

## Cornell Journal of Law and Public Policy

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Volume 2  
Issue 1 Fall 1992

Article 3

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### Recommended Citation

Barnard, Thomas H. (1992) "Disabling America: Costing Out the Americans with Disabilities Act," *Cornell Journal of Law and Public Policy*: Vol. 2: Iss. 1, Article 3.

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# DISABLING AMERICA: COSTING OUT THE AMERICANS WITH DISABILITIES ACT

Thomas H. Barnard<sup>†</sup>

## INTRODUCTION

Who can deny that the Americans with Disabilities Act ("ADA")<sup>1</sup> is a well-intentioned statute designed to protect and aid the disabled? Congress certainly reflected such aspirations as it overwhelmingly passed the ADA.<sup>2</sup> Nevertheless, the ADA's high purpose and strong congressional support mask an otherwise problematic statute. Some of the ADA's flaws, such as the precedential uncertainty that results from an individualized, case-by-case approach to claim determination, appear inherent to disability legislation.<sup>3</sup> In contrast, the ADA's most troubling defect, the decision to saddle American businesses with the ADA's resulting costs, represents a congressional error in discretionary policy formulation. This article will demonstrate that Congress foisted the ADA's costs upon the business sector without any plausible justification.

## I. BACKGROUND

Congressional thinking in certain quarters can be characterized as follows: The country has a problem. The government cannot or will not solve the problem. Therefore, the government should pass a law requiring businesses to solve the problem

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<sup>1</sup> 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

<sup>2</sup> The Senate passed its version of the ADA on September 7, 1989 by a vote of 76 to 8. *Senate Passage of Civil Rights Bill Moves Debate Over Disabled to House*, Daily Lab. Rep. (BNA) No. 174, at A-5 (Sept. 11, 1989). The House of Representatives passed its bill on May 22, 1990 by a vote of 403 to 20. *House Overwhelmingly Approves Bill to Bar Employment Bias Against Disabled*, Daily Lab. Rep. (BNA) No. 100, at A-16 (May 23, 1990).

<sup>3</sup> See Thomas H. Barnard, *The Americans With Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 231 (1990) (noting that the ADA, perhaps out of necessity, forces an individualized inquiry into many of its enforcement issues).

regardless of whether or not the business sector caused the problem or derives any benefit from the solution. Play-or-pay employer mandate health care proposals provide an illustrative example of this type of congressional thinking, as they are intended to solve the nation's health care crisis by requiring employers to directly provide employee health insurance or to pay a payroll tax into a government sponsored program. But why? The business sector did not cause the problem and does not profit by such a solution.<sup>4</sup> Correspondingly, the ADA requires employers not only to refrain from discriminating against the disabled<sup>5</sup> (a perfectly reasonable requirement) but, among other things, to reasonably accommodate individual disabilities.<sup>6</sup> Moreover, Congress has clearly indicated that the required cost of accommodation may be more than a *de minimis* sum.<sup>7</sup>

Who cares what the ADA costs the business sector! This was one panelist's response to a question concerning the ADA's expected financial burden upon the business sector.<sup>8</sup> Likewise, advocacy groups apparently do not care what the ADA costs the business sector. A recent survey of twenty-five advocacy groups dedicated to advancing the interests of disabled individuals found that the advocacy groups believe that the business sector should pick up the tab for ADA compliance and that employment-related accommodations and barrier removals are simply a cost of doing business.<sup>9</sup>

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<sup>4</sup> The Employee Benefit Research Institute (EBRI) estimates that under a 9% payroll tax, a play-or-pay plan could increase employer costs by \$30 billion to \$45 billion. *EBRI Issues Comprehensive Review of Health Reform Proposal Costs, Implications*, Daily Lab. Rep. (BNA) No. 79, at A-13 (April 23, 1992). Moreover, EBRI estimates that play-or-pay plans could result in a loss of anywhere from 131,000 to 965,000 jobs. *Id.*

<sup>5</sup> 42 U.S.C. § 12112 (Supp. II 1990).

<sup>6</sup> *Id.* § 12112(b)(5)(A)-(B).

<sup>7</sup> "The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, [432] U.S. 63 (1977) are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under Title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer." H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 68 (1990) [hereinafter HOUSE REPORT].

<sup>8</sup> Robert H. Holdsworth, Remarks at the *Cornell Journal of Law and Public Policy* ADA Symposium (Mar. 28, 1992).

<sup>9</sup> *Americans with Disabilities Act Survey: A Clash Between Employers and*

Someone should care what the ADA costs the business sector! In 1991, 87,266 businesses failed in the United States, up 43.7% from 1990.<sup>10</sup> Moreover, in 1991 the dollar liabilities of failed businesses increased 95.9% to \$108.8 billion, up from \$55.5 billion in 1990.<sup>11</sup> Additionally, 1991 represented the seventh consecutive year that bankruptcy filings have increased.<sup>12</sup>

