

NOTE

THE AMERICANS WITH DISABILITIES ACT: EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES, IN SOME LARGE BUSINESSES, IN SOME MAJOR CITIES, SOMETIMES . . .

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“[P]eople need not be limited by physical handicaps as long as they are not disabled in spirit.”

~Stephen Hawking¹

INTRODUCTION

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law by President George H.W. Bush.² Congress stated that the purpose of the ADA was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³ The first subchapter (Title I) of the ADA addresses accommodations for the disabled in the field of employment. President Bush attempted to quash “fears that the ADA is too vague or too costly” by stating that the Act struck a careful balance between the rights of individuals with disabilities and the legitimate interests of businesses.⁴ In particular, he noted that Title I of the

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1. Dennis Overbye, *Stephen Hawking Plans Prelude to the Ride of His Life*, N.Y. TIMES, Mar. 1, 2007, at A15, available at <http://www.nytimes.com/2007/03/01/science/01hawking.html>.

2. George H.W. Bush, Statement by the President upon signing the Americans with Disabilities Act of 1990, as reprinted in 1990 U.S.C.C.A.N. 601 [hereinafter Statement by President Bush].

3. 42 U.S.C. § 12101(b)(1) (2000).

4. Statement by President Bush, *supra* note 2, at 602.

ADA would become effective for employers with twenty-five or more employees on July 26, 1992, with an extension to employers with fifteen or more employees on July 26, 1994, thus permitting employers adequate time to become acquainted with the ADA.⁵ But in fact, the exclusion of employers with fewer than fifteen employees requires only a small percentage of the nation's employers to ever become acquainted with the ADA at all.

This Note argues that the balance discussed by President Bush is in fact tipped toward the employer and not the individual with a disability. The bright-line exclusion of all employers with fewer than fifteen employees is a major roadblock to achieving the "comprehensive national mandate for the elimination of discrimination against individuals with disabilities" that Congress stated as the clear purpose of the ADA.⁶

First, this Note will outline the current ADA statute and the legislative debate that brought it and the minimum employee threshold into existence. Next, the way in which the courts are currently analyzing the ADA and the minimum-employee threshold will be discussed. Then, an empirical study of the current state of employment and disability will be presented. This study will show that while the ADA has improved the ability of a disabled person to procure employment, the inclusion of a minimum-employee threshold has left a substantial gap of non-coverage. Finally, this Note will propose two changes to the ADA that address this problem. The first, and definitively bolder, alternative suggests removing the minimum-employee threshold completely and allowing the judiciary to use the undue-hardship provision of the ADA to balance the needs and abilities of both parties. The second alternative preserves a bright-line test for ease of judicial administration and employer understanding, but it is based on each individual employer in order to facilitate the goals that the minimum-employee threshold was designed to achieve.

I. THE ADA: A COMPREHENSIVE NATIONAL MANDATE

In 1990, Congress found that forty-three million Americans had a disability and that the number was increasing.⁷ Congress further found that persons with disabilities were isolated and discriminated against in critical areas such as employment and access to public accommodations.⁸ These

5. *Id.*

6. § 12101(b)(1).

7. *Id.* § 12101(a)(1).

8. *Id.* §§ 12101(a)(2)-(3).

detriments were causing disabled persons as a group to occupy an inferior status in the social, economic, and educational aspects of our society.⁹ Congress stated that the nation's proper goal was to place persons with disabilities on an even playing field with the rest of society.¹⁰ Thus, invoking the sweep of congressional authority, Congress adopted the ADA to eliminate discrimination against persons with disabilities.¹¹

However, immediately following this promising introduction, Congress distinguished between the types of discrimination suffered by persons with disabilities and addressed them with different degrees of protection. Congress addressed access to “any place of public accommodation” in the third subchapter (Title III) of the ADA.¹² A public accommodation was defined in Title III as any private entity that affects commerce and that falls within a statutorily defined non-exhaustive list of entity types.¹³ Meanwhile, Congress limited equal opportunity to employment for persons with disabilities to all “covered entit[ies]” in Title I of the ADA.¹⁴ After July 26, 1994, a covered entity included employers that retain fifteen or more employees for each working day in each of twenty or more weeks in the current or preceding calendar year.¹⁵ These two titles are supposed to eliminate discrimination against persons with disabilities. However, Title III is a “clear and comprehensive mandate”¹⁶ that includes any entity affecting commerce. Title I, on the other hand, is not comprehensive as it addresses discrimination in only part of the labor force. This discrepancy is not consistent with the goal of the ADA.

The fifteen-employee minimum threshold was borrowed from the 1972 amendment to Title VII of the Civil Rights Act of 1964, which addresses employment discrimination based on race, sex, national origin, and religion.¹⁷ The threshold in Title VII was chosen so that small businesses would be

9. *Id.* § 12101(a)(6).

10. *Id.* §§ 12101(a)(8)-(9).

11. *Id.* §§ 12101(b)(1), (4).

