for getting answers to questions. At the same time, it is also important to inform the public about their rights. According to Commissioner Miller, while technical assistance is not a central driving force in what the agency does, it is important. EEOC's technical assistance efforts complement those of other organizations that provide technical assistance on the ADA. Commissioner Miller said the goal of technical assistance should be to eliminate discrimination and he would like to see EEOC do a better job in outreach.[178]

EEOC's Legal Counsel said that Office of Legal Counsel staff does more travel for technical assistance and outreach purposes on ADA than any other law that EEOC enforces. She noted that participation in seminars and meetings fosters an informal network of communication. However, technical assistance is delivered principally through the district offices and is required in their LEPs. The district offices are held accountable, she said, for outreach and technical assistance. She believes that the decentralized approach works well.[179] The Director of the Office of Legal Counsel's ADA Division said that

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[174] White interview.

[175] Gilbert Casellas, Chairman, EEOC, interview in Washington, DC, Dec. 1, 1997.

[176] *Hearing before the Subcomm. on Commerce, Justice, State, The Judiciary and Related Agencies of the House Comm. on Appropriations*, 105th Cong. 2 (Apr. 1, 1998) (statement of Paul M. Igasaki, Acting Chairman, EEOC).

[177] Reginald Jones, Commissioner, EEOC, interview in Washington, DC, Apr. 1, 1998.

[178] Paul Steven Miller, Commissioner, EEOC, interview in Washington, DC, Apr. 7, 1998.

[179] Ellen Vargyas, Legal Counsel, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 8, 1998.

his organization provides technical assistance to field staff on ADA in addition to requests for information from outside EEOC. Each field office has an ADA policy contact in the Division. The staff also does public speaking on ADA to a wide variety of groups as part of the Office of Legal Counsel's outreach responsibilities.[180]

The Director of the Office of Field Programs explained that the three offices are doing different things with respect to EEOC's technical assistance program. The Office of Communications and Legislative Affairs has a national perspective on EEOC's outreach program. The field offices deal with outreach in terms of their jurisdictional and geographical areas, and the Office of Field Programs oversees the activities of the field offices and reviews how these fit into the National Enforcement Plan. Office of Legal Counsel staff members speak on issues as requested.[181] There is extensive coordination between the Office of Field Programs and the Office of Communications and Legislative Affairs, because the Office of Communications and Legislative Affairs is responsible for national publications. A headquarters office for outreach, she said, would be a problem because it would not have jurisdiction over the field offices.[182] Eventually, EEOC hopes to implement a national outreach plan, once the LEPs are in place. This will permit the agency to identify the areas of technical assistance that need strengthening. Local offices tell headquarters where outreach is needed, so the Office of Field Programs does not direct the offices.[183] However, the Director of Field Coordination Programs stated that she now has an outreach coordinator on her staff who coordinates field technical assistance activities with staff in the Office of Legal Counsel and the Office of Communications and Legislative Affairs. She hoped with future money generated by the revolving fund to put one outreach coordinator in each field office.[184]

In July 1997, EEOC held its first national conference for EEOC staff engaged in outreach. A conference on the revolving fund was scheduled for August 1998. In addition, EEOC disseminates a newsletter to all offices that includes information on field office outreach activities. This permits staff to borrow ideas from each other.[185] Finally, field staff mentioned that each field office outreach contact point files a quarterly report on outreach and education activities covering all presentations made, stratified by category, and listing the particular groups that were reached.[186]

Several field offices planned to use the local media to publicize EEOC's programs and the laws it enforces, including ADA, either with appearances by staff on public affairs shows or PSAs. Additionally, a few field offices have indicated plans for producing PSAs and videos. These include the following:

- The Los Angeles District Office planned to produce PSAs in English, Spanish and Asian languages that would run on television and radio stations and in the print media.[187] The office also has an orientation video for people who file charges. Many of the other offices had similar videos; however, some, like the Boston Area Office, did not.[188]

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[180] Christopher Kuczynski, Director, Americans with Disabilities Act Division, Office of Legal Counsel, EEOC, interview in Washington, DC, Apr. 8, 1998.

[181] The staff of OLC are the primary spokespersons for the agency on policy matters. They provide policy interpretations as requested. This is distinguishable from the field responsibility for identifying underserved groups, employers, and geographic areas and providing outreach and technical assistance services. *See* EEOC Comments, July 17, 1998, p. 5.

[182] Thornton interview. Since field offices, organizationally, report directly to the Office of Field Programs, superimposing a separate office to handle this single function would bifurcate management. *See* EEOC Comments, July 17, 1998, p. 5.

[183] Thornton interview. Field offices are asked to identify where outreach is needed and submit proposals for addressing these needs within their jurisdictions. The Office of Field Programs reviews these plans and provides appropriate feedback based on overall needs. As such, the Office of Field Programs does not dictate field outreach activities. EEOC Comments, July 17, 1998, p. 5.

[184] Choate interview.

[185] Ed Elizondo, Outreach and Education Coordinator, Dallas District Office, EEOC, telephone interview, Apr. 13, 1998.

[186] Larry Pincus, Program Analyst, New York District Office, EEOC, telephone interview, Apr. 20, 1998 (hereafter cited as Pincus interview).

[187] Los Angeles District Office Local Enforcement Plan, First Edition 1996–1997, p. 10.

[188] Devika Dubey, Investigator, Boston Area Office, EEOC, telephone interview, Apr. 10, 1998.

- The Miami District Office, as part of its strategies for providing EEOC services to underserved communities, plans to produce PSAs for radio and television.[189]
- The Atlanta District Office planned to produce an educational video, using office staff and a task force of stakeholders who will identify topics, write the script, and act. It planned to distribute the joint venture video throughout the district community.[190]
- The San Francisco District Office planned in fiscal year 1997 to hold a series of symposia to educate community groups about equal employment opportunity laws. It planned to market and publicize these events through PSAs and direct mail.[191]
- The feasibility of developing and producing a videotape for very small employers was being explored in fiscal year 1997 by the Dallas District Office. The tape would provide information on correct job interviewing, sexual harassment, and religious and disability discrimination.[192]
- The Milwaukee District Office planned to contact local advertising councils to seek their help in producing PSAs throughout its three-State jurisdiction. The plan was to have the first PSAs aired in fiscal year 1997.[193]

In carrying out their technical assistance and outreach responsibilities, the field offices have a significant amount of flexibility and discretion. A regional attorney in the Los Angeles District Office noted that the Office of Field Programs has allowed the field offices to be creative.[194] As demonstrated above, the district offices' creativity does appear to have resulted in some very innovative approaches to outreach, especially in light of EEOC's limited resources. As an example of the creative efforts of the field office technical assistance efforts, the New York District Office had developed a brochure explaining the laws that EEOC enforces but oriented toward its immigrant population. It was published in seven languages and was distributed by the Office of Field Programs to district offices with large immigrant populations.[195] The New York District Office also published a "know your rights brochure" for distribution at outreach programs.[196] Recognizing these innovations, Acting Chairman Igasaki directed the Office of Field Programs to make available to *all* field offices the most useful information that has been developed by the various offices. The Acting Chairman also directed the Office of Communications and Legislative Affairs to take the lead in developing information packets, videos, and questionnaires for distribution to the public.[197]

Outreach to Underserved Groups

According to the Director of the Office of Field Programs, some technical assistance programs have been developed for small businesses, for example, half-day TAPS seminars. One-half day seminars have proven attractive to small business because they cost less than full-day seminars. District offices are aware that they need to make an effort to reach small businesses. She noted that earlier in the ADA implementation process, both the Office of Legal Counsel and Office of Program Operations (now the Office of Field Programs), had some programs aimed at small businesses,[198] and added that last year's focus was to reach small businesses by making revolving fund courses cheaper.[199]

EEOC prepared a small business information sheet in conjunction with the National Federation of Independent Business (NFIB) and placed the document on the agency's Web site, which also contains EEOC's policy guidance.[200] The manager of Legislative Affairs at NFIB said that EEOC was interested in reaching out to the small business community and placing the small business information on the Web site was a good

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189 EEOC, Miami District Office LEP, p. 7.

190 EEOC, Atlanta District Office, "Local Enforcement Plan," revised Aug. 16 1996, p. 3.

191 EEOC, San Francisco District Office, "Local Enforcement Plan," pp. 5–6.

192 EEOC, Dallas District Office LEP, p. 11.

193 EEOC, Milwaukee District Office LEP, p. 12.

194 Pamela Thomason, Regional Attorney, Los Angeles District Office, EEOC, telephone interview, Apr. 15, 1998 (hereafter cited as Thomason interview).

195 Choate interview.

196 Pincus interview.

197 Paul Igasaki, Acting Chairman, EEOC, operational recommendations made at the Apr. 21, 1998 EEOC meeting.

198 Thornton interview. *See* EEOC Comments, July 17, 1998, p. 5.

199 Thornton interview (statement of Linda Lawson).

200 Mastroianni interview.

example of effective outreach and technical assistance. Although she was unaware of any technical assistance materials prepared by either EEOC or DOJ other than the ADA technical assistance manual, she said the manual was very well done and informative.[201]

Several of the district offices mentioned that they had made efforts to reach out to the small business community. In Los Angeles, staff has made presentations to groups such as chambers of commerce, roundtables, employer groups, and personnel management association meetings.[202] The Chicago District Office recognized that the full-day TAPS programs do not reach the small business community, so in 1997 it held a half-day seminar cosponsored with the Small Business Administration specifically aimed at small businesses. Two more half-day seminars for small businesses were planned for 1998.[203]

EEOC staff acknowledged that EEOC needed to reach the minority disability community, another underserved group.[204] Former Chairperson Gilbert Casellas also acknowledged that EEOC had been told that minorities with the disabilities have a harder time learning about the ADA. He said the National Enforcement Plan is trying to deal with this by addressing intersection cases, those involving discrimination based on age, race, sex, etc., in addition to disability.[205]

Disability is disproportionately higher in the minority community. For example, the presence and prevalence of disability for African Americans is almost twice as high as it is for the general population. Minorities who are disabled are not only faced with issues of discrimination; they also must deal with issues that relate to low socioeconomic status. Minorities tend to live in the least accessible areas of their communities, thus receiving lower levels of health, rehabilitation, and educational services.[206]

In the quarterly meeting of the National Council on Disability in November 1997, Council Member Hughey Walker voiced concerns about outreach to minorities with disabilities because many are unaware of the protections available to them under the ADA. Council Member Ela Yazzie-King raised similar concerns about obstacles faced by individuals with disabilities who speak English as a second language.[207] Alternatively, a staff person at the President's Committee on Employment of People with Disabilities said that both EEOC and DOJ had made a good effort to reach out to minority group members. However, he said there is always room for improvement in this area.[208]

The director of the Research and Training Center at Howard University recently said that the Federal outreach effort had been fairly effective, but she indicated greater familiarity with what DOJ has done than with what EEOC has done. She also said there was still a need to prepare informational and educational materials that target people with low reading skills.[209] The executive director of the National Center for Latinos with Disabilities stated that she had not seen any technical assistance or informational materials on the ADA from either EEOC or DOJ. She said that it would be very helpful to have publications in Spanish.[210]

Because of the mandate to reach underserved groups, the field offices are required as part of the outreach component of their LEP to describe how they plan to reach these groups. Some district offices are more specific than others. For example,

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[201] Mary Reed, Manager, Legislative Affairs (House Spokesperson), National Federation of Independent Business, telephone interview, Jan. 14, 1998.

[202] Rosa Viramontes, Enforcement Manager, Los Angeles District Office, EEOC, telephone interview, Apr. 10, 1998.

[203] Julie Bowman, Enforcement Supervisor, Chicago District Office, EEOC, telephone interview, Apr. 8, 1998.

[204] Thornton interview.

[205] Gilbert Casellas, Chairperson, EEOC, interview in Washington, DC, Nov. 25, 1997.

[206] USCCR, Briefing on the Americans with Disabilities Act, May 6, 1994, p. 17.

[207] National Council on Disability, Quarterly Meeting, Nov. 6, 1997.

[208] Claudie Grant, Employment Advisor, Office of Plans, Projects and Services, President's Committee on Employment of People with Disabilities, telephone interview, Nov. 19–20, 1997.

[209] Sylvia Walker, Director, Research and Training Center for Access to Rehabilitation and Economic Opportunity, Howard University and Vice Chairperson, President's Committee on Employment of People with Disabilities, telephone interview, Nov. 19, 1997.

[210] Maria Elena Rodriguez-Sullivan, Executive Director, National Center for Latinos with Disabilities, telephone interview, Nov. 25, 1997.

the Charlotte District Office has taken a "grassroots" approach to reaching out to minority and other underserved groups through contacts with such groups as the NAACP, human relations commissions, and veterans' groups. The office has also developed contacts with state-affiliated groups that then contact the district office when they need information. In the Charlotte District Office, the Hispanic community is the primary underserved group which is targeted for technical assistance. Because this ethnic group is composed mostly of transient migrant workers, they are difficult to contact, track and educate on a consistent basis. The office attempts to assist these individuals by working with various departments of labor, unions, and school systems.[211]

Future of EEOC's Outreach, Education, and Technical Assistance Program

A staff official of the National Council on Disability criticized EEOC's technical assistance because it has primarily benefited employers, who are most able to pay the cost of reimbursement to the revolving fund for TAPS programs.[212] This was acknowledged by several EEOC officials. However, most provided assurances that the TAPS programs, while designed primarily to reach employers on their ADA responsibilities, were not at the expense of the "free" training and technical assistance that EEOC has been doing on ADA.[213]

The Director of Field Coordination Programs, acknowledged that the training and technical assistance programs that are funded by the revolving fund are for groups that have the resources to pay. But the money that is received for the TAPS programs is used to reimburse EEOC for staff time. These funds in turn, she said, are used to provide "free" or "no fee" outreach training to groups who cannot afford to pay.[214] Staff expects to have a better coordinated and planned outreach and technical assistance effort in the future. One focus will be the development of technical assistance products, for example, educational videos with leader and participant guides.[215]

With funding provided by the revolving fund, the goal will be to put one outreach coordinator in each field office who will not only conduct revolving fund programs but will enable other staff members to do more outreach without charging fees. EEOC also wants to experiment with new approaches to providing technical assistance. Each field office has a stakeholder council which it consults, and some send out newsletters to their stakeholders. The goal is to have expanded communications in the field.[216] EEOC will use various communications strategies to reach underserved communities in its outreach programs. As long as there is a requirement that outreach is a component of each LEP, on which field staff is held accountable,[217] there is an assurance that EEOC's commitment to technical assistance will continue. Several EEOC staff members also indicated that with additional resources the agency could do an even more effective job of carrying out its outreach, education and technical assistance responsibilities.[218] The anticipated increase in funding in fiscal year 1999 and the use of funds generated by EEOC's revolving fund may ultimately provide the agency with the resources to expand its outreach, education, and technical assistance programs to all segments of society on all the laws EEOC enforces, including the Americans with Disabilities Act.

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[211] Billy Sanders, Technical Assistance Coordinator, Charlotte District Office, EEOC, telephone interview, Apr. 13, 1998. Mr. Sanders said that interacting with the Hispanic communities in the district's target cities (Rocky Mount, NC, and Greenville, Charleston, Florence, Beaufort, and Waterboro, SC), who seem to be victims of "indigenous slavery," is a somewhat depressing task. As sharecroppers, the Hispanic individuals in these communities are charged a fee for renting houses; and they buy their "bosses" supplies from the store. At the end of the week, they can owe their bosses more money than they are paid. Consequently, they are never able to save money. Mr. Sanders has contacted health departments to inspect some of the communities where migrant workers reside. Mr. Sanders has a good relationship with the Department of Labor. According to Mr. Sanders, although he is somewhat limited in jurisdiction, he does monitor geographical areas where people are putting in long hours.

[212] Imparato interview.

[213] White interview.

[214] Choate interview.

[215] Ibid.

[216] Ibid. *See* EEOC Comments, July 17, 1998, p. 6.

[217] Vargyas interview.

[218] White interview.

8 Findings and Recommendations

Since acquiring responsibility for enforcing the Americans with Disabilities Act of 1990 (ADA), EEOC has faced enormous challenges. With responsibility for the ADA and with another major responsibility EEOC acquired at the same time, enforcement of the Civil Rights Act of 1991, came a 38 percent increase in the number of charges of discrimination filed with the agency. The increased workload was not matched by a concomitant increase in budget, resources, or staff. In real dollars, EEOC's fiscal year 1997 budget was 8 percent below its appropriation level for 1989, several years before the ADA went into effect. EEOC also lost staff. Its fiscal year 1997 staffing level of 2,586 FTEs was well below its staff level of approximately 2,800 in the years before the agency acquired responsibility for the ADA. Not surprisingly, EEOC's increased workload in the face of its declining resources resulted in a large increase in EEOC's backlog. EEOC's pending inventory of charges more than 180 days old more than doubled, from 46,000 charges to 98,000 charges, between fiscal years 1991 and 1995.

Over the past several years, EEOC has taken a number of creative and innovative steps to attempt to deal with the reality it faces: an overwhelming workload with insufficient resources. Under the leadership of former Chairman Gilbert Casellas, the agency created several Commissioner-led task forces to conduct a comprehensive review of EEOC's enforcement activities and to make recommendations that would "articulate the vision and chart the course that will take [EEOC] into the 21st century." A principal outcome of these task forces was the implementation, in 1995, of Priority Charge Handling Procedures, which attempted to focus EEOC's limited resources on the most "meritorious" charges. EEOC also began experimenting with using alternative dispute resolution techniques, in particular, mediation, to encourage charging parties and respondents to come to mutually beneficial agreements and to reduce the number of charges that needed investigation. EEOC increased its emphasis on outreach and education and technical assistance to encourage voluntary compliance with employment discrimination statutes. Finally, EEOC attempted to focus its enforcement efforts through the development of its National Enforcement Plan, along with Local Enforcement Plans for each district office.

These innovations have had mixed success in improving EEOC's effectiveness as a civil rights enforcement agency. They undoubtedly can be credited with a major reduction in the agency's backlog by fiscal year 1996. Civil rights advocacy groups and employers alike generally have reacted favorably to the changes. However, EEOC's abandonment of its commitment to do a full investigation of all charges has led to fears among some that individuals with meritorious charges of discrimination may find their charges dismissed without a proper review by EEOC staff and hence be left to fight discrimination on their own. EEOC also has been criticized for expending resources on systemic cases or cases that develop the law that some would argue

could be spent better on investigating and conciliating individual charges of discrimination.