What is particularly troubling about the ADA is that Congress did not even make a halfhearted effort to consider how the Act's costs would affect the business sector. After lengthy consideration concerning the legislation's benefits,<sup>13</sup> the Senate gave short shrift to the associated business costs. Under a section labeled "Economic Impact on the Individuals, Consumers and Businesses Affected,"<sup>14</sup> the Senate first concluded that "[s]avings to the public and private sectors in the form of increased earnings for people with disabilities and decreased government benefit and private insurance and benefit payments is estimated to be in the billions of dollars per year."<sup>15</sup> Next, in its only discussion of the ADA's business costs, the Senate explained that:

[c]osts to businesses for reasonable accommodations are expected to be less than \$100.00 per worker for 30% of workers needing an accommodation, with 51% of those needing an accommodation requiring no expenses at all. A Louis Harris national survey of people with disabilities found that among those employed, accommodations were provided in only 35% of the cases. For reno-

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*Advocacy Groups*, Business Wire, Jan. 20, 1992, available in LEXIS, Nexis Library, BWIRE File (citing survey commissioned by the law firm of Blank, Rome, Comisky & McCauley and Alexander & Alexander Consulting Group Inc.).

<sup>10</sup> *1991 Business Failures Soar 44 Percent to Record Level; Liabilities Nearly Double to \$109 Billion*, Business Wire, Feb. 20, 1992, available in LEXIS, Nexis Library, BWIRE File (citing the Dun & Bradstreet Corp.).

<sup>11</sup> *Id.* (quoting Joseph W. Duncan, vice president and corporate economist for the Dun & Bradstreet Corp.).

<sup>12</sup> *Bankruptcies up 21% in '91*, L.A. TIMES, Mar. 3, 1992, at D6.

<sup>13</sup> S. REP. NO. 116, 101st Cong., 1st Sess. 5-20 (1989) [hereinafter SENATE REPORT].

<sup>14</sup> *Id.* at 89.

<sup>15</sup> *Id.*

vation and new construction, costs of accessibility are generally between zero and one percent of the construction budget.<sup>16</sup>

The House of Representatives did not even discuss the ADA's costs to the business sector.<sup>17</sup>

## II. BUSINESS AS USUAL

Before considering the ADA's special or unusual costs, it is useful to examine the costs it will generate simply because it is a new statute. Most responsible employers will:

1. train human resource personnel and supervisors regarding their obligations under the new statute (these costs include actual training expenses and opportunity costs);
2. revise job applications to eliminate unlawful questions regarding health<sup>18</sup> or prior workers' compensation claims;<sup>19</sup>
3. revise job descriptions (while the ADA does not require employers to develop or maintain job descriptions,<sup>20</sup> many employers will probably review their job descriptions and consider revising them to properly denote the "essential functions" of a job);<sup>21</sup>
4. change medical examination procedures and train company medical personnel to assure compliance with the statute (for example, businesses are prohibited from conducting pre-offer physicals);<sup>22</sup>
5. modify manuals and interview guidelines to eliminate discriminatory or unlawful references; and

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<sup>16</sup> *Id.*

<sup>17</sup> HOUSE REPORT, *supra* note 7.

<sup>18</sup> An employer cannot inquire into whether an individual has a disability at the pre-offer stage of the selection process. 29 C.F.R. § 1630.13(a) (1992). However, an employer may make pre-employment inquiries into the ability of an applicant to perform job related functions. *Id.* § 1630.14(a).

<sup>19</sup> 29 C.F.R. app. §1630.13(a) (1992).

<sup>20</sup> *Id.* app. § 1630.2(n).

<sup>21</sup> *Id.* (noting that established job descriptions are relevant in determining whether a particular function is essential).

<sup>22</sup> *Id.* §§ 1630.13-14 (1992).

6. review their collective bargaining agreements and meet with Union representatives regarding their mutual ADA obligations.

In addition to taking a proactive approach, many employers will also find themselves in a defensive posture as they respond to discrimination claims filed with the Equal Employment Opportunity Commission (EEOC)<sup>23</sup> and to other lawsuits. Evan Kemp, Chairman of the EEOC, estimates that the agency will receive 12,000 to 15,000 additional complaints per year as a result of the ADA's implementation.<sup>24</sup>

Many people may justify the ADA-related defense costs with the following accountability argument: "Who cares? After all, the respondents are accused of discriminating." However, this argument not only runs counter to American notions of justice, but it is also inconsistent with the EEOC's investigatory track record. In fiscal year 1988, the EEOC closed 70,922 charges, 52.4% after complete investigation.<sup>25</sup> By EEOC definition, only 15% of the closed cases had merit in that there was either a settlement, withdrawal of the charge with benefits to the charging party, or a "cause" finding which resulted in successful or unsuccessful conciliation.<sup>26</sup>

It is important to note that an employer will incur response expenses for every ADA charge filed (even the meritless claims). These expenses include furnishing documents, answering questionnaires, giving testimonies, and submitting formal position statements. Additionally, employers who actually have to defend an ADA lawsuit will likely incur substantial discovery costs and attorney fees. Employers will also incur indirect costs. Such costs include time that management and human resource personnel will need to spend at depositions, in respond-

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<sup>23</sup> The EEOC is empowered to remedy ADA violations. 42 U.S.C. §§ 12117 (Supp. II 1990), 2000e-5 (1988).