12. *Id.* § 12182(a) (emphasis added).

13. *Id.* § 12181(7).

14. *Id.* § 12112(a).

15. *Id.* §§ 12111(2), (5).

16. *Id.* § 12101(b)(1).

17. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.). The 1964 version of Title VII contained a twenty-five employee minimum threshold but was reduced to fifteen employees by the 1972 amendment. *Id.* § 2000e(b); Patricia Davidson, Comment, *The Definition of “Employee” Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206 (1984).

protected and spared compliance and litigation expenses.¹⁸ The courts have inferred that the reason for the ADA's minimum-employee threshold is the same as Title VII because both statutes address employment discrimination.¹⁹ But another reason for the Title VII threshold that surfaced during the congressional debates was the concern of forcing small family-run businesses to hire outside of their family or ethnicity.²⁰ The concern is that a small business owner of a particular religion may have conflicts with a member of another religion. This, however, should not have been a concern for the drafters of the ADA because disability and creed are different bases of discrimination. One's worship habits may actually offend an owner of a small business to the point that she does not want to associate with the person. However, someone's mobility impediment is not offensive in a manner such that a business owner should not want to associate with the person. The sole reason for adopting the minimum-employee threshold in the ADA should have been to protect small business owners from incurring the expense of litigation and compliance, not personal belief.

Another reason for the inclusion of the minimum-employee threshold is that Congress wanted to provide some protection for small businesses.²¹ The use of such a bright-line test—either fifteen employees or not—improves judicial efficiency. The court can provide the protection desired by Congress but yet not have to expend large amounts of time applying a more laborious test. Yet even though bright-line rules are often desirable, they cannot be used when they are unreasonable in light of human experience and common sense.²² The fifteen-employee minimum threshold, although easy to apply, cannot be supported if it defies common sense—as will be shown later in this Note.

II. INTERPRETATION BY THE COURTS

Like many statutes, the ADA has morphed over time due to judicial interpretation. The minimum-employee threshold of the ADA has

18. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72 (3d Cir. 2003) (discussing reasoning behind Title VII's minimum-employee threshold).

19. *See Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (applying and extending the reason for Title VII's minimum-employee threshold to the ADA).

20. *Armbruster v. Quinn*, 711 F.2d 1332, 1337 n.4 (6th Cir. 1983) (discussing the legislative history of the 1972 amendments and the remarks of Senators Fannin and Ervin), *overruled by* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 509-10 (2006) (holding that the minimum employee threshold requirement is part of the plaintiff's claim to relief, not a jurisdictional requirement).

21. *Id.*

22. *United States v. Sharpe*, 470 U.S. 670, 685 (1985).

unfortunately been substantially restricted by the courts. This section will first show that some courts have interpreted the ADA to have a much stronger link to Title VII than the legislature intended, thereby frustrating the purpose of the statute; and second, that these courts have thus applied a test to the threshold requirement that substantially limits the amount of "covered entities."

An important concern in the minimum-employee threshold question is what is an employer? The statute states that an employer is "a person engaged in an industry affecting commerce who has 15 or more employees."²³ A "person" would include a corporation because it possesses the legal authority to act as a person under the law.²⁴ But is a corporation comprised of a parent company and all of its subsidiaries, or is each subsidiary its own company? In the former, all of the employees of the linked businesses would be counted toward the minimum-employee threshold. In the latter, each would stand alone in the count toward the minimum-employee threshold. The courts have developed different tests in answering this question.

Under Title VII, some courts of appeals have adopted the National Labor Relations Board (NLRB) test to determine if two nominally distinct companies should be considered a single entity and thus have their employee numbers consolidated.²⁵ The test encompasses four factors: "interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control."²⁶ Courts adopting this test have focused on the factor of centralized control of labor relations or the location of employment decisions.²⁷ The Department of Labor has advocated the NLRB four factor test to determine the number of employees in the parent-subsidiary context in Family and Medical Leave Act (FMLA) cases, which are limited to employers with fifty or more employees.²⁸ Oftentimes, cases are brought and similarly analyzed under both the FMLA and ADA statutes.²⁹

At least two courts of appeals, however, have stated that the National Labor Relations Act, administered by the NLRB, and Title VII have different

23. 42 U.S.C. § 12111(5)(a) (2000).

24. BLACK'S LAW DICTIONARY 365 (8th ed. 1999).

25. *See, e.g.*, *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 84 (3d Cir. 2003) (stating adoption of the NLRB test in the 2d, 5th, 6th, 8th, 9th, 11th, and D.C. Circuits); *see also* *Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 5 (1st Cir. 2006); *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) (adopting the NLRB test in Family and Medical Leave Act (FMLA) cases).

26. *Nesbit*, 347 F.3d at 84.

27. *See id.*

28. 29 C.F.R. § 825.104 (2007), authority to enact regulations granted by 29 C.F.R. § 2654 (2007).

