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Attitudes, Behavior and the Employment Provisions of the Americans with Disabilties Act

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ATTITUDES, BEHAVIOR AND THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

TITLE I of the Americans with Disabilities Act of 1990 (ADA)[1] is a federal civil rights law designed to address employment discrimination facing millions of Americans. The goals of Title I of the ADA have as much to do with battling attitudinal barriers and prejudice faced daily by qualified employees and job applicants with disabilities as they have to do with overcoming physical barriers in the workplace.

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1. 42 U.S.C. §§ 12101-12213 (1994).

Since its July 26, 1992 effective date, the implementation of Title I has been the subject of intense debate by employers, courts, policymakers, academics and persons with and without disabilities. Supporters of the law stress the overarching importance of the civil rights guaranteed by Title I. Critics cast the law as unnecessary, overly broad, difficult to interpret, and as a preferential treatment initiative. Others question whether the law's economic benefits to employers, persons with disabilities and society outweigh its administrative burdens. These and other questions have fueled the debate over, or as some argue, the backlash against, Title I.

Five years after the effective date of Title I, fundamental interpretive questions remain. What is the statutory scope of the definition of a disability? Who are qualified persons covered for purposes of the ADA? What medical inquiries and tests are acceptable measures of employee qualifications and ability to perform job functions? What responsibilities do employers and employees have in the reasonable accommodation process? How may Title I disputes be resolved without resort to litigation? What is the relation of Title I to developing policy initiatives in the areas of health care, health insurance and welfare reform law?

Answers to these and other questions related to Title I implementation must be guided increasingly by systematic empirical study.[2] This Article has two related objectives. First, it attempts to further discussion regarding study of individual and collective attitudes and behavior surrounding Title I interpretation, with a focus on issues facing individuals with hidden and perceived disabilities. Second, the Article examines emerging empirical information related to attitudes and behavior under Title I, discussing the implications of the findings for future policymaking in this area.

Part II of this Article provides an overview of the central terms of Title I, stressing the need for study of attitudinal biases associated with various provisions of the law.[3] The role of empirical study in

2. *Cf.* U.S. GENERAL ACCOUNTING OFFICE, PEOPLE WITH DISABILITIES: FEDERAL PROGRAMS COULD WORK TOGETHER MORE EFFICIENTLY TO PROMOTE EMPLOYMENT 4 (1996) [hereinafter GAO DISABILITY REPORT] (finding absence of coordinated data collection efforts by agencies regarding Americans with Disabilities Act (ADA) implementation).

3. Physical barriers to the workplace have been studied extensively. *See, e.g.*, Wendy E. Parmet, *Title III-Public Accommodation, in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 123, 123-36 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) [hereinafter IMPLEMENTING THE ADA] (discussing accommodations for range of disabilities pursuant to ADA Title III). Although there is likely a strong relationship between physical barriers and attitudinal biases in the workplace, this Article focuses on attitudinal barriers.

fostering a more comprehensive understanding of attitudes toward Title I is examined, as well as the role that the Equal Employment Opportunity Commission (EEOC) plays in enforcing compliance with the law. Part III surveys study of Title I, including analysis of workplace accommodations, dispute avoidance and resolution practices and addresses issues involving medical testing of persons with hidden or perceived disabilities.[4] Finally, Part IV examines implications for future study of Title I, deriving policy implications from a longitudinal study of the employment of persons with disabilities.[5]

II. ATTITUDES, BEHAVIOR AND ADA TITLE I

For the most part, prior writings on Title I focus on reviews of the provisions of the law and their interpretation by the courts.[6] These analyses are, of course, required for consistent enforcement of the civil rights guaranteed by the law.[7] Significantly less attention, however, has been devoted to study of the individual, corporate and societal implications of Title I in practice. To complement evolving and sometimes inconsistent interpretations of Title I case law, study must be conducted of the underlying attitudes (e.g., stereotypes, prejudices and biases) and behaviors (e.g., compliance and discrimination patterns and provision of reasonable accommodations) associated with implementation.

This need to inform affected individuals and policymakers is not unlike that faced after the landmark United States Supreme Court decision in *Brown v. Board of Education*.[8] Extensive study was required and conducted on attitudes and behavior toward school desegregation policies. Many disciplines took up this challenge, among them social psychology, political science, economics and so-

4. For a further discussion of workplace accommodations, dispute avoidance and resolution practices under Title I, see *infra* notes 141-253 and accompanying text.

5. For a discussion of the policy implications regarding future study of Title I, see *infra* notes 254-95 and accompanying text.

6. *See generally* Peter D. Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853, 855 (1994) (noting that dramatic changes in public attitudes and behaviors toward individuals with disabilities in employment, general services, telecommunications and public accommodations have not been adequately documented or communicated).

7. *See* Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1478 (1994) (arguing that because Title I is in early stages of implementation, it is essential to define underlying bases for interpretation of law).

8. 347 U.S. 483 (1953).

ciology, examining the predictive links between underlying attitudes and subsequent social behavior.[9]

Development of an analogous body of interdisciplinary research is needed of the ADA generally, and of Title I in particular. It may be that the passage of the ADA alone has changed attitudes toward persons with disabilities in American society, simply in the recognition of their basic civil rights, or in the acknowledgment of the prejudice and segregation historically faced by many qualified individuals with disabilities. Beyond this effect, however, knowledge of Title I in practice is needed, based on study of the law's actual workings.

A first avenue for study is the development of information on the relation between the civil rights guaranteed by Title I and the law's economic impact on covered employers.[10] Without support of data, some argue that the rights guaranteed by Title I will yield long-term positive economic effects to society and to individuals with disabilities and, moreover, that it is not possible to achieve one without the other.[11] Also without reliance on data, critics of the law contend that Title I implementation will result in economic waste and inefficiency, declines in productivity and reverse discrimination.[12] These arguments often are made by analogy to alleged market inefficiencies in the implementation of Title VII of the Civil Rights Act of 1964 (Title VII)[13] involving issues of race and gen-

9. *See, e.g.*, Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960) (discussing premises underlying school desegregation cases); Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839, 839-54 (1983) (reviewing 93 research studies).

10. *See, e.g.*, John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2601 n.46 (1994) (discussing economic implications of Title VII law).

11. *See* Justin W. Dart, Jr., *The ADA: A Promise To Be Kept*, *in* IMPLEMENTING THE ADA, *supra* note 3, at xxi, xxiv-xxv (stating that government must coordinate its efforts, and citizens must execute revolution of empowerment); John L. Wodatch, Prepared Statement Before the Senate Committee on Labor and Human Resources, Subcommittee on Disability Policy (July 26, 1995) (stating criticisms of Title I suggest law is misunderstood); *see also* Gregory S. Kavka, *Disability and the Right to Work*, 9 SOC. PHIL. & POL. 262, 269 (1992) (noting that with existence of lingering discrimination and prejudice toward persons with disabilities, society cannot rely on free labor markets to supply equal employment opportunities for qualified persons with disabilities).

12. *See, e.g.*, Walter Y. Oi, *Employment and Benefits for People with Diverse Disabilities*, *in* DISABILITY, WORK AND CASH BENEFITS 103 (Jerry L. Mashaw et al. eds., 1996) (commenting that ADA has not produced anticipated growth in employment rates).

13. 42 U.S.C. §§ 2000a to 2000h-6 (1994).

der.[14] Regardless of viewpoint, information is lacking upon which to assess the economic impact of Title I.

A second avenue for study involves analysis of attitudes toward disability. A focus on underlying attitudes would complement study of the physical barriers to equal access for persons with disabilities in employment and other aspects of society.[15] Moreover, because the ADA is a broad law, with titles covering employment, state and local governmental services, public accommodations, insurance and telecommunications, the study of attitudes associated with these areas is necessary for a complete understanding of the law's impact.[16] Future analysis is required of the interaction among the ADA titles and attitudes and behavior toward qualified persons with disabilities.

A. *Attitudes*

In dramatic and unforeseen ways, individual and societal attitudes about the nature of disability impact the lives of millions of Americans on a daily basis. The Supreme Court, in *Alexander v. Choate*,[17] has recognized that discrimination against people with disabilities is "most often the product, not of invidious animus," but rather of thoughtless and indifferent attitudes.[18]

Examination of the major terms of Title I, with an emphasis on issues surrounding attitudes about "hidden" (i.e., not immediately obvious) and perceived disabilities, serves several purposes. First, an increasing number of qualified individuals with hidden or per-

14. *See, e.g.*, John J. Donohue III, *Is Title VII Efficient?*, *in* EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 137, 137-45 (Paul Burstein ed., 1994) [hereinafter LABOR MARKET DISCRIMINATION AND PUBLIC POLICY] (concluding theoretical attack on efficiency of Title VII of Civil Rights Act of 1964 is incomplete); Paula England, *Neoclassical Economists' Theories of Discrimination*, *in* LABOR MARKET DISCRIMINATION AND PUBLIC POLICY, *supra*, at 59-69 (examining theory that most employment discrimination will disappear in competitive labor markets); Richard A. Posner, *The Efficiency and Efficacy of Title VII*, *in* EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY, *supra*, at 147-52 (concluding Title VII is neither efficient nor economically justified).

15. *Cf.* GARY BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971) (suggesting that "taste" for discrimination in employment may be explained by premarket factors); England, *supra* note 14, at 59-69 (examining Becker's theory that employers have "taste" or preference for employment discrimination).

16. For instance, studies may examine the relation of employers' attitudes about accessible public and private transportation to the employment of qualified employees with disabilities needing such transportation.

17. 469 U.S. 287 (1985).

18. *Id.* at 295. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990) (arguing that meaning of disability is mutable and is now embedded in networks of social relationships).

ceived disabilities are entering the workforce and are being denied equal employment opportunities solely on the basis of myths, misconceptions and prejudice about their impairments.[19]

Second, the study of attitudes toward persons with hidden or perceived disabilities is illustrative of underlying biases, prejudice and stereotypes.[20] Unlike race or gender discrimination, the protected characteristics associated with hidden or perceived disabilities may not be immediately obvious to employers.[21] Conscious and unconscious attitudes may lead to inaccurate perceptions and economically inefficient behavior by employers and others toward qualified persons with disabilities. Attitudinal biases may be reflected in unconscious negative views of ability to perform a job, even though an individual may be presently asymptomatic and qualified.[22] Conscious attitudinal biases about the abilities of people with disabilities have been amplified in media portrayals of persons with hidden impairments, such as stories suggesting that persons with histories of psychiatric impairments are prone toward violence or inappropriate behavior in the workplace.

Third, in the absence of research, it is difficult, if not impossible, to articulate the nature of attitudes and behavior underlying interpretation of Title I's discretionary provisions, such as "employment discrimination," a "qualified" individual, "reasonable accom-

19. *See, e.g.*, STEVE KAYE, DISABILITY RIGHTS ADVOCATES AND DISABILITY STATISTICS CTR., DISABILITY WATCH: STATUS REPORT ON THE CONDITION OF PEOPLE WITH DISABILITIES 3-4 (1996) [hereinafter DISABILITY WATCH] (finding most common health impairments associated with disability are "hidden" conditions, and persons with "hidden disabilities," such as those with mental impairments, encounter severe attitudinal bias in workplace); *Fired Waiter Alleges Perceived Discrimination by Employer on False Report of HIV Disease*, AUSTIN AM.-STATESMAN, June 15, 1996, at B2 (noting that employee terminated for perceived disability of acquired immune deficiency syndrome (AIDS) highlights trend in employment discrimination regarding fear of AIDS among food service workers).

20. *See generally* Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41, 44 (1996) (examining applicability of research based on minority group model of disability to interpretation of antidiscrimination measures such as ADA); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1173 (1995) (discussing biased attitudes within context of Title VII); Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (same).

21. *See* Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 933 (7th Cir. 1995) (discussing similarity between nonobvious nature of religious discrimination and disability discrimination in cases involving hidden disabilities).

22. *See, e.g.*, Fink v. Kitzman, 881 F. Supp. 1347, 1370 (N.D. Iowa 1995) (describing pervasive discrimination that persons with disabilities have experienced on purported ground that "others would feel uncomfortable around them"); GAO DISABILITY REPORT, *supra* note 2, at 4 (attitudinal bias toward people with psychiatric disabilities includes labeling as unemployable).

modation," "direct threat" or "undue hardship."[23] Study is required to assess the extent to which compliant behavior under Title I, by employers, insurers or others, is linked to individual attitudes, organization cultures, structural forces in organizations (e.g., nature of health care or retirement benefits for workers), physical barriers to the workplace or other sources.

A starting point for the analysis of attitudes underlying interpretation of Title I is with the law's central premise that covered entities (i.e., employers with fifteen or more employees) may not "discriminate" against a "qualified person" with a disability in any aspect of employment.[24] Some commentators argue that interpretations of the concept of discrimination should be based primarily on traditional legal processes of precedential development.[25] Others suggest that the law's requirements as drafted are not readily interpretable and, therefore, without amendment, are not capable of effective implementation.[26] Still others maintain that the concept of discrimination under Title I extends the guarantees of equal employment opportunity beyond the scope of previous antidiscrimination laws toward a preferential treatment initiative.[27]

Despite emerging regulatory guidance and attempts at clarification by the courts, there remains a degree of uncertainty in the

23. 42 U.S.C. §§ 12111, 12112 (1994). *See, e.g.*, Deane v. Pocono Med. Ctr., No. 96-7174, 1997 WL 500144, at *3 (3d Cir. Aug. 25, 1997). The *Deane* court noted:

> [T]he use of vague and general standards rather than strict guidelines—particular with respect to what constitutes a disability, a qualified individual and reasonable accommodation—has permitted inconsistent if not absurd judgments and favored those with easily accommodated disabilities or minor impairments, rather than those with serious disabilities who seek nothing more than the equal employment opportunities to which they are entitled.

Id.; *see also Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1602, 1615 (1996) (arguing that many of Title I's terms are ambiguous and vague).

24. 42 U.S.C. §§ 12111(5)(A), 12112(a).

25. *See* Blanck, *supra* note 6, at 861-62 (discussing degree of ambiguity built into Title I to allow for flexible, case-by-case approach).

26. *See, e.g.*, Oi, *supra* note 12, at 112 (noting that Title I terms like disability and accommodation are difficult to define).

27. *Cf.* 136 CONG. REC. H12509 (1990) (statement of Rep. Marlenee) ("It is simply wrong to believe that one legislative remedy can be a panacea for the problems faced by such a diverse group including every disability from dyslexia and obesity to quadriplegia, tuberculosis and AIDS."). *See, e.g.*, Donohue, *supra* note 10, at 2608-11 (analyzing how, unlike prior antidiscrimination legislation that called for employers to disregard certain traits, ADA Title I requires employers to identify impairments and overcome them); Sherwin Rosen, *Disability Accommodation and the Labor Market*, *in* DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18, 21 (Carolyn L. Weaver ed., 1991) (asserting that ADA effectively requires firms to treat unequal people equally, thus discriminating in favor of people with disabilities).

concept of discrimination under Title I.[28] In the absence of study, prior analyses tend to reflect reactive interpretations to legal challenges, many times in response to failed attempts at implementation. The value of prospective study of attitudes about the concept of unjustified discrimination, or conversely about equal employment opportunity, lies in its ability to assist in efficient policy and economic planning and in its educational value to help prevent disputes before they arise.

One of the most contentious aspects of disability law, research and policy involves the definition of disability.[29] Under Title I's three-prong definition, a person with a disability covered by the law must have a known physical or mental condition or impairment that "substantially limits major life activities,"[30] have "a record of" a physical or mental condition,[31] or be "regarded as" having such a condition.[32] The discussion here focuses on the second and third prongs of the definition of disability, which are meant to prevent discrimination on the basis of biased attitudes and resultant adverse behavior associated with perceived yet often asymptomatic disabilities.[33]

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28. *See* George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 126-132 (1995) (discussing limits of concept of discrimination); Daniel Seligman, *The Lawyer's Friend*, FORTUNE, May 29, 1995, at 176 (noting confusion regarding meaning of ADA's terms).

29. *Cf.* GAO DISABILITY REPORT, *supra* note 2, at 78 (noting that disability is difficult to define and measure).

30. 29 C.F.R. § 1630.2(i) (1997). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* A "substantial" limitation on the major life activity of working does not allow the individual to perform a class of job activities compared to an average person with comparable skills and training. *See id.* § 1630.2(j)(3)(i).

31. A record of disability means that one "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." *Id.* § 1630.2(k). An employer must rely on the record of disability in making employment-related decisions to be held liable under Title I. *See id.* pt. 1630, app. § 1630.2(k).

