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THE INTERACTION OF THE AMERICANS WITH DISABILITIES ACT AND ALTERNATIVE DISPUTE RESOLUTION WITHIN THE EEOC

HONORABLE R. GAULL SILBERMAN* .

Thank you for asking me to be here today at this symposium, Civil Rights for the Next Millennium: The Evolution of Employment Discrimination Under the Americans With Disabilities Act.

This year, 1995, marks the thirtieth anniversary of the 1964 Civil Rights Act, and I have been commissioner of the Equal Employment Opportunity Commission ("EEOC") for the last ten of those years. I was astonished to realize that I have been on the EEOC for a third of its existence. It has been an extraordinary time during which we have dealt with what I believe is perhaps the most important domestic policy issue of our time. That is, how can an increasingly diverse, heterogeneous nation live and work together in peace and prosperity?

Congress created the Equal Employment Opportunity Commission in the Civil Rights Act of 1964.¹ The Commission was charged with the enforcement of our nation's employment discrimination

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¹ Pub. L. No. 88-352, 78 Stat. 253 (1988) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)) (prohibiting employment discrimination on basis of race, color, religion, sex, or national origin; creating EEOC and federal employment discrimination law utilizing National Labor Relations Board and federal labor law as model); *see also* R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1534 (1994) (focusing on interaction between EEOC administration and mechanics of individual employer's ADR process).

laws,² in other words, the laws that were meant to ensure peace and to promote prosperity.³

The manner in which novel laws creating new workplace rights, such as the Americans with Disabilities Act (the "ADA"),⁴ contribute to this goal is a question of enormous importance, going to the very heart of our national ethos.⁵ Not only is this a question of importance for the short term, but also, as this conference rightly recognizes, for the sake of succeeding generations.

Of course, for people with disabilities, civil rights in the workplace only very recently became a reality.⁶ The realization of this goal was the result of a long campaign to raise public awareness by disability rights advocates, including my friend and former Chairman of the EEOC, Evan J. Kemp.⁷ They also endeavored to foster the national consensus that people with disabilities deserve the right and the opportunity to participate fully in the economic and political life of our country.⁸

The ADA was enacted not quite five years ago with unprecedented bi-partisan support. After an extensive give and take process, balancing the interests of employers and the disabled com-

² See Silberman et al., *supra* note 1, at 1534. The EEOC gradually gained power to enforce Title VII until the 1991 Civil Rights Act amended Title VII and the ADA to expand the EEOC's prosecutorial powers, and authorized, in addition to jury trials, compensatory and punitive damages. *Id.*

³ *Id.* The EEOC was created after World War I as a means to endorse fair and impartial arbitration of labor disputes by an objective outsider. *Id.*

⁴ Pub. L. No. 101-336, 104 Stat. 329 (1990) (codified at 42 U.S.C. §§ 12101-213 (Supp. V 1993)).

⁵ See EDUC. AND LABOR COMM., AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485, 101st Cong., 2d Sess. 51 (1990). The ADA operates to protect Americans as well as all individuals with disabilities, regardless of their status, ethnicity, or national origin. *Id.*

⁶ See Am. with Disabilities Act Man. (BNA) 10:0003 (1994). As of July 26, 1992, Title I of the ADA prohibited employers of 25 or more employees from discriminating against otherwise qualified job applicants and workers who have disabilities or become disabled. *Id.*; see also Jay Mathews, *Disabilities Act Failing to Achieve Workplace Goals; Landmark Law Rarely Helps Disabled People Seeking Jobs*, WASH. POST, Apr. 16, 1995, at A1. The ADA was considered to be one of the great bipartisan civil rights laws of the century. *Id.* The ADA guaranteed that disabled people would have access to buildings, streets and public transportation facilities, as well as increased opportunities for jobs, and fuller and more productive lives. *Id.*

⁷ Liz Spayd, *Trouble in the Workplace at EEOC; As Enforcement Demands Increase, Agency Feels the Squeeze*, WASH. POST, Sept. 22, 1992, at A19 (detailing Kemp's door-to-door lobbying effort to convince legislators that in order to properly effect ADA regulations more funding is needed for EEOC).

⁸ Susan Cahill, *Conquering Disabilities: How a Spirited Civil Rights Movement Is Breaking New Ground*, WASH. POST, June 29, 1993, at Z14. "TAB" is the acronym for "temporarily able-bodied," used to refer to the fact that one out of every seven Americans has a disability that interferes with daily activities and that more than 85% of people with disabilities were not born that way but became disabled. *Id.*

munity, the Americans with Disabilities Act went into effect. After a two-year start-up period, the law was enacted for larger employers in 1992 and became fully effective for employers of fifteen or more employees in July of 1994.⁹ At that point, we went from covering 264,000 employers and 77 million employees, to 666,000 employers and 86 million employees.¹⁰ I relate these statistics to you not just to throw more numbers at you, but to emphasize the tremendous scope and effect of this law.