During the same time that EEOC has been implementing major changes in its approach to its work, it has developed a highly credible ADA implementation, compliance, and enforcement program. The agency published detailed ADA regulations within 1 year of the law's enactment; provided comprehensive initial training on the statute for all of its staff; set about developing a series of policy documents laying out and explaining its interpretation of controversial or unsettled aspects of the law; provided extensive outreach and education and technical assistance on the statute; and engaged in ADA litigation to protect the rights of individuals with disabilities and to develop the law. By most accounts, EEOC's efforts in implementing the ADA far outstripped its previous efforts on other employment discrimination statutes. It is clear that implementing the ADA has been a major focus of the agency since the law was passed.

EEOC has been particularly effective in the ADA policy guidance it has published. Generally, these guidance documents provided thoughtful and well-researched interpretations of the statute on issues that were controversial or unsettled. In developing the guidance documents, EEOC was very faithful in interpreting the ADA consistent with congressional intent. EEOC's policy guidance has been very influential in development of the law, but on some issues, some courts have issued opinions at odds with EEOC's policy guidance. Where Federal courts have done so, they have interpreted the ADA very narrowly and restricted its coverage in ways that are at odds with congressional intent. Many Federal judges appear either to misunderstand the ADA or be hostile to it, and EEOC has been somewhat limited in its ability to influence them. However, on issues where some courts have disregarded EEOC's policy guidance, the agency has continued to make concerted efforts to develop the law consistent with congressional intent through its litigation activities. In particular, EEOC has effectively and efficiently used its authority to file *amicus curiae* briefs, to intervene in lawsuits, and to file systemic lawsuits to promote correct interpretations of the ADA, consistent with congressional intent.

In light of the resource constraints it faces, EEOC's ADA implementation, compliance, and enforcement efforts have been reasonably effective in clarifying the meaning of the ADA and developing the law, in protecting the rights of individuals charging discrimination on the basis of disability, and ensuring that persons with disabilities, employers, and the general public are informed of their rights and responsibilities under the law. Through this study, the U.S. Commission on Civil Rights has identified both areas of strength and areas that can be improved. The findings and recommendations below are intended to assist EEOC in its efforts to enhance its effectiveness in carrying out its mission to enforce the ADA.

General Findings and Recommendations

Cost of Compliance with the ADA

Finding: Many critics of the ADA argue that it imposes large costs on employers, both through the expenses associated with providing reasonable accommodations to individuals with disabilities and through the expense of defending against frivolous lawsuits. Cost of compliance is not an appropriate argument against remedying the denial of civil rights.

Recommendation: The National Institute on Disability and Rehabilitation Research might undertake a comprehensive report on the costs and the benefits of the ADA in order to provide additional information on the subject.

Media Coverage of the ADA and Disability

Finding: For the ADA to achieve its primary goal of equal opportunity for individuals with disabilities, it needs to be understood by the American public as a truly important civil rights statute that provides essential civil rights to individuals with disabilities. However, in general, the national media have provided misleading and inaccurate coverage of the ADA and related disability issues, with the result that many Americans not only do not understand the ADA, but also are hostile to it. One particularly egregious example of the poor quality of media coverage of ADA issues was the grossly inaccurate coverage of EEOC's guidance on psychiatric disabilities, which suggested that EEOC required employers to hire and retain workers who posed a safety threat to their

fellow employees, where this plainly was not the case. The poor quality of coverage has led to a gross misunderstanding of the ADA on the part of the general public, as well as to increased hostility to individuals with disabilities. As one disability advocate has told the Commission, "the public relations battle is being lost" and the ADA is being viewed as a source of frivolous lawsuits and not as an important means of guaranteeing the rights of the disabled.[1]

Recommendation: Because the ADA never truly will become an effective civil rights statute if it continues to be misunderstood and viewed negatively by the American public, Federal agencies charged with enforcing the ADA, especially EEOC and the U.S. Department of Justice, along with other Federal agencies charged with protecting the interests of individuals with disabilities, particularly the National Council on Disability and the President's Committee on Employment of People with Disabilities, should work together to promote greater understanding of and support for the ADA. These agencies should mount a national public relations campaign for the ADA. Furthermore, they should make concerted efforts to ensure that journalists and other media professionals are well informed about the ADA and understand the need for accurate and balanced coverage of the statute and other disability issues.

Judicial ADA Interpretations Inconsistent with EEOC Guidance

Finding: Some Federal courts have issued decisions restricting the coverage of the ADA. These decisions often have conflicted with congressional intent as expressed in the statute's legislative history. These decisions also have generally interpreted the language of the statute more narrowly than EEOC. Many disability rights advocates have contended that these courts have gone far toward denying civil rights protections to many individuals with disabilities whom Congress, in drafting the ADA, clearly desired to protect. Unless or until the U.S. Supreme Court resolves these differences between judicial and EEOC interpretations by ruling on specific ADA-related issues, or Congress amends the statute or its regulations to clarify its intent, EEOC and some courts in the Federal judiciary, particularly Federal judges who issue decisions contrary to the ADA's legislative history, will continue to develop the law along two separate, contradictory lines. Because these differences in interpretation relate to fundamental aspects of the statute, such as whether mitigating measures should be considered in determining the presence of a disability and whether some impairments are "inherently" disabling, they have created serious concerns about the purposes of the statute and its ability to provide civil rights protections for individuals with disabilities.[2]

Recommendation: For all Federal judges to better understand and more carefully consider EEOC's legal interpretations and Congress' legislative intent in creating the ADA, the Federal Judicial Center, in partnership with EEOC, should take steps to ensure that all Federal judges are provided comprehensive training on the ADA. Specifically, EEOC should work with the Federal Judicial Center Judicial Education Division to develop curricula for training and workshops for Federal judges on ADA law. This training should be conducted by experts in the civil rights and disability advocacy field. EEOC should offer its expertise on the ADA, including attorneys from EEOC's Office of Legal Counsel, in speaking before Federal judges and in providing them with written materials to accompany training sessions. This training should address the intent and purpose of the ADA, as well as particularly complex areas of the law. To develop and coordinate this training, EEOC should enter into a partnership with the Federal Judicial Center based on a memorandum of understanding between the two agencies that would specify EEOC's role in the development of training projects relating to ADA. EEOC should ensure through this partnership that its officials have frequent opportunity to address new as well as seasoned Federal judges on ADA law.

The ADA and Disability Policy

Finding: Although the ADA often is thought of as a culmination of a long line of statutes extending civil rights protections to different groups of Americans, it also needs to be understood as a major new component of the Nation's

[1] *See* chap. 1, pp. 6–7; chap. 5, p. 121.

[2] *See* chap. 1, pp. 7–8; chap. 4, pp. 76, 81–83, 91–99; chap. 6, pp. 125–26.

broader policy towards people with disabilities. With the exception of section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act is the only major component of the set of programs that constitute America's disability policy that is premised on a recognition that people with disabilities have a right and, indeed, a responsibility, to work. The Americans with Disabilities Act sets a goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[3] Most of the rest of the Nation's disability policies are premised on what has been termed a "medical" or "charity" model of disability. Under this model, people with disabilities are injured, or limited, and deserve assistance in the form of health care, vocational rehabilitation, and, when they cannot work, income supports. Based on the medical model, over the years, the United States has put in place a variety of supports for people with disabilities, including social security disability insurance, supplemental security income, State workers' compensation programs, and disability coverage for veterans.

Many of these disability benefit programs have created powerful work disincentives. For instance, the loss of health care coverage from medicare or medicaid that ensues when an individual with a disability finds gainful employment is a major impediment preventing many individuals with disabilities from seeking work. As a result of these work disincentives, many individuals with disabilities are trapped in the disability benefit system. Without a major reform of the national disability benefit programs to remove their work disincentives, the ADA will never achieve its goals of "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.

In addition to the work disincentives, individuals with disabilities are often prevented from working because of lack of adequate training for available jobs, inaccessible transportation, and the need for personal assistance supports. Government provision of these needed supports could allow many individuals with disabilities to enter the work force and make substantial contributions to the economy, while saving at least some of the money taxpayers currently spend on the disability benefits system.[4]

Recommendation: Congress and the President should work together to enact legislation reforming national disability benefit programs to remove disincentives to working and provide needed supports to enable individuals with disabilities to take advantage of employment opportunities. A useful first step in this direction is for Congress to act on legislation currently pending in the U.S. House of Representatives (the Ticket to Work and Self Sufficiency Act of 1998) and the U.S. Senate (The Work Incentive Improvement Act of 1998). Congress should speedily draft a workable bill and forward it to the President for his signature. Furthermore, the National Task Force on Employment of People with Disabilities created by Executive Order on March 13, 1998, should move aggressively to fulfill its mission "to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population." The task force should make concrete recommendations to the President and Congress, and Congress and the President should act on those recommendations and implement other reforms as needed to ensure that individuals with disabilities are able to make the ADA's goals of "equality of opportunity, full participation, independent living, and economic self-sufficiency" reality. The task force should ensure that, as it works in this direction, it seeks and incorporates input from the disability community, employers, disability experts, and the general public, as well as Federal agencies that are not represented on the task force.

Chapter 3. Organization and Administration of the U.S. Equal Employment Opportunity Commission

EEOC's Structural Organization

Finding: EEOC's structural organization generally is conducive to effective implementation of the ADA and other employment discrimination statutes. By having a specialized unit, the ADA Policy Division in its Office of Legal Counsel devoted to ADA, EEOC has in place a mechanism

[3] 42 U.S.C. § 12101 (1994).

[4] *See* chap. 2, pp. 31–37.

for ensuring effective ADA regulatory and policy development and a nationwide outreach, education, and technical assistance program for the ADA, and that EEOC has a cadre of ADA experts who can provide training and technical assistance to its investigators and attorneys.

In addition, EEOC's division of legal responsibilities into two office, the Office of General Counsel, for litigation, and the Office of Legal Counsel, for policy development and representing EEOC, is a sound division of labor that prevents conflicts of interest within a given legal office. Where necessary for consistency in EEOC's policy positions and other matters, staff from the two offices appear to interact and communicate effectively with each other.[5]

Recommendation: The Commission commends EEOC's designation of a particular office to conduct litigation and another to concentrate on policy development. The Commission recommends that EEOC's structural organization be used as a model for other Federal agencies, particularly civil rights enforcement agencies.

Systemic Enforcement Plan

Finding: In their joint report published in March 1998, the Priority Charge Handling Task Force and the Litigation Task Force recommended that the Systemic Enforcement Services unit develop a Systemic Enforcement Plan. Such a plan would explain how the unit plans to supplement the systemic work done by the field offices. According to the report, the plan should set expected results, and the unit should be responsible for achieving these results.[6]

Recommendation: EEOC should implement the recommendation of the joint report for a Systemic Enforcement Plan as soon as possible. Such a plan could set priorities for the Systemic Enforcement Services unit and provide for specifically targeted issue areas. The plan should have built-in flexibility to ensure that when new issues emerge they can become a plan priority.

Commissioner Task Forces

Finding: Under the leadership of former Chairman Gilbert Casellas, EEOC has instituted the constructive practice of having Commissioner-led task forces evaluate strategies, polices, procedures, and practices and develop recommendations for improving the agency's operations. These task forces have produced thoughtful reports that were acted upon and resulted in substantial improvements in the way EEOC conducts its business. However, to date, the task forces have not focused sufficiently on EEOC's enforcement of the ADA. For instance, the recent task force report on "Best" Equal Employment Opportunity Policies, Programs, and Practices provides very little information on employment practices that promote the purposes of the ADA.[7]

Recommendation: The Commission commends EEOC for its use of Commissioner-led task forces to evaluate its operations and make recommendations for improvement. However, EEOC should create a Commissioner-led task force to evaluate its enforcement of the ADA. This task force should also work to provide information to employers on "best" ADA practices, or practices that advance the purpose of the ADA. In particular, the task force should emphasize that employers need to take a proactive approach to compliance with the ADA and not merely respond on an *ad hoc* basis to the needs of individual employees with disabilities. The task force should emphasize that compliance with the ADA is an interactive process, and employers are responsible for anticipating and responding to the needs of employees with disabilities and developing a workplace that provides true equal employment opportunity for individuals with disabilities.

Local Enforcement Plans

Finding: EEOC's National Enforcement Plan requires each district office to produce a local enforcement plan (LEP) that identifies underserved populations, geographic areas, and employment practices important to their districts; identifies and prioritizes local issues under the National Enforcement Plan, and describes how the office intends to manage its charge inventory. The first generation of LEPs, developed and implemented in 1996-1997, clearly have failed to achieve their intended purpose of being valuable strategic, policy, and management tools for EEOC. The district offices were not given

[5] *See generally* chap. 3, pp. 38–51.

[6] *See* chap. 3, p. 43.

[7] *See* chap. 3, pp. 51–53.

much guidance on how to develop their LEPs, and as a result, there is little uniformity in what was produced. Furthermore, in general, the district offices' efforts to seek and incorporate local stakeholders' input as they developed their plans were inadequate. Although some district offices made a serious effort to include stakeholders, others relied primarily on staff input. Finally, the LEPs generally did not include clearly articulated and achievable goals and objectives and thus cannot be used effectively as management tools. The 1998 joint report of EEOC's Priority Charge Handling Task Force and its Litigation Task Force recognizes the shortcomings of the first generation of LEPs and made a number of important recommendations for making the LEPs more effective strategic, policy, and management tools.[8]

Recommendation: EEOC should adopt and implement the recommendations of the joint report of the Priority Charge Handling Task Force and the Litigation Task Force with respect to the local enforcement plans to ensure that the plans become the truly valuable strategic, policy, and management tools they are intended to be, rather than mere pieces of paper thrown together to meet a requirement. In particular, the Office of Field Programs and the Office of General Counsel should work together to provide detailed guidance on what is expected in a LEP, including providing a uniform format. The LEPs should be designed to include clearly articulated and measurable goals and objectives, so that they can represent a type of "contract" between the district offices and EEOC headquarters. Measurable goals and objectives also will permit EEOC headquarters and district offices to be evaluated on their success in achieving the goals and objectives. Finally, the district offices should make an enhanced and substantial effort to consult with stakeholders in the development of their plans, and the LEPs should clearly reflect that input. District offices should use the LEPs as a way to develop an ongoing partnership with stakeholders to ensure that EEOC is responsive to local needs and priorities.

Finding: EEOC's National Enforcement Plan encourages "joint investigative and enforcement activities" between field offices and the fair employment practices agencies (FEPAs). It also encourages district offices to solicit suggestions from the FEPAs in developing their Local Enforcement Plans. Currently, there is little coordination between FEPAs and EEOC field offices on investigations. Furthermore, although FEPA directors attend an annual meeting, usually at EEOC headquarters, which provides training on different areas, the joint report of the Priority Charge Handling Task Force and the Litigation Task Force stated that this training was not sufficient to meet the needs of all FEPA staff.[9]

Recommendation: In keeping with recommendations made in EEOC's National Enforcement Plan, EEOC should develop more coordination between FEPAs and EEOC's field offices with respect to investigations. Also, EEOC should ensure that training is sufficient to meet the needs of *all* FEPA staff, not just FEPA directors.

Strategic Plan

Finding: EEOC's 1997-2002 Strategic Plan, developed in accordance with the mandate of the Government Performance and Resolution Act, does not adequately fulfill the requirements of the act. Although it effectively recounts EEOC's recent initiatives and accomplishments and identifies barriers to the agency's effectiveness, especially the continuing lack of sufficient resources, the plan does not establish clear performance objectives and measures and provides little detail as to how EEOC intends to accomplish its goals and objectives. The plan points to the difficulty in measuring the extent of equal employment opportunity, but does not make a serious attempt to grapple with the problem of how to establish meaningful and measurable goals and objectives.[10]

Recommendation: EEOC should enhance its Strategic Plan by developing a companion document with clear performance objectives and measures. In doing so, EEOC should use the best measures available for determining outcomes. Such a document could be the foundation for the annual performance plans that also are required by the Government Performance and Results Act.

[8] *See* chap. 3, pp. 53–56.

[9] *See* chap 3, pp. 52–53.

[10] *See* chap. 3, pp. 56–59.

Budgetary and Staff Resources

Finding: EEOC clearly is an agency that is straining to accomplish its mandate in the face of insufficient budgetary and staff resources. Despite several creative efforts to make the most of its available resources, EEOC cannot truly accomplish its mission of promoting equal employment opportunity without an increased budget appropriation from Congress. However, the agency has not conducted any formal internal studies, nor has it contracted with an outside entity, to assess or prioritize its budgetary and staffing needs in light of its workload and its Strategic Plan and National Enforcement Plan. Without such a study, EEOC cannot make a convincing case for why it should be given more resources and explain clearly what it would do with additional funds if it receives them. At the President's request, Congress is considering increasing EEOC's budget appropriation substantially. At the same time, Congress is deciding where any additional funding should go. Without a serious budgetary study by EEOC, Congress likely will make these appropriation decisions based on political factors and insufficient information.[11]

Recommendation: EEOC should do a formal study of its budgetary and staffing needs in light of its workload, Strategic Plan, and National Enforcement Plan and develop a detailed plan for what it would do with additional budgetary and staffing resources. The plan should include accountability factors to ensure that any additional resources are used appropriately, effectively, and efficiently. Congress should consider such a study and plan seriously and provide increased appropriations to EEOC to permit the agency to fulfill its statutory mandate.

Staff Training on ADA

Finding: EEOC provided comprehensive initial training on the ADA to all of its staff, and both EEOC headquarters and field offices have pursued an active staff training agenda on the ADA since the initial training. Some in the disability advocacy community have voiced concerns that EEOC field office staff do not have sufficient training on the ADA to handle ADA charges appropriately, but most EEOC staff interviewed by the Commission appear to be satisfied that they have received adequate training on the ADA. EEOC's ADA training manual is excellent and comprehensive. Given its limited resources, EEOC's level of commitment to providing ADA training to its staff has been exceptional, and the training appears to have been superior to that provided on other employment discrimination statutes EEOC enforces. Nevertheless, because ADA law continues to develop, ongoing staff training on the ADA is needed. EEOC has no budget for staff training. A recent EEOC initiative to develop training partnerships with the American Bar Association to provide free training to field office staff on specific issues shows promise as a way of ensuring that staff are provided necessary training on the ADA and other employment discrimination laws and issues.[12]

Recommendation: The Commission commends EEOC for the quality training it has provided its staff on the ADA and, in particular, the excellent ADA training manual it has developed. EEOC should continue to provide ongoing training to staff on the ADA, as well as on other employment discrimination statutes and issues. EEOC should make maximum possible use of its training partnership with the American Bar Association to ensure that staff are trained on emerging ADA issues. However, such training cannot take the place of systematic training, which can only be accomplished if EEOC obtains congressional funding for staff training. In its budget requests to the Office of Management and Budget and in testimony before Congress, EEOC should identify the ongoing need for staff training on the ADA and other employment discrimination laws and issues, including civil rights investigations. Congress should provide specific funds targeted to training EEOC's staff.