32. 42 U.S.C. § 12102(2) (1994). Title I of the ADA also prohibits discrimination on the basis of an association with a person with a disability. *Id.* § 12112(b)(4). To help evaluate the meaning of discrimination under Title I, the EEOC has issued interpretative guidance. *See* [1993-1997 Transfer Binder] EEOC Compl. Man. (CCH) ¶ 6903 (Oct. 10, 1995) [hereinafter EEOC Compl. Man.] (defining term "disability"). EEOC guidelines state the agency's position on how it intends to enforce Title I, but do not have the status of settled law. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973) (noting EEOC guidelines are entitled to "great deference" in absence of "'compelling indications that [they are] wrong'") (citation omitted).

33. An example of a case involving all three prongs is *EEOC v. Joslyn Manufacturing, Co.*, No. 95 C 4956, 1996 WL 400037, at *1 (N.D. Ill. July 15, 1996) (involving plaintiff who contended he was qualified for job, regarded as person with carpal tunnel syndrome, had record of impairment that substantially limited major

A prototypical case involving the third prong of the definition of disability might involve a qualified asymptomatic individual who is denied an employment opportunity because of an employer's negative attitudes toward that individual's supposed predisposition for cancer, human immunodeficiency virus (HIV) disease or psychiatric illness.[34] In cases like this, the attitudes of others, and not an obvious impairment per se, determine whether a person has a disability protected by the law.[35] For instance, in a case involving a qualified individual with asymptomatic HIV disease, supervisors' or coworkers' attitudes and behavior upon learning of the employee's condition may be enough to show that the employer perceived the employee as having an impairment that substantially limits the major life activity of working. These attitudes also may provide insight into the employer's motives for subsequent adverse employment actions toward the employee.[36]

In *School Board v. Arline*,[37] the Supreme Court examined the concept of discrimination based solely on attitudes toward disability, noting that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."[38] Lower courts have suggested that qualified people who are regarded or perceived as

life activity of working and was denied employment on that basis). A person with a perceived or hidden disability may or may not have an underlying disability covered by Title I. *See, e.g.*, Johnson v. American Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819 (7th Cir. 1997) (holding plaintiff may be regarded by employer as having a disability even if missing teeth did not constitute an actual impairment).

34. This Article uses the term "psychiatric illness" to refer generally to mental illness. *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC STATISTIC MANUAL OF THE AMERICAN PSYCHIATRIC ASSOCIATION (DSM-IV) 37-174 (4th ed. 1994) [hereinafter DSM-IV] (defining psychiatric illnesses).

35. *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997) ("We hold unhesitatingly that HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA."); Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (finding HIV disease is per se disability under the Rehabilitation Act of 1973 (Rehabilitation Act)); *cf.* Runnebaum v. Nationsbank of Md., No. 94-2200, 1997 WL 465301, at *6 (4th Cir. Aug. 15, 1997) (en banc) (finding employee with asymptomatic human immunodeficiency virus (HIV) disease is not per se disabled for purposes of ADA).

36. *See* Runnebaum v. Nationsbank of Md., 95 F.3d 1285, 1289, 1295-96 (4th Cir. 1996) (discussing biased attitudes toward disability reflected in supervisor's "panicky" and "uncontrolled" behavior toward employee with asymptomatic HIV disease and comparing this analysis to cases interpreting the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076), *vacated*, No. 94-2200, 1997 WL 465301, at *1 (4th Cir. Aug. 15, 1997); *see also* Louis Pechman, *Appearance Based Discrimination*, 216 N.Y.L.J. at 1, 1 (discussing review of disability discrimination cases on basis of physical appearance).

37. 480 U.S. 273 (1987).

38. *Id.* at 284 (reviewing section 504 of Rehabilitation Act).

having a disability "are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic."[39]

Under a Title I claim based on a theory of attitudinal discrimination, a qualified individual must show that the employer regarded the individual as having a condition that substantially limits a major life activity, in the employment context, for instance, a limitation on the individual's future ability to work.[40] The plaintiff must demonstrate that the employer made an adverse employment decision because of the unjustified perception of a disability, whether based on myth, fear or stereotype, and not on the employee's or job applicant's present abilities.[41] Moreover, there must be a causal connection between the employer's attitudinal bias about the disability and the employer's behavior in the denial of equal employment opportunity.

Theories of Title I discrimination based on attitudinal bias are emerging.[42] There are several illustrative case types that are highlighted in Appendix A to this Article.[43] One scenario involves circumstances in which an employer makes a negative employment decision toward an individual who is incorrectly perceived as an asymptomatic person with a disability, yet deemed otherwise qualified to perform the job (illustrated in the lower left cell in Appen-

39. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995). The analysis of attitudinal discrimination toward qualified persons with perceived disabilities under Title I is analogous to earlier discussions of discrimination on the basis of race and gender under Title VII (i.e., no relation of perceived status to job qualifications). This is not to suggest that people with apparent (i.e., visible) disabilities do not experience actual and harsh discrimination. It is to suggest that there likely are differences in attitudinal biases and behavioral prejudice associated with perceived and apparent disabilities.

40. *See* 29 C.F.R. § 1630.2(1) (1997).

41. *See id.*; *see also* Gordon v. Hamm, 100 F.3d 907, 912 (11th Cir. 1996) (holding that perceived impairment must be substantially limiting and significant).

42. *See* Michael D. Moberly, *Perception or Reality? Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345, 348 (1996) (reviewing perceived disability case law arising under state statutes).

43. *See* Peter D. Blanck, Prepared Remarks on Title I of the ADA at the Thirty-First Annual *Villanova Law Review* Symposium (Oct. 26, 1996); Appendix A (containing simplified table with yes/no response for actual disability and yes/no response for perceived disability that aids in analysis of definition of four potential outcomes to question of discrimination). Appendix A depicts four discrimination scenarios: (1) perceived disability, but no actual impairment (i.e., a case brought under the third prong of definition); (2) perceived disability with actual impairment (i.e., a case brought under the first or third prong); (3) no perceived disability and no actual impairment (i.e., a case unsuccessfully alleging disability); and (4) no perceived disability with actual impairment (i.e., a case of hidden undisclosed disability). For a discussion of variations on the four scenarios using case examples, see *infra* notes 44-57, 130-34 and accompanying text.

dix A). In *La Paz v. Henry's Diner, Inc.*,[44] an individual who was openly gay was wrongly perceived by his employer to have HIV disease and allegedly was terminated on that basis.[45] When questioned by his employer, the employee denied that he was HIV positive and offered to submit to an acquired immune deficiency syndrome (AIDS) test, an offer the employer refused.[46] The outcome in this type of case turns on whether the asymptomatic employee was fired because of his employer's unjustified attitudes toward the perceived disability of AIDS, and not because of his present job abilities or an actual impairment.[47]

A second scenario involves alleged employment discrimination and perceived disability in circumstances where the appropriateness of an employee's workplace behavior is at issue (illustrated in the top left cell in Appendix A). In cases of this type, the behavior at issue is not always related to an underlying disability recognized by the law. In *Fenton v. Pritchard Corp.*,[48] an employee who was terminated for inappropriate and threatening behavior toward a fellow employee was deemed not qualified and thereby not entitled to

44. 946 F. Supp. 484 (N.D. Tex. 1996).

45. *See id.*

46. *See id.*

47. The employer alleged the plaintiff was fired because he was rude to customers. *See id.*; *see also* Katz v. City Metal Co., Inc., 87 F.3d 26, 29 (1st Cir. 1996) (finding employer may have perceived employee as disabled where he knew of employee's heart attack and hospitalization, was informed employee would have to return to work on limited basis and personally observed employee's fatigue); EEOC v. Texas Bus Lines, 923 F. Supp. 965, 979 (S.D. Tex. 1996) (holding employer's decision not to hire plaintiff based on unsubstantiated perception of obesity as disability constituted discrimination under Title I).

In *Deane v. Pocono Medical Center*, No. 96-7174, 1997 WL 500144, at *12 (3d Cir. Aug. 25, 1997), the Third Circuit concluded that an individual who is "regarded as" disabled by an employer is not entitled to workplace accommodation if that individual is not in fact disabled. The *Deane* court stated: "Thus, if an individual is perceived to be but is not actually disabled, he or she cannot be considered a 'qualified individual with a 'disability' unless he or she can, without accommodation, perform all the essential as well as the marginal functions of the position held or sought." *Id.* Judge Becker disagreed with the majority holding that a "regarded as" plaintiff must be able to perform all the functions of the job without reasonable accommodations to be considered qualified under Title I. *See id.* at *14 (Becker, J., dissenting). Judge Becker argued that the holding prevented a class of plaintiffs under the "regarded as" prong of the ADA from bringing suit and this was contrary to congressional intent. *See id.* (Becker, J., dissenting). On October 3, 1997, the Third Circuit vacated its panel's decision and decided to rehear the appeal en banc. Deane v. Pocono Med. Ctr., No. 96-7174, 1997 WL 500144, at *1 (3d Cir. Oct. 3, 1997).

48. 926 F. Supp. 1437 (D. Kan. 1996). In *Fenton*, the plaintiff defied an employer directive to refrain from contact with a particular co-employee. *Id.* at 1446. The court characterized these actions as illustrating poor judgment and lack of impulse control, rather than a Title I-covered disability. *See id.*

Title I protection.[49] The employee contended unsuccessfully that his behavior toward coworkers led his employer to perceive him as a covered person with a mental disability.[50] Cases of this type suggest that an employer's negative attitudes toward an employee resulting in an adverse employment decision nevertheless must be based on disabilities that fall under the purview of the act. Employment decisions based on perceptions of an employee's personality or behavior problems, such as a short temper or poor judgment in the workplace, are not discriminatory if the underlying impairment is not regarded as a covered disability.[51]

A third scenario that implicates attitudes toward disability involves decisions by employers to grant or refuse the provision of workplace accommodations (illustrated in the top right cell in Appendix A). In cases of this kind, employment discrimination likely will not be found in circumstances where the employer does not perceive or treat an employee's hidden impairment (e.g., depression caused by the death of a spouse) as a substantial limitation on the employee's present ability to work.[52] Moreover, an employer's granting of leave, flexible work hours, vocational training or other

49. *See id.* at 1443.

50. *See id.* "The perceived disability alleged was that [the plaintiff] was dangerous, a threat to other employees, unstable and that he might 'go postal,' or 'go ballistic .'" *Id.* Nevertheless, the *Fenton* court found that the plaintiff's actions did not demonstrate that his employer perceived him as having a covered disability. *Id.* at 1446.

51. *See, e.g.*, Stewart v. County of Brown, 86 F.3d 107, 110 (7th Cir. 1996) (finding employee did not make valid perceived disability claim, even though employer thought he was excitable, ordered numerous psychological evaluations for him and stated to third persons that considered employee emotionally and psychologically imbalanced, because employer repeatedly was advised that employee was mentally fit for job); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726-27 (5th Cir. 1995) (holding that employee's impairment of arm injury did not substantially limit any major life activity nor was she perceived as disabled by her employer); Brieland v. Advance Circuits, Inc., No. 4-96-660, 1997 U.S. Dist. LEXIS 14424, at *15 (D. Minn. Sept. 16, 1997) ("This court agrees that [plaintiff]'s inability to get along with others is not the sort of activity within the ADA's purview of a major life activity."); *Fenton*, 926 F. Supp. at 1445 ("[I]ndividuals with common personality traits . . . are not considered disabled."); Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1580 n.8 (N.D. Ala. 1996) (noting that character flaws, poor judgment, irresponsible behavior and lack of impulse control are not necessarily impairments under Title I); Greenberg v. New York, 919 F. Supp. 637, 642 (E.D.N.Y. 1996) (same); 29 C.F.R. § 1630.2(h) (1997) (stating that definition of disability does not include "common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder").

52. *See* Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563, 1568 (S.D. Ga. 1996). In *Johnson*, the plaintiff alleged that she was discharged because her employer "regarded" her as having a mental impairment. *Id.* at 1568. To pursue a claim under the Title I's "regarded as" definition of a disability, the court ruled that the plaintiff must show that the employer perceived her as suffering from a mental impairment and "*that such impairment substantially limited her ability to work.*"

"accommodations" are not by themselves indicative of perceptions of an employee's disability.[53] In addition, an employer's decision not to hire an individual with an impairment for a position does not by itself demonstrate that it perceives the applicant as disabled for purposes of Title I analysis, regardless of whether an accommodation is required.[54]

A fourth scenario involving alleged employment discrimination occurs where a qualified employee is perceived by an employer as having a covered impairment, the employee actually has a covered impairment, and the employee is discharged on that basis (illustrated in the lower right cell in Appendix A). In cases of this kind, an employee may allege not only that the employer regarded him as having the impairment, but also that the impairment sub-

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Id. (emphasis added). The *Johnson* court found that the plaintiff failed to present evidence to meet this aspect of her burden. *Id.* at 1568-69.

An employer need accommodate only those disabilities that are obvious or called to the employer's attention. *See* Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 932 (7th Cir. 1995) (stating that employer is not liable under Title I when it lacks knowledge of disability where effects of disability, such as tardiness, may have many causes); Stola v. Joint Indus. Bd., 889 F. Supp. 133, 135 (S.D.N.Y. 1995) (same); *see also* Holihan v. Lucky Stores, 87 F.3d 362, 366-67 (9th Cir. 1996) (finding issue of material fact as to perceived disability claim where employer called employee into two meetings to discuss his "aberrational behavior," asked him if he had "problems" and encouraged him to seek counseling); EEOC v. Joslyn Mfg. Co., No. 95 C 4956, 1996 WL 400037, at *13-14, 19 (N.D. Ill. July 15, 1996) (finding genuine issue of fact as to whether plaintiff's perceived impairment substantially limited his ability to work where employer contended it did not treat plaintiff's carpal tunnel syndrome as substantially limiting impairment because it declined to hire him for only one job so plaintiff was not disqualified from broad range of jobs).

53. *See Johnson*, 923 F. Supp. at 1568 (finding employer's grant of leave of absence was humanitarian gesture in response to plaintiff's grief). A related question involves the extent to which Title I lawsuits on the basis of perceived disability conflict with other policy concerns underlying the law, such as the goal to encourage employers to humanize their relationships with their employees. *See id.* at 1568-69.

54. *Cf. Joslyn Mfg. Co.*, 1996 WL 400037, at *6 (noting that failure to hire person for only one job does not necessarily mean that employer did not discriminate based on disability). The court in *Joslyn* stated:

> [The] test for whether a perceived impairment substantially limits a major life activity is not whether the employer's rejection of the applicant was due to a good faith, narrowly-based decision that the applicant's characteristics did not match specific job requirements. Rather, the proper test is whether the impairment, as perceived, would affect the individual's ability to find work across a class of jobs or a broad range of jobs in various classes.

Id.; *see also* Barnes v. Cochran, 944 F. Supp. 897, 899 (S.D. Fla. 1996) (finding fact that employer deemed applicant unqualified does not mean that employer did not perceive applicant as disabled).

stantially limited the employee's ability to work.[55]

In some circumstances an individual with a covered impairment (e.g., a person who uses a wheelchair because of paralysis) may be "substantially limited" in a job only because of the unjustified attitudes of others.[56] In other words, many serious obvious or perceived impairments, which independently may be covered under Title I's definition of disability, are "disabling" in the workplace as a result of employers' misperceptions about individual performance capabilities or about the efficacy of certain workplace accommodations (illustrated by cases in the lower right cell of Appendix A).

As discussed next, in each of the four generalized scenarios illustrated in Appendix A, the employee still must show a connection between an employer's biased attitudes toward the employee's actual or perceived disability and that employer's subsequent adverse behavior.[57]

B. *Behavior*

The four fact patterns described above illustrate emerging theories of discrimination based on employers' attitudes toward individuals with or without present impairments who are perceived to have disabilities, individuals with impairments who are not perceived to have disabilities, and individuals not perceived to have nor having impairments covered by the law.[58] Employers' negative

55. *See* Abbott v. Bragdon, 107 F.3d 934, 942 (1st Cir. 1997) (holding that HIV disease substantially limited major life activity of reproduction); Koblosh v. Adelsick, No. 95 C 5209, 1996 WL 675791, at *4 (N.D. Ill. Nov. 20, 1996) (involving employee with cerebral palsy arguing that disability substantially limited his ability to walk and that employer regarded him as having disability); *cf.* Runnebaum v. Nationsbank of Md., No. 94-2200, 1997 WL 465301, at *6 (4th Cir. 1996) (en banc) (finding that HIV infection is not per se disability under first prong of Title I definition and rejecting assertion by plaintiff with asymptomatic HIV disease that he was regarded as having disability under third prong of definition); Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 37 (1997) (discussing whether HIV as disability covered under ADA depends on underlying assumptions about nature of infection, meaning of disability and changing public perceptions of HIV).

56. *See, e.g.*, Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 538 (7th Cir. 1995) (discussing how employee may be limited by employer's perceptions rather than by impairment itself); Hodgdon v. Mt. Mansfield Co., 624 A.2d 1122 (Vt. Sup. Ct. 1992) (involving employer who treated employee who lacked upper teeth as being substantially limited in ability to work).