It is important to recognize that the ADA was a revolutionary concept. It is not surprising that the scope, effect and revolutionary nature of the legislation gave rise to what are, unfortunately, persistent fears about the Act's cost and complexity.¹¹ To some extent I believe these criticisms are based on misconceptions and a lack of knowledge about how the EEOC and the courts have interpreted and enforced the Act, and I hope to dispel some of these myths today.

I think it is also important to reiterate that as with any new law, the ADA needs to undergo a "breaking-in period," a time of education, clarification, and most importantly, changes in attitudes and practices.¹²

⁹ See Am. with Disabilities Act, EEOC Tech. Assist. Man. (BNA) 90:0504 (Feb. 1992) (explaining ADA requirement that covered employers are those with requisite number of employees working for them for 20 or more calendar weeks); see also Larry A. Strauss, *Disability Law Adds Smaller Companies*, USA TODAY, July 26, 1994, at 4B (explaining that through increase in number of small companies that employ workers, total of 402,000 businesses are now required to comply with ADA).

¹⁰ See Rochelle Sharpe, *Labor Letter*, WALL ST. J., Apr. 19, 1994, at A5 (predicting explosion in EEOC caseload due to increased number of employees covered under ADA after EEOC had received 15,274 ADA related complaints in fiscal 1993); Anne Grimes, *Reinvigorating the Fight Against Discrimination*, WASH. POST, Oct. 27, 1994, at A21. EEOC Chairman Gilbert F. Casellas expressed surprise at the increasing number of claims filed after the passage of the Civil Rights Act and stated that "[b]usiness is still too good." *Id.*; Strauss, *supra* note 9, at 4B (asserting addition of smaller businesses means 86% of work force now covered under ADA).

¹¹ See Fred W. Lindecke, *Leading the Way; Cooperation Can Open Doors for "Americans With Disabilities Act"*, ST. LOUIS DISPATCH, Mar. 27, 1995, at 1A. A radio personality once commented "a perfectly good sidewalk was being torn up, and he never saw anybody in a wheelchair on the street." *Id.* An advocacy group for the disabled in St. Louis, called Parquard, pointed out that this is precisely the point of accessibility, asserting "[t]he disabled in wheelchairs were not there because they couldn't use the sidewalk." *Id.*; see also Joseph Perkins, *Muddy Waters: Federal Laws Are Full of Pollution*, SAN DIEGO UNION TRIB., June 2, 1995, at B5 (asserting that more than one-third of ADA claims are frivolous claims alleging dubious disabilities such as back pain, emotional problems and alcohol or substance abuse).

¹² See Harry Stoffer, *Disabilities Law Proves Less Disruptive Than Feared*, PITT. POST-GAZETTE, Feb. 13, 1994, at A1. Most of the entities affected by the law namely, hotels, theaters, restaurants, larger employers, and public agencies have willingly complied with ADA regulations. *Id.* Compliance has required mainly structural changes in entryways,

One of the basic questions most often asked is whether the EEOC is prepared to enforce this new and complicated law effectively.¹³ The answer is both yes and no.

It is fair to say that in the nearly five years since Congress passed the ADA, the Commission has done an extraordinary job in writing regulations, providing technical assistance, and in training our people as well as others in the complexities of this new landmark legislation.¹⁴

Since the EEOC opened its doors, nearly thirty years ago, it has been a troubled agency, however, it has never been challenged as it is today. Congress continues to assign the EEOC more responsibility and allocate less money.¹⁵ Additionally, the budget Congress has appropriated for us has failed woefully to keep pace with the ever mounting number of charges.¹⁶ With declining resources and fewer investigators, a huge backlog has developed, and the workload threatens to overwhelm the agency.¹⁷

Ironically, although it has not gotten enough public attention or Congressional pledges of assistance, our increasing inability to serve the public in a timely fashion may have more negative practical consequences for a greater number of people, including individuals with disabilities.¹⁸

bathrooms and other features. *Id.* Pamela Berger, an attorney with the Disabilities Law Project in Pittsburgh, asserted her belief that "we're going to see a change in the way the world looks over the next few years and I hope we will see a difference in the way people are treated." *Id.* But see Lindecke, *supra* note 11. The National Federation of Independent Business spokesman, Jim Weidman, said the ADA is "too new to rate" and is "so vaguely worded no one knows whether they are in compliance." *Id.*

¹³ See Grimes, *supra* note 10. EEOC Chairman, Gilbert Casellas, attributed the current overwhelming backlog of cases handled by the EEOC to a lack of resources and the implementation of the ADA which has caused a 100% increase in the number of cases handled by the EEOC. *Id.*