Finding: Although EEOC investigators have received considerable training on the ADA, the law is complex and may present them with particular challenges when handling charges of discrimination based on disability. Furthermore, because it is new, the ADA is a developing law, and issues can arise in a particular ADA case that were not covered in the ADA training.[13]

Recommendation: EEOC should contract with an independent outside auditor to review

[11] *See* chap. 3, pp. 59–62.

[12] *See* chap. 3, pp. 62–65.

[13] *See* chap. 3, pp. 62–63.

the case files for all ADA investigations to evaluate their quality and ensure that investigators used the proper analyses in their investigation. Where problems are uncovered based on the case file reviews, EEOC should develop and provide targeted training to ensure that all of its investigators have the knowledge to do quality ADA investigations. If the reviews uncover evidence that some investigations have been done improperly or have not been sufficiently thorough, these cases should be reopened and reinvestigated.

Chapter 4. Assessment of EEOC's Rulemaking and Policy Development

EEOC's Title I Rulemaking and Policy Development

Finding: EEOC has actively pursued ADA rulemaking and policy development. EEOC released a comprehensive title I regulation a year after the law was enacted and since then has issued a series of policy guidance documents on ADA issues. The creation of an ADA Policy Division in the Office of Legal Counsel has brought together in one office the legal expertise on the ADA necessary to develop sound policy. In addition, EEOC has developed and furthered its policy positions through the litigation activities carried out by the Office of Legal Counsel. The interactions and communication between staff in the Offices of Legal Counsel and of General Counsel on ADA issues are positive and have permitted EEOC to develop and pursue a unified and sound ADA policy agenda. Furthermore, the recent creation of a policy development committee should enhance EEOC's effectiveness in developing and publishing sound ADA policy.

However, EEOC does not adequately include views of stakeholders in the policy development process. Some disability advocates have criticized EEOC for not having a formal mechanism in place for advocacy groups to raise issues or concerns with EEOC on specific issues *before* issuance of EEOC policy guidance. Although EEOC follows the formal notice and comment procedures for issuing substantive regulations, it has no similar mechanism in place for interpretive policy guidance. EEOC has frequent informal interactions with stakeholders, but no formal mechanism for obtaining stakeholders' participation as it develops particular ADA policies. EEOC "floats" ideas at meetings and welcomes letters on policy issues from stakeholders, but it does not solicit comments on or circulate drafts of proposed policies outside of the agency before they are approved by the Commissioners. As a result, stakeholders have felt left out of EEOC's ADA policy development process. Both EEOC and its stakeholders could benefit from more formal interaction during the policy development process.[14]

Recommendation: The Commission commends EEOC for the creation of an ADA Policy Division and the sound ADA policy it has developed. However, EEOC should take steps to increase stakeholders' participation in its policy development process. It would be impractical for EEOC to provide for formal review and comment of its proposed policies and that would likely slow the policy development process. However, EEOC should develop a formal mechanism for obtaining stakeholders' views during its policy development process. An example of such a mechanism might be a notice in the *Federal Register* that EEOC has begun working on a draft of an enforcement guidance on a specific topic and invites comments, or that EEOC has finished a draft of an enforcement guidance document that is available for review and comment pending completion of a final version. More generally, EEOC should create an ADA Policy Advisory Committee consisting of representatives of disability advocacy groups, disability experts, and employers to advise the Commission on where further ADA policy guidance is needed and provide input on what it should say. Members of the advisory committee should be chosen to represent the wide array of stakeholders' interests, including people from all regions of the country and individuals with different kinds of disabilities. This committee should meet regularly, at least twice a year, with the newly formed staff policy development committee.

EEOC's Policy and Enforcement Guidance on Title I of the ADA

Finding: EEOC's guidance on the ADA to date, both in regulations and policy, has been exemplary both in implementing Congress' intent to ensure civil rights for people with disabilities and in elucidating and clarifying the

[14] *See* chap. 4, pp. 66–77.

statute's more ambiguous language, based on congressional intent as stated in the ADA's legislative history.[15] EEOC has published important ADA policy guidance documents in a number of areas that inform the public of its position. In addition, the legal interpretations that EEOC advances in its ADA policy guidance play an important role in shaping nearly every aspect of the agency's ADA implementation and enforcement efforts.[16]

However, EEOC has not delivered on its promise, in an early policy guidance on the major provisions of the ADA, that it would develop several policy documents on "Theories of Discrimination" under the ADA, "Definition of Qualified Individual with a Disability," and "Reasonable Accommodation and Undue Hardship." These issues, particularly reasonable accommodation and undue hardship, lie at the center of some of the most heavily disputed debates that have arisen since the passage of the ADA. The issues are of extreme importance for employers and people with disabilities alike, in terms of understanding their rights and responsibilities under title I. EEOC policy guidance on these topics would help to clarify the agency's position, develop the law, and improve employers' and employees' understanding.[17]

Recommendation: EEOC should proceed expeditiously to develop and publish policy/enforcement guidance on the definition of qualified individual, reasonable accommodation, and undue hardship within 6 months from publication of this report. In addition, EEOC should continue to develop, publish, and disseminate policy guidance on other key issues that it has not already addressed. For instance, EEOC should also issue guidance on health insurance and disability-based insurance in one comprehensive policy document.

Finding: EEOC typically does not issue enforcement guidance on every unresolved ADA issue causing conflict among the courts, reserving its enforcement guidance for larger topics of importance. One reason for this is that EEOC's Office of General Counsel, in litigation and *amicus* activity, advances EEOC's position on these issues. However, in the past, the Office of Legal Counsel issued brief, 1-page documents on discrete topics relating to the ADA. For example, on May 11, 1995, EEOC issued a 1-page "guidance memorandum" on disability plans under the ADA. On July 17, 1995 EEOC issued a "policy statement" on alternative dispute resolution. These brief documents address specific ADA-related topics without the indepth analysis of the much longer ADA enforcement guidance documents. The short documents, nonetheless, offer an effective mechanism for enunciating or clarifying EEOC's position on specific topics or issues, particularly issues in which the courts are in conflict.[18]

Recommendation: EEOC should reinstitute the practice of issuing brief "policy statements" to offer an official position on ADA issues on which it chooses not to do enforcement guidance. Such policy documents could serve to state, reinforce, or elaborate on specific issues, particularly those on which the courts are in conflict. In addition, these statements could be used to help disseminate EEOC's positions to employers.

Finding: In many of its activities, EEOC addresses issues and topics that may require the advice of subject-matter experts in social science or medicine. For instance, in EEOC's enforcement guidance on the ADA and psychiatric disabilities, EEOC attorneys not only drafted a legal discussion and analysis, but also addressed clinical issues, such as separating mere traits from a diagnosis of a personality disorder and determining when traits, such as poor ability to concentrate or think, become signs of an impairment. Furthermore, EEOC investigators and attorneys investigating charges of discrimination or pursuing litigation often need to understand a charging party's medical condition to determine whether he or she has a disability under the ADA. Thus, EEOC staff in the ADA Policy Division and in the field offices could benefit from consultation with inhouse experts. EEOC has inhouse experts, including social scientists, economists, psychologists, and other subject matter experts, in its Research and Analytic Services unit in the Office of General Counsel.

[15] *See* chap. 4, pp. 72–76.

[16] *See* chap. 4, pp. 72–73.

[17] *See* chap. 4, pp. 75–76.

[18] *See* chap. 4, p. 75.

However, the Office of Legal Counsel and its ADA Policy Division apparently have had little contact with that office. Furthermore, despite evident need, EEOC does not have inhouse medical experts in the Research and Analytic Services unit or any other unit.[19]

Recommendation: EEOC should enhance its use of subject-matter experts in ADA policy development and case handling. Office of Legal Counsel staff should use more fully the Research and Analytic Services expertise in subject matter fields, particularly during the development of policy guidance. At a minimum, if staff in the Research and Analytic Services have expertise in an area in which the ADA Policy Division is preparing guidance, then the Office of Legal Counsel should have such staff review the document for accuracy. Furthermore, EEOC should consider whether hiring an inhouse medical expert would be beneficial to its staff doing ADA investigations and litigation.

Defenses

Finding: Although an understanding of the concepts of "job related" and "business necessity" is crucial to any case in which the employer is relying on qualification standards as a defense, EEOC's treatment of these concepts has been limited to providing definitions of the terms in its title I regulations and the appendix to its regulations. These definitions are not always clear. For example, EEOC's regulations and their appendix do not provide a simple, direct discussion of the meaning of business necessity. The interpretive guidance/appendix states that "[s]election criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity." This explains, in a somewhat convoluted way, what business necessity is not but not what it is. A definition of both business necessity and job relatedness, framed in simpler, more direct, language can be found in the ADA legislative history. The House Committee on Education and Labor report states:

> The interrelationship of these requirements in the selection procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.[20]

Recommendation: EEOC should include a discussion and analysis of the meaning of "job related" and "business necessity" in its future policy guidance on "qualified individual with a disability" and reasonable accommodation. This discussion should build on EEOC's previous guidance in the appendix to its title I regulations, as well as the definition in the House Committee on Education and Labor report.

EEOC Policy Guidance: Defining Disability

Finding: The ADA statute provides a broad framework for ensuring equal employment opportunity and nondiscrimination for people with disabilities in employment. However, the broadness of its language has created room for controversy among policy makers and in the Federal courts as to the definition of such keys terms as "disability," and "reasonable accommodation." EEOC has sought to clarify the meaning of key terms in title I and its implementing regulations, such as "substantial limitation" and "major life activity." In keeping with congressional intent, EEOC has interpreted these terms broadly. However, some courts have disagreed with EEOC's interpretation and have applied a more narrow reading.[21]

Recommendation: EEOC should continue a dialogue with the private bar and the Federal judiciary to establish understanding of and create consensus on the meaning of key terms contained in the ADA's definition of "disability" and

[19] *See* chap. 4, p. 75.

[20] H.R. REP. NO. 101–485(II), at 71 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 353–54. *See* chap. 4, pp. 79–80.

[21] *See* chap. 4, pp. 81–83.

their proper applicability in a title I analysis. EEOC should adopt a policy of pursuing regulatory additions in areas where the courts have consistently opposed the EEOC's position on key ADA issues, such as mitigating measures, even though EEOC has the statute's legislative history behind its position.

Finding: Ever since the passage of the ADA, there have been fears that the statute would lead to numerous frivolous lawsuits by individuals with mild or imaginary impairments. However, the ADA is a carefully crafted document that relies on section 504 of the Rehabilitation Act for its primary substantive requirements. These requirements are rigorous and include the need to show a *substantial* limitation to a major life activity. Whether an impairment is substantial requires an evaluation of the nature, severity, and potential for permanence. Thus, it is very unlikely that a claimant with a mild or imaginary impairment will survive EEOC priority charge processing system or prevail in court. If accurate information on the ADA's requirements were readily available to potential claimants whose claims are meritless, as well as to their employers, the number of meritless lawsuits could be minimized. Similarly, if employers were well informed of their obligations under the statue, the need for individuals with meritorious cases to file suit to obtain compliance would be reduced.[22]

Recommendation: To minimize the costs associated with meritless or unnecessary ADA lawsuits, EEOC should work extensively with human resources, management officials, labor union representatives, and clinicians, to ensure that the criteria, standards, and processes for determining who is a qualified individual with a disability and what is a reasonable accommodation are disseminated widely among these professionals and others who need to understand these concepts to ensure compliance with the ADA and avoid litigation.

EEOC Policy: Substantial Limitation

Finding: The decisions of the Federal courts have helped to define the scope of the term "physical or mental impairment" with respect to the length of time needed for a limitation of a major life activity to be "substantial." In the courts, claimants bringing cases based on temporary disabilities largely have failed to achieve protection under the ADA. This is an area where the majority of courts agree with EEOC. However, it appears that some attorneys continue to bring meritless ADA cases on behalf of individuals with temporary impairments that waste time and resources of plaintiffs, defendants, and the judicial system.[23]

Recommendation:. EEOC should conduct a program with the private bar to exchange information and analysis on the ADA that would allow the agency to clarify or explain its policy positions and address other relevant issues. EEOC should undertake this effort through its current partnership with the American Bar Association to train EEOC attorneys and any other partnerships it has already or will develop with the employment law divisions of major attorneys' professional organizations such as the American Bar Association and the National Bar Association. EEOC should work with these organizations to develop training, workshops, and conferences addressing such themes as "understanding the ADA" and "avoiding frivolous litigation in civil rights cases." To minimize the litigation of meritless cases, EEOC should rely on its technical assistance staff working with its ADA Policy Division to ensure wide dissemination among plaintiffs' attorneys of as much written guidance and technical assistance material as possible focusing on ADA claims where precedent and EEOC's guidance make clear that the alleged "disability" will not meet the ADA standard.

EEOC Policy: The Major Life Activity Analysis

Finding: Much of the controversy surrounding the ADA has to do with whether particular activities can be considered "major life activities" for purposes of the statute. Although EEOC has given examples of major life activities in its regulations and policy guidance, it has never issued a comprehensive list of major life activities, nor has it attempted to define further the term's meaning, perhaps by developing specific criteria for what constitutes a major life activity.[24]

[22] *See* chap. 4, pp. 72, 79–80, 85.

[23] *See* chap. 4, pp. 86–87.

[24] *See* chap. 4, pp. 87–89.

Recommendation: In light of continued controversy over what a major life activity is, EEOC should issue some form of guidance, perhaps a brief 1- or 2-page policy statement that would rely in part on the ADA's legislative history and the U.S. Supreme Court's decision in *Bragdon v. Abbott*. The policy statement should provide some specific criteria for determining whether a given activity constitutes a major life activity.

Finding: In general, a major problem with the regulatory requirements relating to showing a substantial limitation in the major life activity of working is that they are too vague. As a result, the EEOC's regulatory guidance on doing this analysis appears to require courts to place an extremely high burden on claimants seeking to show substantial limitation. EEOC's requirement for ADA claimants to show substantial limitation in a "class or broad range of jobs" has resulted in courts disagreeing on the proper criteria for defining a class or broad range of jobs. Using these guidelines, what one court would include as a job in which the claimant must prove that he or she would be substantially limited, another court may find irrelevant to its analysis.

For example, one court has found that a pilot must show that he is limited in *nonpilot* jobs for which his training qualifies him, as opposed to only showing that he or she has a disability that prevents, or is perceived as preventing him or her, from performing the job of a pilot. However, another court found that the relevant class of jobs was limited to pilot jobs. This court stated that the relevant class of jobs was "that of all *pilot* positions at all airlines." However, even this characterization presents a disagreement because another court has found that the relevant class of jobs was limited to pilot jobs *only at the defendant airline*. These regulations have been criticized on several other grounds.[25]

Recommendation: EEOC should issue a notice of proposed rulemaking and hold hearings on better ways to ensure that the regulations do not create discrimination through the provisions on a broad range or class of jobs. At a minimum, EEOC should issue enforcement guidance or a policy statement addressing the issue that provides analysis and offers examples to clarify this standard.

Finding: The factors for determining whether a person is substantially limited in the major life activity of working provided in the title I regulations can be criticized on two grounds. First, disabled individuals will, in some cases, have to expend resources proving that they are substantially limited by showing evidence for these criteria. Second, the factors include geographical limitations that could undercut protection from discrimination because they could mean that an individual with a disability who resides in one geographical region would have the protection of the statute while an individual in another region may not.[26]

Recommendation: EEOC should issue a notice of proposed rulemaking and hold hearings on better ways to ensure that the regulations do not create discrimination based on geographical area.

Finding: EEOC's guidance clearly indicates that in determining whether an individual has a disability under the ADA, it first must be determined whether the individual has a substantial limitation to a major life activity other than working and then, if the individual does not, whether the individual has a substantial limitation to the major life activity of working. However, there is still misunderstanding or misapplication of the distinction between "major life activity" in general and the "major life activity of working." At least one recent court decision shows faulty reasoning in finding that a plaintiff's impairment was not a disability because it did not prevent her from doing her job duties, without first considering whether the plaintiff had a substantial impairment to any other major life activity.[27]

Recommendation: EEOC should issue new policy guidance, perhaps in the form of a brief policy statement specifically addressing the analysis for the major life activity of working. This guidance should explain that a title I claimant only needs to show a substantial limitation in the major life activity of working as an alternative argument, when the claimant cannot show a sub-

[25] *See* chap. 4, pp. 89–91.

[26] *See* chap. 4, pp. 90–91.

[27] *See* chap. 4, pp. 90–91.

stantial limitation in any other major life activity. Since this is a very important distinction that, if misapplied, could significantly change the outcome of a case, the proper analysis for distinguishing between the concepts of "major life activity" in general and "major life activity of working" should be reiterated. In addition, EEOC should continue to file *amicus* briefs in cases where this issue is likely to be present.

EEOC Policy: Mitigating Measures

Finding: EEOC has been clear in stating that mitigating measures should not be considered in determining whether an impairment or a substantial limitation exists. However, EEOC has not addressed in policy the courts' concerns that for all practical purposes the substantial limitation has been removed in a situation where the disability is controlled through a mitigating measure. EEOC has not explained clearly what the substantial limitation is for an individual whose disability is controlled through mitigating measures.

To date, EEOC's efforts in strengthening its position on mitigating measures and working to ensure that it prevails in the courts have been somewhat limited. For example, EEOC has not issued guidance on mitigating measures in the form of a substantive regulation, which would carry substantially more legal weight and would require the courts' deference; nor has EEOC addressed the issue in comprehensive policy guidance that provides a careful, thoroughly developed rationale explaining EEOC's position as it has done for other discrete topics and issues such as psychiatric disabilities and the effects of representations made in disability benefits claims on ADA claims. EEOC has addressed the mitigating measures issue in significant ways in its enforcement guidance on other title I issues and in its litigation and *amicus curiae* briefs. In addition, EEOC has continued its program to conduct technical assistance and outreach and education with members of the Federal judiciary and the private bar explaining EEOC's interpretation of mitigating measures under the first prong of the ADA's definition of disability.[28]

Recommendation: Barring a Supreme Court ruling resolving the mitigating measures issue, at a minimum, EEOC should issue new policy guidance addressing the issue of mitigating measures and explaining what exactly the substantial limitation is in situations where mitigating measures are reducing the effect of the impairment on the individual's life. In other words, EEOC should address the arguments that some courts are making that the mitigating measure removes the substantial limitation for all practical purposes.