57. *See Johnson*, 923 F. Supp. at 1568-69 (finding that plaintiff failed to produce evidence that employer "regarded" her as disabled, and that she failed to show any connection between employer's alleged perception of disability and adverse employment action).

58. *See* Appendix A (containing summary of analysis).

attitudes about people with obvious, hidden, or perceived disabilities do not by themselves constitute discrimination, unless they form the basis for subsequent discriminatory behavior toward qualified individuals. Proof of the link between negative attitudes and discriminatory behavior, that is, "discriminatory animus" toward a qualified individual, is one element of a prima facie case under Title I.[59]

The concept of a "qualified individual" with a disability is central to the analysis of the link between attitudes and discriminatory behavior.[60] In establishing employment qualifications, the applicant's or employee's skills are to be considered independent of preconceived attitudes about the relation of disability to current job qualifications. An individual with a disability is qualified for purposes of Title I if he or she satisfies the prerequisites for the job, such as educational background or employment experience, and can perform essential job functions.[61]

Study is lacking on the relationship between employer attitudes and behavior toward disability, and biases inherent in the purported qualifications required to perform jobs (i.e., in the essential skills listed in job descriptions).[62] In the absence of such research, employment decisions for many persons with perceived disabilities are based on misconceptions about an individual's future abilities and not on the individual's present qualifications.[63]

This line of research is warranted in light of the growing number of Title I cases alleging a hostile work environment or disability harassment.[64] Courts that have addressed the issue have

59. *See Johnson*, 923 F. Supp. at 1569 (comparing Title I's causation element to Title VII's causation element, which requires proof of discriminatory intent that led employer to make employment decision).

60. Blanck, *supra* note 6, at 864-65 (noting that this phrase has been interpreted since its use in the Rehabilitation Act, but little empirical study of the concept of "qualification" has been conducted, particularly as it applies to persons with different disabilities).

61. 29 C.F.R. § 1630.2(m), (n) (1997). *See, e.g.*, Hegwer v. Board of Civil Serv. Comm'rs, 7 Cal. Rptr. 2d 389, 397 (Ct. App. 1992) (finding that paramedic whose thyroid condition caused excessive weight gain was not qualified employee because she exceeded body-fat-based weight standards for firefighters and emergency medical technicians that were reasonable means of insuring health and safety of employees and public).

62. *See generally* Peter D. Blanck, *The Americans with Disabilities Act: Issues for Back and Spine-Related Disability*, 19 SPINE 103, 103 (1994) (discussing prevalence of back injury in workplace and implications for Title I analysis).

63. For a discussion regarding the need for information on the usefulness of employment tests for determining "qualifications" and other decisions about an individual's abilities and potential, see *infra* notes 241-52 and accompanying text.

64. *See* Jerome L. Holzbauer & Norman L. Berven, *Disability Harassment: A New Term for a Long-Standing Problem*, J. COUNS. & DEV., May 1996, at 478-83 (reviewing

found that a "hostile environment theory" is actionable under Title I.[65] In determining whether an employer creates a hostile work environment, courts have considered behavioral factors worthy of study, such as the nature and severity of the alleged conduct and whether it interfered with the work performance of a qualified employee.[66] Under a hostile environment or disability harassment theory, Title I would be violated if the employer's behavior discriminates against a qualified employee because of a disability.[67]

An employer may criticize an employee's work performance as long as it is job-related and not a "subterfuge" or pretext for discrimination (e.g., as illustrated by the cases in the top left cell in Appendix A).[68] The employer's right to assess job performance, however, may not violate Title I's requirement that it provide "reasonable accommodations" for a qualified employee with a disability.[69] An accommodation is a modification to the workplace process or environment that makes it possible for a qualified person with a disability to perform essential job functions.[70] Accom-

behavioral definitions of disability harassment and rise in number of Title I harassment charges before EEOC); Brian T. McMahon et al., *An Empirical Analysis: Employment and Disability from an ADA Litigation Perspective*, 10 NARPPS J. 3, 3-14 (1995) (reviewing EEOC charges involving harassment); Ravitch, *supra* note 7, at 1475 (analyzing cause of action for disability harassment and hostile environment).

65. *See* Bryant v. Compass Bank, No. CN-95-N-2458-S, 1996 WL 529214, at *5-7 (N.D. Ala. May 31, 1996) (reviewing cases of hostile environment theory under Title I).

66. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that conduct must be severe enough that reasonable person would find it hostile); *see also* Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1017 (7th Cir. 1996) (recognizing that claims of discriminatory constructive discharge are cognizable under ADA Title I); Gray v. Ameritech, Corp., 937 F. Supp. 762, 771-73 (N.D. Ill. 1996) (same).

67. *See* 42 U.S.C. § 12112(a); *Bryant*, 1996 WL 529214, at *5 ("To establish a prima facie case under the ADA, the plaintiff must prove she has a disability, is a qualified individual, and was subjected to unlawful discrimination because of her disability.").

68. *See, e.g., Bryant*, 1996 WL 529214, at *5.

69. *See* 29 C.F.R. § 1630.2(o) (1997); Barbara Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 230, 230-35 (1993) (discussing how employers, upon showing of undue hardship, may take action against misconduct of employee's with disabilities).

70. *Compare* Overton v. Reilly, 977 F.2d 1190, 1194-95 (7th Cir. 1992) (approving accommodation for chemist with depression by restricting job to decrease contact with public when contact with public occupied five percent of employee's time), Arneson v. Sullivan, 946 F.2d 90, 90-93 (8th Cir. 1991) (holding that employer must take reasonable efforts to provide "distraction-free environment" for employee with apraxia, a neurological disorder characterized by disruptions in concentration), *and* Kent v. Derwinski, 790 F. Supp. 1032, 1039-40 (E.D. Wash. 1991) (requiring two reasonable accommodations for employee with mental retardation: sensitivity training for coworkers and use of care by supervisor in disciplin-

modations are determined on an individual basis and include workplace design modifications or flexible scheduling of work tasks.

To be eligible for an accommodation, an employee must make his disability "known"[71] to the employer and request an accommodation.[72] This requirement places a burden on an individual with a hidden or non-obvious disability to timely disclose the claimed disability and allow the employer to provide an accommodation.[73] Once the request is made, the employer retains the right to choose an appropriate accommodation, as long as it is effective and the employee has a good faith opportunity to participate in the process.[74] An employee is not "qualified" if he cannot perform the job

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ing to avoid criticism or undue stress), *with* Hudson v. MCI Telecomm. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996) (holding that request by employee with carpal tunnel syndrome for unpaid leave for indefinite amount of time not reasonable), Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 442 (6th Cir. 1991) (holding that requiring employer to provide "stress-free environment" to accommodate employee who was unable to handle rejection or criticism would be unreasonable), *and* Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794, 803 (D. Colo. 1995) (finding that employee who rejected employer's proposals for reasonable accommodations was not qualified individual with disability). *See, e.g.*, 42 U.S.C. § 12111(9)(B) (1993) (qualified employee may request reasonable accommodation of being transferred to vacant and similar position with employer).

71. Exactly how a "known" disability is defined for purposes of Title I has been the subject of debate. *See, e.g.*, Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996) (noting that plaintiff cannot make out prima facie case of disability discrimination without proof that employer had actual or constructive knowledge of plaintiff's disability); Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379, 394 (N.D. Iowa 1995) (holding that employer cannot be liable without knowledge of employee's disability because "[the] 'ADA does not require clairvoyance'" (*quoting* Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 933 (7th Cir. 1995))). *See generally* ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 129-54 (1995) (examining scope of protection afforded by ADA).

72. *See, e.g.*, Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1286 (7th Cir. 1996) (finding that reasonable accommodation process requires good faith communication between employer and employee, and in case involving hidden mental disability communication process is even more critical).

73. *See* Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1569 (S.D. Ga. 1995) (holding that employee must request reasonable accommodation at time disability presents problem on job); *see also* 29 C.F.R. part 1630, app. § 1630.9 (1997) (holding that employee is responsible for informing employer of need for accommodation).

74. *See* Taylor v. Principal Fin. Group, 93 F.3d 155, 164 (5th Cir. 1996) (recognizing responsibility for fashioning reasonable accommodation shared between employer and employee); Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1135-37 (7th Cir. 1996) (holding university not liable under ADA where plaintiff responsible for breakdown in accommodation process); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496, 1501 (N.D. Iowa 1997) ("Neither party should be able to cause a breakdown in the [reasonable accommodation] process for the purpose of either avoiding or inflicting liability."); *cf.* Ann Nelson Marshall, *A Hope Not Yet Fulfilled: People with Psychiatric Disabilities and the ADA*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 41, 42 (1995) (noting that employer who demanded client be medica-

with or without a reasonable accommodation.[75]

Title I does not require an accommodation if it would impose an "undue hardship" on the employer.[76] An undue hardship is a situation in which an employer is required to bear significant difficulty or expense in relation to the accommodation or the resources of the company.[77] A common critique is that accommodations create undue hardships.[78] Studies indicate, however, that negative attitudes about the cost-effectiveness of accommodations by employers may have more to do with unfounded beliefs than with the actual qualifications of persons with disabilities or their ability to contribute to employers' economic bottom lines.[79]

Persons with apparent, hidden or perceived disabilities sometimes are alleged to be "unqualified" for a job when they are believed to pose a direct safety or health threat to themselves or others in the workplace.[80] Factors considered in determining

tion compliant assumed right of assessing mental health treatment and determining clinical appropriateness, which should be purview of employee and clinician). *See generally* Peter D. Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co., in* THE ANNENBERG WASHINGTON PROGRAM REPORTS (1994) [hereinafter *Sears I*]; Peter D. Blanck, *Communicating the Americans with Disabilities Act, Transcending Compliance: 1996 Follow-up Report on Sears, Roebuck and Co., in* THE ANNENBERG WASHINGTON PROGRAM REPORTS (1996) [hereinafter *Sears II*].

75. *See* 42 U.S.C. § 12112(a) (1994).

76. *See id.* § 12111(10).

77. Decisions about undue hardship are made on a case-by-case basis. *See id.*; *see also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138-40 (2d Cir. 1995) (discussing employer's burden of proving undue hardship through use of cost-benefit analysis); Gardner v. Morris, 752 F.2d 1271, 1281-84 (8th Cir. 1985) (stating that requiring employer to provide physician and laboratory facilities in remote location for monitoring appropriate medication level of employee with bipolar disorder constituted undue hardship); Hill v. Florida Dep't of Pub. Health and Rehab. Serv., No. 89-0027-CIV-T-22A, 1992 WL 183217, at *6-8 (M.D. Fla. May 15, 1992) (holding that employer did not have to eliminate public-contact function of position to accommodate employee with depressive disorder because accommodation would impose undue hardship by requiring coworker to perform employee's job).

78. *See, e.g.*, Christopher J. Willis, Comment, *Title I of the Americans with Disabilities Act: Disabling the Disabled*, 25 CUMB. L. REV. 715, 715-52 (1994-95) (recognizing that Title I forces employers into losing economic position).

79. *Cf.* Philip S. Lewis, *Attitudes and Behavior of Employers Toward Persons With Disabilities in a Post-ADA Labor Market* (1994) (Ph.D. dissertation, The Union Institute), 55/10-B DISSERTATION ABSTRACTS INT'L 4593 (finding minimal difference in attitudes of employers of different sizes or types of business, but substantial differences regarding provision of accommodations with larger firms more likely to provide accommodations); Lisa M. Ehrhart, *A National Study of Employer Attitudes Toward Persons With Disabilities* (1994) (Ph.D. dissertation, Virginia Commonwealth University), 55/07-A DISSERTATION ABSTRACTS INT'L 1802 (same).

80. *See* 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.2(r) (1997) (defining direct threat as "[a] significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accom-

whether a direct threat exists include the duration of the risk, nature of potential harm and likelihood that the harm will occur.[81] Cases in which a direct threat defense is used by an employer may implicate underlying and unfounded biases about hidden or perceived impairments such as genetic, psychiatric, addictive or contagious conditions.[82]

Employers are required to make an individualized and objective determination of direct threat, based on the employee's present ability to safely perform essential job functions.[83] This determination must be made on the basis of tests of current medical judgment.[84] Examination is needed of employers' attitudes of the perceived risk (e.g., "threat" to others) associated with employing persons with apparent and hidden disabilities.

Pre- and post-employment inquiries regarding medical history or disability likewise have been the subject of controversy in employment discrimination lawsuits involving persons with hidden

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modation" and stating that where mental or emotional disability is involved, employer must identify specific behavior on part of individual that would pose direct threat); *see also* 28 C.F.R § 36.208 (1997) (stating that Title I may require accommodations that eliminate or sufficiently reduce direct threat).

81. *See* 29 C.F.R. § 1630.2(r); *see also* Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities, in* MENTAL DISORDER WORK, DISABILITY, AND THE LAW 225-26 (Richard J. Bonnie & John Monahan eds., 1997) (noting that direct threat standard balances rights of persons with disabilities against need of society to prevent harm).

82. *See* Doe v. University of Md. Med. Sys. Corp., 50 F.3d 1261, 1266 (4th Cir. 1995) (holding hospital did not violate ADA when it suspended HIV-positive surgical resident because of threat to patients); Judice v. Hospital Serv. Dist. No. 1, 919 F. Supp. 978 (E.D. La. 1996) (holding hospital did not violate ADA by requesting recovering alcoholic surgeon to undergo second medical evaluation before reinstatement of staff privileges); Scoles v. Mercy Health Corp., 887 F. Supp. 765, 770 (E.D. Pa. 1994) (finding that hospital did not violate ADA by suspending clinical privileges of HIV-positive surgeon because of safety threat to patients); *see also* Peter D. Blanck, *Students with Hearing Disabilities, Reasonable Accomodations, and the Rights of Colleges and Universities to Establish and Enforce Academic Standards:* Guckenberger v. Boston Univ., 21 MENTAL & PHYSICAL DISABILITY L. REP. 680, 687 (1997); James J. McDonald, Jr. et al., *Mental Disabilities Under the ADA: A Management Rights Approach,* EMPLOYER REL. L.J., Spring 1995, at 541-69, 557-58 (reviewing cases involving direct threat defense); Phillip L. McIntosh, *When the Surgeon Has HIV: What to Tell Patients About the Risk of Exposure and the Risk of Transmission,* 44 U. KAN. L. REV. 315, 315-64 (1996) (examining legal aspects of issues raised by HIV infection of health care workers); Pope L. Moseley et al., *Hospital Privileges and the Americans With Disabilities Act,* 21 SPINE 2288, 2290-93 (1996) (reviewing cases involving direct threat defense); Mary E. Sharp, *The Hidden Disability That Finds Protection Under the Americans With Disabilities Act: Employing the Mentally Impaired,* 12 GA. ST. U.L. REV. 889, 921-26 (1996) (same).

83. *See* 29 C.F.R. § 1630.2(r).

84. *See id.*

and perceived disabilities.[85] Title I prohibits disability-related pre-employment inquiries and medical tests. Examinations are permitted after a conditional job offer has been made.[86] Medically-related employment tests, if used by an employer, must be administered to all employees regardless of disability, and with limited exceptions, the information obtained must be treated as confidential.[87]

Medical test results obtained during employment or after a conditional offer of employment is made may not be used to exclude a qualified individual from a job unless the exclusion is job-related, consistent with business necessity and not amenable to reasonable accommodation.[88] If an employee meets the threshold showing of discrimination by alleging that an employer unfairly used a medical test to screen out individuals with disabilities (e.g., individuals with genetic or psychiatric illness), the employer may rebut the claim by proving that the test accurately measures job skills that are consistent with business necessity, such as workplace health, safety, productivity or security requirements.[89]

A related issue involves Title V of the ADA,[90] which allows insurance companies to administer medical tests[91] that are consistent with state law practice[92] and based on sound actuarial data.[93] Although the results of medical tests conducted as part of a post-

85. *See, e.g.*, Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 674-75 (1st Cir. 1995) (finding employer did not violate ADA when it inquired into ability of job applicant, former employee with known psychological disability, to function effectively in workplace and get along with co-workers and supervisor, or where employer required that applicant provide medical information as to ability to return to work with or without accommodation and as to type of accommodation necessary).

86. 42 U.S.C. § 12112(d)(3) (1994); *see* EEOC Compl. Man., *supra* note 32, ¶ 6903; *see also* Susan Alexander, *Preemployment Inquiries and Examination: What Employers Need to Know About the New EEOC Guidelines*, 45 LAB. L.J. 667, 667-78 (1994) (summarizing EEOC guidelines); Robert B. Fitzpatrick, *Employer's Screening Procedures Under the Americans with Disabilities Act: What's Legal? What's Debatable?*, A.L.I.-A.B.A., March 2, 1995, at 285 (surveying ADA in practical context); David M. Katz, *Disability Queries Okay After Offering Job*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFIT MGMT., June 17, 1996, at 31 (discussing window of opportunity for employers to ask about job applicants' disabilities after offers are made).