<sup>24</sup> *Most Workers Would Accept Changes in Duties, Hours to Accommodate Disabled Workers, BNA Survey Finds*, Daily Lab. Rep. (BNA) No. 11, at A-2 (Jan. 16, 1992).

<sup>25</sup> *EEOC Obtained Record Benefits, Reduced Charge Inventory in FY 1988*, Daily Lab. Rep. (BNA) No. 209, at A-5 (Oct. 28, 1988).

<sup>26</sup> *Id.* It can be argued that in many instances settlements and withdrawal of charges with benefits to the charging party are simply an expeditious means for the employer to avoid further expense. Since neither scenario represents an actual finding of discrimination, the EEOC calculation of meritorious cases may be inflated.

ing to written discovery requests, and appearing as witnesses at trial.

Employers can also expect to incur costs arising out of the Civil Rights Act of 1991.<sup>27</sup> This statute was originally intended to overrule and respond to several U.S. Supreme Court employment discrimination decisions,<sup>28</sup> including *Wards Cove Packing Co. v. Atonio*.<sup>29</sup> However, by the time it became law, the coverage was greatly expanded and now provides for, among other things, compensatory and punitive damages as well as jury trials for claims of intentional discrimination under Title VII and the ADA.<sup>30</sup> The expanded damages and jury trials will result in greater employer liability exposure and, correspondingly, more ADA lawsuits. House Minority members echoed this view prior to the ADA's final passage:

The Committee is now considering the Civil Rights Act of 1990, which among many other things, would amend Title VII remedies to include punitive and compensatory damages. These proposed changes to Title VII, in the view of the Minority Members, would thus, by fiat, undermine and reverse the underlying agreement which led to the passage of the ADA by the Senate. *Employers, in short, are now facing the prospect of punitive and compensatory damages under a new statute imposing many novel requirements unfamiliar to most businesses in the private sector.* This prospect threatens to undermine all support for this legislation and is the one issue which will result in complete opposition to the bill by the entire business community.<sup>31</sup>

Expanding on the House Minority view, it is important to note that the substantive law prohibiting race, gender, national

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<sup>27</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>28</sup> H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 2, at 1-4 (1991).

<sup>29</sup> 490 U.S. 642, 657, 659 (1989) (holding that to establish prima facie case of disparate impact under Title VII, employees must show that any racial disparity in the workplace results from specific employment practices; furthermore, plaintiffs retain burden of persuasion in showing that such practices are not justified by legitimate business needs).

<sup>30</sup> See Civil Rights Act of 1991, *supra* note 27, § 102.

<sup>31</sup> HOUSE REPORT, *supra* note 7, at 167 (emphasis added).

origin, religious, and age discrimination serves as a useful guide for employer behavior. Employers generally know what actions will constitute a Title VII violation. In contrast, because the ADA is so new, employers lack a useful behavioral guide.

### III. THE ADA'S SPECIAL COST PROBLEMS

#### A. INDIVIDUALIZED, CASE-BY-CASE ANALYSIS

Unlike other types of discrimination claims, the ADA, beginning with the definition of who is disabled and working through the most fundamental issues of what is a reasonable accommodation and what constitutes an undue hardship defense, requires a case-by-case, individualized resolution.<sup>32</sup> Congress and the EEOC unabashedly support the case-by-case approach. The *EEOC Technical Assistance Manual*<sup>33</sup> notes that:

[u]nder other laws that prohibit employment discrimination, it usually is a simple matter to know whether an individual is covered because of his or her race, color, sex, national origin or age. But to know whether a person is covered by the employment provisions of the ADA can be more complicated. It is first necessary to understand the Act's very specific definitions of "disability" and "qualified individual with a disability." Like other determinations under the ADA, deciding who is a "qualified" individual is a case-by-case process, depending on the circumstances of the particular employment situation.<sup>34</sup>

Ultimately, the ADA's case-by-case analysis will inhibit the development of meaningful precedent, and, consequently, the EEOC, employers, and employees will be forced to seek guidance directly from the courts. Moreover, the courts will not be

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<sup>32</sup> See generally Barnard, *supra* note 3 (discussing at length the problems associated with a case-by-case, individualized approach).

<sup>33</sup> EQUAL EMPLOYMENT OPPORTUNITY COMM'N, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT (1992) [hereinafter EEOC MANUAL].

<sup>34</sup> *Id.* § 2.1; see also *id.* § 3.9 (noting that a determination regarding whether a particular accommodation will impose an undue hardship must be made on a case-by-case basis).



able to easily resolve ADA cases. Summary judgments, which courts frequently use to eliminate frivolous Title VII claims, will be difficult to grant within a case-by-case framework. As such, employers will carry an extra litigation burden peculiarly inherent to the ADA.

#### B. DEFINITIONS OF DISABILITY AND QUALIFIED PERSON WITH A DISABILITY

In virtually all other types of discrimination cases, there is almost never an issue about whether the plaintiff is protected. Rarely, if ever, does a defendant dispute whether or not the plaintiff is over forty, Afro-American, Hispanic or female. However, determining who is actually disabled is quite another matter. In many instances, disability determination will become a threshold question which, in turn, will increase litigation costs. While determining who has a "disability,"<sup>35</sup> who is a "qualified individual with a disability,"<sup>36</sup> and what are the "essential functions"<sup>37</sup> of a job will entail substantial costs even for claims involving well-meaning plaintiffs, this process is especially susceptible to abuse by the dishonest employee.