EEOC should file more *amicus* briefs in cases in which mitigating measures have been at issue. EEOC should consider issuing any guidance on this issue in the form of a substantive regulation that would have greater legal authority, thereby making it more difficult for the courts to ignore as they have ignored EEOC interpretive and policy guidance on this issue. Finally, EEOC should hold training or conferences with members of the Federal judiciary and the private bar on this issue.

EEOC Policy: *Per Se* Disabilities

Finding: EEOC's policy guidance supports the idea that some disabilities can be considered *per se* disabilities, or inherently substantially limiting under the ADA. EEOC's guidance states "[i]n very rare instances, impairments are so severe that there is no doubt that they substantially limit major life activities. In those cases, it is undisputed that the complainant is an individual with a disability." However, EEOC's position on *per se* disabilities is not entirely clear. EEOC's Associate Legal Counsel has said that EEOC's position is that in determining whether an individual has a disability under the ADA, it always should be considered whether the individual meets the criteria laid out in the three prongs of the ADA's definition of disability. On the other hand, she said that EEOC acknowledges that there is legislative history suggesting that asymptomatic HIV is covered as inherently substantially limiting and that some courts have found that other impairments such as insulin-dependent diabetes, alcoholism, and manic depression are *per se* disabilities.

Some courts have rejected the language in EEOC's guidance stating that "[o]ther impairments, however, such as HIV infection, are inherently substantially limiting," because they have determined that it "effectively negates the

[28] *See generally* chap. 4, pp. 91–99.

statutory requirement that one must be substantially limited in order to be covered," thus creating a category of *per se* disabilities that arguably do not require the analysis indicated in the ADA's definition of disability. Thus, EEOC's guidance relating to *per se* disabilities under the first prong appears directly at odds with these recent court decisions.

To date, EEOC has issued no new policy guidance or substantive regulation addressing the apparent contradiction noted by recent court decisions relating to whether the requirement for a showing of substantial limitation can be waived for some disabilities, as EEOC has stated in its guidance. The Associate Legal Counsel indicated that she does not believe EEOC will address the issue "because there is nothing EEOC can add to the debate."

The U.S. Supreme Court decided the case of *Bragdon v. Abbott* in June 1998, addressing the question of whether asymptomatic HIV infection is a disability within the meaning of the ADA. However, the Court did not address the issue of whether HIV infection is, as EEOC states in its guidance, an *inherently* disabling condition that does not require any showing of a substantial limitation of a major life activity to be considered a disability within the meaning of the ADA.[29]

Recommendation: EEOC should issue new policy explaining the implications of the Supreme Court's ruling in *Bragdon v. Abbott* for title I claims, clarifying the analysis required and addressing any language in previous guidance that seems to contract the substantial limitation requirement. In addition, EEOC should clarify whether it considers impairments, such as alcoholism or manic depression, as *inherently* substantially limiting, as it seems to indicate in its enforcement guidance on the definition of disability, and whether there should be an express exception to the substantial limitation requirement for these impairments.

EEOC Policy: The Use of the Third Prong

Finding: A question that has arisen under the third prong of the ADA's definition of disability is whether a claimant must show that his or her perceived condition or impairment is one that substantially limits a major life activity. In the case of disabilities such as asymptomatic HIV infection, under-control diabetes, and others that have been the subject of dispute under the first prong as to whether they actually create substantial limitations on major life activities, some courts that have found no disability under the first prong have taken this finding and applied it to the third prong. This analysis assumes that if the condition is not substantially limiting on a major life activity in fact, it cannot be perceived as such. However, the ADA's legislative history makes clear that a person who is rejected from a job because of the myths, fears, and stereotypes associated with disabilities is covered under the third prong, whether or not the employer's perception was shared by others in the field and *whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.*

EEOC states in its title I regulations and enforcement guidance that a determination of whether there is a substantial limitation is relevant for all three prongs. However, this position appears to contradict the House Judiciary Committee report, which clearly states that the first prong requirement that a disability must be substantially limiting to a major life activity does not apply to the third prong. As a result, there is a certain lack of clarity in EEOC's guidance with respect to the third prong.[30]

Recommendation: EEOC should issue new policy guidance addressing both the first and the third prong with respect to the requirement of a showing of a substantial limitation of a major life activity, specifically, whether the third prong can bypass the substantial limitation requirement by focusing on *perception* of disability not *actual* disability.

EEOC Policy: Reasonable Accommodation

Finding: To date, EEOC has not issued comprehensive policy guidance on the term "reasonable accommodation." The issue of reasonable accommodation has engendered much controversy and the question of what constitutes reasonable accommodation remains unresolved. EEOC has indicated that it is developing guid-

[29] *See generally* chap. 4, pp. 99–101.

[30] *See* chap. 4, pp. 101–03.

ance on the meaning of "qualified individual" and "reasonable accommodation."

One area of some disagreement is the question of whether and when reassignment to a vacant position can constitute reasonable accommodation. EEOC's title I regulations and interpretive guidance include reassignment to a vacant position as an example of reasonable accommodation. However, in a recent case, the Tenth Circuit held that employers are not obligated under the ADA to provide another job as a reasonable accommodation. The court reasoned that reassignment can be used as a means of accommodation only when it would be *possible* to accommodate the employee in his or her current position but doing so would cause the employer undue hardship. However, where accommodation in the current position is *impossible* because the employee cannot perform the essential functions of his or her current job even with reasonable accommodation, the employee is no longer a qualified individual with a disability within the meaning of the ADA and is therefore no longer covered under the statute.

This argument, which directly conflicts with EEOC's position on the issue, raises several questions. The first question that arises in the context of reassignment is whether, to be covered, the individual with a disability needs to be qualified for the job he or she currently holds or for the one to which he or she seeks reassignment The second question is whether the qualified individual standard demands that individuals with disabilities be able to perform the essential function of the job with or without reasonable accommodation.[31]

Recommendation: EEOC should discuss the issue of whether and when reassignment can constitute reasonable accommodation in its enforcement guidance on reasonable accommodation. The discussion should address the two questions above relating to reassignment as a reasonable accommodation. The guidance also should clarify EEOC's position on the many other issues relating to reasonable accommodation.

[31] *See generally* chap. 4, pp. 108–12.

Business Necessity and the Direct Threat Standard

Finding: An issue that has arisen under the ADA is when an employer's policy that screens out individuals based on their disabilities is justified as a "business necessity." Some employers have argued that when such a policy is motivated by safety concerns, it constitutes a "business necessity" and therefore may be permitted under the ADA. However, EEOC and at least one court have applied a more rigorous standard, stating that a safety-based policy that has an adverse effect on individuals with disabilities only is permitted if it can be shown that the excluded individuals pose a direct threat to the health or safety of others in the workplace. EEOC's position that the more rigorous direct threat standard should apply appears to be consistent with the spirit and purpose of the ADA. However, although EEOC has expressed this position by bringing suit against an employer whose drug and alcohol policy barred all employees with current or former substance abuse problems from working in safety-sensitive jobs, the agency has not issued policy guidance or technical assistance materials explaining its position to employers.[32]

Recommendation: EEOC should include a discussion and analysis of its position on safety-based qualifications as a business necessity in its enforcement guidance on reasonable accommodation and "qualified individual with a disability." This analysis should explain fully from a practical perspective, using actual workplace situations as examples, EEOC's position that all safety-based qualifications standards must meet the "direct threat" test to be considered as a business necessity.

Undue Hardship

Finding: The courts have not always agreed with EEOC's interpretations of the undue hardship requirement. One notable example is *Lori l. Vande Zande v. State of Wisconsin,*[33] where the Seventh Circuit suggested that the term "undue hardship" should be evaluated in relation to "the benefits of the accommodation to the disabled

[32] *See* chap. 4, pp. 112–15.

[33] 44 F.3d 538; 1995 U.S. App. LEXIS 99; 133 A.L.R. Fed. 713; 3 Am. Disabilities Cas. (BNA) 1636 (7th Cir. 1995).

worker as well as to the employer's resources." Thus, in effect, the Seventh Circuit disagrees with EEOC's position that for an accommodation to be reasonable it need merely be "effective." The *Vande Zande* decision suggests that an employer may apply a cost-benefit analysis to determine whether a particular accommodation is reasonable. This contradicts EEOC's position that the cost of an accommodation does not enter into the analysis of whether or not the accommodation is reasonable.

Another issue relating to reasonable accommodation that remains unresolved is whether a plaintiff who proves that he or she was perceived as having a disability, and can perform the essential functions of the job, is entitled to reasonable accommodation. EEOC has not issued any guidance on this issue. However, Congress included within the meaning of disability both actual as well as perceived disability without making any distinctions between the two in terms of the threshold showing of qualifications. It follows that if a plaintiff with an actual disability is entitled to reasonable accommodation, then one with a perceived disability may be as well."[34]

Recommendation: EEOC should clarify its position on the undue hardship issue, perhaps in its enforcement guidance on reasonable accommodation and qualified individual with a disability. Given the significant concerns of numerous stakeholders, including businesses, policy makers, and at least one court, EEOC should acknowledge the opposing perspectives on the interplay between "reasonable accommodation" and "undue hardship." EEOC should demonstrate in policy guidance that its view that the only criterion for an appropriate reasonable accommodation is that it be "effective" is fully supported in the ADA and its legislative history. EEOC should issue an interim guidance on these issues to give all stakeholders, including businesses and disability rights groups, an opportunity to comment.

In addition, in its enforcement guidance on reasonable accommodation and qualified individual with a disability, EEOC should include a discussion and analysis of its position on whether plaintiffs who show that their employer perceived them as disabled are entitled to reasonable accommodation, and that the undue hardship analysis does not permit a cost-benefit analysis.

Chapter 5. Assessment of Enforcement Guidance on Title I Topics and Issues

Enforcement Guidance on Psychiatric Disabilities

Finding: EEOC's enforcement guidance on psychiatric disabilities is unclear in its statement that the *DSM–IV* may be "relevant" to identifying mental disorders that may qualify for ADA coverage. To some, use of the term "relevant" appears to suggest that there may be other means of identifying mental disorders. However, the guidance does not specify whether other means of identifying mental disorders are acceptable or what those means may be. As the guidance is written, it appears to suggest that in some circumstances mental disorders not covered in the *DSM–IV* and thus not diagnosed in accordance with *DSM–IV* criteria might be disabilities covered under the act. Thus, the guidance is far more vague than both the statute's legislative history and accepted practices of the psychiatric community, which regards the *DSM–IV* as the *only* means of diagnosing the presence of mental disorders. Addressing concerns relating to the use of the term "relevant" with regard to the *DSM–IV*, EEOC staff have explained that this term must be understood as a legal term that is used to evaluate evidence. It is not a judgment as to the *weight* of the evidence.[35]

Recommendation: EEOC should clarify in policy guidance or in a brief policy statement whether it considers the *DSM–IV* as the only relevant diagnostic manual for identifying and diagnosing mental disorders. It may be useful for EEOC to address in policy the concerns expressed about use of the term "relevant" with regard to the *DSM–IV*. EEOC also should explain that the term must be understood as a legal term that is used to evaluate evidence and not as a judgment as to the *weight* of the evidence.

Finding: EEOC uses a standard of whether the person has different abilities from "the average person in the general population" for psychiatric disabilities. This is a comparative meas-

[34] *See* chap. 4, pp. 115–17.

[35] *See* chap. 5, pp. 119–21.

urement that creates a large margin of error. How many hours the average person in the general population sleeps or how much or how clearly the average person thinks or concentrates are difficult assessments to make and are probably useless in doing an EEO investigation. In addition, this generalized standard seems oddly at variance with Congress' and EEOC's "individualized" and "case-by-case" approach in implementing the ADA. It is difficult to see the utility of this standard since its practical value seems limited. At a minimum, it seems the "general population" element might be narrowed in some way.[36]

Recommendation: EEOC should seek the advice of clinicians in the psychiatric field to determine a more precise measurement for assessing whether an individual is "substantially limited in major life activities," such as sleeping, thinking, and concentrating. EEOC should issue a brief policy statement further defining the means by which the "substantial limitation" determination can be made and explaining whether the "average person" standard should be applied literally or whether it is intended as an approximation of some kind.

Finding: EEOC's enforcement guidance on psychiatric disabilities states that self-reporting and the testimony of family and friends will serve as credible evidence for the presence of a psychiatric disability under the ADA. This language appears to suggest that self-reporting by itself is enough to establish the presence of a psychiatric disability.[37]

Recommendation: EEOC should revisit its statement that self-reporting and testimony of family and friends can serve as credible evidence for the presence of a psychiatric disability under the ADA to determine whether it needs clarification or elaboration, such as clarifying that self-reporting is not sufficient when the employer requests medical documents.

Finding: EEOC's enforcement guidance on psychiatric disabilities does not answer important questions relating to reasonable accommodation. The guidance does not address the issue of documentation to show the medical need for an accommodation, specifically how much information the employer is entitled to get under the ADA, or from whose doctor the information can come, the employer's or the employee's doctor. A second issue that the guidance does not discuss is the reasonable accommodation process. For example, the guidance does not address whether, in the interactive process that courts require to reach a reasonable accommodation, the employer or the employee has to suggest a potential accommodation. Furthermore, the guidance also does not address whether, in cases where reassignment might be appropriate, it is the employer's responsibility to identify possible job vacancies. Another issue that the guidance does not discuss is whether there is a continuing requirement for reasonable accommodation if one or more accommodations are attempted and prove unsuccessful. Finally, with respect to undue hardship, the guidance does not clarify its scope. For example, if a high level employee with a psychiatric disability needs a long term leave of absence, the guidance offers no information to determine at what point his or her absence amounts to an undue hardship on the company.[38]

Recommendation: EEOC should issue guidance, perhaps in the form of a brief policy statement, addressing all of these issues in the context of psychiatric disabilities. EEOC should follow up with technical assistance efforts to ensure that employers and employees alike know their rights and responsibilities with respect to psychiatric disabilities in the workplace.

Finding: In the case of violence or threats of violence, the EEOC enforcement guidance on psychiatric disabilities notes, "nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence." Several courts have found that maintaining an acceptable standard of conduct generally is an essential function of any job. Any individual engaging in abusive, violent, or threatening behavior, regardless of whether such an individual claims a psychiatric disability, may therefore be considered no longer capable of performing an essential function of the job and thus no longer "otherwise qualified." The only caveat EEOC

[36] *See* chap. 5, pp. 124–27.

[37] *See* chap. 5, p. 127.

[38] *See* chap. 5, pp. 128–30.

adds to this rule is that if the sanction is not job related and consistent with business necessity, "imposing discipline under them could violate the ADA." It would be rare, if not never, that some form of sanction for violent behavior in the workplace would be considered inconsistent with business necessity and not job related. Therefore, a policy of firing those who engage in violent behavior is not a violation of the act as long as it is implemented uniformly, against both people with disabilities and those without. However, the guidance does not make clear that, if an employee who has engaged in violent behavior related to his disability has put the employer on notice as to his disability, the employer might also have to conduct a direct threat analysis to ensure that the employee is no longer a "qualified individual with a disability."[39]

Recommendation: EEOC should address in a policy statement or letter the issue of whether the fact pattern changes significantly where the employee has put the employer on notice about his disability rather than claiming it after a violent episode. If EEOC considers these two circumstances to be different, the agency should explain in what way and how it changes the analysis. In particular, EEOC should explain whether the employer has to do a direct threat analysis or whether the employer can rely on the precedent in the courts stating that any violent behavior makes the employer no longer qualified with a disability and therefore no longer a member of the statute's protected class.

Finding: Among the most significant barriers confronting people with psychiatric disabilities in the workplace today are attitudinal barriers created by a lack of understanding by both employers and employees. This problem has been exacerbated by negative portrayals of people with psychiatric disabilities in the news media, particularly since EEOC issued its enforcement guidance in March 1997.[40]

Recommendation: EEOC should undertake a concerted technical assistance, outreach, and education effort to combat the negative myths, fears, and stereotypes that surround psychiatric disabilities. EEOC should begin by developing an interagency task force on issues confronting people with psychiatric disabilities. EEOC should develop more technical assistance documents specifically addressing issues involving psychiatric disabilities in the workplace. Along these lines, EEOC should work with private disability rights groups, including advocacy and policy research groups to produce reports on this issue. EEOC should also develop a program of outreach and education activities such as workshops, conferences, and training with public and private employers to educate them about appropriate reasonable accommodations for people with psychiatric disabilities. For example, EEOC should encourage employers to provide flexible and part-time work schedules where possible for people with psychiatric disabilities.

EEOC Policy: Interim Enforcement Guidance on Employer-provided Health Insurance

Finding: EEOC's policy position on actuarial data and its uses has been an important subject of debate. Some commentators contend that specific aspects of the interim enforcement guidance relating to actuarial data are inconsistent with the express statutory language of the ADA. For example, a disability rights advocacy group claims that the guidance fails to define what types of information courts are to consider as "legitimate" actuarial data. The same group also points out that the guidance does not require that employers or insurers provide such actuarial data to employees who are refused insurance coverage, and calls upon EEOC to mandate that employers/insurers make such information available. Further, one author has raised concerns that the interim guidance deviates significantly from the statutory language of the ADA because of its "undue reliance" on actuarial standards to define subterfuge. According to this author, the plain language of section 501(c) and legislative history indicate that actuarial principles are only to be considered in "determining whether insured plans are consistent with state law" and "do not apply to self-insured plans subject to ERISA. . . ."[41]

Recommendation: EEOC should issue guidance addressing the actuarial data issue and should consider requiring employers or insurers

[39] *See generally* chap. 5, pp. 130–34.

[40] *See* chap. 5, pp. 133–35.

[41] *See* chap. 5, pp. 135–36, 140–44.

to provide actuarial data to employees who are refused insurance coverage. EEOC should also address the issue of whether it has been allowing "undue reliance" on actuarial principles by applying them to self-insured plans under ERISA.

Finding: In its interim guidance on disability-based distinctions in employer-provided health insurance, EEOC stated clearly that it does not consider distinctions between mental health and physical health benefits to be disability-based distinctions. However, EEOC does consider this precise distinction to be a disability-based distinction in the context of long term or disability insurance. In its litigation and *amicus* briefs, EEOC has sought to prohibit the practice of providing a shorter term of coverage for mental disability than for physical disability in *disability* insurance benefit plans, but it has not taken the same position on *health* insurance plans for people who are still working. Thus, EEOC clearly makes a distinction between health insurance and long term disability insurance. However, EEOC never has clarified this distinction in policy guidance or litigation. As a result, it remains unclear why EEOC has taken arguably contradictory policy positions in its interim enforcement guidance as compared to its recent litigation posture in insurance cases.