29. *See, e.g.*, *Burnett v. LFW, Inc.*, 472 F.3d 471 (7th Cir. 2006).

policies and thus should not be governed by the same test.³⁰ In the ADA context, these courts have reasoned that the minimum-employee threshold should be strictly construed because the legislative purpose behind the threshold is to spare small companies the considerable expense of complying with the ADA's many nuanced requirements.³¹ These courts have adopted the reasoning of Judge Richard Posner in the Seventh Circuit case *Papa v. Katy Industries, Inc.*³² The Seventh Circuit test involves three conditions, each in itself sufficient to establish that a subsidiary and a parent company are one entity. The conditions are: the parent company pierced the corporate veil; the enterprise purposefully split itself in order to avoid the anti-discrimination laws; or the parent company directed the subsidiary to perform the discriminatory act.³³ The court in *Papa* adopted this test for both Title VII and the ADA.³⁴ There are two problems with this test. First, adopting a strict-construction test by linking Title VII and the ADA together violates the intent of the legislature that the ADA be more expansive than Title VII. And second, the test, if accepted, imposes a nearly impossible burden for an ADA plaintiff to overcome.

The court in *Papa* adopted the test for both the ADA and Title VII as if they were identical. Yet, the strict interpretation adopted in *Papa* does not coincide with the legislative history of the ADA. In fact, Congress made important distinctions between the two statutes, indicating that Congress wished the ADA to be given a broader scope than Title VII. First, the legislature explicitly and extensively broadened the provisions of the ADA by stating that the ADA would not incorporate the principle enunciated by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*³⁵ that an employer need not accommodate an employee under Title VII if the accommodation would require more than a *de minimis* cost for the employer.³⁶ Congress further stated that the reasonable accommodation must be provided unless it rises to a level requiring "significant difficulty or expense" to the employer.³⁷ Second, Title VII is not applicable to individuals elected to public office by

30. *Nesbit*, 347 F.3d at 85; *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).

31. *Nesbit*, 347 F.3d at 84.

32. 166 F.3d 937 (7th Cir. 1999); *Nesbit*, 347 F.3d at 85 (adopting the test of *Papa*).

33. *Papa*, 166 F.3d at 940-941.

34. *Id.* at 939.

35. 432 U.S. 63, 84 (1977).

36. H.R. REP. NO. 101-485, pt. 2, at 68 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 350.

37. *Id.*

qualified voters.³⁸ When enacting the ADA, Congress expressly stated that the ADA did not incorporate Title VII's elected-official exception.³⁹

Since Congress highlighted certain changes in the ADA that had similar or identical phrasing to provisions of Title VII, Congress did not intend the ADA to be a mirror image of Title VII, with the words "race, religion, and national origin" replaced with "disability." Further, where the legislature intended to directly incorporate Title VII, it stated its intent. For instance, the legislature incorporated Title VII's remedies into the ADA by cross-reference to Title VII instead of copying and pasting the language into the ADA.⁴⁰ The intent in this instance was that the ADA's remedies would be synchronized with changes to the remedies of Title VII, not frozen by their direct restatement in the ADA.⁴¹ The legislative history in two instances suggests that the ADA was intended to be more expansive than Title VII. Specifically, the replacement of the *de minimis* employer burden with an undue-hardship burden significantly expands the number of accommodations that would be required to be implemented by employers. The ADA's minimum-threshold provision should likewise not be construed against the implementation of reasonable accommodations for disabled individuals.

Further, the test set forth in *Papa* heightens the burden placed upon an ADA plaintiff.⁴² First, the judicial inquiry that must be made in order to determine if the corporate veil has been pierced has been described as one of the most confusing areas of law.⁴³ Placing a burden usually reserved for the attorneys of lucrative stockholder class actions onto attorneys seeking equitable relief in the form of a reasonable accommodation is patently unfair. Second, both of the other conditions, proving either the purposeful division of a corporate entity to avoid anti-discrimination laws or a direct act by a parent company to force the subsidiary to discriminate, approach the high burden of

38. 42 U.S.C. § 2000e(f) (2000).

39. H.R. REP. NO. 101-485, pt. 2, at 54 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 336; H.R. REP. NO. 101-485, pt. 3, at 32 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 455; Parker v. Yuba Cty. Water Dist., No. 02:06-CV-0340-GEB-KJM, 2006 WL 2644899, at *2 (E.D. Cal. Sept. 14, 2006).

40. H.R. REP. NO. 101-485, pt. 3, at 48 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 471.

41. *Id.*

42. See Nesbit v. Gears Unlimited, Inc., 347 F.3d 72 (3d Cir. 2003) (finding that the plaintiff had not proven the existence of one of the three conditions required to establish a parent subsidiary relationship); Papa v. Katy Indus., Inc., 166 F.3d 937 (7th Cir. 1999) (same); Cheskawich v. Three Rivers Mortgage Co., L.L.C., No. 2:05CV691, 2006 WL 2529591 (W.D. Pa. Aug. 31, 2006) (same); Diggs v. Dynege, Inc., No. 03 C 3223, 2003 WL 22794558 (N.D. Ill. Nov. 24, 2003) (same); Radimecky v. Mercy Health Care & Rehab. Ctr., No. 00 C 2889, 2000 WL 1644510 (N.D. Ill. Oct. 26, 2000) (same).