The same type of employee who feigns a job injury or takes extended time away from the job can be counted on to seek special treatment ("reasonable accommodation") at the workplace. Here, subjective types of injuries or illnesses, i.e., those where no objective medical evidence exists, will be the most troublesome form of abuse, as the medical professional will be forced to rely solely on the claimant's communications to determine the existence of a disability.

Stress is an example of a subjective illness.<sup>38</sup> The EEOC notes that stress is a condition which may or may not be considered an impairment depending on whether it results from a

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<sup>35</sup> 42 U.S.C. § 12102(2) (Supp. II 1990); 29 C.F.R. § 1630.2(g) (1992).

<sup>36</sup> 42 U.S.C. § 12111(8) (Supp. II 1990); 29 C.F.R. § 1630.2(m) (1992).

<sup>37</sup> 42 U.S.C. § 12111(8) (Supp. II 1990); 29 C.F.R. § 1630.2(n) (1992).

<sup>38</sup> Stress related impairments are presently popular in workers' compensation circles. Consider, for example, the employee who unsuccessfully sought workers' compensation benefits for hyperventilation and anxiety attacks after learning that there had been two mouse sightings in the workplace. *Marsico v. Workmen's Compensation Appeal Bd.*, 588 A.2d 984 (Pa. Commw. Ct. 1991).

documented physiological or mental disorder.<sup>39</sup> The EEOC provides an example:

A person suffering from general "stress" because of job or personal life pressures would not be considered to have an impairment. However, *if this person is diagnosed by a psychiatrist as having an identifiable stress disorder, s/he would have an impairment that may be a disability.*<sup>40</sup>

Here, the employee will simply need to find a psychiatrist who is willing to state that the employee has an "identifiable stress disorder."<sup>41</sup>

An identifiable stress disorder could, among other things, be an "adjustment disorder." Pursuant to the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised* (the "DSM-III-R"),<sup>42</sup> the psychiatrists' authoritative source, the essential feature of an "adjustment disorder" is:

a maladaptive reaction to an identifiable psycho-social stressor, or stressors, that occurs within three months

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<sup>39</sup> EEOC MANUAL, *supra* note 33, § 2.1(a)(i).

<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> California and several other states have recognized workers' compensation claims for stress related disorders that are unaccompanied by any physical injury. *See, e.g., Horn v. Bradco Int'l, Ltd.*, 283 Cal. Rptr. 721 (Ct. App. 1991) (relegating plaintiffs intentional infliction of emotional distress claim to workers' compensation system even though claim unaccompanied by physical injury); *Jones v. City of New Orleans*, 514 So. 2d 611, 613 (La. Ct. App. 1987) (holding that plaintiff entitled to compensation benefits even though post-traumatic stress disorder unaccompanied by physical trauma to the body); *writ denied*, 515 So. 2d 1111 (La. 1987); *Cerami v. Rochester City Sch. Dist.*, 538 N.Y.S.2d 644, 645 (App. Div. 1989) (noting that employment induced psychological injury is unquestionably compensable); *McGarrah v. State Accident Ins. Fund Corp.*, 675 P.2d 159, 170 (Or. 1983) (holding that under Oregon Workers' Compensation Statute, stress-caused claims for benefits arising out of mental disorders are compensable if they flow from the conditions of the worker's employment); *Johnson v. State, ex rel. Wyo. Workers' Compensation Div.*, 798 P.2d 323 (Wyo. 1990) (holding that post-traumatic stress disorder and spontaneous major depression arising out of motor vehicle accident which occurred in course of employment is compensable under Wyoming workers' compensation law where there is no accompanying physical injury).

<sup>42</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d. ed. rev. 1987).

after onset of the stressor, and has persisted for no longer than six months. The maladaptive nature of the reaction is indicated either by *impairment in occupational* (including school) *functioning* or in usual social activities or relationship with others or by symptoms that are in excess of a normal and expectable reaction to the stressor.<sup>43</sup>

What happens if a psychiatrist makes such a diagnosis in accord with the *DSM-III-R*? Does the diagnosed "adjustment disorder" then give rise to the level of a "disability" within the meaning of ADA? Other potential problem areas under the ADA include the traditionally troublesome workers' compensation cases; namely, bad backs, carpal tunnel syndrome, and more recently, VDT induced eye strain. The subjective nature of these ailments generate many suspect cases. As such, the employee who is willing to make a false workers' compensation claim will likely exploit the ADA to procure part-time work, light work, a cushy job, or some other concession.

After initially determining whether an employee or applicant is disabled, typical ADA analysis will then consider whether or not the person is a "qualified individual with a disability." In defining this term, the ADA introduces an additional concept: that to be "qualified," the individual need only be able to perform the "essential functions" of a job.<sup>44</sup> In determining what constitutes essential job functions, the evidence to be considered includes:

1. the employer's judgment as to which functions are essential;
2. written job descriptions prepared before advertising or interviewing applicants for the job;
3. the amount of time spent on the job performing the function;
4. the consequences of not requiring the incumbent to perform the function;
5. the terms of a collective bargaining agreement; and

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<sup>43</sup> *Id.* at 329 (emphasis added).