EEOC's distinction between mental and physical for health insurance but not for disability insurance abrogates the important purpose of the ADA to prevent any kind of different treatment on the basis of a disability. Under EEOC's current position, all people with mental disabilities can legally have fewer health insurance benefits than people who have physical illnesses. In addition, this distinction is creating confusion considering that at least one court has cited to EEOC's interim health insurance guidance as support for a finding that a *disability* insurance plan distinguishing between physical and mental health benefits is not prohibited under the ADA. This apparent confusion as to EEOC's position further suggests the need for updated guidance in this area from EEOC. Finally, EEOC never issued final guidance on employer-provided health insurance. It withdrew proposed plans to issue such guidance in August 1997.[42]

[42] *See* chap. 5, pp. 144–47, 148.

Recommendation: EEOC should issue final guidance on employer-provided health insurance. When EEOC issues new policy guidance announcing its position on both parity of benefits between mental and physical for both health and long term disability insurance plans, EEOC should eliminate the distinction between health insurance and long term disability insurance and reverse its position so that both kinds of insurance require insurers to provide parity between mental and physical.

If EEOC chooses not to reverse its position, at a minimum, it should explain in policy guidance the basis for its differing positions on whether the physical-mental distinction is "disability-based" as between health insurance and disability insurance. In addition, EEOC should finalize its "interim" guidance to address not only health, but disability insurance plans.

Finding: One issue not directly addressed by EEOC in policy or by the ADA's legislative history is whether retired employees may sue under the ADA although technically they are no longer "qualified individuals with disabilities." The Second Circuit has recently reversed a lower court's ruling that retired employees can no longer perform the essential functions of the jobs they once held and therefore are not qualified individuals with disabilities. EEOC filed an *amicus* brief in this case in which it agreed with the appeals court's decision that retired employees may be eligible to sue under the ADA even if they are no longer capable of performing the essential functions of their former jobs. In this brief EEOC argued:

> The language of the ADA shows that Congress clearly intended to prohibit employers from discriminating in the area of fringe benefits, many of which are distributed in the post-employment period. If former employees may not challenge discrimination in post-employment fringe benefits, the entitlement to which they earned by virtue of employment, Congress' goal of providing comprehensive protection from disability discrimination would be severely undermined.[43]

[43] Amicus Curiae Brief for the EEOC at 5, Castellano v. City of New York, No. 96–7920, 1998 U.S. App. LEXIS 3646, 21 E.B.C. 2697 (2nd Cir. Feb. 24, 1998).

However, EEOC has not addressed this issue in its policy or enforcement guidance.[44]

Recommendation: In its enforcement guidance on reasonable accommodation and qualified individual with a disability, EEOC should include a discussion and analysis of its position on whether retired employees who can no longer perform the essential functions of their former jobs are ineligible to sue under the ADA because technically they are not qualified.

EEOC Policy: Enforcement Guidance on Preemployment Inquiries and Medical Exams

Finding: EEOC's enforcement guidance on preemployment inquiries and medical exams appears mired in a set of complex prohibitions and requirements under which employers must labor to remain within the boundaries of permissible, nondiscriminatory conduct while doing pre-offer hiring practices such as interviews. The guidance seems entirely focused on details without ever clearly setting forth the broad principles on which the numerous requirements are based. Although the guidance attempts to clarify EEOC's position with respect to mention of need for reasonable accommodation during the interview process, it nonetheless suggests a fairly complicated and highly specific set of "do's" and "don'ts" of which employers must be aware. For example, according to the guidance, an employer may ask an applicant if he or she can perform job functions "with or without reasonable accommodation"; however, "an employer may not ask a question in a manner that requires an individual to disclose the need for reasonable accommodation." This seems a subtle and easily overlooked distinction.

Any employer who has not read EEOC's guidance thoroughly is in danger of running afoul of the statute. More than any other ADA-related issue, this one seems to require the strongest efforts on the part of EEOC to ensure dissemination to all job applicants, employers, and businesses. These efforts will require a significant amount of technical assistance, outreach, and education to ensure that all of these stakeholders have a good understanding of how to proceed through the stages of the hiring process.[45]

Recommendation: Due to the subtlety and complexity of the preemployment inquiry requirements, EEOC should devote particular attention to this area of ADA law, with increased efforts in technical assistance, outreach, and education.

Enforcement Guidance on Effects of Representations Made in Applications for Disability Benefits

Finding: As a response to a growing trend in the courts barring ADA claims by plaintiffs who had previously applied for disability benefits such as social security or workers' compensation, EEOC issued enforcement guidance in February 1997. In this guidance, EEOC advances legal and public policy arguments to support its position that the application of judicial estoppel in this context wrongly interprets the ADA and thwarts its purposes. In making these arguments, the guidance relies on a comparison demonstrating the differences between the purposes and standards of the ADA and those of the various disability benefit schemes. EEOC supports its arguments with a thorough, carefully crafted analysis that incorporates the relevant caselaw and makes excellent use of hypothetical examples. Overall, the document's analysis of the judicial estoppel issue demonstrates both common sense logic and consistency with the purposes of the ADA as set forth in the law and its legislative history.

However, this is one of only a few examples of enforcement guidance EEOC has issued on discrete smaller issues that have been the source of controversy between EEOC and the Federal courts.[46]

Recommendation: EEOC should continue to issue guidance on discrete policy issues, such as this one, that have been the source of controversy between EEOC and the Federal courts. EEOC could better and more thoroughly explain and support its position on such issues as mitigating measures, the use of the third prong, and the "major life activity of working" concept.

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[44] *See* chap. 5, p. 148.

[45] *See generally* chap. 5, pp. 148–57.

[46] *See generally* chap. 5, pp. 162–72.

Chapter 6. Assessment of EEOC's Charge Processing and Title I Enforcement Activities

Finding: The ADA is a complex statute for which legal interpretation and caselaw are still in their initial phases of development, suggesting a need for EEOC investigative and legal staff handling ADA charges to have a specialized knowledge of the ADA. Several EEOC staff noted that the complexity of the statute affects charge processing. This is due to the vagueness and complexity of ADA concepts, such as "qualified individual with a disability." One district director stated that the qualitative differences between the ADA and other statutes that EEOC enforces have presented difficulties. Because of the complexities of the law and its relative newness, EEOC has yet to take on some of the more serious issues, as it has with other laws. In addition, EEOC may have underestimated the difficulties staff have had with the law.

Although EEOC has specialized staff on the ADA in its headquarters Office of Legal Counsel, EEOC's field offices do not have investigative or legal staff who specialize on ADA charges or litigation. Investigators and attorneys work on all statutes. EEOC staff and officials have given several arguments for not having investigative or legal staff assigned to work exclusively on ADA. For instance, in field offices where there are only one or two attorneys, to assign one of them exclusively to the ADA might not make sense in comparison to the workload the office has. In addition, having all staff be familiar with all the statutes EEOC enforces may serve to give them deeper understanding of employment discrimination on which they can draw in ADA investigations and litigation. Although these arguments are persuasive, they do not prevent EEOC from designating investigative and legal staff in field offices to become "ADA experts" to whom other field office staff can turn informally for advice and assistance should a particularly complex or novel ADA case present itself.[47]

Recommendation: The Commission commends EEOC for its implementation of the law thus far. Staff have been sufficiently trained in the basics of the law. Because of the complexities of the law, however, EEOC should ensure that its staff are prepared to handle difficult issues related to applicability and enforcement of the law. Unless EEOC receives considerably more resources and increases the number of investigators and attorneys in its field offices substantially, the agency should not assign investigators and attorneys to work exclusively on the ADA. However, each field office should designate investigative and legal staff to become ADA experts who can serve as resources for other field office staff and handle particularly complex or novel ADA charges that arise. Although these individuals should not work exclusively on the ADA, they should be provided advanced training on the ADA, they should interact regularly with staff in the ADA Policy Division, and they should be given particularly complex or ADA charges to handle. Furthermore, they should provide outreach and education and technical assistance on the ADA.

Enforcement Generally

Finding: EEOC staff generally agree that EEOC has done a good job, overall, of enforcing the ADA. In addition, they appear satisfied the EEOC's Priority Charge Handling Procedures have empowered staff, giving investigators more autonomy in charge processing, increasing the interaction between investigators and attorneys, and eliminating layers of review. They appear confident that the Priority Charge Handling Procedures' categorization system is beneficial and allows them to process charges more efficiently.

However, there is a danger that meritorious charges may end up being dismissed because they are not recognized as meritorious during the intake process and therefore are categorized as "C" charges. Because of the complex nature of the ADA, this danger is particularly acute for ADA charges. Although some investigators indicated that they rarely categorized ADA charges as "C" charges during intake, the field offices generally do not appear to have in place adequate safeguards to ensure that meritorious cases are not miscategorized as "C" charges.[48]

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[47] *See* chap. 6, pp. 187–88; see *generally*, chap. 6.

[48] *See* chap. 6, p. 1888.

Recommendation: EEOC's Office of Field Programs should ensure that EEOC's field offices are implementing the Priority Charge Handling Procedures properly. The Office of Field Programs should review the procedures used in each field office to ensure that meritorious ADA charges, as well as meritorious charges under the other statutes EEOC enforces, are investigated and resolved. The effectiveness of such procedures should enter into district directors' performance evaluations.

Charge Intake

Finding: Because the intake process determines whether EEOC will accept a charge of discrimination and hence whether an individual who has experienced discrimination on the basis of disability has any chance of redress, it is essential that the intake process be thorough and effective. In general, EEOC's intake process appears to be sound. During intake, EEOC staff inform the complainant of his or her rights under the law and obtain sufficient information from the complainant to develop a charge of discrimination. All charging parties are informed of their right to file a charge, that they must file a charge to be able to file a private suit and that there is a responsibility of retaliation by the respondent. Charging parties also are informed of what to expect during the processing of their charge and are given the staff member's assessment of the charge. However, some disability advocates contend that EEOC's intake personnel are not sufficiently trained on the ADA or do not take sufficient time to interview potential charging parties.[49]

Recommendation: EEOC's Office of Field Programs, in conjunction with representatives from the field offices, should develop common procedures for intake and periodically evaluate the quality of the intake process in each field office. In addition, EEOC should develop a thorough training module for intake personnel and ensure that all personnel who perform intake duties are provided such training.

Finding: Charge intake is handled differently in the various EEOC field offices. Many offices have a rotation system in which investigative units take turns performing intake duties. Other offices have permanent intake staff. The task forces on priority charge handling procedures and litigation recommended in their joint report that the Office of Field Programs assess the results of these two methods and share the information from the assessment with the field offices.[50]

Recommendation: The Office of Field Programs should review each field office to evaluate the effectiveness of its form of charge intake and recommend changes where needed. Based on the results of the review, EEOC should develop a model charge intake system that can be implemented where district office officials feel there is a need for change.

Finding: The different field offices have different ways of providing information to potential charging parties. For example, the Chicago and Los Angeles district offices show potential charging parties a videotape while they wait for their interview. The joint task force report recommended that the Office of Field Programs coordinate the information provided to charging parties. All videos, foreign language materials, and brochures should be made available to all offices. The report further recommended that the Office of Field Programs, the Office of General Counsel, and the Office of Communications and Legislative Affairs assess information needs and determine what should be developed centrally for distribution to field offices.[51]

Recommendation: All field offices should have the same resource materials available for their use. When a field office develops resource materials for its own use, it should forward the materials to the Office of Field Programs for dissemination to the other field offices. Charging parties across the country should be provided the same information.

Finding: Staff interviewed by the Commission stated that intake of ADA charges does not differ greatly from intake of charges filed under other statutes; however, there are some differences. An enforcement supervisor in Dallas said that if a person has a disability that is not ap-

[49] *See* chap. 6, pp. 191–92.

[50] *See* chap. 6, pp. 192–93.

[51] *See* chap. 6, pp. 191–93.

parent, staff give that person the "ADA letter," which tells the charging party that EEOC must receive written medical information from a physician that explains what the disability is and how it rises to the level of a disability that substantially limits a major life activity. The charging party is given 30 days to provide this information. Such cases usually are categorized as "B" charges, pending the receipt of medical information. It is the responsibility of the charging party to provide that information. EEOC will dismiss the case if the information is not received.[52]

Recommendation: EEOC should ensure that ADA cases, as well as other cases, are being handled in the same manner by all field office staff. Procedures should be developed for obtaining medical information from charging parties. EEOC should have inhouse contractors with the expertise needed to assess medical information. For example, EEOC should contract with NIH, an agency known for its medical expertise, for medical advice.

Charge Categorization

Finding: During the intake interview, EEOC staff decide if a charge falls under category "A," "B," or "C." Many staff indicated that under the new procedures there is better screening of charges, and staff can be honest with charging parties about the prospects and validity of their case. However, one district director reported that he is not comfortable stating that staff are capable of making a determination of the priority of a charge. Thus, supervisors also are involved in charge categorization. For all four statutes enforced by EEOC, close to 60 percent of the charges are placed in category "B." Category "A" charges account for 15 percent of all ADA charges, while category "C" charges account for 27 percent of all ADA charges.[53]

Recommendation: Although intake staff should make an initial determination of which category a charge should be in, the categorization of charges should be reviewed by supervisors after the interview to ensure that the correct category has been assigned. The Office of Field Programs should conduct a review based on a comparative sample of offices to assess how well offices are doing with the categorization procedures currently in place. Additional training should be provided to those offices where OFP determines there is a problem with correct charge categorization.

Finding: Charge categorization is not handled uniformly across field offices. Many field offices further categorize "A," "B," and "C" charges. For example, the Charlotte District Office has two categories for each priority level. In Dallas, for "C" charges that are dismissed during intake, the charging party is given a right to sue letter during the interview. Furthermore, the joint task force report noted some problems with charge categorization. For example, the Charge Data System data indicate that not all "C" charges are dismissed at intake. The report stated that sometimes investigators feel they need additional information before they can categorize charges as "C" charges. The task forces also noted an imbalance in the identification and processing.[54]

Recommendation: EEOC should ensure that all offices are using the same system for categorizing charges. Although EEOC has a document that briefly explains the "A, B, C" categories, it should provide further assistance to field office staff. Along these lines, EEOC should develop and issue a comprehensive staff reference guide providing specific examples and other useful information for field office use.

Finding: Charge categorization may be misunderstood by respondents, charging parties, and other individuals outside of EEOC. For example, the director of Golden State University's Employment Rights Clinic stated that practitioners do not understand clearly the prioritization system and do not know if they can influence the decision process. The director also stated that charging parties may not know how to frame their charge so that the important legal facts are made clear. Similarly, intake personnel may not be able to determine if there are bases for discrimination other than as described by the charging party.[55]

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[52] *See* chap. 6, p. 193.

[53] *See* chap. 6, pp. 193–95.

[54] *See* chap. 6, p. 195.

[55] *See* chap. 6, p. 195.

Recommendation: EEOC should develop materials to explain the Priority Charge Handling Procedures to groups outside of EEOC, particularly charging parties. These materials should include user-friendly outreach and education documents that would clearly explain EEOC procedures for charge intake and categorization. In addition, these documents should thoroughly explain the types of information EEOC relies on in reviewing and categorizing charges. Also, these documents should contain complete information that tells people planning on filing a charge with EEOC what they can expect from the moment they walk in the door until they have a determination on their case. These materials should be disseminated widely among the public to ensure that as many people as possible have access to specific information on how to file an ADA complaint and how EEOC addresses complaints once they have been filed.

Commissioner Charges

Finding: Commissioner charges are an important tool for eliminating discrimination in those cases where the victims cannot or do not file individual charges. Commissioner charges are used as an enforcement tool in cases where there is no individual charge, often when victims of discrimination may be afraid to file a charge with EEOC, or even may not realize that they are being treated unfairly because they have no basis of comparison. EEOC staff or outside individuals or organizations may request a Commissioner charge. EEOC Commissioners told the Commission that they take the Commissioner charges very seriously and only file them when they are convinced that discrimination has occurred. Commissioner charges account for only a small proportion of all EEOC charges. Only 99 ADA charges have been Commissioner charges. Of all charges filed between October 1989 and September 1997, 559 were Commissioner charges, representing less than 1 percent of all charges.[56]

Recommendation:. EEOC should continue the judicious use of Commissioner charges to advance the purposes of the ADA and the other statutes that EEOC enforces when there is sufficient evidence to suggest that discrimination has occurred. EEOC should use Commissioner charges the greatest extent possible in conjunction with the National Enforcement Plan to ensure that priority issues are addressed fully. Further, EEOC should use this tool to ensure that ADA compliance is occurring in work environments where people with disabilities are particularly vulnerable to employment practices banned by the statute.

Charge Investigation

Finding: The new Priority Charge Handling Procedures stress the need for attorneys to be involved in the classification and investigation stages of cases and suggest organizing investigator-attorney teams or "other collaborative arrangements" to accomplish this. This need has been identified by those outside of EEOC as well such as the Chairman of the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce and the Speaker of the House. Attorney involvement in investigations varies among the field offices. The Director of the Office of Field Programs stated that investigative staff and attorney staff are working well together; the form of coordination depends on the office culture. However, even with increased attorney involvement, attorneys are not involved in the intake process unless specifically requested to do so by an investigator.[57]

Recommendation: EEOC should continue efforts to improve attorney-investigator coordination. EEOC should explore ways of using attorneys during charge intake and other investigative procedures. For example, EEOC should initiate a pilot program in which attorneys and investigators jointly conduct intake and investigate charges. EEOC should review and assess any differences in quality or length of time to complete investigations when attorneys are involved. Both attorneys and investigators should participate in this review by providing their personal observations and assessments on the strengths and witnesses of the program.

Determinations

Finding: Under the Priority Charge Handling Procedures, EEOC no longer issues sub-

[56] *See* chap. 6, pp. 195–98.

[57] *See* chap. 6, pp. 198–201.

stantive no cause determinations. The procedures state that because the determination no longer explains in detail the disposition of the charge, determination counseling is critical. Most offices attempt to inform the charging party by telephone when a no cause determination is made. In the Charlotte District Office, the charging party is given 5 days to provide additional information; then the case is dismissed. The 1998 joint task force report noted that some offices do not consistently do determination counseling to inform charging parties of the reasons for a determination. Further, there are no formal procedures for charging parties to request reconsideration of their cases. Field offices respond to such requests on a case-by-case basis.[58]

Recommendation: The determinations sent to charging parties should provide sufficient detail as to why no cause was found, or why the charge was dismissed, and EEOC should establish a formal policy for responding to requests for reconsideration of cases. In addition, the reasons for no cause findings should be in writing.