43. Frank Easterbrook & Daniel Fischl, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985).

showing scienter or conscious behavior, as is required in securities-fraud cases.⁴⁴ This burden, like the burden to establish a pierced corporate veil, is much too great to place upon a plaintiff pleading for a reasonable accommodation. At the present date, no plaintiff has successfully overcome the burden established in *Papa*.

Yet regardless of which test is adopted, the amount of ink spilt in the attempt to administer the bright-line rule of the minimum-employee threshold illustrates its lack of effectiveness. If the courts must formulate tests that require the type of factual inquiry used in the pierced corporate-veil scenario, judicial efficiency is not achieved. Meanwhile, if the point of the ADA is to promote a balance between disabled individuals and employers, small businesses should be forced to litigate if they feel the accommodation requested is an undue hardship. ADA plaintiffs already must litigate concepts as detailed as piercing the corporate veil. Without some greater burden on small businesses, the balance struck in the ADA fails.

III. EMPLOYMENT AND DISABILITY IN THE UNITED STATES: WHAT THE ADA MISSES

The capitalist economy and the mindset of the United States requires that each person earn his or her own way through life so that the government, and ultimately the people, do not have to support that person. The ADA was enacted to allow persons with disabilities to have the same ability to earn their way as non-disabled persons by giving them equal access to employment.⁴⁵ The ADA's minimum-employee threshold may seem very insignificant in the entire scope of the ADA, but the significance of the barrier left by this provision becomes visible when the labor and disability statistics of the United States are studied. The primary statistical data used here is from the *Statistical Abstract of the United States (Statistical Abstract)*.⁴⁶ The *Statistical Abstract* is the authoritative source of economic statistical information in the United States.⁴⁷

44. *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999).

45. 29 C.F.R. § 1630 (2007).

46. U.S. Census Bureau, *Statistical Abstract of the United States: 2007* (126th ed.) Washington, DC, 2006, available at: www.census.gov/prod/www/statistical-abstract.html [hereinafter *Statistical Abstract*].

47. U.S. Census Bureau, What is the Statistical Abstract?, <http://www.census.gov/compendia/statab> (last visited Aug. 15, 2008); see also U.S. Census Bureau, Statistical Abstract: Overview, <http://www.census.gov/compendia/statab/overview.html> (last visited Aug. 15, 2008) [hereinafter Overview].

Two preliminary matters must be explained about the *Statistical Abstract*. First, the *Statistical Abstract* uses specific terms that must be defined. Every physical business location that employs a person⁴⁸ is termed an establishment.⁴⁹ An enterprise consists of all of the establishments or physical locations that are owned by a single entity.⁵⁰ The enterprises and establishments are placed in groups based on the number of persons they employ.⁵¹ Second, the statistics available do not have a group with enterprises of fewer than fifteen employees, but only a fewer-than-twenty employee group. The statistics are used to show trends and general truths about the state of employment in the United States. The intent of this section is to show the gross inadequacy of the ADA in providing equal employment opportunity in the United States with the inclusion of a minimum-employee threshold. I do not intend here to provide an exact snapshot of employment in the United States.

In 1990, Congress stated that there were some forty-three million Americans with disabilities.⁵² In 2002, the number of disabled persons had climbed to over fifty-one million, or 18% of the total population, an increase consistent with the population growth of the United States.⁵³ Of these 51 million Americans, 28 million were between the ages of fifteen and sixty-five, the age group that is considered the labor force of the United States.⁵⁴ Thus, the total work force of the U.S. was comprised of at least 13% disabled persons. The mean income of a person with a disability in 2002 was \$23,034.⁵⁵ Meanwhile, the mean income of a person without a disability was \$31,840.⁵⁶ A further breakdown shows that 77% of individuals with a severe disability earned less than \$20,000 per year, while only 39% of individuals

48. Self-employed and government-employed persons are not considered.

49. U.S. Census Bureau, Statistics of U.S. Businesses Tabulations by Enterprise Size Introductory Text, <http://www.census.gov/epcd/subs/introusb.htm> (last visited Aug. 15, 2008) [hereinafter Introductory Text].

50. Introductory Text, *supra* note 49.

51. *Id.*

52. 42 U.S.C. § 12101(a)(1) (2000).

53. U.S. CENSUS BUREAU, PREVALENCE OF DISABILITY BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 2002 (2007), available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t1.pdf>.

54. U.S. CENSUS BUREAU, PREVALENCE OF TYPES OF DISABILITY AMONG INDIVIDUALS 15 YEARS AND OLDER: 2002 (2007), available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t2.pdf>.