<sup>44</sup> 42 U.S.C. § 12111(8) (Supp. II 1990). "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

6. work experience of people who have performed the job in the past and/or work experiences of people who currently perform similar jobs.<sup>45</sup>

Making this determination will be no simple feat and, once again, will undoubtedly give rise to litigation.

An inquiry into what constitutes the essential functions of a job also raises a more fundamental question. What happens to the so-called marginal job functions? It is not as if they disappear. Someone must perform them. For example, what if a secretary who uses a wheelchair is unable to perform filing functions (and, for the sake of argument, it is concluded that filing is not an essential job function). Someone will have to perform the job's filing requirement. Will it be another secretary? The secretary's supervisor? A manager? A file clerk? Someone will have to take on the task and, consequently, add a duty to their responsibilities. This person may want additional pay. Also, supervisors or managers who take on the duty may resent the different treatment, because, unlike their peers, they would be required to do their own filing.

Union jobs may create contractual problems as the employee who is assigned the additional tasks could grieve the unequal treatment. Also, should a grievance arise, or even a question, what does the employer do if the disability is not obvious? According to the ADA, the disabled person's medical records are largely confidential.<sup>46</sup> Hence, an employer may not be able to explain to the complaining employee or to the union its reason for providing the disabled person with special treatment. In another scenario, the reassignment of so-called marginal job duties could give rise to discriminatory and/or comparable pay claims if a member of the opposite sex or a different race receives the additional job duties.<sup>47</sup>

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<sup>45</sup> 29 C.F.R. § 1630.2(n)(3) (1992).

<sup>46</sup> 29 C.F.R. § 1630.14(b)(1)-14(d)(1) (1992).

<sup>47</sup> Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e-2000e-17 (1988) makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and conditions of employment because of such individual's race, color, religion, gender, or national origin.

## C. THE DUTY TO PROVIDE REASONABLE ACCOMMODATION

The duty to provide reasonable accommodation<sup>48</sup> to a disabled applicant or employee is a key concept under the ADA. It sets disability discrimination apart from almost any other type of prohibited discrimination.<sup>49</sup> The basic rationale behind discrimination legislation is to treat everyone equally. However, the ADA demands an employer to favor disabled persons, at least under certain circumstances. The *EEOC Technical Assistance Manual* summarizes the reasonable accommodation obligation:

- An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business.
- Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity.
- The obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes.
- An employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation, unless it would cause an undue hardship.<sup>50</sup>

The EEOC has identified the following examples as reasonable accommodations that an employer may be required to undertake:

- making facilities readily accessible to and usable by an individual with a disability;

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<sup>48</sup> 29 C.F.R. § 1630.9 (1992).

<sup>49</sup> Employers also have an affirmative obligation to reasonably accommodate an employee's religious beliefs. 42 U.S.C. § 2000e(j) (1988).

<sup>50</sup> EEOC MANUAL, *supra* note 33, § 3.1.

- restructuring a job by reallocating or redistributing marginal job functions;
- altering when or how an essential job function is performed;
- part-time or modified work schedules;
- obtaining or modifying equipment or devices;
- modifying examinations, training materials or policies;
- providing qualified readers and interpreters;
- reassignment to a vacant position;
- permitting use of accrued paid leave or unpaid leave for necessary treatment;
- providing reserved parking for a person with a mobility impairment;
- allowing an employee to provide equipment or devices that an employer is not required to provide.<sup>51</sup>

There is little doubt that in many instances accommodation will be possible with very little or no cost to an employer.<sup>52</sup> Moreover, the suggestion that employers consult with the disabled person for the purpose of determining how she may be accommodated<sup>53</sup> will in many instances be beneficial to the employer. The disabled person may have lived with the disability for a long time or may have received training in ways to overcome her disability and, consequently, will be able to make helpful, practical suggestions. However, the EEOC's list of possible accommodations<sup>54</sup> clearly reveals that such inexpensive, practical accommodations are not the only ones contemplated. Qualified readers and interpreters,<sup>55</sup> for example, could be expensive, since this remedy entails extra people,

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<sup>51</sup> EEOC MANUAL, *supra* note 33, § 3.5.

<sup>52</sup> A number of publications have published lists containing examples of inexpensive accommodations. But consider the following example: "An individual with dyslexia working as a police officer had trouble filling out forms at the end of the day. Providing him with a tape recorder and *allowing a secretary to type out his reports allowed him to continue in his job*. Actual cost: \$69.00." *Reasonable Accommodations*, THE INFORMED EXECUTIVE (Employers Resource Council, Seven Hills, Ohio), Nov. 1, 1992 at 3 (emphasis added). Assuming that the tape recorder cost \$69.00, are we to assume that the secretary's time is free?

<sup>53</sup> 29 C.F.R. § 1630.2(O)(3); EEOC MANUAL, *supra* note 33, § 3.7.

<sup>54</sup> EEOC MANUAL, *supra* note 33, § 3.5.