¹⁴ See Michael Trimarchi, *Workplace-Agency Sees Minimal Costs in Complying With New Disabilities Rules*, WASH. POST, Aug. 2, 1992, at H2. Asserting that companies must show that they value people with disabilities as much as they value all their workers, particularly when making human resource training available to the disabled. *Id.* By doing so, companies can enhance their productivity goals with better performance by all employees. *Id.*

¹⁵ See Grimes, *supra* note 10. Chairman Gilbert F. Casellas stated unequivocally "we have increased responsibility but have not gotten increased resources." *Id.*

¹⁶ *Id.* Casellas asserts that the EEOC will ask Congress for a budgetary increase of between 25% and 30% over the 1995 appropriation of \$230 million for fiscal 1996. *Id.* He acknowledged, however, that the EEOC never has been fully funded and probably will continue in that fashion. *Id.*

¹⁷ *Id.* The size of the EEOC staff has dropped by 558 since 1980, creating a situation where EEOC investigators have more than double their 1990 caseloads. *Id.*

¹⁸ See Spayd, *supra* note 7. Then Chairman of the EEOC, Evan J. Kemp, stated that reduced funding could ultimately force the agency to "ration justice" among women, minorities and the disabled. *Id.*

In 1994, the EEOC received an all time record total number of 91,189 charges of discrimination, representing a staggering fifty-three percent increase from the 1990 level.¹⁹ Despite a lot of myths and misconceptions to the contrary, we had approximately a six-month backlog in our fifty district offices throughout the nation. Those dates are important in that 1990 was the last year the EEOC was able to keep relatively current in its charge processing. This feat was accomplished thanks to a complete revamping and strengthening of enforcement policies and procedures in the 1980s, by then Chairman, Clarence Thomas.

The increase in claims was predictable for two reasons. In 1991, Congress enacted a new civil rights bill²⁰ providing greatly increased remedies for victims of race, sex and national origin discrimination, and thus, new incentives to file charges.²¹ Most importantly, in 1992 the ADA went into effect.²² Most of the growth in our workload has been attributable to the ADA. In 1994, the second full year of ADA implementation, the EEOC received nearly 19,000 ADA charges, or twenty-one percent of our total receipts. We fully expected a twenty percent increase in our receipts once the ADA went into effect.²³ We also projected that Congress was going to continue to provide us with the resources we needed in order to keep up with the newly created demand. Unfortunately, the resources we sought based on these projections have failed to materialize.²⁴ Not only have we been unable to add the necessary investigators to deal with the increases in workload, we

¹⁹ See Office of Program Operations, EEOC, Fourth Quarter Report for Fiscal Year 1994, at 1 (unpublished); see also Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 384 (1995). The process of a Title VII charge requires compliance with a lengthy administrative process complicated by the current backlog of over 90,000 charges and decrease in funding of \$13,000,000. *Id.*

²⁰ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

²¹ See Silberman et al., *supra* note 1, at 1535 (pointing out 1991 Civil Rights Act amended Title VII and ADA to authorize jury trials as well as compensatory and punitive damages).

²² 42 U.S.C. § 12111 (1990); see C. ANGELA VAN ETTEN, *AMERICANS WITH DISABILITIES ACT; ANALYSIS AND IMPLICATIONS* 49 (1993) (enunciating effective date of statute was 24 months after enactment of ADA).

²³ See Murray Weidenbaum, *Government's Presence in the Workplace Growing Larger All the Time*, L.A. TIMES, Feb. 9, 1992, at 2D (predicting 20% increase in number of charges as direct result of ADA enforcement); Gerald D. Skoning, *Litigious Society Tests Disability Law*, CHI. TRIB., Dec. 6, 1994, at 23 (affirming that as result of ADA implementation charges of discrimination have increased by more than 40,000 charges).

²⁴ See *Business is Booming For EEOC Investigators*, GOVERNMENT EXECUTIVE, Jan. 1995, at 9 [hereinafter *Business is Booming*]. Congressional leaders are unwilling to match the EEOC's growing workload with additional financial resources. *Id.* This year Republican

have actually lost staff. Although productivity, as well as numbers of charges resolved, have increased and our people are working harder and better than they ever have before, they simply have been given an impossible mission.

The pending inventory is now more than 96,000 charges, or nineteen months of work if we were never to take in another charge. That is double the inventory we had prior to the implementation of the ADA and triple the inventory we had in 1991 prior to the Civil Rights Act. It is undoubtedly the worst backlog in the agency's history.²⁵

There is actually some good news on this front, which I will address shortly, that is, Alternative Dispute Resolution ("ADR").²⁶ I have long been a proponent of alternative dispute resolution. When the Commission's new chairman, Gilbert F. Casellas came on about nine months ago, the first thing he did was appoint three task forces to propose new ways to deal with the agency's workload crisis: one for charge processing, one for state and local fair employment agencies, and one for alternative dispute resolution.²⁷ I chaired the latter task force with Commissioner Paul Miller and our report has gone to the chairman.