55. U.S. CENSUS BUREAU, DISABILITY STATUS, EMPLOYMENT, AND ANNUAL EARNINGS: INDIVIDUALS 21 TO 64 YEARS OLD: 2002 (2007), available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t5.pdf>.

56. *Id.*

without a disability earned less than \$20,000 per year.⁵⁷ These figures lead to the grim fact that 26% of individuals with a severe disability were below the poverty level compared to 8% of those without a disability.⁵⁸ Rural areas have had a higher frequency of disabled persons (17.6%) compared to urban areas (15.8%) and suburbs (13.4%).⁵⁹

In 1994, the Equal Employment Opportunity Commission (EEOC) released a statement that Title I of the ADA is in full effect now that the minimum-employee threshold for employer compliance has been reduced to fifteen.⁶⁰ The release further explains that the expansion will increase the number of “covered entities” from 264,000 to 666,000 enterprises at 1.7 million establishments.⁶¹ When taken at face value, these figures appear impressive and would lead one to believe that the minimum-employee threshold is barely even a factor. The EEOC omits, however, the percentage of establishments that are within the ADA’s coverage. The *Statistical Abstract* reported that there were approximately 7.3 million establishments in the U.S. in 2003.⁶² Of these 7.3 million establishments, 2.1 million were part of an *enterprise* with more than twenty employees and would be covered by the ADA.⁶³ Thus, the percentage of establishments that qualified as “covered entities” under the ADA based on being part of an *enterprise* with more than twenty employees was a mere 28.7% of all *establishments* nationwide in 2003.⁶⁴ When the current court methodology of determining whether a subsidiary’s employee number is considered part of a parent corporation’s employee number is factored into the figures, the situation becomes even more bleak.⁶⁵ If a subsidiary, which may have its own establishment, is not considered part of a business with more than twenty employees, then the establishment is considered alone and is not required to comply with the ADA. The number of *establishments* in the United States with more than twenty employees was only 14.0% of the total establishments in the United

57. U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF INDIVIDUALS 25 YEARS AND OLDER BY DISABILITY STATUS: 2002 (2007), available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t4.pdf>.

58. *Id.*

59. LEWIS E. KRAUS ET AL., CHARTBOOK ON DISABILITY IN THE UNITED STATES, 1996, at 12 (1996), available at <http://www.infouse.com/disabilitydata/disability/disability.pdf>.

60. Press Release, Equal Employment Opportunity Comm’n, Disabilities Act Expands to Cover Employers with 15 or More Workers (July 19, 1994), available at <http://www.eeoc.gov/press/7-19-94.html>.

61. *Id.*

62. STATISTICAL ABSTRACT, *supra* note 46, at 498 tbl.740.

63. *Id.*

64. *Id.*

65. *See supra* Part II.

States, or a total of 1.1 million of the total 7.3 million business establishments.⁶⁶ If every *establishment* in the United States with fewer than twenty employees was either the only establishment of a business or was considered by a court to be a stand-alone business (and the employees of the parent corporation were not added to its employee number), then the number of actual locations at which a disabled person would have a legal right to a reasonable accommodation would be quite low. I concede that not every establishment with fewer than twenty employees will be separated from its parent corporation in the determination of its employee number under the ADA. But still, the percentage of establishments required to comply with the ADA is clearly below 25%, which is unsatisfactory.

The EEOC's statement about the ADA's coverage also assumes a homogeneous dispersal of disabled persons and businesses across the United States. The percentage of disabled persons in the United States ranges, by state, from 6.2% to 12.6%.⁶⁷ Regarding business, anyone who has traversed a mere one hundred miles from her home would know that homogeneity is not reality in the United States. In fact, the heterogeneous nature of America has been touted as one of its best features.⁶⁸ Therefore, the protection afforded by the ADA would be much greater if the 666,000 businesses and 1.7 million establishments that the EEOC claims are "covered entities" under the ADA were evenly spread across the United States. If this were the truth, the ADA would provide a disabled person convenient access to a covered entity anywhere. The locations of "covered entities" have not been exactly determined, but a rough comparison of certain recorded statistics illustrates the heterogeneity present. Greene County, Pennsylvania, a rural area, has a recorded population of 40,000 people⁶⁹ with eleven major employment types.⁷⁰ The total number of businesses and employees has been recorded for each type. If each entity in a business type employed an equal number of workers as all of the other businesses in the type, only one out of eleven would employ more than fifteen people.⁷¹ In comparison, Allegheny County, Pennsylvania,

66. STATISTICAL ABSTRACT, *supra* note 46, at 496 tbl.738.

67. KRAUS ET AL., *supra* note 59, at 42.

68. *See generally* WILLIAM LEAST HEAT-MOON, BLUE HIGHWAYS: A JOURNEY INTO AMERICA (1999).

69. Epodunk, Greene County, PA, <http://www.epodunk.com/cgi-bin/genInfo.php?locIndex=14076> (last visited Aug. 15, 2008).