<sup>55</sup> *Id.*

salaries, and benefits. Modifying equipment, devices, and exams<sup>56</sup> could also be quite costly. Likewise, providing for part-time work and paid or unpaid leave<sup>57</sup> may entail substantial expense, especially if another person must be hired or paid overtime to perform the disabled person's work.

ADA proponents will argue that Congress provided an "undue hardship"<sup>58</sup> defense whereby not every "mom-and-pop" business will be required to hire interpreters, make significant alterations in equipment or permit a disabled person to work part-time when the business needs a full-time person. However, Congress has made it clear that the "undue hardship" defense will not be easy to establish as employers must demonstrate that the hardship is more than *de minimis*.<sup>59</sup>

Correspondingly, the EEOC, in issuing the *Technical Assistance Manual*, accurately reflected congressional intent when it stated that "whether a particular accommodation will impose an undue hardship must always be determined on a case-by-case basis."<sup>60</sup> The Commission further stated that:

[a]n accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.<sup>61</sup>

The EEOC then explained that the concept of "undue hardship" includes any action that is unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business.<sup>62</sup>

Expanding on what may be unduly costly, the EEOC rejected the notion, based once again on congressional intent, that an employer may claim "undue hardship" because the cost of an

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 29 C.F.R. § 1630.9(a) (1992).

<sup>59</sup> HOUSE REPORT, *supra* note 7 and accompanying text.

<sup>60</sup> EEOC MANUAL, *supra* note 33, § 3.9.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

accommodation is high in relation to an employee's wage or salary.<sup>63</sup> Hence, there is no cost-benefit analysis and, consequently, an employer may be required to hire two persons to perform one job, e.g., an interpreter or reader as well as the disabled person.<sup>64</sup>

One of the most difficult and potentially costly problems associated with the "undue hardship" defense is determining its relationship to union policy and collective bargaining agreements. What role will the union play if it has negotiated an agreement with an employer to fill vacant positions by seniority, but the employer awards the position to an ADA candidate? Similarly, how will the union respond to reallocation of marginal job duties to union employees? So far, the EEOC has not resolved these questions except to note that "[t]he terms of a collective bargaining agreement *may* be relevant in determining whether an accommodation would impose an undue hardship."<sup>65</sup> This issue is of great concern not only to unionized employers but, obviously, to the unions themselves. Unions may have their own members vying against each other and could easily find themselves defending section 301<sup>66</sup> duty of fair representation actions regardless of the positions they take.

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<sup>63</sup> "An employer may not claim undue hardship simply because the cost of an accommodation is high in relation to an employee's wage or salary. When enacting the ADA "factors" for determining undue hardship, Congress rejected a proposed amendment that would have established an undue hardship if an accommodation exceeded 10% of an individual's salary. This approach was rejected because it would unjustifiably harm lower-paid workers who need accommodations. Instead, Congress clearly established that the focus for determining undue hardship should be the resources available to the employer." *Id.*

<sup>64</sup> In *Nelson v. Thornburgh*, 567 F.Supp. 369 (E.D. Pa. 1983) *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984) *cert. denied*, 469 U.S. 1188 (1985), the court held, in a case arising under the section 504 of the Rehabilitation Act of 1973, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (1988)) (protects disabled Americans from discrimination by any program or activity receiving federal financial assistance) that the state of Pennsylvania discriminated against blind welfare agency workers, who were responsible for receiving and recording information from welfare applicants, by refusing to provide them with half-time readers or their mechanical equivalent.

Frankly, this case can and hopefully will be distinguished in the event like factors give rise to a private sector case.

<sup>65</sup> EEOC MANUAL, *supra* note 33, § 3.9 (emphasis added).

<sup>66</sup> Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1988).



In summary, the reasonable accommodation/undue hardship issues present the greatest and costliest challenge to employers.

#### D. DIRECT THREAT DEFENSE

Another issue which has the potential to be a sizable cost to employers arises from the "direct threat" defense. According to the EEOC, "[a]n employer may require as a qualification standard that an individual not pose a 'direct threat' to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job."<sup>67</sup> The EEOC qualifies this defense by stating quite accurately that "an employer must meet very specific and stringent requirements under the ADA to establish that such a 'direct threat' exists."<sup>68</sup>

In general, the employer must be prepared to identify:

- a *significant* risk of substantial harm;
- a *specific* risk;
- a *current* risk, not one that is speculative or remote;
- an assessment of risk based on objective medical or other factual evidence regarding a particular individual; and
- whether the risk can be eliminated or reduced below the level of a "direct threat" by *reasonable accommodation, even if a genuine significant risk of substantial harm exists.*<sup>69</sup>

One issue that is certain to arise from these requirements is determining whether the risk is "current" as opposed to "speculative" or "remote." According to the EEOC:

The employer must show that there is a *current* risk—"a high probability of substantial harm"—to health or safety based on the individual's present ability to perform the essential functions of the job. A determination that an individual would pose a "direct threat" cannot be based on speculation about *future* risk. *This includes speculation that an individual's disability may become more severe.* An assessment of risk cannot be

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<sup>67</sup> EEOC MANUAL, *supra* note 33, § 4.5.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

based on speculation that the individual will become unable to perform a job in the future, or that *this individual may cause increased health insurance or workers' compensation costs, or will have excessive absenteeism.*<sup>70</sup>

In determining what is current the EEOC also speaks of "imminence," i.e., the risk must be imminent. Here, the EEOC gives an example of a bad back: "A physician's evaluation of an applicant for a heavy labor job that indicated the individual had a disc condition that might worsen in eight or ten years would not be sufficient indication of imminent potential harm."<sup>71</sup>

Does this requirement mean an employer must hire an applicant to perform a heavy lifting job where an x-ray reveals a bad disc condition but it does not presently manifest itself in such a way that the applicant cannot physically perform the job in question? What if the physician says it might worsen in two days? Two months? Two years? Or, more likely, it could be two days, two months or two years, but it will happen.