Alternative Dispute Resolution

Finding: Over the past several years, EEOC has begun to implement alternative dispute resolution (ADR) to resolve certain charges of discrimination more quickly and efficiently than they could be resolved through the traditional investigation, negotiation, and settlement or litigation process. ADR has proven to be effective with issues such as reasonable accommodation. However, because EEOC has not had funding for the ADR program, in most field offices, the program has been implemented on a very small scale and relies almost entirely on volunteer mediators. The President has proposed increasing EEOC's funding, with much of the increase specifically designated for the ADR program. Such an increase would enable EEOC to mount full-scale ADR programs in all of its field offices, allowing more charges to go through the ADR process and generally decreasing the amount of time it takes for EEOC to process a charge.[59]

Recommendation: The Commission strongly supports EEOC's use of ADR as an alternative to its traditional investigation process to reduce its backlog and obtain speedier resolution of cases. ADR should continue to be emphasized by EEOC. However, because EEOC cannot implement ADR effectively without the additional resources requested by the President, Congress should provide EEOC with the resources needed to mount an effective, full-scale ADR program. EEOC should use the additional funds to create a formal ADR program in each of its district offices. In addition, EEOC should ensure that charging parties and respondents do not have to pay for ADR.

Litigation

Finding: Litigation is an essential element of EEOC's ADA enforcement program. In cases of egregious violations of the law, EEOC involvement in a lawsuit demonstrates that it is serious about enforcing the law. EEOC's use of litigation encourages respondents who have discriminated to settle charges of discrimination rather than run the risk of being sued by EEOC. Furthermore, cases EEOC litigates receive a great deal of public attention and as a result have an effect far beyond the parties involved. EEOC believes that it is important to get involved in cases where the agency can advance the public interest[60]

Recommendation: EEOC should continue to use litigation as a central component of its ADA enforcement strategy. EEOC should choose cases it litigates judiciously to ensure that the cases are meritorious and advance the public interest. EEOC should pursue such cases aggressively.

Finding: EEOC and the Department of Justice do not coordinate their ADA activities very well. This is particularly true with regard to employment issues under title II (State and local employers). DOJ only litigates a tiny portion of its State and local employment cases. Part of the problem is that there is not much employment expertise at DOJ.[61]

Recommendation: EEOC and the Department of Justice should coordinate better by working together to ensure that charges relating to State and local employers are handled appropriately. The Department of Justice, for example, should make greater use of EEOC's em-

[58] *See* chap. 6, pp. 201–02.

[59] *See* chap. 6, pp. 202–07.

[60] *See* chap. 6, p. 202.

[61] *See* chap. 6., pp. 202–07.

ployment expertise through better cooperative efforts and information-sharing programs.

Technology

Finding: EEOC suffers from technology limitations that may affect the usefulness of the charge data system (CDS). Both EEOC and outside commentators have noted that EEOC needs to upgrade its computer systems. For example, the EEOC task force report on FEPAs noted that FEPAs were using computers that could not handle the large volume of charges. Further, FEPAs had data transmission problems due to modem or phone line deficiencies, and some staff was not sufficiently trained on the operation of the system. These problems lead to inaccurate and incomplete data.[62]

Recommendation: The CDS provides much valuable information. Funding should be provided for improvements in technology to ensure the accuracy of the data contained in the system. Upgrades to equipment, particularly in the FEPAs, is necessary to ensure accurate and complete data. In addition, future changes to the system should provide for more detailed information. For example, data fields should be added so that EEOC can track when a charge is reclassified into a different category.

Finding: Other technology limitations affect the ability of EEOC's staff to do their jobs. EEOC has outdated and inadequate computer technology that impedes the ability of its staff to conduct aggressive and coordinated enforcement of the ADA and the other civil rights statutes the agency is charged with enforcing. EEOC staff have no e-mail capability, no access at their desks to the Internet or legal research tools, and no easy access to the CDS. In addition, EEOC's headquarters and field offices are not linked through a network system, and as a result are unable to obtain critical information to improve their investigative and litigation efforts. For instance, if EEOC has more than one charge against the same company on the same issue, but these charges are filed in different district offices, EEOC's inadequate computer technology prevents EEOC staff from having access to this information.[63]

Recommendation: Congress should approve the President's request for additional funds for fiscal year 1999 to enhance EEOC's computer technology, and EEOC should move expeditiously to update and network its computers and provide Internet and e-mail capability to its staff.

Finding: Data used for this report had not been through the data "cleaning" process. Thus, some charges contained incomplete or erroneously entered information were not included in the analyses.[64]

Recommendation: Changes should be made to the system so that data entry is easier and, thus, less prone to error. Rather than requiring staff to enter codes, the system should provide a list of bases, for example, from which to choose. Further, date fields should be changed so that only valid dates are accepted. In addition, organizations requesting data should be provided the most recent corrected data set.

Charges Under All Statutes

Finding: More than 50 percent of charges under the EPA, ADEA, and title VII, and just under 50 percent of all ADA cases, result in no cause findings. A "no cause" finding is issued when a full investigation fails to support the allegations.[65] Close to 30 percent of all closures are administrative closures, which includes notice of right to sue requested by the charging party, no jurisdiction, withdrawal without benefits, and charging party's failure to cooperate. Therefore, 80 percent of all charges indicate that no discrimination has occurred. The large number of no cause findings suggests that either many charging parties file nonmeritorious claims that waste EEOC staff time and resources, or EEOC needs to reevaluate its charge processing procedures to ensure that charges are being evaluated and investigated properly.[66]

Recommendation: EEOC should conduct a study to determine the reasons for the large number of no cause findings and administrative

[62] *See* chap. 6, p. 211.

[63] *See* chap. 6, pp. 211-13.

[64] *See* chap. 6, p. 213.

[65] *See* chap. 6, pp. 213–15.

[66] *See* chap. 6, p. 215.

closures. If the reason is that many nonmeritorious claims are filed, EEOC should attempt to improve its outreach and education efforts so that members of the public become better informed as to what types of charges have merit under the ADA and other nondiscrimination in employment statutes. Beyond this, EEOC should keep more detailed data on no cause findings. For example, EEOC should keep data on why there was a no cause finding.

Finding: Since a major new thrust of EEOC's charge processing system is the use of alternative dispute resolution, it is essential for EEOC to have data on ADR closures. It is not clear under which closure category ADR closures fall in EEOC's charge database system.[67]

Recommendation:. EEOC should revise its charge database system to include ADR closures as a separate closure category.

Charges Under the ADA

Finding: One-fifth of the charges citing the ADA involved "miscellaneous" disabilities, such as mental retardation, allergies, and speech impairments, each less than 3 percent of all ADA charges. "Other" disabilities—disabilities not specifically identified in the EEOC charge data system—account for 23 percent of all ADA charges.[68]

Recommendation: EEOC should consider expanding its disability categories, or collapsing some of the less frequently noted categories. EEOC should work hand-in-hand with the disability community to determine which disabilities it should track. Furthermore, EEOC should consider revising this list as the Nation ages and as disability becomes more prevalent in society. However, EEOC should provide a crosswalk to previous disability categories so that trends can be analyzed over time.

Finding: Charge processing time has changed little since the introduction of the Priority Charge Handling Procedures. Virtually the same percentage of charges are closed in less than 6 months and in 6 to 12 months as before EEOC adopted the new procedures. Furthermore, the percentage of charges that take more than 2 years to resolve has risen slightly.[69]

Recommendation: EEOC should do an internal audit to determine why charge processing time has not changed with the institution of the Priority Charge Handling Procedures. Depending on the results of the audit, EEOC should provide further training to its staff on implementing the procedures or revise the charge processing procedures to ensure that the time it takes for EEOC to process charges of discrimination is reduced.

Chapter 7. Assessment of EEOC's Outreach, Education, and Technical Assistance

EEOC Technical Assistance Program

Finding: Title I of the ADA, and the ADA in general is a very complicated statute. Many people, particularly employers, do not know their rights and responsibilities under ADA. Moreover, many disabled people do not know that the ADA exists. EEOC and its field offices, particularly the New York and Detroit offices field offices, have designed and implemented generally effective ADA technical assistance programs. In addition, EEOC has developed a significant amount of technical assistance material on the ADA. However, overall, EEOC does not have a very proactive technical assistance program. For example, EEOC's Office of Legal Counsel goes on sponsor-reimbursed travel to speak on the ADA, but OLC does not have a travel fund specifically earmarked for presentations and other technical assistance activities. In addition, EEOC does not have a strategic plan for its technical assistance efforts. Although EEOC can recount past efforts, it has not produced any clear statements of goals for future efforts in this area.

Technical assistance responsibilities are scattered throughout the agency without an overall plan and clearly defined organizational structure to guide technical assistance activities. EEOC's senior management recognizes the importance of the technical assistance program to accomplishing the agency's overall mission. Since the establishment of the National Enforcement Plan in July 1996, there has been a more focused approach to technical assistance, education, and outreach ef-

[67] *See* chap. 6, p. 215.

[68] *See* chap. 6, pp. 215–17.

[69] *See* chap. 6, pp. 217–20.

forts. However, there does not appear to be significant institutionalized coordination of these efforts by the responsible offices—Office of Field Programs, Office of Legal Counsel, and Office of Communications and Legislative Affairs.[70]

Recommendation: EEOC needs to revitalize its technical assistance program for the ADA. First, EEOC must create a central technical assistance office in its headquarters to provide direction and coordination of technical assistance efforts on the ADA and the other civil rights statutes EEOC enforces. This office should encompass all technical assistance efforts of the agency including liaison with the field offices. In addition, EEOC should establish an internal outreach, education, and technical assistance coordination committee, composed of representatives of the three responsible offices and the office of the Chairperson, to work in consultation with the central technical assistance office. The committee should meet quarterly to advise the central technical assistance office through the development and implementation of Commissionwide approaches to outreach, education, and technical assistance. Once established and operational, the committee also should review annually the implementation of previously approved efforts and report to the Commissioners.

Second, EEOC should work closely with the President's Committee on Employment of People with Disabilities, which has its own separate technical assistance program, to develop an integrated technical assistance program. For example, the two agencies should develop a memorandum of understanding on technical assistance activities.

Finding: EEOC stated in the ADA technical assistance plan that it would develop and distribute public service announcements to radio and television stations. However, because it was estimated that the cost for a multimedia PSA campaign would be in excess of $400,000, the agency was unable to carry out this initiative.[71]

Recommendation: EEOC should consider developing a national radio PSA campaign as part of its overall technical assistance effort. The agency headquarters central technical assistance office should develop and coordinate the program so that the agency has a consistent, coherent public voice. To ensure that the program covers all geographical areas, the headquarters office should work closely with all agency field offices. The agency should specifically earmark funding for this project.

Finding: The field offices operate with a significant amount of independence and flexibility in conducting their outreach, education, and technical assistance responsibilities. This has led to the development of some innovative technical assistance materials such as the New York District Office's brochure on immigrants' employment civil rights that was published in seven languages and was distributed by the Office of Field Programs (OFP) to other district offices with significant immigrant populations. Until recently, there does not appear to have been a systematic approach by OFP to ensuring that information and materials are exchanged among all of the field offices. Under the current organization, however, a staff person is now responsible for coordinating technical assistance in the field. Further, if funds are available from the revolving fund, there are also plans to establish an outreach coordinator in each district office. In the summer of 1997, OFP held a meeting with the technical assistance coordinators to share ideas to enhance the overall effectiveness of the field technical assistance program. Finally, at the April 21, 1998, EEOC Commission meeting, Acting Chairman Igasaki directed that OFP make available to all field offices the innovative information that has been developed by some of the field offices. The Chairman also directed OCLA to take the lead in developing information packets, videos, and questionnaires for distribution to the public.[72]

Recommendation: The Commission commends EEOC for recognizing the importance of sharing information about the innovative approaches to outreach, education, and technical assistance being developed by its field offices. The agency should institutionalize this process. An annual meeting of the technical assistance coordinators would be one method of ensuring that there is a formal process for sharing accomplishments in the outreach program. At the end

[70] *See generally* chap. 7.

[71] *See* chap. 7, pp. 230–31.

[72] *See* chap. 7, pp. 236–39.

of each conference, OFP and the participants should submit a report to the Commissioners.

Finding: Officials at EEOC acknowledge that the agency has had limited success in reaching underserved communities such as small businesses and minorities with disabilities. Congress also has recognized that the EEOC needed to make a greater effort to reach these groups. The introduction in July 1996 of Local Enforcement Plans with a mandatory technical assistance component ensures that management can evaluate the efforts of the field offices to reach underserved groups. However, it is not evident from interviews with EEOC officials that there is any mechanism to evaluate the effectiveness of past and future outreach and technical assistance efforts specifically designed to reach underserved communities.[73]

Recommendation: EEOC should develop a means of periodically evaluating the effectiveness of the agency's outreach, education, and technical assistance programs to underserved groups. The agency should establish an advisory committee of representatives from outside the EEOC to assist in the development of methods to evaluate the effectiveness of these efforts and to advise on ways to improve the technical assistance program's outreach to underserved communities. EEOC should file periodic reports with the Commissioners on the evaluation of this effort.

[73] *See* chap. 7, pp. 239–41.

Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners A. Leon Higginbotham and Yvonne Lee

Introduction

The Americans with Disabilities Act (ADA) is one of the most important civil rights laws ever enacted. Its ongoing purpose is nothing less than "a national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[1] As this Commission report concludes, in the short period since its enactment, the employment provisions of the ADA have already begun to help do just that. However, in spite—or perhaps because—of its success, the ADA has been subjected to a great deal of criticism. To be sure, the nature of that criticism is mostly inconsistent, not to say outright incoherent. Thus, critics have accused the ADA of doing both too little and too much: too little because it has not increased by a large enough margin the number of people with disabilities in the work force; too much because it has forced employers to hire people whose disabilities render them unqualified to perform job functions; too little because it has made employers wary of taking a chance on people with disabilities; too much because it has encouraged frivolous lawsuits from people whose disabilities are not genuine.

Of course, the easiest response to the criticism that the ADA is not working fast enough is to point out, as did Justin Dart, the former Chairman of the President's Committee on Employment of People with Disabilities, that "[i]t is misleading and dishonest to suggest that the ADA is a failure because it has not in sixty months solved problems that the ten commandments have not solved in more 3,000 years."[2] It is equally easy to answer the criticism that some ADA lawsuits may have been without merit by pointing out that, just as Justice John Harlan cautioned that "hard cases make bad law,"[3] marginal cases make for bad arguments. In short, much of the criticism of the ADA would not necessarily deserve a response if it did not betray a deeper philosophical viewpoint on the value of civil rights legislation in our society and the role of administrative agencies in assuring justice for all Americans. Because we believe in the enduring value of civil rights statutes, and because we favor vigorous enforcement of such statutes, we write this additional statement.

I

The ADA Empowers People with Disabilities and Enriches Our Society

Individuals with disabilities have been called the largest minority group in this country. Data from a 1990 U.S. Census Bureau survey exposed a staggering 49 million Americans with disabilities,[4] many of whom were unemployed. Specifically, 56 percent of the disabled population were of working age—between the ages of 21 and 64. Yet, over 60 percent were unemployed.[5] Obviously, the incorporation of the disabled into the work force is a matter of grave concern just as increasing the hiring of the disabled is an enormous challenge.[6] However, to claim that the ADA has a negative impact on hiring is wrong for two reasons.

As an initial matter, such an argument is counterfactual. Recent data from the U.S. Census Bureau revealed a marked increase in the employment of persons with disabilities since the enactment of the ADA. For example, the employment of persons with severe disabilities increased almost 3 percent from 1991 (23 percent) to 1994 (26.1 percent), resulting in 800,000

more jobs.[7] Improvement in the quality of life for Americans with disabilities have also been attributed to the ADA. In a private survey by the United Cerebral Palsy Foundation, an overwhelming 96 percent of the sampled 1,330 disabled people and their families reported that the law had improved their lives.[8] Empirical studies also register positive results. A recent longitudinal study of the experiences of over 1,100 adults with mental retardation in Oklahoma found that, through government funding and private efforts, positive change occurred in their lives since the passage of the ADA. Relative unemployment levels for participants declined, and the proportion of participants in competitive employment increased significantly.[9]

More important however, one wonders whether critics who wield numbers and statistics have ever considered it worthwhile "to place the ADA within a framework apart from that of marketplace morality."[10] After all, that 49 million people are—and have remained—a "minority" is not a twist of fate nor an accident of history, nor a matter of individual discrimination. Rather, "throughout history, people with disabilities lived with two limitations: one, the actual physical or mental impairment, and two, society's differential treatment caused by reactions to the impairment."[11] Accordingly, the ADA was enacted, not only to protect people with disabilities from acts of discrimination, but also "to attack the myths and stereotypes associated with disabilities and in order to change the attitudes of people in this country."[12] Certainly, since its enactment, the ADA has done much to change the attitude of employers and to empower people with disabilities.[13] In other words, "it is justice that [the ADA is] after, and justice is not always, or even often, amenable to precise measurement, or even any measurement at all."[14] Thus, to always insist on "counting heads" is, in a real sense, a regrettable diminishment of both the ADA's success for people with disabilities and its beneficial value to our society.

II

EEOC Enforcement of the ADA Is Fair and Consistent with Congressional Intent

As is the case with any other civil rights statute, the ADA would not be effective unless it was vigorously enforced through administrative resolution and private litigation. Effective administrative enforcement of civil rights legislation requires that the agency responsible for its implementation not just mechanically carry out the law, but also use its constitutional discretion and rule-making authority to give the statute shape and substance. It is far too late in the day to think that administrative agencies serve—or should serve—any other purpose. As far back as 1825, Chief Justice John Marshall recognized that any time Congress enacts a statute it necessarily gives the power "to those who are to act under [the] general provisions to fill up the details."[15]

Yet one recurring criticism of the act is that the EEOC and private litigants have engaged in frivolous lawsuits. To begin with, the argument rests on the false premise that these lawsuits were frivolous because, on occasion, a finder of fact may have ruled against a plaintiff. This is wrong as a matter of law and as a matter of fact. A frivolous lawsuit is prohibited by Rule 11 of the Federal Rules of Civil Procedure. The fact that these cases were adjudicated on the merits is proof enough that the court found them not to be frivolous. Moreover, there is absolutely no evidence that the ADA has encouraged more lawsuits than other statutes. Indeed, the fact that critics of the ADA tend to recycle the same few marginal case examples is a strong indication that in the overwhelming majority of cases the act is working to integrate people with disabilities into the work force.[16] Certainly, a fair and reasoned examination of the statute would focus on the cases that lie at the center not those that hang on the margins.