87. *See* 42 U.S.C. § 12112(d)(3)(A), (B).

88. *See id.* § 12112(c)(4)(A); 29 C.F.R. § 1630.14(b)(3) (1997).

89. *See* 42 U.S.C. § 12113(a); *see also* Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 113-15 (1994) (discussing methods to satisfy job-relatedness requirement that scored test validly relates to job at issue).

90. 42 U.S.C. § 12201.

91. *See id.* § 12201(c)(1); EEOC Compl. Man., *supra* note 32, ¶ 6903 (defining medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health").

92. *See* 42 U.S.C. § 12201(c)(1).

93. 29 C.F.R. § 1630.16(f) (1997).

offer examination may not be used to withdraw an offer of employment to a qualified applicant, third-party insurers or employers self-funding their insurance plans may classify employees with regard to health insurance coverage on the basis of their medical histories.[94] Limitations on health insurance coverage or exclusions of hidden disabilities, such as genetic or psychological conditions, are permitted under the ADA as long as they are not a pretext for disability-based discrimination.[95]

Another issue involves the use by employers of personality-oriented employment tests to screen for hidden impairments or disabilities related to mental functioning. Not all personality-oriented employment tests constitute medical tests for purposes of Title I.[96] Employers may assess a broad set of personality characteristics during pre- and post-employment screening as long as the purpose is to predict necessary, job-related functions, rather than to screen out qualified individuals with disabilities.[97] The determination of

94. Although the ADA's legislative history generally addresses health insurance issues, it does not address the extent to which Title I may affect employees' life and disability insurance coverage. *See* S. REP. NO. 101-116, at 29 (1989); Marvin R. Natowicz et al., *Genetic Discrimination and the Law*, 50 AM. J. HUM. GENETICS 465, 471 (1992) (discussing effect of new technologies on insurance coverage); *see also* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (including provisions prohibiting denial of insurance coverage based on mental or physical disability); *Can Benefits for Mental Illness Be Limited to Two Years Under the ADA?*, LAW. WKLY. USA, June 3, 1996, at 512 (discussing EEOC position on mental illness benefits as extending beyond health insurance plan to disability plan).

95. *See* 42 U.S.C. § 12112(a). A self-funded employer may offer a health insurance policy to employees. An employer may offer a policy that does not cover experimental treatment for Huntington's disease, but may not withdraw dependent coverage for an employee whose child develops cystic fibrosis or bipolar mental illness solely on the basis of that disability. In cases where companies self-fund, in effect acting as an insurer, attitudinal biases and economic considerations provide incentives to use genetic or psychological testing to avoid future insurance costs and compensation claims. *Cf.* Parker v. Metropolitan Life Ins. Co., No. 95-5269, 1997 WL 431851, at *11 (6th Cir. 1997) (holding ADA does not prohibit disparate coverage in disability plan for physical and mental conditions).

96. *See* Thompson v. Borg-Warner Protective Servs. Corp., No. C-94-4015 MHP, 1996 WL 162990, at *7 (N.D. Cal. Mar. 11, 1996) (emphasizing that "[t]he ADA protects disabilities, not any characteristic which an employer may consider to be a personal flaw or undesirable aspect of an applicant's personality"); EEOC Compl. Man., *supra* note 32, ¶ 6903 (noting that psychological tests used to determine individual honesty, taste and habits are considered nonmedical examinations and that tests used to provide evidence that applicant has any mental disorder, impairment or specific condition such as anxiety, depression or compulsive disorder are considered medical in nature).

97. *See* Black, *supra* note 89, at 90-121 (discussing legal issues raised by pre-employment personality screening); Wayne F. Cascio, *The Americans with Disabilities Act of 1990 and the 1991 Civil Rights Act: Requirements for Psychological Practice in the Workplace, in* PSYCHOLOGY IN LITIGATION AND LEGISLATION 179, 199-200 (Bruce D. Sales & Gary R. VandenBos eds., 1994) (same); Richard Klimoski & Susan N.

whether a test is medical in nature is made on a case-by-case basis.[98] Psychological examinations are considered medical tests to the extent they provide evidence that an applicant has a mental impairment as defined, for instance, by the *American Psychiatric Association's Diagnostic Manual*.[99]

Employment decisions based on attitudes about the usefulness and predictability of medical tests sometimes deny employment to currently qualified individuals solely on the basis of their perceived status.[100] A related area involves circumstances in which an employer may refuse to hire a qualified asymptomatic applicant if occupational exposure to certain conditions is likely to, or perceived to, increase the employee's known susceptibility to disease (as determined by medical tests), even with the provision of accommodations.[101] Analysis is required of the relation of attitudes about Title

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Palmer, *The ADA and the Hiring Process in Organizations, in* IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT FOR PSYCHOLOGY 73-74 (Suzanne M. Bruyere & Janet O'Keefe eds., 1994) (same); McDonald et al., *supra* note 82, at 554-56 (same).

98. The EEOC identifies the following as factors in determining whether a test is medical: It is (a) administered or interpreted by a health care professional; (b) designed to reveal an impairment in physical or mental health; (c) determining the applicant's physical or mental health; (d) invasive (e.g., requires drawing of blood, urine or breath); (e) measuring an applicant's performance of a task or the applicant's physiological responses to performing the task; (f) normally given in a medical setting; and (g) using medical equipment. *See* EEOC Compl. Man., *supra* note 32, ¶ 6903; *see also Thompson*, 1996 WL 162990, at *3-7 (holding that plaintiff, job applicant for security-guard position, failed to show that "behavioral problems" and "emotional stability" revealed by personality test were covered disabilities or characteristics that could lead to identifying whether applicant had impairment recognized by Title I); Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 86-88 (Ct. App. 1991) (holding that portions of employer's personality test that inquired into areas of sexual and religious nature violated state antidiscrimination laws and state constitutional right to privacy of job applicants for security-guard positions because questions were overly intrusive and did not relate to job).

99. *See* DSM-IV, *supra* note 34, at 25 (listing recognized mental disorders).

100. *See* Paul R. Billings et al., *Discrimination as a Consequence of Genetic Testing*, 50 AM. J. HUM. GENETICS 476, 477 (1992) (noting that social and personal consequences associated with genetic testing are incompletely understood, particularly in light of potential for genetic discrimination); *see also* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, MEDICAL MONITORING AND SCREENING IN THE WORKPLACE 3 (1991) (stating that 42% of large corporate respondents considered job applicants' health insurance risk factors in determining employability and 36% engaged in health insurance risk assessments of job applicants); Velida Starcevich, *Workplace: Designer Genes Only, Please*, OBSERVER, June 2, 1996, at 8 (discussing EEOC estimate that five percent of large companies test their employees' genes).

101. *See* Muller v. Costello, 1996 WL 191977, at *8 (N.D.N.Y. April 16, 1996) (ruling that corrections officer with asthma triggered by exposure to secondhand smoke on job may proceed with claims alleging ADA violations); *cf.* Peter D. Blanck & Corrine R. Butkowski, *Pregnancy-Related Impairments and the Americans with Disability Act*, OBSTETRICS & GYNECOLOGY CLINICS N. AM. (forthcoming 1998) (discussing cases that allow pregnant women to work in higher paying jobs that re-

I implementation to an employer's occupational safety and health policies. Likewise, research may examine the relationship between tort law responsibilities and Title I implementation, such as the way attitudes concerning potential tort liability,[102] claims of employer negligent hiring or negligent retention influence employers' behavior toward the provision of accommodations.[103]

Another area worthy of study is the relation of employers' organizational cultures to employment and work benefit decisions involving qualified job applicants with hidden and perceived disabilities.[104] Untested "corporate" attitudes about job applicants with certain conditions include fears of increased absenteeism, decreased productivity and higher health care costs.[105] Similar views have resulted in inequities in the provision of health insurance, so that qualified individuals with hidden disabilities are denied adequate coverage.[106] Without careful study, inequities in health insur-

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quire exposure to toxic chemicals); Frank S. Ravitch, *Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees*, 36 B.C. L. REV. 257, 265-66 (1995) (claiming hypersensitivity must be associated with recognized disability to be actionable under Title I).

102. A case implicating issues of occupational injury, tort liability and disability brought under section 504 of the Rehabilitation Act involved Northwestern University's decision to prohibit a student with a disability from participating in the university's varsity basketball program. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 476 (7th Cir. 1995). The district court concluded that the student qualified to play varsity basketball and that, based on medical testimony, there was no genuine and present risk that he could be injured or injure others. *See id.* at 477. Thus, the school was obligated to provide the student with a reasonable accommodation when he was playing basketball. *See id.* The court did not state an opinion on whether Northwestern could require the student (analogously, the Title I-protected employee) to sign a waiver of liability when competing. *See id.* The Seventh Circuit reversed the lower court decision, concluding that the university's medical determination of whether an individual is medically qualified must be given deference by the court. *See id.* at 486; *see also* United States Department of Labor, Occupational Safety and Health Administration (OSHA), Rep. No. 3148-1996, *Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers* (visited Sept. 13, 1997) <http://www.osha.gov./oshpubs/workplace> (stating management commitment should include organizational concern for employee emotional and physical safety and health).

103. *See generally* Michael Saks, *Do We Know Anything About the Behavior of the Tort Litigation System and Why Not?*, 140 U. PA. L. REV. 1147, 1150 (1992) (reviewing empirical studies of tort litigation system).

104. *See Sears II*, *supra* note 74, at 42 (discussing employer attitudes).

105. *Cf.* Peter D. Blanck, *The Emerging Work Force: Empirical Study of the Americans with Disabilities Act*, 16 J. CORP. L. 693, 784 (1991) (describing empirical investigation of ADA employment provisions).

106. *See* T. H. Cushing, *Should There Be Genetic Testing in Insurance Risk Classification?*, 60 DEF. COUNS. J. 249, 251 (1993) (discussing genetic testing and its effect on insurance coverage). *See generally* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (including, among other provisions, prohibition of discrimination against individuals with predisposi-

ance coverage for employees with hidden conditions may be magnified. Overly broad use of medical testing by employers and insurers may result in qualified individuals being unable to obtain adequate insurance and thereby unable to attain and retain employment.

A comprehensive examination of attitudes and discriminatory behavior toward disability is required to formulate educational programs for ADA stakeholders.[107] Studies show the central role of education in recognizing and eliminating employment discrimination facing qualified people with disabilities.[108]

Yet, in one study, less than fifty percent of the general population with disabilities reported being aware of the ADA, four years after the law's enactment.[109] In another study, only one-third of individuals who reported experiencing genetic discrimination knew of the existence of state commissions designated to combat discrimination.[110] Additional study is needed to assist in the assessment and prevention of unjustified attitudes and discriminatory behavior

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tion to genetic illness); *Hearing of the Senate Labor and Human Resources Committee, Subject: Genetics*, FED. NEWS SERV., July 25, 1996, at 13 (discussing limitations of application of ADA to genetic discrimination).

107. *See* Bob Dole, *Are We Keeping America's Promises to People with Disabilities—Commentary on Blanck*, 79 IOWA L. REV. 925, 927-28 (1994) (suggesting society has obligation to know how ADA is working and whether people covered are aware of rights); Laura L. Mancuso, *ADA Fact or Fiction?*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 6, 6-9 (1995) (discussing role of education in changing one journalist's views on ADA).

108. *See* MARTHA J. MCGAUGHEY ET AL., IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT: PERCEPTIONS AND EXPERIENCES OF INDIVIDUALS WITH DISABILITIES 14 (1996) (reporting that 98% of highly educated sample of persons with disabilities, but only 58% of less-educated sample, were aware of ADA). Two-thirds of the studies' highly educated sample reported that they knew how to file an ADA-related discrimination complaint, compared with only eight percent of the less educated sample. *See id.* at 18. *See generally* United Cerebral Palsy Associations, *1996 ADA "Snapshot of America" Shows Change in Lives of Americans with Disabilities* (July 26, 1996) (reporting study showing that 96% of individuals with disabilities, their friends and family members surveyed said ADA made difference in their lives and 46% perceived more acceptance by their communities).

109. *See* Blanck, *supra* note 6, at 873 (discussing findings of the 1994 Harris Survey, NATIONAL ORGANIZATION ON DISABILITY AND HARRIS, LOUIS & ASSOCIATES, 1994 SURVEY OF AMERICANS WITH DISABILITIES (Harris, Louis & Assocs., Inc., ed., 1994)).

110. *See* Lisa N. Geller et al., *Individual, Family, and Societal Dimensions of Genetic Discrimination: A Case Study Analysis*, 2 SCI. & ENGINEERING 71, 80 (1996) (surveying over 900 individuals regarding genetic discrimination). This lack of awareness among individuals is one reason why studies of state insurance commissions find the commissions to be unaware of genetic discrimination faced by many qualified individuals. *See* Jean E. McEwen et al., *A Survey of State Insurance Commissioners Concerning Genetic Testing and Life Insurance*, 51 AM. J. HUM. GENETICS 785, 790 (1992) (finding only 2 of every 42 insurance commissioners reported receiving formal complaints about genetic discrimination).

to lessen the negative economic and societal costs of these practices.[111]

C. *Shaping of Attitudes and Enforcement of Behavior*

As the agency designated to enforce Title I, the EEOC has emphasized the collection and dissemination of information, educational outreach to address prejudice toward qualified people with disabilities, and policy guidance to prevent discrimination. The EEOC also has supported the study of informal dispute resolution processes, promoting alternative resolution techniques to litigation.

The EEOC has received over 80,000 charges of discrimination under Title I in the five years since the law has been in effect.[112] Of the charges received to date, the majority involve hidden disabilities, such as emotional and psychiatric impairments (approximately thirteen percent of all charges), back impairments (nineteen percent of charges), neurological impairments (eleven percent of charges), heart impairments (four percent of charges), diabetes (four percent of charges) and cancer (two percent of charges).[113]

Litigation before the EEOC covers a range of issues. Cases have been brought involving hiring and promotion, reasonable accommodation, medical testing and confidentiality, forced medical leave, health insurance coverage, hostile work environment, disability harassment and termination. Roughly ten percent of EEOC charges involve hiring issues, while fifty percent involve discharge, twenty-eight percent involve failure to provide accommodations, and twelve percent involve disability-related harassment.[114]

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111. Research must be devoted to attitudes involving vulnerable populations, such as children, patients, persons with other disabilities, persons in poverty and those disenfranchised from society with little voice in research or regulation. *See* Peter D. Blanck & Mollie Weighner Marti, *Genetic Discrimination and the Employment Provisions of the Americans with Disabilities Act: Emerging Legal, Empirical, and Policy Implications*, 14 BEHAV. SCI. & L. 411, 432 (1997) (discussing legal and ethical dilemmas related to genetic testing involving vulnerable populations); Susan M. Vazakas, Ph.D. Dissertation, *Genetic Discrimination and the Americans with Disabilities Act* (Ph.D. dissertation, Boston University), *in* 54/02-A DISSERTATION ABSTRACTS INT'L 662 (1993) (suggesting risk for "biological underclass" susceptible to genetic discrimination). *See generally* PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, DISABILITY AND DIVERSITY: NEW LEADERSHIP FOR A NEW ERA 17 (1995) (discussing implications of disability for minority populations).

112. *See EEOC Struggles with Caseload*, 45 LAB. L.J. 432, 432 (1994) (reporting number and type of charges filed under Title I).

113. *See Employment Rate of People with Disabilities Increases Since Enactment of ADA*, NEWSL. OF GREAT LAKES DISABILITY & BUS. TECHNICAL ASSISTANCE CENTER REGION V NEWS, (Institute on Disability and Human Develoment, Chicago, Ill.), Summer 1996, at 4.

114. *See id.*

Hiring cases are an important topic for future study given the substantial percentage of qualified people with actual and perceived disabilities who are not working and are seeking jobs, as well as the relation of hiring practices to pre-employment medical testing practices.[115] Analysis of harassment and hostile work environment hiring cases also may illuminate underlying biased attitudes toward disability.[116] Cases involving the failure to provide accommodations similarly may reflect individual or corporate attitudes toward employment of persons with disabilities and in some instances, contribute to a hostile work environment or disability harassment.[117]

EEOC educational efforts have been directed toward a learning process for employers and employees with hidden disabilities concerning their respective rights and obligations under Title I.[118] In its regulatory guidance, for instance, the EEOC has extended protection to qualified individuals who experience employment dis-

115. *See Sears II, supra* note 74, at 14 (discussing Title I hiring case involving charging party who used wheelchair and who filed seven applications with retail store during period when store filled 108 positions, contending store discriminated in failing to hire applicant and failing to provide him with reasonable accommodations); *see also* DISABILITY WATCH, *supra* note 19, at 16 (noting that 58% of Americans with disabilities are of working age). By some estimates, three quarters of working-age Americans with disabilities do not have jobs. *See id.* at 19 (citing data from 1995 population survey showing that 72.2% of Americans with disabilities of working age do not have jobs). *See generally* Peter D. Blanck, *The Emerging Role of the Staffing Industry in Employing People with Disabilities: Empirical Study of Manpower, Inc., in* THE LAW, HEALTH POLICY AND DISABILITY CENTER PROGRAM REPORTS (1997) (studying demographics and workplace accommodations in staffing industry).