A bad heart condition poses similar problems. Will the physician be able to say that the potential for harm posed by the heart condition is "imminent" if the person does heavy lifting? In many instances, probably not. Also, what if an employer does know that an employee has a bad heart condition and hires or promotes that individual to a heavy labor job (e.g., a janitor shovelling snow or an operator lifting heavy pieces of steel)? This will be virtual homicide, and in some states, the employee's family may have a credible claim. In Ohio, for instance, the law allows employees who are victims of employer intentional torts to escape the exclusivity of workers' compensation law and, consequently, to recover both at common law and under workers' compensation law.<sup>72</sup> Here, Ohio employers are potentially liable for compensatory and punitive damages at common law if they either intend to harm their employees or require them to work *under conditions the employer knows are*

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<sup>70</sup> *Id.* (third and fourth emphasis added) (citation omitted).

<sup>71</sup> *Id.*

<sup>72</sup> *Brady v. Safety-Kleen Corp.*, 576 N.E.2d 722, 730 (Ohio 1991) (striking down statute that limited employee common law recovery for intentional tort to excess of workers' compensation recovery).

*substantially certain to cause injury.*<sup>73</sup> Will the ADA be a defense to such claims?

As the foregoing discussion illustrates, there is no doubt that the ADA is going to be an expensive proposition to at least some employers if not to all employers. But why should the employer pay?

#### IV. WHY SHOULD THE EMPLOYER PAY?

Clearly, except in some unusual circumstances, an employer will not benefit from accommodating a person who is disabled, who poses a threat of injury to himself or others or who cannot perform all the job functions. The ADA would not be necessary if these scenarios were beneficial to employers as they automatically act in ways that promote their self interests. While this realization is not unique to the ADA, the ADA is clearly unlike other employer burdens in that it does not offer a direct link to the employment relationship itself.

Many labor laws directly regulate labor or employment itself. The Labor Management Relations Act of 1947<sup>74</sup> regulates relations between labor and management; the Fair Labor Standards Act<sup>75</sup> regulates employment wages and hours; the Occupational Safety and Health Act<sup>76</sup> regulates the health and safety of employees on the job; and workers' compensation laws provide compensation for workplace injuries. Other laws regulating employment are the direct result of labor performed, such as federal tax laws which require withholding to pay income taxes, thus placing an extra burden on employers. In contrast, the ADA regulates employment in such a way as to solely perform a social welfare function, i.e., transferring a responsibility from the government, the family, or the disabled individual to someone else, namely an employer.

Such a transfer will affect employers disproportionately—hitting small employers the hardest. The fact that many accommodations may be made at little or no cost, will not be very comforting to the employer who gets an applicant with a high cost disability, such as a person infected with the AIDS virus.

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<sup>73</sup> *Id.* at 734 (Brown, J., concurring) (citing *Fyffe v. Jenos, Inc.*, 570 N.E.2d 1108, 1109 (1991)).

<sup>74</sup> 29 U.S.C. §§ 141-187 (1988).

<sup>75</sup> *Id.* §§ 201-219.

<sup>76</sup> *Id.* §§ 651-676.

Likewise, small employers will also encounter problems if they hire someone who subsequently develops a disability which requires significant accommodation or some other extraordinary expense<sup>77</sup> — such as part-time employment, leaves of absence, or special assistance.

Large employers also have reason for concern. Clearly employer size is a factor to be considered in determining whether or not an accommodation is reasonable or poses an "undue hardship."<sup>78</sup> Such criteria would suggest that there may be no accommodation too substantial for the likes of General Motors. However, General Motors lost \$4.5 billion in 1991.<sup>79</sup>

The dollars will add up, especially if there is no concomitant benefit to the employer. Moreover, even if an employer can pass on some or all of the cost to the consumer, American businesses will struggle to compete in the world market.<sup>80</sup> In short, Congress simply took business out of its equation when it did a very superficial cost-benefit analysis of the ADA.

## V. ALTERNATIVES

Are there alternatives short of repealing part or all of the ADA?

### A. KEEP THE CAPS

There is currently a bill in Congress called the Equal Remedies Act of 1991<sup>81</sup> which is designed to remove the caps

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<sup>77</sup> Consider, for example, the employer in *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 995 (6th Cir. 1991) where an employee gave birth to a hydrocephalic baby whose medical expenses exceeded \$80,000. Similarly, the Clifton Steel Co., Twinsburg, Ohio, employed a diabetic worker under age 40 who suffered a heart attack. As a result, the company's monthly insurance rate increased between \$2700 and \$3500 to cover the employee's insurance costs. Jay Greene, *Employer Learns New Business-Health Insurance*, THE PLAIN DEALER, (Cleveland), Feb. 9, 1992, at 9A.