In any event, more often than not, the claim that the ADA encourages frivolous lawsuits is a thinly veiled attempt at perpetuating the stereotype "that there are two groups among the disabled population: those with 'traditional' disabilities such as the blind or people who use wheelchairs who are worthy of compassion or pity, and those whose disabilities are not

'genuine' but are convenient excuses for special treatment."[17] This stereotype is not only pernicious, but it also goes against the very mission of the ADA which, after all, was enacted to combat the myth that there are more or less deserving disabled people. In fact, Congress expressly refrained from providing an exhaustive list of disabilities under the ADA precisely because it recognized that the term disability should not be subject to a limited *and limiting* definition. Admittedly, we all have our own definition of who is disabled and, for most of us, that definition may be perfectly sincere. However, if as Shakespeare wrote "there are more stars in heaven and earth [] than are dreamt of in [our] philosophy,"[18] then surely one of the purposes of the ADA is to expand our own philosophy on what a disability is and what a person with a disability can do.

Conclusion

Obviously, we need to do more work if we are to achieve the "national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[19] In particular, we should be concerned that the pattern of EEOC filings with an emphasis on termination and not hiring claims may suggest that the majority of individuals with disabilities still are not yet able to take full advantage of their ADA rights. They may need greater education, information and help in utilizing what is available. However, to say that is not to imply that the ADA has not been effective. Rather it is to suggest that more vigorous enforcement is needed.

Those who argue that vigorous enforcement discourages employers from hiring people with disabilities seem to believe that civil rights enforcement should operate according to the principles of the biblical definition of faith: the evidence of things unseen and the hope of things to come. The "unseen evidence" is the belief that the ADA is a hindrance to employment, even though it has already increased employment; the "hope of things to come" is the supposition that without the ADA we will stop discriminating, even though our history, culture and customs taught—and teaches—us to discriminate. We need not deny the real evidence of our experience; we need not deny the hope the ADA has so far brought us. The promise of the ADA—to provide opportunities for persons with disabilities—benefits us all if we achieve their inclusion in every aspect of American life. This enforcement report is a small contribution to the goal of realizing that promise through effective implementation of the ADA.

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[1] House Committee on Energy and Commerce, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 4, at 25 (1990).

[2] Quoted in Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 221 (1998).

[3] *United States v. Clark*, 96 U.S. 37, 49 (1878).

[4] John M. McNeil, U.S. Dep't of Commerce, Americans With Disabilities: 1991–1992 Data from the Survey of Income and Program Participation 5 (1993).

[5] President's Committee on Employment of People with Disabilities, Statistical Report: The Status of People with Disabilities.

[6] For a general discussion on EEOC efforts at enforcement of the employment provisions of the EEOC, see Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217 (1998); Paul Steven Miller, The Americans With Disabilities Act in Texas: The EEOC's Continuing Efforts in Enforcement, 34 Houston L. Rev 777 (1997).

[7] Employment Rate of People with Disabilities Increases under the Americans with Disabilities Act, (President's Comm. on Employment of People with Disabilities, Washington, D.C., July 22, 1996) (jobs for the severely disabled increased from 2.91 million in 1991 to 3.71 million in 1994).

[8] United Cerebral Palsy Ass'n, Is ADA Working?: 1994 Progress Report on ADA, American Business 4 (1994).

[9] *Id.*

[10] David J. Popiel, The Debate over the Americans with Disabilities Act: A Question of Economics or Justice? 10 St. John's J.L. Comm. 527, 528 (1995).

[11] Elizabeth Clark Morin, Americans With Disabilities Act of 1990: Social Integration Through Employment, 40 Cath. U.L. Rev. 189, 192 (Fall 1990).

[12] Louis Graziano, The Americans with Disabilities Act: Both Sword and Shield, 10 St. John's J.L. Comm. 511 (1995).

[13] Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 224 n.38 (1998) (reporting that a July 1995 Louis Harris and Associates Survey of senior corporate executives found that 70% of the executives surveyed supported the ADA and did not favor a weakening of the law.)

[14] David J. Popiel, The Debate over the Americans with Disabilities Act: A Question of Economics or Justice? 10 St. John's J.L. Comm. 527, 528 (1995).

[15] *Wayman v. Southard*, 10 Wheat. 1 (1825); See also, *United States v. Grimaud*, 220 U.S. 506 (1911) (applying Justice Marshall's theory specifically to administrative agencies.)

[16] Below are some often-recycled examples. A careful examination of the facts show these cases to raise far from frivolous issues.

- In 1997, a Ryder Systems Truck driver won a 5.5 million verdict after claiming under ADA that the company unfairly removed him from his position as truck driver based on safety concerns after he suffered an epileptic seizure. In fact, the employee was desperately seeking an alternative job so that he might not become dependent and unemployed. He asked the company to place him in March 1993 in a job loading automobiles onto railroad cars within a confined area. Medical experts hired by the plaintiff and the company said he could perform the essential functions of the proposed job safely, but the company refused to place him in that position.

- In *Davidson v. Midelfort Clinic*, 133 F.3d 499 (1998), the plaintiff disclosed during her interview for a job that she suffered from ADD, a chronic psychological disability that affects a person's ability "to concentrate, to learn, to organize one's thoughts, to verbalize them, and to formulate explanations." The plaintiff had struggled with ADD for many years, although she was not diagnosed with the disability until late in life. Notwithstanding her disability, the plaintiff, through "hard work, adaptive techniques, and help from her professors," had excelled in both high school and college. In her graduate course work she obtained a 3.87 on a 4.0 point scale. Throughout her education, the plaintiff would compensate for her disability by laboriously writing out passages of everything she read. Her claim was whether her employer should have reasonably accommodated her disorder by cooperating with her to find solutions, rather than firing her for having a backlog of dictation.

- In *EEOC v. Wal-Mart Stores, Inc.*, No. CV-95-1199JP (D.N.M. Feb 21, 1997), the EEOC sued Wal-Mart for refusing to hire a plaintiff who did not have a right arm. The refusal to hire followed questions to the plaintiff about his current and past medical conditions. The EEOC based its suit upon requirements in the ADA prohibiting such questions. Prior to the ADA, such information was frequently used to exclude applicants with disabilities—both hidden and visible—before there was any determination about the individual's capability to perform the particular job.

[17] Paul Steven Miller, The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit, 49 Case W. Res. 217, 221 (1998).

[18] Hamlet, Act 1, sc. 5.

[19] See *supra* note 1.

Statement of Commissioner Russell G. Redenbaugh

The two-part report by the U.S. Commission on Civil Rights assessing Federal enforcement of title I (EEOC) and title II, subtitle A (DOJ), of the Americans with Disabilities Act is an important effort. It represents the first indepth study of disabilities issues by the Commission since the ADA was signed into law by President Bush on July 26, 1990. As the Commission's statutory enforcement report for fiscal year 1998, it also aims to fulfill our annual statutory obligation to report to the President and to Congress on the enforcement of Federal civil rights law in a particular area—this year, the ADA.

The report is important for me, professionally and personally. I am blind. As a member of a class protected under ADA, and as a Commissioner, I am committed to expanding opportunities for all Americans, and especially for the 54 million Americans who are disabled. I am also committed to doing what works. Now that 8 years have passed since the passage of the ADA, it is important to stop and look at what has happened. Consider these findings from a new, landmark survey by Louis Harris and Associates, commissioned by the National Organization on Disability:

- 71 percent of disabled persons of working age (18 to 64) are not employed, versus 21 percent of nondisabled Americans, a gap of 50 percentage points. In 1986 (when Harris first conducted this poll), 66 percent of the disabled were not employed, versus less than 10 percent of all Americans.
- 34 percent of adults with disabilities live below the poverty line (i.e., in households earning less than $15,000 in annual income), versus 12 percent of those without disabilities. The income gap—approximately 20 percentage points—has remained virtually constant since 1986, when the percentages were 51 percent and 29 percent, respectively.[1]

The Harris survey also looks at gaps between those with and without disabilities in other areas, including education, frequency of socializing, attendance at religious services, political participation, and access to transportation and health care. But as the survey's findings make clear, "Employment continues to be the area with the widest gulf between those who are disabled and those who are not." The new findings are disturbing, especially when one considers that there are approximately 20 million more people working today than in 1986 and the overall unemployment rate has gone down by 35.7 percent, from 7 percent in 1986 to about 4.5 percent today. Obviously, the unemployment rate for the severely disabled is a serious social problem and, in the 8 years since passage of the ADA, there is no evidence of any improvement. In fact, there is reason to believe the EEOC's enforcement of title I may diminish the employment prospects for persons with disabilities by actually encouraging employers to discriminate for fear of future legal liabilities.

I must commend the staff of the USCCR's Office of Civil Rights Enforcement for preparing a report that, on the whole, is carefully researched and clearly written. The report provides a thorough outline of the ADA enforcement activities of both the EEOC and the DOJ. It also provides a thoughtful analysis of the background and history of America's disability policy and the debate that gave rise to the passage of ADA. The discussions of the complexity of the

[1] 1998 National Organization on Disability/Louis Harris & Associates Survey of Americans with Disabilities, Washington, D.C., July 23, 1998.

law and the numerous and often contradictory decisions by the courts over the past several years are especially helpful in illuminating both the challenges and opportunities that the ADA continues to present for disabled Americans and for employers and employees alike.

It was not the original purpose of the Commission's report to ask whether the law is bringing about its intended consequences. However, the report does stray into the policy area, albeit without producing the necessary analytical framework to support its policy recommendations. It advocates an expansion of EEOC's interpretation of the law, in a way that may or may not have been contemplated in the original legislation, without ever addressing this fundamental question: Are the EEOC's regulations for enforcing title I actually improving employment possibilities for the disabled?

As the report clearly points out, since the passage of the ADA "many basic issues, such as who is protected by the act and what employers or other covered entities are required to do under the act, remain unresolved." The report also rightly acknowledges that, "In large part, these issues arise out of inherent ambiguities in the language of the statute that have not been resolved through the issuance of implementing regulations or by the Federal courts." While I certainly agree with the problems the report identifies in this regard, I strongly disagree with its basic direction for encouraging the executive branch to expand the ADA beyond its current interpretations in a way that would only serve to further distort and trivialize the law's intent and that would perhaps even increase public hostility toward the disabled.

My greatest concerns with this report are based not on the problems it has identified, but on its recommendations for addressing those problems. For example, the report contains numerous calls for expanding EEOC's rulemaking and/or the development and issuance of additional "policy guidance" with respect to the definitions and concepts of "qualified individual with a disability," "reasonable accommodation," "undue hardship," "mitigating measures," and "major life activities." The underlying thrust of the recommendations is that "EEOC should adopt a policy of pursuing regulatory additions in areas where the courts have consistently opposed the EEOC's position on key ADA issues. . . ."

The report repeatedly takes the position that EEOC is doing an "exemplary" job in interpreting and enforcing the ADA. It posits that where the courts may have struggled or disagreed with the EEOC's interpretations, this is because "Many Federal judges appear either to misunderstand the ADA or be hostile to it." Although conceding that the law is complex, the report does not draw the corollary that difficulties of legal interpretations can result from such complexity and are not necessarily an indication of bad will. Consider this array of cases, which constitute only a small sampling of the issues that have come before almost every Federal circuit over the past few years. **Many of these cases defy credulity and are absolutely not what we intended when we passed the ADA in 1990:**

- A Federal jury awarded a New Mexico man who lost part of his arm in a car accident $157,500 after a Wal-Mart interviewer asked him an illegal question when he applied for a stocker's job. The question was, "What current or past medical problems might limit your ability to do a job?" The February 1997 award—which included $150,000 in punitive damages—is the largest ever involving an unlawful preemployment medical inquiry. See *EEOC v. Wal-Mart Stores, Inc.*, 1998 WL 278758 (D.N.M.).
- A Wisconsin psychotherapist with attention deficit disorder who was fired for falling behind on her paperwork won reinstatement of her claim under ADA as a result of a Seventh Circuit decision last January. The court noted that ADA may reach those "who may require some kind of accommodation from their employer, notwithstanding their inability to demonstrate a present impairment that is substantial enough to qualify as disabling under the ADA." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998)
- In January 1997, the EEOC won a $5.5 million verdict for a former Ryder Systems truck driver, claiming under ADA that the company unfairly removed him from his position citing

safety concerns after he had suffered an epileptic seizure. The driver was hired by another firm, had a seizure while driving, and crashed into a tree. The trial judge reduced the award to approximately $491,000, and both sides have filed appeals with the Sixth Circuit. *EEOC v. Complete Auto Transit, Inc.*, E.D.Mich., verdict entered on Jan. 6, 1997, notice of appeal filed Nov. 10, 1997 (No. 97–2202), notice of cross-appeal filed July 22, 1998 (No. 98–1806)

- A former Federal employee claimed that his threatening behavior on the job was tied to his alcoholism (a covered disability under the both the Rehabilitation Act of 1973 and the ADA). The Tenth Circuit Court of Appeals rejected the man's claim, reasoning that "We cannot adopt an interpretation of the statute which would require an employer to accept egregious behavior by an alcoholic employee when that same behavior, exhibited by a non-disabled employee, would require termination." (*Williams v. Widnall,* 79 F.3d 1003 (10th Cir. 1996))
- In February 1997, a secretary with depression failed to persuade the Court of Appeals for the Seventh Circuit that her employer's refusal to grant her an indefinite leave of absence or permission to work at home violated the ADA. The court reasoned that, "Not only is it doubtful that an executive secretary could perform her essential job functions at home, but we have stated as a matter of law that working at home is not a reasonable accommodation." *Johnson v. Foulds, Inc.*, 111 F.3d 133 (7th Cir. 1997), unpublished disposition, 9 NDLR P 165, 1997 WL 78599 (7th Cir. (Ill.))
- Also in February 1997, the U.S. District Court for the Eastern District of Michigan threw out the ADA claim of a computer salesman with a facial scar, ruling that although a scar might qualify as a disability, the employee had failed to show any nexus between the scar and management's decision to fire him. *Van Sickle v. Automatic Data Processing, Inc.*, 952 F.Supp. 1213 (E.D.Mich. 1997)
- In September 1997, a Federal judge in New York dismissed the ADA claim of a fired employee who was diagnosed with colitis and depression. After a 2-week stay in a psychiatric hospital, the woman had returned to work and was offered an alternative assignment by her employer. She refused to accept the assignment and was fired for insubordination. The judge rejected the woman's claim that her colitis prevented her from working and that her depression substantially limited her ability to perform her job. The court also rejected the woman's assertion that her condition caused her to be disinterested in sex, which she argued was a major life activity covered by ADA. *Johnson v. New York Medical College,* 10 NDLR P 370, 1997 WL 580708 (S.D.N.Y.)
- Several years ago, an AT&T employee sued the company for failing to accommodate his alleged disability (depression and severe anxiety) by providing him with a job without prolonged and inordinate stress. The Third Circuit ruled in January 1998 that a request for a stress-free workplace is not a reasonable accommodation under the ADA. *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3rd Cir. 1998)
- After he was fired in 1994, an industrial process engineer at Guilford of Maine filed suit under ADA based on his inability to get along with others. In response to several warnings he had received from his supervisor about a marked deterioration in his attitude, his psychologist told the company that the man's duties should be restricted "to avoid responsibilities which require significant interaction with other employees." The First Circuit rejected the ADA claim, saying that while "ability to get along with others" might be considered a major life activity under the ADA in some circumstances, in the plaintiff's case the evidence did not establish that he had difficulty in interacting with anyone other than his supervisor. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997)

- Characterizing EEOC's position as "troublesome," a Federal judge in Detroit ruled last January that the agency should not have sued the Hertz Corp. for disabilities discrimination when Hertz dismissed, for reasons of misconduct, a "job coaching service" engaged to help mentally retarded workers. Three months after the employees started working for Hertz at the Detroit airport in early 1994, the two job coaches were observed by several Hertz supervisors "engaged in rather passionate lovemaking" in the front seat of a car, while their two charges were in the back seat. The EEOC filed suit for the job firm (which received government funds for its coaching service), alleging that the provision of a job coach was a reasonable accommodation under ADA, and that once the company hired the employees, it was obligated to continue that accommodation indefinitely. The court compared the lawsuit to the fairy tale about the emperor's new clothes, and characterized EEOC's position as an unwarranted expansion of the ADA that would have the effect of punishing employers for hiring persons with disabilities. *EEOC v. Hertz,* 7 A.D. Cases 1097, 11 NDLR P 293, 1998 WL 5694 (E.D.Mich.)