70. U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS: SUMMARY STATISTICS FOR GREENE COUNTY, PA (1997).

71. *Id.*

an urban area, has a recorded population of 1.25 million people⁷² with eleven major employment types.⁷³ Once again, if each entity in a business type employed an equal number of workers as the others of the same type, five out of eleven would employ more than fifteen people.⁷⁴ This basic calculation shows only that it is more likely that a disabled person would encounter a business that is a covered entity in an urban area than in a rural area. When this is coupled with the fact that more people with disabilities live in rural areas than in cities or suburbs, the protection afforded by the ADA is once again diminished.⁷⁵

The EEOC further states that the decrease in the minimum-employee threshold expands coverage to nearly 86% of the nation's workforce. This figure is determined by considering the number of people who currently work in a business or establishment with more than fifteen employees. This figure, according to the *Statistical Abstract*, is still true today. But this figure proves nothing about the effectiveness of the ADA. The ADA was intended to be a "clear and comprehensive mandate"⁷⁶ in order to provide "equality of opportunity"⁷⁷ for individuals with disabilities. This lofty goal, which has been a point of laudation for the ADA,⁷⁸ is not achieved by providing *somewhere* for a person with a disability to work. The fact that 86% of the nation's workforce is currently employed in a business that is considered a "covered entity" does not fix the fact that a disabled person in the workforce has to choose to work at one of the 2.1 million of 7.3 million business establishments that may be required to comply with the ADA.⁷⁹ The lack of ADA protection for a disabled person in at least 5.2 million, or 71.3%, of all business establishments is hardly equal *opportunity*.⁸⁰

At most, the current state of the law provides a job somewhere. Whether the disabled individual enjoys her job, must engage in a long commute to reach her job, or is settling for a job outside of her educational background are

72. Epodunk, Allegheny County, PA, <http://www.epodunk.com/cgi-bin/genInfo.php?locIndex=13489> (last visited Aug. 15, 2008).

73. U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS: SUMMARY STATISTICS FOR ALLEGHENY COUNTY, PA (1997).

74. *Id.*

75. *See supra* Part III.

76. 42 U.S.C. § 12101(b)(1) (2000).

77. *Id.* § 12101(a)(8) (emphasis added).

78. Steven Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 108-09 (1997).

79. STATISTICAL ABSTRACT, *supra* note 46, at 498 tbl.740.

80. *Id.*

not concerns addressed by the current statute. The assertion that a disabled person has *equal access* to employment because 28.7% of business establishments in the United States are currently required to comply with the ADA is unreasonable. The assertion runs afoul of common sense and human experience. This foul calls for the invalidation of any bright-line rule⁸¹—in this case, the minimum-employee threshold.

IV. TWO NEW PROPOSALS

Envision two common small businesses. The first small business is a “mom-and-pop” grocery store in a small town and has four employees with a net profit of \$25,000 per year for the owner and his wife, their only source of income. The second small business is a four-partner accounting and investment firm in an urban area with a net profit of \$950,000 per year to be split among the four partners. A paraplegic woman in a wheelchair applies to work at both businesses. In order to allow her to work at either business, a ramp would need to be installed to allow her to enter the front of the building. Also, the bathroom door would need to be widened so that she may access it. The total renovations would cost approximately \$2,000.

The purpose of the minimum-employee threshold was to protect small businesses from the cost of litigation and from making accommodations that were so costly that they jeopardize the financial stability of the business. This blanket rule may indeed protect some mom-and-pop businesses, but it is also shielding lucrative and sophisticated businesses from compliance. Judge Posner has stated, with no reference to legislative history or empirical study, that the “purpose [of the minimum-employee threshold] is unaffected by whether the tiny firm is owned by a rich person or a poor one. . . . If a firm is too small to be able economically to cope with the anti-discrimination laws, the owner will not keep it afloat merely because he is rich”⁸² This assertion is inapposite to the legislative history of the ADA, which states that the purpose of the threshold is to protect small businesses from the *expense* of litigation and compliance.⁸³ If the small business has the financial resources to comply, its size is not of any importance.

So, according to the current version of the ADA and Judge Posner, both of these businesses are exempt from compliance with the ADA, and thus this

81. *United States v. Sharpe*, 470 U.S. 670, 685 (1985).

82. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).

83. *See supra* Part I.

paraplegic woman would need to go elsewhere for employment. Yet the differences between these two businesses are clear and illustrate the folly of using a minimum-employee threshold to protect economic interests. The minimum-employee threshold was designed to protect the first business, yet the second business is allowed to hide behind this provision even though it can easily finance an accommodation for this paraplegic woman.

I propose two revisions to the ADA that would protect a firm “too small to be able to economically cope”⁸⁴ with the ADA but still further the purpose of the ADA. In order to describe my proposals, I will refer to the above hypothetical of the two small businesses.