We believe that ADR offers particular benefits to disability claims and failure to accommodate claims.²⁸ When I leave the Commission this summer, I hope the legacy that I leave will be a functional ADR program and that the Commission can use ADR more effectively than it ever has before.

The distribution of ADA claims is quite interesting. The most frequently cited disability is back impairments which represent

lawmakers cut the EEOC's budget by \$13 million leaving it with the same \$233 million allocation the agency received in 1994. *Id.*

²⁵ See Grimes, *supra* note 10 (stating that as of Oct. 27, 1994 backlog had reached all time high of 92,396).

²⁶ 42 U.S.C. § 12212 (Supp. V 1993); see VAN ETEN, *supra* note 22, at 200. The use of ADR is encouraged to resolve disputes arising under the ADA. *Id.* Methods of ADR include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials as well as arbitration. *Id.*

²⁷ See *Business is Booming*, *supra* note 24, at 9 (describing three task forces appointed by Chairman Casellas).

²⁸ See Civil Rights Act of 1991, § 118, Pub. L. No. 102-166, 105 Stat. 1071 (codified in 42 U.S.C. § 2000e (1998 & Supp. V 1993)). The statute provides in relevant part that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title." *Id.* See also Thomas J. Pisorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMPLOYEE REL. L.J. 205, 209-10 (1993) (highlighting pros and cons of ADR within context of ADA).

twenty percent of the total charges coming in.²⁹ Remember, these are charges I am discussing, not claims that we have found to be meritorious. These are our customers, as we like to call the people that walk in through our doors.

About twelve percent of the claims are neurological impairments, such as epilepsy, paralysis, Alzheimer's disease and Muscular Sclerosis.³⁰ Eleven percent of our claims are emotional and psychiatric impairments,³¹ the latter being a category into which fall some of the most difficult ADA issues. Hearing and vision impairments make up about three percent of the claims,³² followed by HIV infection constituting two percent.³³ However, the largest of these groupings is the ambiguous "other" category, which represents twenty-seven percent of all charges,³⁴ and can include anything from a very complicated impairment that does not fall under any of these categories, to the so-called nontraditional disabilities. Some impairments are so inherently nontraditional, they may not be disabilities at all, for example smoking, obesity, stress and chemical sensitivity.³⁵

The types of employment actions challenged under the ADA roughly parallel what we see under other statutes. The single most frequently challenged employment action is, as under every other statute, discharge. This claim alone comprises fifty percent of all ADA charges. This statistic may somewhat dispel the myth that the ADA is solely about opening up employment for people who have not been in the workplace before.

It is true that the ADA does function to give some people, who might not otherwise have had the chance, an opportunity to work.³⁶ The ADA, however, is also about maintaining work rela-

²⁹ See Skoning, *supra* note 23, at 23 (highlighting statistics on claims under ADA).

³⁰ See Mathews, *supra* note 6, at A1 (discussing types of claims brought under ADA rubric).

³¹ *Id.*

³² See Skoning, *supra* note 23, at 23 (noting percentages of different claims brought under ADA).

³³ See Mathews, *supra* note 6, at A1 (noting percentage breakdowns of ADA claims).

³⁴ *Id.*; see also Stuart Silverstein, *A Job Still to be Done; For Many, Disabilities Act Hasn't Lived Up to Promise*, L.A. TIMES, July 26, 1994, at 1D (enunciating statistics on all charges from 1992 to 1994).

³⁵ See John J. Coleman & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 ALA. L. REV. 55, 59-63 (1993) (noting human impairments which may not constitute disabilities).

³⁶ See Mathews, *supra* note 6, at A1. A spokesperson for the Civil Rights Commission stated the primary purpose of the ADA was to provide increased access to jobs for people who are severely disabled, and that goal has not been realized. *Id.*

tionships, and in that way is strikingly similar to the rest of employment discrimination law. The failure of employers to provide reasonable accommodation accounts for about twenty-five percent of the claims, followed by hiring claims which make up eleven percent of all claims.³⁷

The first panel of speakers asked the question, Remedial Legislation: Sword or Shield? The answer, of course, is that remedial legislation must be both sword and shield. The ADA clearly proclaims, in pertinent part, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency."³⁸

Equality of opportunity and access to society's benefits, however, are impossible without a job. A staggering two-thirds of all persons with disabilities are unemployed.³⁹ In fact, a recent Harris survey found that from 1986 to 1994, the percentage of disabled individuals who were working actually declined slightly.⁴⁰ If we cannot break the grip of economic dependence and segregation, our society is doomed to spend billions of dollars a year on benefits most people with disabilities would willingly trade for a good job.⁴¹ The conventional wisdom, therefore, is that the sword of ADA enforcement should be aimed at hiring and accommodation, specifically, issues of work force entry and integration. For people with severe or so-called traditional disabilities, the natural fear is that the Americans with Disabilities Act will simply become another outlet for wrongful discharge claims by people with arguably trivial disabilities, or worse yet, added leverage for the lawyers in workers' compensation cases.