- In the case of *Smith v. Midland Brake Inc.*, the Tenth Circuit Court of Appeals ruled last March that Midland Brake did not violate the ADA by refusing to rehire a former light assembler, who was terminated after he became unable to work because of a chronic skin condition. The company attempted to accommodate the employee by assigning him to work that involved less lifting and reducing his exposure to irritants in the job. The man took a leave of absence, received $20,000 to settle his workers' compensation claim, and was terminated. In his suit against Midland Brake, he argued that the company was obliged to find an alternative position for him within the company. *Smith v. Midland Brake, Inc.,* 138 F.3d 1304 (10th Cir. 1998)

- Also last March, the First Circuit Court of Appeals ruled that a Massachusetts trucker who asked to be allowed to maintain a special driving route to accommodate his fear of crossing bridges was not fired in violation of the ADA. The court ruled in favor of the employer, who testified that the man had been fired because he was caught along with two other drivers falsifying travel logs required by the U.S. Department of Transportation. *Champagne v. Servistar Corporation,* 138 F.3d 7 (1st Cir. 1998)

- A 20-year veteran employee of Southwestern Bell Telephone Co., who was fired for verbally abusing and striking a female coworker, had his ADA claim dismissed in the Fifth Circuit. His contention was that his outburst was caused by post-traumatic stress disorder (PTSD) that resulted from an incident 4 months earlier when he rescued a drowning woman. During an evaluation period following the outburst, the company decided to dismiss him after receiving an anonymous letter from employees in the man's department accusing him of being a "disgusting, dangerous and abusive man and manager." The court found that the plaintiff failed to demonstrate that his PTSD substantially limited his major life activities, observing that after he left Southwestern Bell, the man ran his own software distribution business for almost a year and eventually was hired as a senior consultant with another company. *Hamilton v. Southwestern Bell Telephone,* 136 F.3d 1047 (5th Cir. 1998)

- In the Sixth Circuit last May, the court found that the offer of the City of Middletown, Ohio, to reassign a disabled police officer to a desk job was a reasonable accommodation under the ADA, even though it was not the accommodation preferred by the employee. As a result of on-the-job injuries to his neck, shoulders, back, and legs in the late 1980s, the police officer had missed a considerable amount of work time, and disputes arose about the legitimacy of his absences. The officer ended up receiving a 45 percent permanent disability retirement, but then filed suit under ADA, arguing that the city had failed to accommodate his disability by not allowing him to work the 11:00 p.m. to 7:00 a.m. shift or transferring him to a detective position, both of which he claimed were less stressful. Because the man's injuries restricted him to lifting no more than 50 pounds and he needed a job in which frequent ab-

sences would not adversely affect the operation of the department, the court found that the city's offer of the desk job constituted a reasonable accommodation. *Keever v. City of Middletown,* 145 F.3d 809 (6th Cir. 1998)

- In the case of *Mathews v. Trilogy Communications,* the Eighth Circuit Court of Appeals ruled that the termination of an insulin-dependent diabetic traveling sales representative, after he became uninsurable because of his bad driving record, did not establish disability-based discrimination, since at the time of termination he no longer met the same professional requirements—i.e. having a valid driver's license and being insurable under the employer's insurance policy—as when he was hired. The court's reasoning was that these were not just mere company rules, but rather objective qualifications for the job because sales personnel must be able to drive to clients' locations. The decision also referenced the man's failure to tell management about his prior arrest for driving under the influence of alcohol. *Mathews v. Trilogy Communications, Inc.,* 143 F.3d 1160 (8th Cir. 1998)
- In another Eighth Circuit decision, *Cody v. Cigna Healthcare of St. Louis,* the court of appeals rejected a nurse's claim (previously rejected by the EEOC) that she was constructively discharged because of her alleged disability which caused her to become "anxious in elevators, while driving, and while in perceived high-crime neighborhoods." After the nurse's request for reassignment to other neighborhoods was denied, she was observed by other employees "sprinkling salt in front of her cubicle to 'keep away the evil spirits,' staring off into space for an hour at a time, drawing pictures of sperm, and talking about a gun." Cigna offered a paid medical leave on account of the woman's alleged depression and requested that she see a psychologist before returning to work. The woman refused that offer and decided to quit. The court found that even though the woman was diagnosed three years after she quit her job as having schizotypal personality disorder, she was always able to work and got good reviews prior to quitting, and she offered no evidence of diagnosis of depression. *Cody v. Cigna Healthcare of St. Louis, Inc.,* 139 F.3d 595 (8th Cir. 1998)

Most of these cases speak for themselves. While they involve a range of claims and outcomes, they all help illustrate the extent to which the definitions and concepts of title I have been expanded in almost every way imaginable, with the resultant trivialization of "disability." Is it any wonder that the courts are "all over the map" on the ADA? These cases also show the extent to which a law like the ADA can be used as a tool for turning the workplace into what Walter Olson has aptly called "The Excuse Factory."[2]

It might be argued, perhaps, that for all the claims that are dismissed, overturned, or deemed frivolous, there could be an equal number of legitimate, well-founded complaints involving disabled persons who have been unjustly shut out of a job or denied a reasonable accommodation to allow them to perform a job they are both qualified and eager to perform. It is interesting to note that, according to one estimate, between 1992 and 1997 the EEOC received more than 90,000 complaints filed under title I of the ADA, and almost half (49.6 percent) were found, by the EEOC, to have no reasonable cause. What seems to be happening is that, even with the EEOC's rejection of half of its complaints, the courts are dealing with many cases that appear outrageous to most Americans and that damage the reputation of both the ADA and those of us with severe disabilities. The fact that these kinds of cases are growing in number is especially disturbing at a time when 70 percent of the severely disabled are not employed and about 7.5 million Americans remain on the social security disability rolls.

Disabilities do exist. They do limit the abilities of people, perhaps not as much as some think, but the effect is not trivial and it is certainly real. Prejudice and ignorance are also

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[2]Walter K. Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (New York: The Free Press, 1997).

undeniably real. Often employers "globalize" a disability that may exist in one area by assuming an inability in all areas. That is why the Americans with Disabilities Act is needed. The tragedy is that public attention, which should be focused on ways to encourage the employment of persons with disabilities, has been diverted by the continued abuse of title I, as illustrated by the kinds of cases listed above. And as more and more of these cases come to light, more and more Americans have begun to think of the ADA (to borrow the title of a recent news report) as "The Americans with Minor Disabilities Act."[3]

One clear indication that those who have benefited most from the ADA are not the severely disabled is that about 87 percent of complaints to the EEOC come from individuals who are already in a job. Similarly, from my research, it appears that the overwhelming number of ADA-related court cases involves firing, rather than hiring, decisions. Considering that the hiring of the disabled was a key motivator of the ADA, and that only about 30 percent of the severely disabled are in the work force, this is rather shocking. It seems to me to be what Sherlock Holmes might call "the dog that didn't bark."

Why is there so little caselaw claiming discrimination in the hiring of the disabled? It is unlikely that this is because no discrimination occurs in the hiring process. From my own experience, I have found that discrimination, particularly when it occurs at the hiring stage, is very difficult to measure and very difficult to prove. In fact, there is probably no direct evidence. There is only evidence coming from an understanding of economics—from the notion of trade-offs and economic scarcity and choice. If we look from this perspective, we can see that the EEOC's title I regulations may actually encourage discrimination, insofar as they tend to reduce the thousand-fold considerations of hiring down to one: membership in a protected class.

My personal experience is that discrimination against people with disabilities is largely based on ignorance and misunderstanding, rather than exploitation and malicious intent. What comes into play are the "myths, fears, and stereotypes" that are mentioned frequently in the Commission's report. But the proliferation of cases like the ones cited above only deepens the misunderstanding and increase the distrust. Similarly, with its approach of expanding the application of the ADA's key definitions and concepts, this report would only take us in a direction that could encourage further abuse and misunderstandings.

Again, it is not the purpose of the report to decide where the law has strayed far from its original good intentions. Nevertheless, throughout its discussions of the complex issues that have arisen since passage of ADA, these crucial questions remain unanswered: Where is the enforcement effort not helping? Where may it actually be harming those it was intended to help?

I have found that when you are seeking a job you usually have to be able to demonstrate that you are equally competent, if not better than other candidates. That is a high standard, but the right one. Employers should always seek to hire the most qualified. But this can be doubly hard for the disabled candidate, particularly if the potential employer operates from an assumption that you cannot perform the duties of the position because of your disability. How can you demonstrate competence before you are hired, especially for that first job? Also, the added cost of providing "reasonable accommodation" and the risks of a future EEOC lawsuit are powerful incentives for an employer to perpetuate his presumption that you with your disability cannot do the same job an "abled" worker can. Imagine, if you will, that there are five candidates for a position; that two are obviously not qualified; and that of the three remaining candidates, you are the only one with a disability. The obvious incentive for the employer is to take what may look like the safest (and less costly) course of action and hire one of the other two candidates. Thus, your career is

[3]Joseph P. Shapiro, "The Americans with Minor Disabilities Act: The Surprising Beneficiaries of the Law," *U.S. News & World Report*, July 6, 1998, pp. 41–42.

stunted before it even begins. Your only hope is to find an employer who wishes not to discriminate and who is willing to pay extra to exhibit virtuous behavior.

As a member of a class that is protected under ADA, I think it would be hard for me to secure employment today. In 1969 (more than 20 years prior to enactment of the ADA), I was hired by a Philadelphia investment firm on the basis that if it didn't work they would call it off—"no harm, no foul." The standard that applied to me was basically the one that applied to everyone else: If you can do the job, it's yours, but if it turns out you cannot do the job, we're under no obligation to keep you. Today, we could not make that contract and expect it to stick without potential legal liabilities under title I. It is much easier to not hire someone who might be a future legal liability than it would be to terminate him once he has been hired.

This higher risk is a barrier to hiring members of the protected class. An over-expansive application of ADA may create the impression that members of the class it protects essentially become what is termed in human resources jargon "fire proof." The impression (and sometimes the reality) can also be that the "normal" standard (i.e., that if you are disabled and can do the job you are protected by the ADA) becomes distorted to the extent it becomes a tool which an employee may use to *become* "fire proof." The effect that Federal enforcement efforts can have in this regard, although very difficult to measure, cannot be discounted if the ADA is to achieve its purpose, which is to integrate the disabled into American society to the fullest extent possible.

I had hoped that, in assessing EEOC's enforcement efforts for title I, the Commission's report would have explored the impact that these efforts might have on the hiring process. I could not help but be struck by the number of times the report characterized EEOC's regulations and policy guidance as "thoughtful," "insightful," "thorough," "skillful," "consistent," and "common sense." However, there is very little discussion, if any, as to whether employees and employers involved in the actual hiring process, particularly small businesses, share that assessment.

As I have explained above, my own fear is that the ADA implementing regulations can have a chilling effect on the hiring of the disabled. I confess that it was not until I read the section on EEOC's ADA enforcement guidance on "Preemployment Inquiries and Medical Examinations," that I really understood the length and breadth of some of the current requirements. For example:

- In the "pre-offer stage," an employer is not permitted to ask any kind of disability-related questions or questions that are likely to elicit information about a disability.
- An employer may ask an applicant whether he or she can perform different functions of the job itself, including whether an applicant can perform those functions "with or without reasonable accommodation." But the employer may not "ask a question in a manner that requires the individual to disclose the need for reasonable accommodation."
- An employer may not ask, at the pre-offer stage, how many days an applicant was sick or on sick leave in his or her former position, because this question relates directly to the severity of an individual's impairments, and severity is a criterion for determining whether an impairment is "substantially limiting" to a "major life activity" and thus a disability under the ADA.
- Unless they are asking specifically about the ability to perform a job function, employers may not ask whether applicants can perform "major life activities" such as standing, lifting, or walking because such questions "are likely to elicit information about a disability."
- Potential employers may not ask applicants questions about their workers' compensation history because, again, such questions are likely to elicit information about a disability.
- Employers may not ask questions about lawful drug use, since these, too, go to the severity of an impairment. An employer may ask questions about prior illegal drug use, so long as

the employer does not ask about *addiction* to drugs, since this is a covered disability under the ADA.

What I believe this sampling of forbidden questions helps illustrate is this: that laws and regulations that are designed to enhance opportunity and expand rights often can end up serving as constraints and limitations to both. With its numerous calls for the issuance of additional regulations and/or "policy guidelines," and its many recommendations for "clarifying" or "expanding" its interpretations of the key terms and concepts of the ADA, the present report takes an approach that may only add to the regulatory disincentives to the hiring of the disabled. Perhaps what is needed is an additional study by the Commission to explore the tremendous disincentives and problems that the current system may present, for the potential employer and job seeker alike.

In general, the present report tends to endorse the EEOC's position with respect to the various controversies of the past several years (for instance, the debate regarding psychiatric disabilities). However, I was pleased to note that it does attempt to factor in some noteworthy views from the private sector. The report includes, for example, a few references to the response from the Equal Employment Advisory Council (EEAC), which represents over 300 of the Nation's largest private sector corporations. The EEAC was asked, among other things, for its assessment of EEOC policy guidance and, specifically, for its views as to whether EEOC guidelines adequately reflect the intent of Congress in enacting the ADA. It is important to read the council's response, beyond the excerpts contained in the USCCR report:

> The EEOC's initial substantive regulations, for the most part, adequately tracked Congressional intent in enacting the ADA. Since adoption of the regulations, however, the EEOC's enforcement guidance has pushed the boundaries of Title I in every conceivable direction. Over the years, through these documents, the agency has doubled the number of "major life activities" that give rise to ADA coverage, has adopted an interpretation of "qualified individual with a disability" that contradicts the statutory definition, and has attempted to read the word "reasonable"—a critical modifier in defining "accommodation"—out of the statute.[4]

The council's response then goes on to cite specific examples of where the EEOC's guidance has taken some positions that "defy common sense." To the staff's question as to whether the association could identify "any areas where EEOC needs to clarify [its] positions further or where EEOC has not issued policy guidance but should," the council responded, "EEAC does not believe that there are other areas in which the EEOC needs to clarify its position further."[5] In fact, a key point the council makes is that the EEOC "should place itself on constant guard against external and perhaps internal pressures to broaden either the scope of coverage or the scope of an employer's responsibility."[6]

The Commission's report would have done well to follow up on these points in greater detail. There is a growing perception, especially among the severely disabled, that the enforcement agencies have been ignoring *their* personal experiences and trying to fit everything—from paraplegia to personality disorders, epilepsy to allergies, blindness to attention deficit disorder, to name a few—into the same kind of legal mold and, thus, the same kind of traditional civil rights framework. To the extent that the report acknowledges this problem, it does so by advocating, in a number of its recommendations, that the EEOC "clarify" its current guidelines. Certainly, there is something to be said for clarification, especially in those areas where controversies have arisen. But what is the best way to seek such clarification?

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[4]Ann Elizabeth Reesman, General Counsel, EEOC, letter to the Assistant Staff Director for Civil Rights Evaluation, U.S. Commission on Civil Rights, Mar. 2, 1998, p. 5.

[5]Ibid., p. 6.

[6]Ibid., p. 4.

And would this be accomplished more effectively and appropriately by the executive branch, or by the legislative branch, of government?

Many will argue that now is not the time to reopen the ADA for legislative discussion. Nevertheless, my view is that, as the elected branch of government, Congress can and should be held accountable for the laws it passes. When Congress delegates so much of its regulation-making authority to an executive agency, it not only blurs the separation of powers but also invites precisely the kinds of challenges and conflicts that are described in this report and in reports appearing across the country. That is why the United States Commission on Civil Rights' recommendations for having EEOC "develop" the law through its litiga-tion activities are especially troubling. The role of the Federal agencies is not to develop or shape the law but, rather, to carry out the law and, when necessary, perhaps provide a thumb on the scales.

Eight years ago, the Americans with Disabilities Act was passed with high expectations—for addressing those areas where Congress had documented real and pervasive disability-based discrimination, and for promoting economic opportunity and full participation. ADA passage also was achieved despite serious concerns about the potential for abuse of such a law. With respect to employment of the severely disabled, the effects of title I are completely disappointing: There have been no real employment gains for the disabled. Those who were concerned about abuses have an abundance of evidence to justify their concerns. The difficulty is that the core ideal of the law is being pushed to extremes that are not defensible to the American public, thus undermining and jeopardizing the acceptance and long term goals of the ADA.

As someone who has had to deal with disability-based discrimination in my own life, I must say that my decision to vote against this report was not an easy one. The staff of the USCCR's Office of Civil Rights Enforcement has worked diligently to produce some very useful research and to elucidate the major issues raised by EEOC and DOJ's enforcement activities. As Commissioners, we have a special responsibility to facilitate, encourage, and contribute to the marketplace of ideas. In that marketplace, reasonable people can disagree. From my own experience, both personally and professionally, this is particularly true when we debate a topic as complex as Federal enforcement of the ADA. We may differ as to the steps we recommend for achieving our goal, but we are united in our commitment to the goal itself: Protecting the rights of the millions of disabled citizens who continue to struggle for equal access, equal opportunity in the workplace, and an equal chance to contribute to America's future.

APPENDIX A
ADA Charges by Bases

Bases*	Number of ADA charges	Percentage of ADA charges
Other disability	41,872	23.05
Back impairment	26,437	14.55
Emotional/psychiatric impairment	20,651	11.37
Neurological impairment	17,723	9.75
Extremities	16,247	8.94
Regarded as disabled	11,162	6.14
Heart/cardiovascular impairment	6,320	3.48
Diabetes	5,372	2.96
Hearing impairment	4,763	2.62
Vision impairment	4,044	2.23
Cancer	3,577	1.97
Alcoholism	3,318	1.83
Record of disability	3,098	1.71
Asthma	2,635	1.45
HIV	2,566	1.41
Drug addiction	1,606	0.88
Gastrointestinal impairment	1,427	0.79
Other blood disorder	1,394	0.77
Respiratory/pulmonary disorder	1,391	0.77
Speech impairment	1,100	0.61
Allergies	1,089	0.60
Relationship/association with an individual with a disability	1,059	0.58
Kidney impairment	978	0.54
Mental retardation	674	0.37
Chemical sensitivities	605	0.33
Disfigurement	506	0.28
Dwarfism	74	0.04
Total‡	181,688	100

Note: Charges include both ADA-only charges and charges identifying ADA and another statute(s).
* Charging parties may identify up to six bases.
‡ Total represents total bases identified (not total charges). Non-disability bases filed jointly with other statues (such as discrimination based on race, religion, sex, etc.) have been excluded from the total.
Source: EEOC, Charge Data System.

APPENDIX B
ADA Charges by Issue

Issue*	Number of ADA charges	Percentage of ADA charges
Discharge	87,507	34.29
Reasonable accommodation	34,528	13.53
Terms and conditions	29,275	11.47
Harassment	17,345	6.80
Hiring	15,054	5.90
Other	8,128	3.19
Discipline	6,546	2.57
Layoff	6,420	2.52
Promotion	5,915	2.32
Wages	5,042	1.98
Demotion	4,924	1.93
Constructive discharge	4,896	1.92
Reinstatement	4,695	1.84
Suspension	3,543	1.39
Benefits	3,168	1.24
Intimidation	2,931	1.15
Sexual harassment	2,595	1.02
Assignment	2,056	0.81
Recall	1,841	0.72
Benefits—insurance	1,310	0.51
Training	1,198	0.47
Union representation	944	0.37
Prohibited medical inquiry/exam	711	0.28
Retirement involuntary	689	0.27
Job classification	585	0.23
References unfavorable	477	0.19
Benefits—retirement/pension	342	0.13
Exclusion	343	0.13
Referral	335	0.13
Maternity	294	0.12
Qualifications	306	0.12
Seniority	312	0.12
Testing	214	0.08
Record keeping violation	172	0.07
Tenure	183	0.07
Severance pay denied	90	0.04
Filing EEO forms	57	0.02
Advertising	31	0.01
Apprenticeship	35	0.01
Waiver of ADEA suit rights	16	0.01
Early retirement incentive	35	0.01
Posting notice	25	0.01
Segregated facilities	29	0.01

Issue*	Number of ADA charges	Percentage of ADA charges
English language only rule	2	0.00
Other language/accent issue	8	0.00
Paternity	12	0.00
Segregated locals	5	0.00
Total‡	255,169	100.00

Note: Charges include both ADA-only charges and charges identifying ADA and another statute(s).
* Charging parties may identify up to eight issues.
‡ Total represents total issues identified (not total charges). Total includes issues identified in ADA-only complaints and complaints filed jointly with other statues.
Source: EEOC, Charge Data System.

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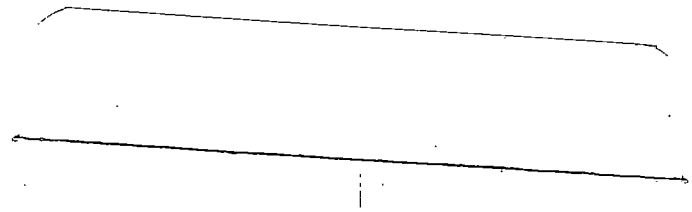

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