A. Removal of the Minimum-Employee Threshold

My first proposal involves removing the fifteen-employee minimum threshold from the ADA’s definition of an employer because the undue hardship provision contains adequate safeguards that would still allow the courts to protect small businesses. A problem with this proposal is that the removal of the bright-line rule opens the door to increased litigation, which many would claim would be a detriment. But judicial efficiency and ease of application do not warrant a bright-line rule that common sense finds unreasonable,⁸⁵ as shown by the statistical evidence presented earlier. A flexible test, while requiring more court interpretation, would allow the ADA to be implemented and the employer to be protected when appropriate. This proposal may appear bold to those who are familiar with the ADA and Title VII as they stand today. But in fact, the disability legislations of individual countries in the European Union do not contain minimum-employee threshold provisions.⁸⁶

Even with the current minimum-employee threshold, an employer with fifteen employees may still challenge Title I of the ADA’s directive to reasonably accommodate a disabled employee if the accommodation would impose an undue hardship on the employer.⁸⁷ The hardship experienced by the employer must be more than *de minimis*, a marked difference between the ADA and Title VII.⁸⁸ In fact, the statute states that the accommodation must

84. *Papa*, 166 F.3d at 940.

85. *Sharpe*, 470 U.S. at 685.

86. Carol Daugherty Rasnic, *The ADA: A Model for Europe with “Sharper Teeth?”* 11 INT’L LAW STUDENTS ASS’N J. OF INT’L & COMP. L. 105, 118 (2004).

87. 42 U.S.C. § 12112(b)(5)(A) (2000).

88. H.R. REP. NO. 101-485, pt. 2, at 68 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 350.

be of “significant difficulty or expense” to constitute an undue hardship to an employer.⁸⁹ The statute lists four factors that a court should analyze: the nature and cost of the accommodation; overall financial resources and the effect on expenses and financial resources of the facility or entity; the number of persons employed at the facility or covered entity; and the type of operations of the covered entity.⁹⁰ Consideration of these four factors of undue hardship would protect a true small business like the mom-and-pop general store, just as the minimum-employee threshold had done before.

First, two of the four factors evaluate the major concern of the legislature: financial resources and expense.⁹¹ In the hypothetical, the difference in revenue between the general store and the accounting firm was the most noticeable difference. A court considering this accommodation should determine that the accommodation might impose an undue hardship on the mom-and-pop business because the accommodation would cost 8.0% of the total profit of the business. Meanwhile, a court might determine that the accommodation is a mere *de minimis* hardship on the accounting and investment firm because the accommodation would cost 0.2% of its total profit.

Second, the undue-hardship provision actually considers the number of employees that a business employs. In the hypothetical, this factor would have no relevance. In this instance, the number of employees tells us nothing about the ability of either business to make a reasonable accommodation for a disabled individual. But the provision is still available even though the minimum-employee threshold is removed. In some instances, an accommodation of a massive scale would be an undue hardship even for an employer with more than fifteen employees. The application could be the same in my proposal such that a four-person firm or a 200-person firm might both warrant protection.

Finally, the undue-hardship provision considers the type of operations of the covered entity, such as the structure and functions of its workforce.⁹² This factor would operate under my proposal in the same fashion as it has under the current version of the ADA. The provision is currently designed to protect the

89. § 12111(10)(A).

90. *Id.* §§ 12111(10)(B)(i)-(iv).

91. *Picinich v. United Parcel Serv.*, 321 F. Supp. 2d 485, 508 (N.D.N.Y. 2004) (discussing financial burdens to employers but finding that the defendant did not present any evidence that the burden was an undue hardship).

92. *Bryant v. Better Bus. Bureau of Md.*, 923 F. Supp. 720, 738-40 (D. Md. 1996) (analyzing this prong of the undue hardship provision but not finding the accommodation to be an undue hardship).

employer who may meet the minimum-employee threshold and be financially sound, but yet a reasonable accommodation would disrupt the workings of its business. For instance, a company may run various production lines that require dropping something from a certain height to a lower height. An operator of a machine on both levels would be required to use a ladder. If this operator was injured in a car accident and required a cane to walk, the business would not be required to install an elevator or ramp system to access the different levels. The installation of such equipment would require a redistribution of equipment in the plant and would disrupt the production lines. Even if the cost is minimal, the accommodation is an undue burden on the employer.

A test that has been advocated for the undue-hardship burden by Professor Epstein could be readily applied to my proposal of removing the minimum-employee threshold.⁹³ Professor Epstein's test proposes a monetary range that a business would need to accommodate based upon a calculation of its working capital.⁹⁴ For instance, a business with less than \$20,000 in working capital would have an accommodation range of \$100 to \$1,000.⁹⁵ If the accommodation was outside of this range, the business would only be required to pay up to \$1,000.⁹⁶ This test would apply the more appropriate undue-hardship provision yet still provide flexibility and guidance for courts and employers.