The high percentage of discharge claims, as well as the discouraging Harris Poll findings, have been cited as evidence that the

³⁷ See Skoning, *supra* note 23, at 23 (contrasting low number of hiring discrimination claims with relatively high figure of 50% of disability discrimination claims which have alleged discriminatory firing).

³⁸ 42 U.S.C. § 12101(a)(8) (Supp. V 1993).

³⁹ See Asra Namani Sr., *Labor Letter*, WALL ST. J., June 7, 1994, at A1. "Survey by Lou Harris & Associates finds that about two of three disabled people are not working; 79% of those not working say they would rather have a job." *Id.*

⁴⁰ See LOUIS HARRIS & ASSOC., SURVEY OF AMERICANS WITH DISABILITIES 37, Study No. 942003 (1994); see also Silverstein, *supra* note 34, at 1D. The Harris study asserts that two-thirds of working age Americans with disabilities are jobless. *Id.*

⁴¹ See Namani, *supra* note 39, at A1 (discussing negative effect of citizen dependency on government).

law has failed to reach its intended beneficiaries.⁴² I, however, believe that a closer look at the EEOC's experience suggests otherwise. First, the percentage of ADA hiring claims is actually substantially larger than the percentage of hiring claims under other statutes. That, of course, has to do somewhat with the maturing of statutes. In the beginning, we had many more hiring claims than we did discharge claims. This, however, comports with our general litigation profile. Only a very small percentage of our cases go to litigation. Yet the EEOC's litigation in federal court under the ADA is heavily focused on hiring cases. Additionally, these cases involve a wide range of disabilities, including epilepsy, back and mobility impairments, hearing loss, vision impairments, heart disease and diabetes.⁴³

Moreover, the pursuit of meritorious discharge claims equally serves the ADA's goals by enabling qualified individuals to retain their jobs. The discharge cases generally involve people who are able to and want to continue working, but are fired because of unfounded fears or stereotypes about their disability.⁴⁴ Often, it is a disability that is newly acquired or recently disclosed, such as cancer or HIV.

Thus, charge receipts do not tell the whole story. While the ADA has been an easy target for people who claim it provides a federal cause of action to those with the most trivial of impairments, the fact is that the ADA does not protect people with trivial impairments.⁴⁵ In fact, the EEOC can and does dismiss charges

⁴² See Silverstein, *supra* note 34, at 1D. ADA critics contend the ADA is merely another law people use when they are unhappy about being terminated and has failed both the disabled and has led to unjustified lawsuits against employers. *Id.*

⁴³ See U.S. Dep't of Just. and Equal Opportunity Comm'n, Am. With Disabilities Act Tech. Assist. Guidelines (BNA) 90:0233, 90:0235-36 (1992).

⁴⁴ See *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709 (9th Cir. 1988) (holding placement of teacher with AIDS in non-teaching position discriminatory); *cf. Bradley v. University of Tex. M.D. Anderson Care Ctr.*, 3 F.3d 922, 925 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1071 (1994) (deciding that transfer of HIV positive employee from surgical assistant to position in purchasing department was not discriminatory due to possible "catastrophic consequences of an accident").

⁴⁵ See VAN ETTEN, *supra* note 22, at 34; see also Am. With Disabilities Act, EEOC Tech. Assist. Man. (BNA) 90:0509 (Feb. 1992). In determining whether a disability substantially limits one or more major life activities the regulations provide three factors to consider: (1) its nature and severity, (2) how long it will last or is expected to last, (3) its permanent or long term impact, or expected impact. *Id.*; Mathews, *supra* note 6. Although some bad back or stress claims will be found to be frivolous, some will be found to have merit. *Id.* Evan Kemp stressed that "each person is an individual and has to be judged on that—there is a tendency to explore the limits, and that is what is being done now." *Id.*

whenever the charging party does not have a "substantially limiting impairment."⁴⁶

Most importantly, the consensus that resulted in the passage of the ADA seems to be holding. The two year delay in implementation enabled the Commission to do an outstanding job in terms of getting the regulations written, and providing the technical assistance and training that was necessary in order to get this revolutionary new law on its way. This far-reaching public education effort has helped to change dramatically attitudes towards individuals with disabilities.⁴⁷