<sup>78</sup> EEOC MANUAL, *supra* note 33, § 3.9.

<sup>79</sup> *Crisis at GM: Turmoil at the Top Reflects the Depth of Its Troubles*, BUS. WK., Nov. 9, 1992, at 85.

<sup>80</sup> See David Littman, *The Cost of Regulation, Counted in Jobs*, WALL ST. J., Apr. 21, 1992, at A16 (ADA will inflict competitive handicaps on U.S. based businesses).

<sup>81</sup> H.R. 3975, 102d Cong., 1st Sess. (1991); S. 2062, 102d Cong., 1st Sess. (1991).

on compensatory and punitive awards for victims of intentional discrimination under Title VII of the 1964 Civil Rights Act and the ADA. There are at least two compelling reasons to retain the caps under the ADA. First, as the House Minority Report points out, the ADA is a new statute, with new concepts and many, many unanswered questions.<sup>82</sup> It is fundamentally unfair to subject an employer to limitless damages regarding laws which are largely unclear. Secondly, when Congress passed the ADA an important compromise concerned *eliminating* a provision for compensatory and punitive damages.<sup>83</sup> In short, ADA related caps should be retained for a period of time, such as ten years, while the law develops and employers gain a better understanding of their obligations.

## B. TAX CREDITS AND DEDUCTIONS

Some tax credits are available under the ADA. Eligible small businesses may take a tax credit of up to \$5000 per year for accommodations made to comply with the ADA.<sup>84</sup> These credits are limited to one-half the cost of "eligible access expenditures" that are more than \$250 but less than \$10,250.<sup>85</sup> The ADA also offers tax credits under the Targeted Jobs Tax Credits Program for employers who hire disabled individuals who are referred by state or local vocational rehabilitation agencies, State Commissions on the Blind and the U.S. Department of Veteran Affairs.<sup>86</sup> Additionally, any business may take a full tax deduction, up to \$15,000 per year, for expenses incurred in removing specified architectural and transportation barriers.<sup>87</sup>

These tax incentives are a step in the right direction, but Congress should go further. Since the employer gets no benefit from disability accommodations, they merely serve a useful public purpose (the employment of disabled persons), and, moreover, since Congress suggests that ADA related costs are insignificant compared to the benefits,<sup>88</sup> why not pass the ADA

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<sup>82</sup> HOUSE REPORT, *supra* note 7, at 167.

<sup>83</sup> *Id.*

<sup>84</sup> EEOC MANUAL, *supra* note 33, § 3.11(a)(1).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* § 3.11(a)(3).

<sup>87</sup> *Id.* § 3.11(a)(2).

<sup>88</sup> See SENATE REPORT, *supra* note 13, at 89; HOUSE REPORT, *supra* note 7, at 44-47.

costs on to all taxpayers? This framework would alleviate the unequal financial burden on the business sector and, consequently, *encourage* employers to make accommodations.

#### C. HEALTH CARE COSTS

The cost of health care is presently skyrocketing.<sup>89</sup> At the same time, one of the ADA's most confusing areas concerns employers' health insurance obligations.<sup>90</sup> The EEOC's regulations fail to clarify this problem. Even assuming the EEOC will issue a clarification, the ADA can only escalate the business sector's already alarming health care burdens. The real solution lies in some form of national health insurance — a plan which relieves employers of their health care burdens by spreading the costs to everyone.

#### D. UNION ISSUES

The EEOC must move forward with regulations that resolve the conflicts between the ADA and union bargaining agreements. Issues concerning seniority, marginal job requirements and confidentiality are particularly important. While regulations and guidelines cannot solve all the union related issues, some effort should be made to lend guidance and protection to the affected parties.

#### E. DIRECT THREAT

In regard to establishing a direct threat defense, determination of whether an employee risk is "imminent" or "current" will pose significant legal problems. Here, the "imminent" or "current" standard should be discarded in favor of an employer showing that an individual's condition will, with medical certainty, lead to injury, whether current or within several years. A stricter standard should not be necessary and, ultimately, is unfair to the employer and the employee/applicant alike.

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<sup>89</sup> Sen. Paul Wellstone, upon introducing his bill in the U.S. Senate to establish a national health insurance system, estimated that health care costs are likely to rise to \$1.6 trillion by the end of the decade. *Sen. Wellstone Introduces Legislation to Establish National Health Insurance*, Daily Lab. Rep. (BNA) No. 45, at A-4 (Mar. 6, 1992).

<sup>90</sup> *Disabilities Act Raises Questions for Employers Over Health Insurance*, Daily Lab. Rep. (BNA) No. 51, at A-1 (Mar. 16, 1992).

## CONCLUSION

Congress enacted the ADA without engaging in a cost-benefit analysis. This mistake will impose an intolerable burden upon the business sector, and establishes a bad precedent for future legislation. Implementation of the above suggestions will go a long way toward achieving the ADA's objectives, and, concomitantly, will allow for realistic business compliance.