116. *See* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace?: Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 339, 399 (1996) (reviewing impact of hostile work environment cases); Jerome L. Holzbauer & Norman L. Berven, *supra* note 64, at 478-83 (suggesting systematic study of psychological consequences of disability harassment not available); Ravitch, *supra* note 7, at 1507 n.157 (stating study needed of employees' with disabilities perceptions of harassing conduct); *cf.* England, *supra* note 14, at 59-60 (stating that Becker's taste model suggests link between discrimination in hiring and wages).

117. *See* Ravitch, *supra* note 7, at 1510 (providing example of qualified employee with covered psychiatric disability who requires accommodation of extra sensitivity from employer to perform essential job functions, but employer ridicules condition and unfairly disciplines employee without providing appropriate supervision); *see also* James v. Frank, 772 F. Supp. 984, 997 (S.D. Ohio 1991) (finding that ineffectual accommodation process can contribute to hostile work environment for person with disability).

118. To assist in this process, the EEOC has published training materials (e.g., question and answer pamphlets and fact sheets about rights of individuals with disabilities and responsibilities of employers), responded to public inquiries and sponsored educational programs and public presentations. *See Sears II, supra* note 74, at 12-15 (noting that EEOC has distributed materials, addressed public inquiries and sponsored educational programs and presentations).

crimination on the basis of actual or perceived genetic conditions.[119]

EEOC guidelines present a hypothetical scenario involving a qualified job applicant whose asymptomatic genetic profile reveals an increased susceptibility to colon cancer, but shows no actual link to the development of the disease.[120] After making a conditional employment offer, the employer learns from medical testing about the applicant's increased susceptibility.[121] The employer withdraws the job offer because of unfounded fears about the applicant's future productivity, health insurance costs and absences from work.[122]

The hypothetical applicant would be covered as an individual who is regarded as having a disability and denied employment on that basis.[123] The link among negative attitudes, discriminatory animus and subsequent employment-related behavior unrelated to individual qualifications illustrates the violation of Title I. Study of the causal relations involving attitudes and behavior is a first step toward the prevention of discrimination.

Other EEOC guidelines addressing hidden and perceived disabilities are worthy of study, such as issues related to privacy and use of medical test results.[124] Employers increasingly are requiring employees to take urine and blood tests to screen for use of alcohol or controlled substances.[125] Employers who obtain genetic information from medical tests may not use that information to restrict the employment opportunities of qualified applicants and employees with covered disabilities.[126] Study is needed of the effect of federal and state laws governing the confidentiality of genetic information

119. *See* EEOC Compl. Man., *supra* note 32, ¶ 6903.

120. *Id.*

121. *Id.*

122. *Id.*

123. For discussion of future study on the prevalence of such behavior and attitudes by employers, see *infra* notes 253-84 and accompanying text.

124. *See* Jane Bowling, *Workplaces Fraught with Potential for Invasions of Privacy*, DAILY REC., June 17, 1996, at 17 (suggesting that employers increasingly face invasion of privacy suits if they reveal medical information about employees with disabilities).

125. *See* McDonald et al., *supra* note 82, at 556 (discussing rights of employers to screen work force); Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, TENN. B.J., Mar.-Apr., 1996, at 20, 20-21 (1996) (explaining types of drug testing and consequences for employer).

126. *See* Maxwell J. Mehlman et al., *The Need for Anonymous Genetic Counseling and Testing*, 58 AM. J. HUM. GENETICS 393, 393-97 (1996) (recommending anonymous genetic counseling and testing as practical response to increasing genetic discrimination); Mark A. Rothstein, *The Use of Genetic Information for Non-Medical Purposes*, 9 J. L. & HEALTH 109, 111-13 (1994) (stating that medical information

derived from workplace medical testing.[127]

Attitudes and behavior regarding hidden or perceived disabilities associated with psychiatric illness raise additional issues relating to individual privacy and confidentiality.[128] An employee's decision to disclose to an employer a hidden psychiatric disability is complex.[129] An employer may seek to defend disclosure (e.g., to coworkers) of an employee's hidden psychiatric disability on the basis of Title I's direct threat defense or independent tort liability concerns.[130] Study is needed of the process of disclosure as well as attitudes of employers toward the provision of workplace accommodations for applicants or employees with hidden disclosed disabilities.

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may be obtained through releases by employees, health insurance claims or voluntary medical examinations and wellness programs).

127. No federal laws prohibit genetic discrimination in employment-related settings, however, four bills are currently pending in Congress. *See* H.R. 3160, 104th Cong. (1996); S. 1694, 104th Cong. (1996); S. 1600, 104th Cong. (1996); S. 1028, 104th Cong.(1995) (same as H.R. 3160); H.R. 2748, 104th Cong. (1995). Twelve states have enacted protections for persons against being denied health insurance based on genetic status. *See* ARIZ. REV. STAT. ANN. § 20-448 (1996); CAL. INS. CODE § 10123.3 (West 1996); COLO. REV. STAT. ANN. § 10-3-1104.7 (West 1995); FLA. STAT. ANN. § 760.40 (West 1996); GA. CODE ANN. § 33-54-1 (1995); MD. CODE ANN., INS. § 223 (1994); MINN. STAT. § 72A.139 (1996); MONT. CODE ANN. § 33-18-206 (1994); N.H. REV. STAT. ANN. § 141-H:3 (1995); OHIO REV. CODE ANN. §§ 3901.49, 3901.50 (Anderson 1996); OR. REV. STAT. §§ 659.705, 746.135 (1995); WIS. STAT. ANN. § 631.89 (West 1993). Twenty state legislatures have proposed bills to prohibit genetic discrimination. State laws do not protect those who obtain their health insurance coverage through employer-based plans, because the Employee Retirement Income Security Act of 1974 exempts self-funded plans from state oversight. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994) and in scattered sections of 26 U.S.C.).

128. Recently, the EEOC issued regulatory guidance regarding ADA Title I implementation and psychiatric disabilities. *See* EEOC, EEOC GUIDANCE ON THE ADA AND PSYCHIATRIC DISABILITIES, AMERICANS WITH DISABILITIES ACT MANUAL (BNA) 70:1281-93 (1997) (discussing issues related to definition of disability, major life activities, direct threat and reasonable accommodations); *see also* Catherine C. Cobb, *Challenging a State Bar's Mental Health Inquiries Under the ADA*, 32 HOUS. L. REV. 1383, 1384-1409 (1996) (stating that identification of applicants who lack requisite fitness to practice law would best be achieved by focusing on problematic behavior in certain areas of applicant's life, rather than inquiring about past and present mental illness, which discriminates against applicants, invades their right to privacy and deters them from seeking treatment). *See generally* Laura F. Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 947-948 (1997) (reviewing case law involving accommodation of individuals with mental disability under ADA Title I).

129. For a discussion of the complex decision of whether to disclose a hidden disability, see *infra* notes 221-26 and accompanying text.

130. For a discussion of Title I's "direct threat" language, see *infra* notes 228-41 and accompanying text.

A deeper level of analysis also is needed to aid employers in understanding the meaning and responsibility ascribed to symptoms associated with hidden disabilities. In some circumstances, a qualified employee with a "known" (i.e., disclosed) but nonvisible condition (e.g., Tourette's Syndrome, epilepsy or bipolar disorder) may be accommodated and able to perform essential job functions even when displaying what might be considered inappropriate workplace actions, either based in language (e.g., uncontrolled yelling at a coworker) or behavior (e.g., hypermanic actions).[131] Yet, an individual working at the same job displaying the identical behaviors but who does not have a known disability recognized under Title I might be terminated appropriately.

An employer may violate Title I in circumstances in which a qualified employee, who is not a "threat," is discharged for conduct that is the direct manifestation of a known hidden disability.[132] Thus, if the conduct of a qualified individual with a hidden disability is a function of treatment for disability (e.g., side effect of sleepiness from medication prescribed for bipolar disorder), then accommodation may be required by the employer.[133] In these fact specific situations, the burden is on the employer to demonstrate either that the full extent of the disability was not known,[134] the employee was not "qualified,"[135] or any possible accommodations

131. *Compare* Deane v. Pocono Med. Ctr., No. 96-7174, 1997 WL 500144, at *12 (3d Cir. Aug. 25, 1997) (concluding that individual who is "regarded as" disabled but is not in fact disabled is not entitled to workplace accommodation), *with id.* at *18 (Becker, J., dissenting) (discussing hypothetical plaintiff with Tourette's syndrome who is both "regarded as" having disability and has statutorily defined disability as potentially entitled to reasonable accommodation).

Ken Kress also provided helpful input on this point. *See Americans with Disabilities Act - Implications for Employers*, BROWN U. LONG-TERM CARE QUALITY LETTER (Brown U., Providence, R.I.), May 29, 1995, at 1 (providing hypothetical case of qualified nurse disclosing she is diagnosed as having dissociative identity disorder (i.e., multiple personality disorder) who acts appropriately at work but employer fearful that she may threaten another employee or patient).

132. *See, e.g.*, Hogarth v. Thornburgh, 833 F. Supp. 1077, 1084-85 (S.D.N.Y. 1993) (involving plaintiff with bipolar disorder and providing examples of relation of disability, resultant conduct and employment discrimination under Rehabilitation Act).

133. *Cf.* Murphy v. United Parcel Serv., 946 F. Supp. 872, 881 (D. Kan. 1996) (holding high blood pressure impairment that is controlled by medication is not covered disability). *See, e.g.*, Overton v. Reilly, 977 F.2d 1190, 1195-96 (7th Cir. 1992) (finding genuine issue of fact as to employee's "qualifications" where employee with mental illness alleged sleepiness as side effect of medication).

134. *See, e.g.*, Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931-32 (7th Cir. 1995) (noting some symptoms of disability are so obvious that it is reasonable to infer employer actually knew of employee's disability).

135. *Cf.* EEOC v. Amego, Inc., 110 F.3d 135, 142-44 (1st Cir. 1997) (holding where essential job functions implicate safety of others, plaintiff has burden of

would not enable the employee to perform essential job functions or would not be reasonable.[136]

Study of attitudes and behavior about known hidden disabilities may reveal the meanings ascribed by employers, coworkers or others to the behavior of qualified persons with disabilities. Awareness of these underlying meanings may facilitate equal employment opportunity or accommodation where appropriate and minimize discriminatory behavior on the basis of disability status alone.[137]

The next Part examines research on other sources of underlying attitudinal biases concerning hidden and perceived disability in the employment setting.[138] For instance, some studies find that employers and coworkers tend to view individuals with hidden disabilities differently than those with visible disabilities or those without disabilities.[139] Other studies show that employers and coworkers tend to have negative attitudes toward the provision of accommodations for employees with psychiatric disabilities, often perceiving accommodations for these persons as involving "special" privileges.[140]

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showing that he can perform those functions safely to be considered qualified individual for purposes of Title I analysis and noting that there may be cases in which issue of direct threat is not related to performance of essential job functions and that, in such cases, employer has burden of proving the affirmative defense that employee is direct threat to others in workplace); Peter D. Blanck, *One-Eyed Truck Drivers, Suicidal Therapists and HIV-Positive Surgeons: Direct Threat in the Workplace and the ADA*, Presentation at the 1997 Oberman Research Conference on Employment Policy and ADA Title I (June 10, 1997) (examining burden of proof in direct-threat cases). *See, e.g., Hogarth*, 833 F. Supp. at 1084-85 (noting that goal of eliminating discrimination is not advanced if "employer is permitted to raise a 'pure heart, empty head' defense, claiming that he was unaware of the relation between handicap and its manifestations and therefore should be required to demonstrate why the conduct precludes the employee from being 'otherwise qualified'").

136. *Compare* Gilday v. Mecosta County, No. 96-1571, 1997 WL 532880, at *5 (6th Cir. Sept. 2, 1997) (holding that Title I requires individualized inquiry into whether mitigating measures should be taken into account when determining whether disability exists), *with id.* at *7 (Kennedy, J., concurring in part and dissenting in part) ("[W]here an impairment is fully controlled by mitigating measures and such measures do not themselves substantially limit an individual's major life activities, I believe the ADA provides no protection.").

137. An underlying goal of accommodation strategies in these circumstances may be to help change biased attitudes and behavior by employers and coworkers (e.g., consciousness-raising and educational programs). *See Sears II, supra* note 74, at 10-11 (suggesting cost-effective training programs).

138. For a discussion of research of underlying attitudinal biases concerning hidden and perceived disabilities, see *infra* notes 193-253 and accompanying text.

139. For a discussion of highlighted studies, see *infra* notes 192-253 and accompanying text. For a discussion of the proposition that employers tend to be more accommodating to employees with visible, as opposed to hidden, disabilities, see L.M. Sixel, *Law on Disabled Read Differently*, HOUS. CHRON., July 5, 1996, at 1.

140. *See* Marshall, *supra* note 74, at 41 (noting attitudes by employers that people with psychiatric disabilities are unreliable and a safety risk, to be watched or judged more carefully than other job applicants or employees); Jane A. Moore,

These issues are explored in the context of research on workplace accommodations, dispute avoidance and resolution practices, and medical testing under Title I.

III. EMERGING EMPIRICAL STUDY OF ADA TITLE I

This Part examines three areas of study related to attitudes and behavior underlying Title I implementation. It must be said, however, that the cumulation of studies from varying disciplines is needed for a comprehensive view of the area, as any single study yields only limited information. Prior over-reliance on limited study has lead to a continuation of misinformation about the employment issues facing qualified persons with disabilities.

A. *Workplace Accommodations*

One common criticism is that the costs of Title I compliance outweigh the benefits provided to employers and persons with disabilities.[141] Critics contend that the required provision of accommodations places financial burdens on the operation of businesses.[142] Some argue that the costs of accommodations are especially high for large employers, who may be held accountable for extensive modifications because of their greater financial resources.[143]

A common thread in these critiques is that they are made without reliance on data. In the absence of such information, it is no surprise that the attitudes and behavior of many employers reflect the view that the costs of accommodations outweigh the benefits. It

Can the ADA Work For People With Mental Illness?, 6 J. CAL. ALLIANCE FOR MENTALLY ILL, 25, 26 (1995) (noting that persons with psychiatric disabilities who are accommodated—people who take more time off work or who are allowed certain "privileges," such as working in a private work area—are stigmatized, are perceived as doing lesser job and are not able to obtain increased responsibility or promotions). For a discussion of the highlighted studies, see *infra* notes 191-252 and accompanying text.

141. *See, e.g.*, Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1 (1994) (stating that when absolute right to refuse employment or insurance is denied, without exception, employer or insurer is forced into losing economic position); Willis, *supra* note 78, at 726-29 (outlining numerous costs to employers created by ADA); James Bovard, *Disability Intentions Astray*, WASH. TIMES, May 20, 1996, at A16 (opining that ADA is costly and economically inefficient).

142. *See generally* IMPLEMENTING THE ADA, *supra* note 3, at 6 (explaining history of ADA while highlighting key provisions and controversial issues regarding legislation).

143. *See* Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 251-52 (1990) ("[T]he ADA, while well-conceived and well-intended, will place an onerous burden on employers."); Willis, *supra* note 78, at 726-27 (examining cost to employers of compliance and accommodation).

is helpful to reiterate that Title I does not require employers to hire individuals with disabilities who are not qualified, or to hire qualified individuals with disabilities over equally or more qualified individuals without disabilities.[144] In fact, more than half of all Title I charges filed with the EEOC are dismissed because, among other reasons, the plaintiff alleging discrimination failed to show that he or she was qualified for the position.[145]

Nevertheless, many individuals with disabilities currently in the workforce have appropriate job skills; they are "qualified" for purposes of the law and have their accommodation needs met in reasonable and cost-effective ways.[146] Surveys show that executives have favorable attitudes toward the employment and accommodation of qualified employees with disabilities. A 1995 Harris Poll of business executives found that seventy-nine percent of those surveyed believe that the employment of qualified people with disabilities is a boost to the economy, while only two percent believe it

144. *See* 29 C.F.R. § 1630.2(m),(n) (1997); *Sears I*, *supra* note 74, at 30-40; *Sears II*, *supra* note 74, at 42; *see also* Helen L. v. DiDario, 46 F.3d 325, 334 (3d Cir. 1995) (stating that ADA ensures that qualified individuals be treated in "a manner consistent with basic human dignity, rather than a manner which shunts them aside, hides, and ignores them").