Our view is that there has been a high level of voluntary compliance with few of the instances of subversion or outright defiance that characterized the initial years of Title VII enforcement. Most employers now see people with disabilities as a resource to be utilized, rather than as a burden.⁴⁸ Thus, we have accomplished one of the goals we sought to achieve in writing the ADA and its regulations, namely, to change people's hearts and minds. Repeatedly, we see that this change is underway, opening up and empowering a badly under-utilized segment of our population.⁴⁹

Our success in this area is all the more notable because, unlike Title VII or the Age Discrimination in Employment Act (the "ADEA")⁵⁰ which extend protection to clearly defined classes of victims and where coverage is not usually an issue, the ADA is fundamentally individualized in focus. Coverage depends on meeting a multi-pronged definition of the term "disabled," with differing alternative basis for coverage, each of which may be subject to dispute.⁵¹

⁴⁶ See 42 U.S.C. § 12102(2)(A) (Supp. V 1993); see also S. REP. NO. 110, 101st Cong., 1st Sess., at 23 (1989) ([p]ersons with minor, trivial impairments . . . are not impaired in a major life activity).

⁴⁷ See Larry A. Strauss, *Disability Law Adds Smaller Companies*, USA TODAY, July 26, 1994, at 4B. An added catalyst for making the workplace accessible to the disabled include tax incentives for businesses. *Id.* The ADA is not intended to be a burden on businesses, rather it is intended to facilitate a balancing to remove barriers enabling people with disabilities to have the same opportunities others take for granted. *Id.*

⁴⁸ See Peter D. Blanck, *Implementing Reasonable Accommodations Using ADR Under the ADA: The Case of a White Collar Employee With Bipolar Mental Illness*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 458, 462-63 (1994) (highlighting one employer's attempt to keep valued, disabled employee employed).

⁴⁹ *Id.* at 413.

⁵⁰ 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992).

⁵¹ 42 U.S.C. § 12102(2) (Supp. V 1993). "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such impairment, (C) being regarded as having such an impairment." *Id.*

Having heard this, a lot of you would reply "yes, that's the problem." However, I do not see the differing basis for coverage as a problem, rather it is both the strength and the challenge of the ADA. The ADA requires employers to make individualized assessments of a person's capabilities and imposes a reasonable accommodation requirement not found in Title VII.⁵² Employers must undertake the challenge with some effort and make some modifications in order to enable people with disabilities to perform their job functions. However, the ADA is in many ways, not so much revolutionary as it is evolutionary. It is based on legal principles in terms the EEOC and employers who are government contractors have had experience with for years under the Rehabilitation Act of 1973.⁵³ Essentially, the basic principles of nondiscrimination and equal treatment, that are at the heart of the ADA, are really not hard for employers to grasp.

Allow me to share my perspective on these developments. The ADA and its regulations⁵⁴ have frequently been attacked as too complex and difficult to follow.⁵⁵ The Commission is proud of the fact that the vast majority of users have found that in actual application, these regulations are clearer, more comprehensive, more current and easier to follow than anything that exists under other areas of discrimination law.

There are those of you that might say that that is damning with faint praise, but we will take praise where we can get it. The EEOC has never had the authority to issue substantive Title VII regulations, thus employers have had to look at a massive body of case precedent, as well as an incomplete, sometimes out of date, patchwork of guidelines and issuances for a myriad of Title VII rules. Most importantly, the ADA and its regulations are based on common sense and good business practices. The EEOC's over-

⁵² 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993); see Am. With Disabilities Act, Tech. Assist. Man. § 2.3 (1992).

⁵³ 29 U.S.C. § 791 (1988).

⁵⁴ 29 C.F.R. pt. 1630.

⁵⁵ See Skoning, *supra* note 23, at 23. An employer's ADA obligations to "provide 'reasonable accommodation' to allow a person with a disability to perform the 'essential' job functions unless doing so would cause an 'undue hardship' are confusing for employers." *Id.*; Dep't of Just. & Equal Employment Comm'n, Am. With Disabilities Act Man. (BNA) 90:0523 (1992). The appropriate accommodation may not be easy to identify since each accommodation must be created for the individual and the employer may not know enough about the individual's functional limitations in relation to job function to do so properly. *Id.* Additionally, the employee may not know enough about the equipment being used or the exact nature of the work site to suggest an accommodation. *Id.*

riding goal has been to establish reasonable rules that reasonable people can follow.