Under this proposal, a court would be able to analyze the actual controversy at hand. In the hypothetical, the court would be able to help the paraplegic woman at the small accounting and investment firm because that firm has the resources to provide the accommodation. In the case of the small grocery store, the court would be able to label the accommodation as an undue hardship because of the level of expense in relation to the amount of revenue the business generates. This proposal allows more cases to be decided based on the reasonableness of an accommodation rather than on a requirement that is not linked to the underlying intent of the statute. This standard also allows for movement towards the comprehensive mandate to eliminate discrimination against people with disabilities. Meanwhile, we have avoided driving a small business out of financial stability through compliance with the ADA. Thus, the balance discussed by President Bush would be tipped back toward even.

93. Steven Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391 (1995).

94. *Id.* at 459.

95. *Id.*

96. *Id.*

B. *The Business Revenue Test*

My second alternative proposal removes the minimum-employee threshold but replaces it with another, more appropriate, bright-line test. The threshold would be a measure of economic or financial strength, and thus a true test of the ability of a business to offer a reasonable accommodation. The minimum-employee threshold was designed to protect small businesses from the expense of litigation and compliance.⁹⁷ But why did the drafters of Title VII and subsequently the ADA decide on the number fifteen? The original Civil Rights Act of 1964 stated that the minimum-employee threshold was twenty-five.⁹⁸ The 1972 amendment to the original draft of the Civil Rights Act of 1964 changed the threshold to fifteen.⁹⁹ Before the 1972 amendment was adopted, the original draft of the amendment purported to decrease the minimum threshold from twenty-five to eight.¹⁰⁰ During the debates of the Civil Rights Act of 1964, two judges expressed their disdain for such an arbitrary number. They stated that they believed the inclusion of the minimum-employee threshold was a method by which to ensure that the Civil Rights Act would apply only to a business that truly affected commerce.¹⁰¹ The judges referred to the determination of the minimum number as some “quantum of income theory.”¹⁰² Finally, they stated that the minimum-employee threshold was a “flimsy yardstick” to measure a business’s effect on commerce such that it should be within the scope of the anti-discrimination laws.¹⁰³ These statements and the many different proposed and adopted changes to the minimum-employee threshold show that it is not an exact or appropriate method of determining whether an employer should be subject to the anti-discrimination laws.

Another reason that the minimum-employee threshold is not a proper way to decide which employers should be subject to anti-discrimination laws is that some states have much lower minimum-employee thresholds in their state anti-discrimination laws.¹⁰⁴ These states have adopted much lower-minimum

97. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).

98. Davidson, *supra* note 17.

99. *Id.*

100. H.R. REP. NO. 92-238 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2161.

101. H.R. REP. NO. 88-914 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2475 (Minority views of Hon. Richard Poff & Hon. William Cramer).

102. *Id.*

103. *Id.*

104. *See, e.g.*, CONN. GEN. STAT. § 46a-51 (2006) (setting the Connecticut minimum employee

employee thresholds and yet have not destroyed the market for small businesses due to disability discrimination litigation.¹⁰⁵ The range of minimum-employee threshold numbers illustrates the arbitrary nature of having a minimum-employee threshold and supports the adoption of a new test. Also, an important point that indicates the continuing need for a federal disability discrimination statute is that some states, such as Alabama and Mississippi, have no state disability discrimination protection.

A better way to determine a business's financial ability to provide a reasonable accommodation would be to have a minimum threshold based on an actual financial factor. An easy test to apply would be to set a minimum net-profit threshold. For instance, if the business's net revenue, based on its income tax return, was below a certain amount, it would not be a "covered entity" under the ADA. In my hypothetical, both businesses would be subjected to this test and would possibly need to comply. If the minimum-revenue threshold was, for instance, \$40,000, the grocery store would not have to comply while the accounting and investment firm would have to. This test would more appropriately administer the legislature's intent that small businesses be protected. This test is very similar to the minimum-employee threshold test, but it is a closer measure of the impact that an accommodation would have upon a business.

CONCLUSION

The ADA has made considerable headway in removing discrimination against individuals with disabilities, but the statute still contains more power. Removing the minimum-employee threshold would unlock the true power of the ADA and allow a true removal of the barrier that stops the complete integration of people with disabilities into society. The proposals of this paper are geared toward the disabled individual, but yet they still respect the needs of the employer. Adopting one of these proposals would allow the courts to protect small businesses when warranted but still effectuate the purpose of the ADA when that protection is unwarranted.

number for disability discrimination at three); 43 PA CONS. STAT. § 954 (2007) (setting the Pennsylvania minimum employee number for disability discrimination at four); CAL. GOV'T CODE § 12926 (West 2007) (setting the California minimum employee number for disability discrimination at five).

105. *See, e.g.*, U.S. CENSUS BUREAU, NUMBER OF FIRMS, NUMBER OF ESTABLISHMENTS, EMPLOYMENT AND ANNUAL PAYROLL BY EMPLOYMENT SIZE OF THE ENTERPRISE FOR THE UNITED STATES AND STATES, TOTALS-2004 (2004) (88% of the firms in California have less than twenty employees).