145. *See* Lisa J. Stansky, *Five Years After its Passage, the Americans with Disabilities Act Has Not Fulfilled the Greatest Fears of its Critics—Or the Greatest Hopes of its Supporters*, 82 A.B.A. J. 66, 66 (1996) (stating that as of September 30, 1995, 40% of charges filed with EEOC were dismissed for having no reasonable cause, and another 43% were closed for administrative reasons, including claims that they were withdrawn or closed because the complaining parties failed to cooperate with agency); *see also* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 189 (5th Cir. 1996) (holding that woman treated for breast cancer with daily radiation therapy did not have disability under ADA).

146. *See generally* Alan J. Tomkins & Victoria Weisz, *Social Science, Law, and the Interest in a Family Environment for Children with Disabilities*, 26 U. TOL. L. REV. 937, 939 (1995) (suggesting that most disabled individuals do not need exceptional accommodations, even as children).

A study by the National Academy of Social Insurance found that many qualified persons with disabilities prefer to work and only use disability benefits as a last resort. *See* NATIONAL ACADEMY OF SOCIAL INSURANCE, BALANCING SECURITY AND OPPORTUNITY: THE CHALLENGE OF DISABILITY INCOME POLICY 10 (1996) (noting roughly one half of 34 million working-age adults who experience mental illness over course of year are employed and roughly one third of 16.8 million persons with work disabilities are in labor force, either working or looking for work); *see also* Blanck, *supra* note 105, at 718 (discussing 1986 poll finding that 66% of persons with disabilities surveyed below age 65 who do not work report that they want to work); William B. Gould IV, *Employee Participation and Labor Policy: Why the Team Act Should Be Defeated and the National Labor Relations Act Amended*, Address Before Creighton University School of Law (June 7, 1996) (transcript on file with author) (observing opportunity to work is essential to one's sense of self worth, by providing material goods and by expanding one's horizons, hopes and aspirations).

poses a "threat to take jobs" from people without disabilities.[147]

The developing empirical evidence does not reflect the view that Title I is a preferential treatment law that forces employers to ignore employee qualifications and economic efficiency.[148] To the contrary, studies of accommodations suggest that companies that are effectively implementing the law demonstrate the ability to look beyond minimal compliance in ways that make economic sense. The low costs of accommodations for employees with disabilities have been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers' compensation costs and workplace effectiveness and efficiency.[149]

In a series of studies conducted at Sears, Roebuck and Co. from 1978 to 1996,[150] a time period before and after Title I's July 26, 1992 effective date, nearly all of the 500 accommodations sampled required little or no cost.[151] From 1993 to 1996, the average direct cost for accommodations was $45, and from 1978 to 1992 the average cost was $121.[152] The Sears studies show that the direct

147. *See* LOUIS HARRIS AND ASSOCIATES, INC. AND NATIONAL ORGANIZATION ON DISABILITY, 1995 SURVEY OF CORPORATE EXECUTIVES OF THE ADA (1995) [hereinafter 1995 HARRIS STUDY]; *see also* FLORIDA CHAMBER OF COMMERCE FOUNDATION'S DISABILITY AWARENESS PROJECT, MASON-DIXON POLL 3 (1995) (stating that 72% of businesses that hired persons with disabilities reported that employment of people with disabilities had favorable effect on their businesses and 87% said they would encourage other employers to hire persons with disabilities); *Safety and Health: OSHA Rules By Far Most Burdensome for Employer Chamber Survey Fines*, Daily Lab. Rep. (BNA), at 3 (June 27, 1996) (noting that in rating relative burden of requirements issued under various labor and employment laws on scale of 1 (least) to 10 (most burdensome), small employers rated ADA requirements at 4.8, compared to 6.2 for OSHA, and 4.4 for Fair Labor Standards Act).

148. *See, e.g., Sears II, supra* note 74, at 42 (stating that it is "widely understood" that ADA does not require employers to hire disabled individuals who are not qualified).

149. *See id.* at 22-24 (noting that 80% of surveyed executives reported "minimal or low increases in costs" associated with providing accommodations); *see also* Francine S. Hall & Elizabeth L. Hall, *"The ADA: Going Beyond the Law"*, 8 ACAD. MGMT. EXECUTIVE REV. 17, 17-26 (1994) (reporting similar findings).

150. *See Sears II, supra* note 74, at 8 (observing that Sears employs approximately 20,000 persons with physical or mental disabilities).

151. *See id.* at 17 (noting that 72% of accommodations—including assistive technology, physical access, changed schedules, assistance by others and changed job duties—required no cost, 17% cost less than $100, 10% cost less than $500 and only 1% cost more than $500, but not more than $1000); Mary C. Daly & John Bound, *Worker Adaptation and Employer Accommodation Following the Onset of a Health Impairment*, 51 J. GERONTOLOGY 53, 53 (1996) (reporting most common job accommodations for sample were alterations in job duties, assistance with jobs, schedule changes and more breaks); McGaughey et al., *supra* note 108, at 11, 14 (noting that, according to one sample, most common job accommodations were assistance from job coach and changes in schedules or job duties).

152. *See Sears II, supra* note 74, at 16-24.

costs of accommodating employees with hidden disabilities (e.g., emotional and neurological impairments comprising roughly fifteen percent of the cases studied) is lower than the overall average of $45.[153]

Other studies show that accommodations for employees with disabilities lead to direct and indirect benefits and cost-effective applications that increase the productivity of employees without disabilities. Studies by the Job Accommodation Network ("JAN") demonstrate the benefits to employers of accommodations for qualified employees.[154] More than two-thirds of effective accommodations implemented as a result of a JAN consultation cost less than $500, and almost two thirds of the accommodations result in savings to the company in excess of $5000.[155] The savings associated with accommodations include lower job training costs and insurance claims, increased worker productivity and reduced rehabilitation costs after injury on the job.[156]

Likewise, the results of the 1995 Harris poll show that more than three quarters of over 400 executives surveyed report minimal increases in costs associated with the provision of accommodations (e.g., median cost for accommodations was $233 per employee), and from 1986 to 1995, the proportion of companies providing accommodations rose from fifty-one percent to eighty-one percent.[157]

Two general implications, among others, may be drawn from the existing findings. First, it appears that the degree to which many companies comply with the accommodation provisions of Title I has more to do with their corporate cultures and attitudes than with the actual demands of the law. For many companies with a culture of workforce diversity and inclusion, implementation has resulted in effective business strategies that transcend minimal com-

153. *See id.* at 20 (stating that from 1993 to 1996, average cost for behavioral impairments was $0 and average cost for neurological impairments was $13).

154. *See id.* at 25-27.

155. *See id. See generally* PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, JOB ACCOMMODATION NETWORK (JAN) REPORTS 10 (1994) [hereinafter JAN REPORTS] (stating that JAN provides information on accommodations for employees with disabilities).

156. *See* JAN REPORTS, *supra* note 155 at 10 (reporting that for every dollar invested in effective accommodation, companies realized average of $50 in benefits).

157. *See* 1995 HARRIS STUDY, *supra* note 147; *see also* Hal Clifford, *The Perfect Chemistry: DuPont's Work-Life Program*, 14 HEMISPHERES 33, 34 (1996) (claiming 637% return on expenditures for its LifeWorks program, designed to help employees deal with job and life pressures, based on estimated value of resulting increased performance, employee retention, stress reduction and reduced absenteeism).

pliance with the law.[158]

Second, from an economic perspective, although the direct costs of the accommodations for any particular disability tend to be low,[159] many companies regularly make informal and undocumented accommodations that require minor and cost-free workplace adjustments that are implemented directly by employees and their supervisors.[160] For qualified employees whose conditions are asymptomatic or controlled by medication, any such necessary accommodations are typically minimal.[161] Moreover, accommodations involving universally designed and advanced technology have been shown to enable groups of employees with and without disabilities to perform jobs productively, cost-effectively and safely.[162]

158. *See* PETER D. BLANCK, TRANSCENDING THE AMERICANS WITH DISABILITIES ACT: RESEARCH, POLICY, AND EMPLOYMENT STRATEGIES FOR THE 21ST CENTURY (forthcoming 1998) (suggesting that when employers hire, work with and accommodate qualified employees with disabilities, they enhance their customer bases, employee morale and business goals); *Sears I, supra* note 74, at 9 (pointing out that neither cost alone nor severity of disability determined Sears' strategy toward provision of accommodations); *id.* at Appendix B (comparing Sears' 1994 work force data to national statistics); Barbara Presley Noble, *A Level Playing Field, For Just $121,* N.Y. TIMES, Mar. 5, 1995, at B21 (discussing Sears' findings). *See generally* H. T. HARP, A CRAZY FOLK'S GUIDE TO REASONABLE ACCOMMODATION AND PSYCHIATRIC DISABILITY 2 (Oakland California Independent Living Support Center ed., 1991) (discussing how employers who hire people with psychiatric disabilities, yet fail to provide adequate mental health insurance coverage, may not enable these individuals to retain their jobs).

159. Although many of the accommodations studied at Sears involved simple and commonsense strategies, they have been the subject of litigation in other settings. *See, e.g.*, Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794, 801 (D. Colo. 1995) (involving Title I litigation where employee requested accommodation of periodic sitting on stool while on work duty).

160. *See Sears II, supra* note 74, at 19-24; *see also Sears I, supra* note 74, at 10-12 (noting that since 1972, fewer than 10% of Sears employees who self-identified as disabled through company's Selective Placement Program required any kind of accommodation at time of self-identification).

161. *See* Peter D. Blanck et al., *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, 464 (1994) (documenting accommodation costs).

162. *See Sears I, supra* note 74, at 14-17, 26-29 (noting that Sears provides "a model for other organizations seeking to provide universal access to information technology for employees with and without disabilities"); *Sears II, supra* note 74, at 35-36 (stating that Sears commitment to ADA dispute resolution has resulted in "corporate culture of helping employees to pursue productive, safe and stable careers"). *See generally* DEBORAH KAPLAN ET AL., WORLD INSTITUTE ON DISABILITY, TELECOMMUNICATIONS FOR PERSONS WITH DISABILITIES: LAYING THE FOUNDATION 43-45 (1992) (providing examples of effective use of new technologies in employment and educational settings); S.F. WILSON ET AL., THE CENTER FOR COMMUNITY CHANGE THROUGH HOUSING AND SUPPORT, A TECHNICAL ASSISTANCE REPORT ON CONSUMER AND EX-PATIENT ROLES IN SUPPORTED HOUSING SERVICES 31-33 (1991) (noting that effect of hiring people with psychiatric disabilities was to improve level of individual attention and accommodation to all employees, creating more posi-

These findings suggest that the direct costs of accommodations may be lower than predicted.

Despite the emerging information, there is inadequate study on accommodation strategies for qualified individuals with hidden disabilities. Examination is needed of the type, effectiveness and cost of accommodations at large and small organizations, using standardized means for gathering and analyzing information.[163] Studies must be conducted on the fears and stigmas associated with disclosure of hidden disabilities and the resulting employment consequences; for instance, the extent to which qualified job applicants and employees with hidden disabilities forgo the benefits of accommodations because of fear of disclosure.[164]

Furthermore, examination is needed of direct and indirect costs and benefits associated with staff time related to planning of an accommodation or the positive impact of an accommodation on training and safe workplace practices for fellow employees without disabilities.[165] Analysis of the direct and indirect costs and benefits associated with Title I implementation may enable a more accurate assessment over time of the economic impact of the law on society. Future studies must examine also the relationship between Title I implementation and workers' compensation claims, health insurance laws, the Family and Medical Leave Act of 1993[166] and OSHA regulations, among others.

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tive working environment); Peter D. Blanck, *Communications Technology for Everyone: Implications for the Classroom and Beyond, in* THE ANNENBERG WASHINGTON PROGRAM REPORTS 15 (1994) (providing examples of effective use of new technologies in employment and educational settings).

163. *See* Mary T. Giliberti, *Implementation of the Reasonable Accommodation Provisions of the ADA by the EEOC and the Courts*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 19, 19-20 (1995) (examining reasonable accommodation in context of mental disabilities); Diane Sands, *Reasonable Accommodation or Improbable Emancipation?*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 21, 21-22 (1995) (discussing need to develop effective accommodation strategies for persons with mental impairments).

164. For a discussion of the fears associated with hidden disabilities, see *infra* notes 222-27 and accompanying text.

165. *See* Peter D. Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 283-84 (1996) (examining direct and indirect effects of ADA on Sears, Roebuck and Company); *see also* Morely Gunderson & Douglas Hyatt, *Do Injured Workers Pay for Reasonable Accommodation?*, 50 INDUS. & LAB. REL. REV. 92, 92 (1996) (finding that injured workers did not incur cost of accommodations when they returned to their time-of-accident employer).

166. Pub. L. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601-2619, 2631-2636, 2651-2654 & 5 U.S.C. §§ 6381-6387 (1994)).

B. *Dispute Avoidance and Resolution*

When Title I was passed, critics predicted the law would foster extensive and costly litigation.[167] Some commentators continue to make these claims.[168] The view of one federal court is illustrative:

> [T]he ADA as it [is] being interpreted [has] the potential of being the greatest generator of litigation ever . . . [it is doubtful] whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety workers' compensation claim into a federal case. . . . The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended. . . .[169]

Many companies have not seen the explosion of Title I litigation that critics predicted.[170] Far from creating legal burdens, studies show that implementation strategies may lead to enhanced productivity and effective dispute resolution for employees with and without disabilities.[171] Research suggests that corporations adopting Title I as a framework for effective dispute avoidance and resolution have reduced potential litigation costs and created an environment of cooperation, rather than hostility and confrontation, in managing disability issues in the workplace.[172]

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167. *See* 135 CONG. REC. 10734-02, 10741 (1989) (statement of Sen. Pryor) (observing that definition of impairment is "extremely loose" and will be subject of litigation).

168. *See* Willis, *supra* note 78, at 728-29 (outlining costs to employers created by ADA).

169. Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1577 (S.D. Ga. 1995) (quoting Pedigo v. P.A.M. Transp., Inc., 891 F. Supp. 482, 485-86 (W.D. Ark. 1994)); *see Pedigo*, 891 F. Supp. at 485 n.3 (citing studies in support of claim that ADA generates litigation).

170. *See Sears II*, *supra* note 74, at 30-32 (noting that study tracking 141 ADA-related charges filed with EEOC against Sears from 1990 to 1995 showed that 1% of Sears' charges were filed by job applicants, compared with roughly 10% filed nationally by job applicants during same period; 43% of Sears' charges involved orthopedic impairments, compared with roughly 20% of all EEOC charges raised involving orthopedic impairments; and 15% of Sears' charges involved behavioral impairments (e.g., mental illness), compared with roughly 12% of ADA charges filed with EEOC).

171. *See Sears I*, *supra* note 74, at 39-40 (observing that through mid 1994, Sears had low incidence of Title I charges and only six ADA-related employment lawsuits, with five of these related to termination of employees); *Sears II*, *supra* note 74, at 30-32 (noting that, according to Sears, there has been no "explosion of ADA litigation" and that, to contrary, ADA transcendence has improved workplace for disabled and nondisabled employees).

172. *See* Blanck, *supra* note 6, at 853-59; Robin Talbert & Naomi Karp, *Collaborative Approaches: Aging, Disability, and Dispute Resolution*, 29 CLEARINGHOUSE REV. 638, 638 (1995); *see also* Peter D. Blanck, *The Economics of the Employment Provisions of*

Informal dispute avoidance and resolution processes, such as mediation, reflect positive corporate attitudes and behavior toward implementation.[173] One study that focused on the decision-making processes of executives toward Title I compliance identified the value of proactive and anticipatory strategies versus those that are reactive or reflect a "wait and see" approach.[174] Similarly, the results of a 1995 U.S. General Accounting Office study of 2000 employers with more than 100 employees showed that eighty-nine percent use internal alternative dispute resolution approaches to resolve employment discrimination complaints.[175] Mediation is a particularly effective means for resolving disputes involving workplace accommodations and may lead to cost-effective solutions enabling qualified employees with disabilities to work.[176]

Informal resolution processes may be tailored to meet the needs of employees and employers on a variety of issues. Study of informal dispute resolution practices shows that employees with or without disabilities often seek guidance from their employers or report concerns about disability-related issues.[177] In many compa-

the Americans with Disabilities Act: Part I—Workplace Accommodations, 46 DEPAUL L. REV. 877, 909 (1997) [hereinafter *Economics of the ADA*] (noting study that is limited to analysis of Title I litigation "tends to focus on 'failures' of system, as opposed to economically efficient business strategies").

173. Many companies provide confidential assistance to employees with disabilities through Employee Assistance Programs (EAPs). EAPs provide assessment and referral services for employees with problems that adversely affect their health or job performance, such as stress, depression or substance abuse. *See Sears I*, *supra* note 74, at 36-37 (noting that EAP serves approximately 5% of the Sears work force, roughly 9000 employees).