The ADA has been attacked as too vague, over-inclusive, and accused of spawning outlandish, wasteful claims.⁵⁶ Certainly, many of the law's provisions are not cut and dry, one-size-fits-all solutions. However, that is a necessary consequence of the nature of disability. The ADA's definition of disability is an intentionally open-ended one. Rather than listing specific conditions, the ADA defines disability as "a physical or mental impairment substantially limiting a major life activity, or having a record of, or being regarded as having, such an impairment."⁵⁷

Congress chose this definition because there are many types of physical and mental impairments that affect people differently. Not all impairments are sufficiently severe or long lasting to substantially limit a major life activity, or to do so in precisely the same fashion for all people with the same impairment.⁵⁸ This flexibility, within the definition itself, is a very positive and necessary aspect of the ADA. When the occasional bizarre or frivolous claim has come forward, the courts or the EEOC have had no trouble dismissing it.

Let me emphasize again, the Act protects those with a substantial impairment in a major life activity. It protects those who are "qualified," whether with or without reasonable accommodation.⁵⁹ An agoraphobic applying for a job as a telephone pole climber is just not qualified to perform such a job.⁶⁰ That is all there is to it, and that is precisely the way we have interpreted this law.

It has also been said that the reasonable accommodation requirements of the ADA are too difficult to understand, as well as,

⁵⁶ See Skoning, *supra* note 23, at 23 (highlighting top 10 list of unusual and frivolous disability discrimination claims).

⁵⁷ 42 U.S.C. § 12102(2) (Supp. V 1993).

⁵⁸ See Dep't of Just. & Equal Employment Comm'n, Am. With Disabilities Act Man. (BNA) 90:0510 (1992). The basic question, even when considering temporary disabilities, is whether an impairment "substantially limits" one or more major life activities. *Id.* Temporary, non-chronic impairments that do not last for a long time and have little or no long term impact usually are not disabilities. *Id.*

⁵⁹ 42 U.S.C. §§ 12111(8), 12112(a), (b)(5)(A) (1990).

⁶⁰ 29 C.F.R. § 1630.15(b) (1994). The regulation asserts that an employer may use qualification standards, tests or selection criteria that screen out disabled workers if the action was job related, consistent with a business need and could not be carried out through a reasonable accommodation. *Id.*; see *Dexler v. Tisch*, 43 Fair Empl. Prac. Cas. (BNA) 1662, 1 AD Cas. 1086 (1987) (holding Postal Service facility could not reasonably accommodate applicant who suffered from dwarfism because assigning taller persons to help or permitting use of step stool would impose undue hardship in form of safety risks and inefficiency).

too costly to undertake. However, the accommodation requirements have been successfully implemented by the vast majority of American employers.

The ADA does have important limitations. For instance, the employer must know about the disability.⁶¹ This limitation has turned out to be a very important point in the law. The burden rests on the person with the disability, to request the reasonable accommodation and assert the disability.⁶² If the disability is undisclosed and the individual does not request an accommodation, the employer is not required to be clairvoyant.⁶³ An employer is also not required to provide items that are primarily for personal use, such as eyeglasses, hearing aids and wheelchairs.⁶⁴ Nor is an employer required to reassign essential job functions, lower standards for essential job functions, or most importantly, excuse misconduct.⁶⁵

Essentially, the obligation to make reasonable accommodation extends only to "otherwise qualified" individuals with disabilities.⁶⁶ Furthermore, it is limited by the employer's defense of showing that the accommodation would impose an "undue hardship" on the operation of the business.⁶⁷ The term "undue hardship" is defined as "an action requiring significant difficulty or expense."⁶⁸ In most cases, an appropriate accommodation can be made with little or no difficulty or expense.

A recent study commissioned by Sears Roebuck, indicates that of the 436 accommodations provided by the company between 1978 and 1992, sixty-nine percent cost absolutely nothing; twenty-eight percent cost less than \$1,000; and a mere three percent cost more than \$1,000.⁶⁹ The relatively minor costs of providing reasonable accommodations are offset by the benefits resulting from

⁶¹ 42 U.S.C. § 12112(b)(5)(A) (1990) (employer must make reasonable accommodation to "known physical or mental limitations of an otherwise qualified [applicant or employee] with a disability").

⁶² 29 C.F.R. § 1630.9 (1995).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 29 C.F.R. §§ 1630.2(o), 1630.9 (1995).

⁶⁶ 42 U.S.C. § 12112(b)(5)(A) (1990).

⁶⁷ *Id.*

⁶⁸ 42 U.S.C. § 12111(10) (Supp. V 1993).