174. *See* Mary C. Meisenhelter, Exploring the Process of Executive Decisions Regarding Compliance with the Americans with Disabilities Act (1996) (Ph.D. dissertation, George Washington University), *in* 57 DISSERTATION ABSTRACTS INT'L 1732 (studying executives and degree of compliance with ADA).

175. U.S. GENERAL ACCOUNTING OFFICE, REP. NO. HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 21 (1995) (surveying businesses that filed Equal Employment Opportunity Reports).

176. *See* Peter R. Maida, *Mediation and Reasonable Accommodations*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 38, 38-39 (1995). The Administrative Conference has recommended that Title I enforcement agencies—such as the EEOC, Federal Communications Commission and the Department of Transportation—establish a committee to develop a program for voluntary mediation of ADA cases. *See* Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. 1007, 1065 (1996) (calling for study of mediation programs, including analysis of cases in which mediation is effective; costs, processing time and parties' satisfaction with mediation; impact of mediation on other litigation rates; and rate of compliance with settlements).

177. *See Sears II*, *supra* note 74, at 28-29 (reporting that confidential "help line" staffed by trained personnel is available to employees for guidance on ADA ethics and business policy).

nies, trained staff convey information to the affected employee to facilitate an informed decision or provision of an accommodation.[178] One example of effective informal dispute resolution documented in the Sears study involved alleged disability harassment (e.g., rude comments and inappropriate work assignments) of a deaf employee.[179] The informal resolution included attitudinal training on issues related to disability and workplace harassment. Approximately eighty percent of the informal disputes sampled at Sears were resolved successfully without resort to formal legal mechanisms.[180]

Effective informal dispute resolution processes foster attitudes of responsibility by the affected employees and supervisors, facilitating problem solving and behavioral change at appropriate corporate levels.[181] One study found that individuals with disabilities are less likely to perceive employment discrimination when they are able to informally negotiate job-related problems successfully.[182] The study asked respondents with a disability whether they had resolved a problem related to alleged employment discrimination without filing a Title I charge.[183] Respondents reported resolving problems substantially more times than they reported experiencing discrimination.[184] Moreover, fifty-nine percent of those who attempted informal negotiation activities resolved the problem successfully.[185] Additional study is needed of informal dispute resolution programs that foster a collaborative approach to problem solving.[186]

Study is needed also of the resolution patterns of formal Title I

178. *See id.* at 39-40 (noting that identification number may be assigned to request for confidential follow-up).

179. *See id.* at 63 (reporting that other employees made "jokes" about deaf employee and made deaf employee perform "disproportionate amount of assigned work tasks").

180. *See id.* at 30.

181. For a discussion of evaluation of attitude changes in the workplace, see *infra* notes 260-81 and accompanying text.

182. *See* McGaughey et al., *supra* note 108, at 16.

183. *See id.*

184. *See id.* at 16-17 (noting that, depending on type, between 5.4% and 11.4% of respondents reported job discrimination, and between 8.7% and 18.6% reported problem resolution).

185. *See id.* at 18. The effective settlement of Title I charges is another area requiring study. *See* Lorraine Rovig, *Negotiation Principles for Reasonable Accommodation*, EMPLOYMENT IN THE MAINSTREAM, Sept.-Oct. 1995, at 22-24 (discussing resolution of Title I disputes).

186. *See* Blanck et al., *supra* note 161, at 458 (documenting ADA alternative dispute resolution (ADR) techniques).

charges filed with the EEOC.[187] In the Sears study, during the period studied from 1990 to 1995, the overwhelming majority (ninety-eight percent) of the charges filed with the EEOC were resolved without resort to protracted litigation.[188] Effective resolutions involved compensatory payments and the provision of accommodations enabling qualified employees to return to work. Study is needed of dispute resolution strategies that enable qualified individuals with different disabilities to return to work safely and cost-effectively, thereby reducing workers' compensation costs and unemployment levels.[189]

Employers' positive attitudes and behavior toward Title I dispute resolution have been shown to generate productive effects throughout companies. Other complementary workplace strategies (e.g., flexible scheduling, job sharing, telecommuting) have been shown to enhance dispute resolution and workplace productivity for employees with and without disabilities.[190] Positive outcomes may reflect corporate cultures of helping qualified employees to pursue productive careers, and when disputes arise, focusing on effective and timely problem solving. Education and communication training are crucial in avoiding and resolving disputes and in assisting those involved to understand their rights and obligations under Title I.[191]

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187. The EEOC recently changed its charge processing system to reduce processing time and to devote resources to investigating meritorious charges. Before this change, the EEOC followed a "full investigation" policy for each charge of discrimination under Title I. The full investigation policy was one of the factors contributing to the Commission's growing inventory of charges awaiting resolution. The *Sears II* study found that 34% of the EEOC charges filed against Sears were pending. *See Sears II*, *supra* note 74, at 34; *see also* 42 U.S.C. § 12212 (1994) (encouraging use of ADR to resolve disputes under ADA).

188. *See Sears II*, *supra* note 74, at 34 (noting that results show that 12% of cases settled; 9% were withdrawn; 33% were dismissed; "right to sue" letter issued by EEOC in 8% of cases; decision is pending by EEOC in 34% of cases; and trial court litigation pending in 2% of cases).

189. *See id.* at 22-24 (stating that OSHA estimates that work-related orthopedic impairments account for one of every three dollars spent on workers' compensation and that employers spend $20 billion every year on direct costs for workers' compensation and up to five times that amount for indirect costs). *See generally* EEOC Office of Legal Counsel, EEOC GUIDANCE ON WORKERS' COMPENSATION AND ADA (1996) (discussing issues related to workers' compensation under Title I).

190. *See* Hall & Hall, *supra* note 149, at 17 (identifying successful workplace strategies for resolving ADA Title I disputes); Talbert & Karp, *supra* note 172, at 638-42 (same).

191. *See, e.g.*, Talbert & Karp, *supra* note 172, at 638-42 (discussing need for study of corporate dispute resolution practices, such as establishing training programs about genetic discrimination); McGaughey et al., *supra* note 108, at 18 (same).

C. *Medical Testing*

In the past five years, more than fifty genetic tests have been identified as having the potential for discovering the causes of inheritable but often hidden diseases.[192] Scores of psychological tests are available for employment screening. The availability and low cost of these tests has increased the possibility of test misapplication resulting in stigmatization and discrimination against many qualified individuals with disabilities.

Researchers are beginning to explore the nature of discrimination against persons with hidden or perceived disabilities on the basis of medical testing.[193] In situations where employers, insurers or others use medical information derived from psychological or genetic testing to deny equal employment opportunity or exclude qualified individuals from work-related benefits, the antidiscrimination provisions of Title I are implicated.[194] Adverse employment-related behavior derived from medical test results is particularly harmful when based on misinformation about the usefulness of tests or when tests lack predictive validity and retest reliability.[195]

Studies of genetic testing suggest that the likelihood of developing a genetic condition is perceived differently than the probability of contracting an illness not produced by genetic factors.[196] Individuals have been shown to commit "base-rate errors" in judgment when predicting the outcome of events on the basis of limited data.[197] The phenomenon of base-rate error has been demonstrated in studies of the faulty prediction of future disease onset.[198]

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192. *See* Wendy McGoodwin, *Genie Out of the Bottle: Genetic Testing and the Discrimination It's Creating*, WASH. POST, May 5, 1996, at C3 (discussing Human Genome Project). For a detailed examination of the study of attitudes and behavior toward workplace medical testing of qualified individuals with hidden disabilities, such as those with genetic and psychiatric conditions, see *infra* notes 193-253.

193. *See, e.g.*, Lawrence O. Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109, 111 (1991) (examining how Human Genome Initiative could lead to discrimination); Natowicz et al., *supra* note 94, at 468 (discussing social problems created by new technologies and future problem of genetic discrimination).

194. *See* 42 U.S.C. §§ 12112(c)(2)-(4) (1994); 29 C.F.R. §§ 1630.9-1630.11 (1997).

195. *See* Blanck & Marti, *supra* note 111.

196. *See* Billings et al., *supra* note 100, at 480 (discussing stigmatization of individuals diagnosed with genetic disease, but who are asymptomatic).

197. *See* Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 153-60 (Daniel Kahneman et al. eds., 1982) (discussing base-rate phenomenon).

198. *See, e.g.*, Ward Casscells et al., *Interpretation by Physicians of Clinical Laboratory Results*, 299 NEW ENG. J. MED. 999, 999-1000 (1978) (reporting that less than

In one study of state insurance commissioners, respondents ignored base-rate information about the prevalence and onset of genetic conditions.[199] Responding commissioners were considerably less likely to allow life insurers to refuse coverage or charge higher premiums for applicants who were at genetic risk for developing breast cancer or coronary artery disease than for less prevalent genetic conditions, such as Huntington's disease and cystic fibrosis.[200] Respondents also reported that they were as willing to permit an insurer to refuse to insure an adult with spina bifida as an adult with cystic fibrosis, even though an individual with spina bifida has a significantly higher life expectancy.[201]

Qualitative studies suggest that people with genetic markers who are currently healthy and asymptomatic are denied health insurance and employment opportunities on the basis of predictions that they may become "unhealthy" in the future.[202] Target individuals report being treated as if they were presently disabled or chronically ill. One study of the perceptions of members of genetic support groups found that, as a result of a genetic disorder in the family, one quarter of the respondents believed that they were denied life insurance, twenty-two percent believed they were refused health insurance and thirteen percent believed that they were denied employment opportunity.[203]

There are other pervasive biases and base-rate errors associated with equating a genotype with illness or the lack of effective treatment. First, many genetic conditions and diseases are variable in expressivity and not all individuals with the genotype will develop

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20% of responding students and staff at Harvard Medical School gave correct answer of 2% to question about prevalence rate given base-rate information; almost half of respondents gave same incorrect answer of 95%).

199. *See* McEwen et al., *supra* note 110, at 790 (studying role of genetics in insurance industry).

200. *See id.* at 791. This finding may reflect commissioners' perceptions that breast cancer and coronary artery disease, which are more prevalent in the population than other conditions, are not genetic disorders.

The ADA is not violated by insurers or employers who exclude or charge higher premiums for certain conditions, or who exclude or limit coverage for dependents, as long as these actions impact all employees equitably and do not violate state law. *See* 42 U.S.C. § 12201(c)(1), (2) (1994).

201. *See* McEwen et al. *supra* note 110, at 791.

202. *See* Billings et al., *supra* note 100, at 481; Geller et al., *supra* note 110, at 82.

203. *See generally* E. Virginia Lapham et al., *Genetic Discrimination: Perspectives of Consumers*, 274 SCI. 621 (1996) (finding that fear of genetic discrimination resulted in 9% of respondents refusing to be tested for genetic conditions, 18% not revealing genetic conditions to insurers and 17% not revealing information to employers).

the disease.[204]

Second, when decisions regarding health insurance and employment are based solely on a diagnostic label, the severity or range of the individual's condition is disregarded.[205] Research shows that genotype alone does not necessarily predict the onset or severity of a disabling condition.[206] Nevertheless, low base-rate occurrences (e.g., predicting the most severe scenario) often are used as the benchmark for decisions regarding the employment of persons with genetic and other hidden conditions.[207]

Third, few genetic conditions are caused by a single gene.[208] Health conditions, such as coronary disease, cancer or mental illness, have many causes. Focusing solely on the role of genetics minimizes the impact of other social conditions, such as poverty or environmental conditions, that relate to poor health and higher mortality rates.[209] Unfounded emphasis on genetic test information diverts employers from considering the underlying economic and social mediating factors of workplace health.

In addition, errors in testing and interpretation occur.[210] Because of a high rate of false-positive test results, the medical records of individuals who do not have a genetic condition sometimes suggest treatment for the disease.[211] False-positive tests have been shown to have dramatic effects on an individual's life.[212]

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204. *See* Joseph S. Alper et al., *Genetic Discrimination and Screening for Hemochromatosis*, 15 J. PUB. HEALTH POL'Y 345, 353 (1994) (noting that at least 25% of those with genotype for hemochromatosis, common recessive iron storage disorder, do not develop symptoms of disease).

205. For a discussion of cases finding that obvious symptoms sometimes may be seen as manifestations of hidden disability covered by Title I, see *supra* notes 132-37 and accompanying text.

206. *See* Billings et al., *supra* note 100, at 479-80.

207. *See id.*

208. *See* Abigail Trafford, *Ethics and Genetics*, WASH. POST, April 16, 1996, at ZO6.

209. *See* McGoodwin, *supra* note 192, at C03 ("[O]ver-emphasis on the role of genes in human health neglects environmental and social factors.").

210. *See* Alper et al., *supra* note 204, at 352-53. The same is true for degrees of mental illness as commonly measured by the Minnesota Multiphasic Personality Inventory (MMPI). The predictive validity of the MMPI and other psychological tests has been questioned. *See, e.g.*, Gary F. Coulton & Hubert S. Feild, *Using Assessment Centers in Selecting Entry-Level Police Officers: Extravagance or Justified Expense?*, 24 PUB. PERSONNEL MGMT. 223, 225 (June 22, 1996) (discussing validity of psychological tests and common focus on psychopathology).

211. *See* Alper et al., *supra* note 204, at 353.

212. *See* Montgomery, *supra* note 125, at 24; *see also* Rick Weiss, *Commercial Gene Tests Raise Spectre of DNA Discrimination*, WASH. POST, May 28, 1996, at 10 (reporting that National Breast Cancer Coalition opposes open marketing of test for BRCA1, "[the] breast cancer gene," because ambiguous test results trigger unnec-

Uninformed uses of genetic testing also reinforce biases associated with a "blame the victim" mindset, condemning people with "faulty" genes solely on the basis of that status.[213] Psychological studies have demonstrated this "defensive attribution" as a tendency to blame victims for their misfortune, so that the blamer feels less likely to be victimized in a similar way.[214] Blaming victims for their afflictions causes the victims to be viewed negatively by themselves and others. People who have experienced genetic discrimination report a loss of self-esteem, alienation from family members and others and alterations in family dynamics.[215] Treating persons with genetic disabilities as being sickly or having poor health habits may lead to unwarranted derogation, causing targeted individuals to have less concern for their health and self-worth, in turn enhancing a self-fulfilling prophecy for disease onset.[216]

Another common misconception is that the onset of a genetic condition as indicated by testing indicates the end of a person's present productive work life. One study examined the extent to which workers, through their own actions or their employer's accommodations, adjust to their health limitations and continue working. The results show that only about one quarter of those who become impaired while employed exited the labor force on a permanent basis.[217] Over half of the individuals who continued working remained with their employer, and the remaining individ-

essary panic in many women and give false confidence to those who should remain vigilant).

213. *See* McGoodwin, *supra* note 192, at CO3 (reporting that fear of discrimination causes people to avoid genetic testing for fear of test results being used against them); Paul Steven Miller, Statement of EEOC Commissioner, May 24, 1996, at 3 (on file with author) (referring to first ADA case filed by EEOC involving individuals with developmental disabilities as "a particularly egregious case of blaming the victim").

214. *See* Ruthbeth Finerman & Linda A. Bennett, *Overview: Guilt, Blame and Shame in Sickness*, 40 SOC. SCI. & MED. 1, 3 (1995); Simon Salminen, *Defensive Attribution Hypothesis and Serious Occupational Accidents*, 70 PSYCHOL. REP. 1195, 1195 (1992).

215. *See* Geller et al., *supra* note 110, at 78, 80-81; John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 431, 452-53 (1996) (discussing choices made by parents regarding their children's genetic conditions on basis of fear and stereotypes); *Nightline: Comments of EEOC Commissioner Paul Steven Miller*, (ABC television broadcast, May 17, 1996) (same).

216. *See* Robert Rosenthal, *Interpersonal Expectancy Effects: A 30-Year Perspective*, 3 CURRENT DIRECTIONS PSYCHOL. SCI. 176, 184 (1994) (discussing negative impact of bias on persons with genetic disabilities).

217. *See* Daly & Bound, *supra* note 151, at S54 (stating that respondents who reported that they had "any impairment or health problem that limits the kind or amount of paid work" were classified as disabled).

uals continued to work for different employers.[218] Significantly more employees who remained with their employer after the onset of their impairment reported receiving accommodations from their employer.[219] Additional study is needed on the social and economic consequences of the use of genetic test results by employers and insurers.[220]

A second major area requiring study involves medical testing of qualified individuals with psychiatric conditions. An employer covered by Title I must provide accommodations for a qualified employee or job applicant with a psychiatric illness in circumstances where the employer knows of the condition and the individual can perform the essential job functions.[221] Failure to disclose a hidden psychiatric disability may prevent an individual from receiving accommodations at the time of hiring or subsequent to that time.