⁶⁹ See Mathews, *supra* note 6, at A1 (asserting that accommodating average disabled employee costs only \$121 and in fact 69% of accommodations cost nothing); see also Peter D. Blanck, *Employment Integration, Economic Opportunity and The Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 866 (1994).

increased employment of people with disabilities, reduced dependence on Social Security, and increased consumer spending and tax revenues.⁷⁰

The reasonable accommodation aspects make ADA disputes particularly appropriate for alternative dispute resolution. Proponents envision reasonable accommodation as an interactive process in which employer and employee come together, reaching a conclusion as to what reasonable accommodation would meet the employee's needs within the construct of the employer's ability to provide that reasonable accommodation.⁷¹ The success enjoyed thus far with ADA implementation can be enhanced by more widespread use of ADR by employers and employees at the Commission.

In conclusion, I want to emphasize several key points. First, there is a long history of resistance to alternative dispute resolution in the context of employment discrimination disputes. Initially, it was largely seen as second class justice.⁷² This misconception was due largely to the perception that the only thing the EEOC could do was to conciliate, which originally was true.⁷³ The EEOC was strictly a federal mediation and conciliation service for employment discrimination disputes. However, without the credible threat of litigation, it did not work. The EEOC finally received enforcement authority and prosecutorial power in 1972,⁷⁴ but still relied heavily on early settlement of charges, until the 1950s. Thereafter, we wanted to go further and really enforce this law in the traditional way, through a vigorous litigation program, in order to establish the credibility of the agency and to be a credible deterrent to discrimination.

Now, however, there has been a fundamental change in this country with respect to attitudes toward alternative dispute resolution. It is no longer perceived as second class justice. Many who were previously hostile to ADR have changed their minds as the quality and procedural safeguards of ADR mechanisms have improved. Congress has encouraged ADR in the Administrative Dis-

⁷⁰ See Sen. Tom Harkin, *The Americans with Disabilities Act: Four Years Later—Commentary on Blanck*, 79 IOWA L. REV. 935, 937 (1994).

⁷¹ See generally Silberman et al., *supra* note 1.

⁷² *Id.*

⁷³ See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-59, (1977).

⁷⁴ Equal Employment Opportunity Act of 1972, § 4(a), 42 U.S.C. § 2000e-5(f)(1) (1988).

pute Resolution Act of 1990,⁷⁵ in specific provisions of the Civil Rights Act of 1991⁷⁶ and in the ADA.⁷⁷ ADR is an option many charging parties and respondents want, because it offers both sides a speedier, less confrontational, and sometimes more effective means of resolving charges and vindicating rights.⁷⁸

With that in mind, as well as the support of Chairman Casellas, the ADR task force at the EEOC developed a proposal to make ADR, in the form of voluntary mediation, an integral part of our charge processing system. Mediation would be offered after a charge has been filed and it has been initially assessed and prioritized by the EEOC. In order for the system to be seen as fair, the mediation process would be walled off from the enforcement proceedings.

There is a sophisticated set of facts which transpire before a charge gets to the EEOC with respect to ADR. Although I believe that ADR is enormously important for the ADA, it should not be limited to ADA.⁷⁹ Our ADR program will be available to charges on all bases. Because we expect demand for mediation to exceed our resources, we will have to do it on a random basis, every fifth, tenth or whatever charge.

These laws, whether the ADA, the Civil Rights Act, or the ADEA, involve very emotional questions.⁸⁰ People feel strongly about them, and they have been required to do a lot of heavy lifting in the past thirty years. People seek to bring all kinds of employment disputes under the rubric of the anti-discrimination laws, and that is really swamping the system. We have to take a look at what has happened, and determine how we can segment out those disputes that belong in a traditional employment discrimination enforcement posture, and those matters that would be

⁷⁵ 5 U.S.C. §§ 571-583 (Supp. IV 1992).

⁷⁶ 42 U.S.C. § 1981 (Supp. IV 1992).

⁷⁷ 42 U.S.C. § 12212 (Supp. IV 1992).

⁷⁸ See generally Silberman et al., *supra* note 1, at 1533.

⁷⁹ See *id.*

⁸⁰ See, e.g., *Altman v. NYC Health and Hosp. Corp.*, No. 93 Civ. 882, 1993 U.S. Dist. LEXIS 4228, at *8 (S.D.N.Y. Apr. 2, 1993), *aff'd*, 999 F. Supp. 537 (2d Cir. 1993) (permitting physician to be fired despite ADA regulations on alcoholism, when he was drunk while on duty at hospital that employed him); *Leckelt v. Bd. of Comm'r of Hosp. Dist. No. 1*, 909 F.2d 820, 833 (5th Cir. 1990) (holding hospital did not violate ADA when it discharged nurse who refused to submit to HIV test); *Harmer v. Virginia Elect. and Power Co.*, 831 F. Supp. 1300, 1309-10 (E.D. Va. 1993) (holding employer was not required under ADA to declare an entire building smoke free to accommodate disability of one employee in building with bronchial asthma).

better served in an alternative dispute resolution context. I commend you for spending the time addressing this very important issue.