While the decision to disclose a hidden disability is a complex

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218. *See id.* at S55-S56.

219. *See id.*; *see also Sears II*, *supra* note 74, at 25-27 (discussing increase in employer interest in information regarding accommodations for persons with disabilities and positive cost-benefit analysis of implementation of accommodations).

220. *See Sears II*, *supra* note 74, at 10-11; *see also* Scott Burris, *Dental Discrimination Against the HIV-Infected: Empirical Data, Law and Public Policy*, 13 YALE J. REG. 1, 94 (1996) (stating antidiscrimination intervention necessarily includes attitudinal and behavioral changes); Diane Eicher, *Genetic Tests: A Catch-22 Life-saving Information Might Easily be Misused*, DENV. POST, May 29, 1996, at G01 (observing that fears about health, insurance and employment are based on genetic testing for risk of cancer); Mark A. Rothstein, *Preventing the Discovery of Plaintiff Genetic Profiles by Defendants Seeking to Limit Damages in Personal Injury Litigation*, 71 IND. L.J. 877, 878 (1996) (reviewing ethical, testing and public policy issues in area of genetic prediction).

221. Accommodations for psychiatric disabilities include flexible scheduling, reasonable time off, restructuring jobs or duties, restructuring work environment, educating other employees and job assistance. *See* U.S. OFFICE OF TECH. ASSESSMENT, REP. NO. OTA-BP-BBS-124, PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT 9-11 (1994) (discussing employers' obligation to provide reasonable accommodations to qualified individuals with disabilities); Paul Carling, *Reasonable Accommodations in the Workplace for Persons with Psychiatric Disabilities*, *in* IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT FOR PSYCHOLOGY, *supra* note 97, at 103, 123-27 (discussing same and dividing typical accommodations into those needed at time of hiring and those needed during employment); *Conference Report:* Mainstream Conference Speaker Addresses Accommodations for Mental Disabilities, *in* 5 AMERICANS WITH DISABILITIES ACT MANUAL 73 (1996) (discussing employers' obligation to provide reasonable accommodations to qualified individuals with disabilities); Laura L. Mancuso, *Reasonable Accommodation for Persons with Psychiatric Disabilities*, 14 PSYCHOSOCIAL REHAB. J. 3, 3-19 (1990) (discussing barriers to employment for people with psychiatric disabilities and suggesting types of reasonable accommodations); John W. Parry, *Mental Disabilities Under the ADA: A Difficult Path to Follow*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 100, 104-05 (1995) (discussing same).

one,[222] open disclosure by a qualified employee may promote equal employment opportunity and assist the employee in obtaining necessary accommodations.[223] Nevertheless, fear of negative attitudes and discriminatory behavior often prevents qualified workers from disclosing their psychiatric disabilities or submitting to medical testing.[224]

Studies suggest that employers attach greater stigma to employees with psychiatric disabilities than to those with physical disabilities.[225] Fueled by common prejudice toward psychiatric illness, employers and coworkers may interpret work and personal difficulties or symptoms experienced by an individual with a psychiatric illness as related directly to that individual's ability to perform a job. This tendency may be especially true if the employee previously re-

222. *See generally* LAURA MANCUSO, CAL. DEP'T MENTAL HEALTH, CASE STUDIES OF REASONABLE ACCOMMODATIONS FOR WORKERS WITH PSYCHIATRIC DISABILITIES (1993).

223. *See* Taylor v. Principal Fin. Group, 93 F.3d 155, 157 (5th Cir.) (finding plaintiff failed to disclose to employer any limitations resulting from his disability and any need for reasonable accommodation), *cert. denied*, 117 S. Ct. 586 (1996); *Disclosure*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 32, 33 (1995) (stating disclosure is step toward exercising rights by workers with psychiatric disabilities; without disclosure, employer has no obligation to accommodate and potential of ADA to promote equal employment opportunity is curtailed).

224. *See* DEBORAH ZUCKERMAN ET AL., THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS 9 (1993) (stating that media portrayals of persons with mental illness as dangerous and unpredictable reinforce negative stereotypes); Daniel B. Fisher, *Disclosure, Discrimination and the ADA*, 6 J. CAL. ALLIANCE FOR THE MENTALLY ILL 55, 55 (1995) (advising prudent disclosure of psychiatric history in face of societal stigma and discrimination); Marshall, *supra* note 74, at 41 (discussing invisible barriers of stigma, fear, misunderstanding and lack of information about individuals with psychiatric disabilities); Moore, *supra* note 140, at 25-26 (stating risks caused by prejudices and fears towards mental illness might outweigh benefits of requesting accommodations under ADA).

225. *See* 1995 HARRIS STUDY, *supra* note 147 (observing that 19% of respondents reported being "very comfortable" when meeting someone known to have mental illness, compared with 22% for someone who has mental retardation, 47% for someone who is blind and 59% for someone who uses wheelchair); John B. Allen, Jr., *Don't Judge a Book by Its Cover: Qualified Employees Under the ADA*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 29, 29-30 (1995) (stating ADA makes it possible for persons with disabilities to become employed, but negative attitudes are biggest barrier to employment); Ira H. Combs & Clayton P. Omvig, *Accommodation of Disabled People Into Employment: Perceptions of Employers*, 52 J. REHABILITATION 42, 42-45 (1986) (reporting that mental illness ranked 13th out of 16 severe disabilities surveyed for relative employability and ease of accommodations); Brian J. Jones et al., *A Survey of Fortune 500 Corporate Policies Concerning the Psychiatrically Handicapped*, 57 J. REHABILITATION 31, 31-35 (1991) (reporting employers perceive employees with physical disabilities to be more desirable than those with psychiatric disabilities); Marshall, *supra* note 74, at 41 (stating myths and stereotypes about mental illness and violence encourage employers to request medical information, interviews with the treating clinician and determinations about job "fitness").

quested an accommodation for a known psychiatric disability.[226] In the absence of further study, it is difficult to predict how employers and coworkers will respond to individuals with psychiatric disabilities who self-disclose or whose condition is divulged from medical tests.[227]

Professor Michael L. Perlin has argued that, if Title I is to lessen employment discrimination against persons with psychiatric disabilities, society must address "sanist attitudes."[228] "Sanism," like racism and sexism, is an irrational prejudice based upon biased attitudes.[229] The prominence attached to Title I's "direct threat" language and related views of the predictability of behavior from medical tests are examples of sanist bias.[230] Despite a lack of evidence of increased workplace violence by individuals with psychiat-

226. *See* Carling, *supra* note 221, at 121-27. There is evidence that, with support, qualified people with psychiatric disabilities perform as well on the job as those without such disabilities. *See* George Howard, *The Ex-Mental Patient as an Employee*, 45 AM. J. ORTHOPSYCHIATRY 479, 479 (1975) (maintaining that employees with history of psychiatric problems are indistinguishable from randomly selected employees in job performance, human relations and overall ratings); J. Mintz et al., *Treatments of Depression and Functional Capacity to Work*, 49 ARCHIVES GEN. PSYCH. 761, 766 (1992) ("Behavioral impairments, including missed time, decreased performance, and significant interpersonal problems are common features of depression that appear to be highly responsive to symptomatically effective treatment given adequate time.").

227. *See, e.g.*, B.G. Link et al., *The Consequences of Stigma for Persons with Mental Illness: Evidence from the Social Sciences*, *in* STIGMA AND MENTAL ILLNESS 87, 87-95 (P.J. Fink & A. Tasman eds., 1992) (discussing sharply divergent views about importance of stigma in mental illness); Otto F. Wahl & Charles R. Harman, *Family Views of Stigma*, 15 SCHIZOPHRENIA BULL. 131, 131-39 (1989) (discussing stigmas associated with mental illness).

228. *See* Michael L. Perlin, *Sanism and the ADA: Thinking About Attitudes*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 10, 10-11 (1995); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 20 (1993) (contending that sanist attitudes dominate discourse about persons with mental illness); Michael L. Perlin, *On "Sanism"*, 46 S.M.U. L. REV. 373, 374 (1992) [hereinafter Perlin, *On "Sanism"*] (same).

229. *See* Perlin, *On "Sanism"*, *supra* note 228, at 373. *Compare* George F. Will, *Protection for the Personality-Impaired*, WASH. POST, Apr. 4, 1996, at A31 (giving example of "sanism" attitude by arguing that ADA Title I encourages inappropriate behavior in workplace), *and* G.E. Zuriff, *Medicalizing Character*, 123 PUB. INT'L. 94, 94-99 (1996) (examining essay on which Will's column was based), *with* Jeffrey Altschul, *Law Requires That Disabled Workers Be Able to Do the Job*, BUFFALO NEWS, Apr. 18, 1996, at 2B (providing rebuttal to Will's article), *and* John Moreno, *Your Views*, THE RECORD, Apr. 17, 1996, at N06 (same).

230. *See* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 225 (Richard J. Bonnie & John Monahan eds., 1997) (stating people with mental disabilities are more vulnerable to misuse of direct-threat defense); *cf.* Catherine C. Cobb, *Challenging a State Bar's Mental Health Inquiries under the ADA*, 32 HOUS. L. REV. 1383, 1384 (1996) (examining ADA implications of mental health inquiries routinely included in applications for bar admissions).

ric illness,[231] disability policy and views of employment screening and testing have been influenced in profound ways by negative attitudes toward persons with psychiatric illness.[232]

Existing empirical evidence shows a modest link between the assessment of psychiatric conditions and violent behavior generally.[233] Studies suggest that a small subset of mental disorders involving psychosis (e.g., when irrational thoughts override self-control) are linked directly to violence.[234] Other studies show that substance abuse and a history of violent behavior are better predictors of workplace violence.[235] There is no evidence to suggest that qualified employees with a history of psychiatric illness or medical test results indicating psychiatric illness are prone to workplace violence.

Study is needed of how employers address potential threats in the workplace when the threatening employee claims to have a mental disability that caused him to act violently. Title I does not require employers to hire or retain unqualified employees or those displaying inappropriate behavior, regardless of whether they have

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231. *See, e.g.*, Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 769 (1990) (finding that those with anxiety disorder or affective disorder had similar rates of violence as those with no disorder).

232. *See, e.g.*, Stradley v. Lafourche Communications, Inc., 869 F. Supp. 442, 443-44 (E.D. La. 1994) (holding that employer regarded employee as disabled because employer understood that employee was suffering from acute anxiety and depression and believed that employee's condition made him potentially violent and hostile in workplace); H.R. REP. No. 101-485, at 81, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 564 (reporting Congress's concern that ADA would provide shield for mentally unstable people).

233. *See* John Monahan, *Mental Disorder and Violent Behavior: Perceptions on Evidence*, 47 AM. PSYCHOL. 511, 519 (1992) ("Mental health status makes at best a trivial contribution to the overall level of violence in society."); *see also* R. Otto, *The Prediction of Dangerous Behavior: A Review and Analysis of "Second Generation" Research*, 5 FORENSIC REP. 103, 103-133 (1992) (stating that perhaps one in every two short-term predictions in cases of dangerous behavior are accurate); S. Wessely & P. Taylor, *Madness and Crime: Criminology Versus Psychiatry*, 1 CRIM. BEHAV. & MENTAL HEALTH 193, 193-228 (1991) (discussing methodological difficulties associated with measuring strength of relationship between illness and criminal behavior).

234. *See* B. Link et al., *Violent and Illegal Behavior of Current and Former Mental Patients Compared to Community Controls*, 57 AM. SOC. REV. 275, 275-92 (1992) (stating people currently experiencing psychotic symptoms may be at increased risk of violence; however, being former patient in mental hospital bears no direct relationship to violence).

235. *See* J. Swanson & C. Holzer, *Violence and the ECA Data*, 42 HOSP. & COMMUNITY PSYCHIATRY 79, 79-80 (1991) (finding violence most likely to occur among young, lower class men, persons with substance abuse diagnosis and persons with diagnosis of major mental disorder).

a disability or not.[236]

In one case, the plaintiff alleged that the employer perceived him as having a mental disability and as being dangerous and unstable and that the employer was fearful that the plaintiff might "go postal" or "go ballistic."[237] Although there was evidence that the employer perceived the plaintiff to be a violent person, there was no evidence that the employer viewed him as mentally disabled under the purview of Title I.[238] Thus, the plaintiff's acts of defying a company directive to have no further contact with a coworker and then slapping her justified dismissal.

Nevertheless, it is possible for employers to accommodate nonviolent, yet arguably dysfunctional, work performance observed or revealed by medical tests and associated with a known disability.[239] Title I cases have recognized an employee's inability to function under a diagnosed stress disorder as a covered mental disability and have also recognized the employer's obligation to provide accommodations to enable the qualified employee to function properly on the job.[240] The goal of accommodation is not to further inap-

236. *See* Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) ("The ADA does not, however, erect an impenetrable barrier around the disabled employee, preventing the employer from taking any employment actions vis-a-vis the employee."); Hindman v. GTE Data Serv., Inc., No. 93-1046-CIV-T-17C, 1995 WL 128271, at *5 (M.D. Fla. Jan. 20, 1995) (holding employer did not have to accommodate employee with psychiatric disability who brought loaded firearm to work because employee violated company weapons policy and presented threat to others); Mazzarella v. United States Postal Serv., 849 F. Supp. 89 (D. Mass. 1994) ("[T]he essential functions of any job include avoidance of violent behavior that threatens the safety of other employees" and any qualified employee "must have the ability to refrain from willfully destroying his employer's property."); Gordon v. Runyon, No. CIV.A.93-0037, 1994 WL 139411, at *5 (E.D. Pa. Apr. 24, 1994) (finding that employee who brought mace and stun gun to work was not discharged solely because of his mental disability, but because his continued employment would unduly burden employer by exposing employees to hostile and threatening work environment), *aff'd*, 43 F.3d 1451 (3d Cir. 1994); *see also* Appendix A (top left cell).

237. Fenton v. Pritchard Corp., 926 F. Supp. 1437, 1443 (D. Kan. 1996).

238. *See id.* at 1445. Fenton's actions showed "poor judgment, irresponsible behavior and poor impulse control" and did not demonstrate that management perceived him to have a disability. *Id.*; *see* Carrozza v. Howard County, 847 F. Supp. 365, 367-68 (D. Md. 1994) (stating employer had no obligation to provide accommodation for clerk with bipolar disorder because employee was insubordinate, even if behavior was caused by disability), *aff'd*, 45 F.3d 425 (4th Cir. 1995).

239. *See* Appendix A (top right cell). For a discussion of accommodations for those with known hidden disabilities, see *supra* notes 131-36 and accompanying text.

240. *See, e.g.*, Bryant v. Compass Bank, No. CV-95-N-2458-5, 1996 WL 529214, at *5 (N.D. Ala. May 31, 1996) (holding employer did not violate Title I when criticizing employee's work performance as long as criticism was job-related and not subterfuge for discrimination, even though employer was aware that criticism may cause additional stress to hypersensitive employee).

propriate workplace behavior, but to provide equal employment opportunity to the qualified employee in ways that ensure a productive and safe work environment.[241]

As in the area of genetic testing, there are methodological issues involving screening of job applicants or employees for psychiatric illness.[242] The Minnesota Multiphasic Personality Inventory (MMPI) is a widely used test in the employment context and is illustrative for brief discussion here.[243] The MMPI measures current levels of emotional distress and symptoms that may indicate pathological personality styles.[244] The usefulness of such psychological tests for employment screening has been examined.[245] One issue

241. *See* Bruce G. Flynn, *Violence, Mental Illness and Reasonable Accommodation in the Workplace*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 13, 13-16 (1995) (discussing strategies for managing disruptive behavior in workplace).

242. *See* Black, *supra* note 89, at 72-80 (discussing common personality tests); Michelle A. Travis, *Psychological Health Tests for Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives*, 46 STAN. L. REV. 1717, 1719-25 (1994) (stating policy goals of psychological testing for police applicants include reducing police brutality, increasing public confidence and reducing brutality litigation).

243. *See* ANNE ANASTASI, PSYCHOLOGICAL TESTING 526 (6th ed. 1988) (stating that MMPI is most popular and widely commented upon personality test); Philip Asch et al., *Police Agency Officer Selection Practices*, 17 J. POLICE SCI. & ADMIN. 258, 264 (1990) (reporting that in 1990, 59.7% of all state and city police agencies used MMPI, up from 19.2% in 1972); *see also* Barnes v. Cochran, 944 F. Supp. 897, 905 (S.D. Fla. 1996) (enjoining use of MMPI as pre-employment screening medical test permanently).

244. *See* Black, *supra* note 89, at 74 (stating that test questions cover areas such as health; psychosomatic symptoms; sexual, religious, political and social attitudes; educational, family, occupational and marital issues; phobias; delusions; and sadistic and masochistic tendencies). The MMPI also assesses a person's response style, providing indications of an individual's likelihood of responding in a socially desirable or in an overly defensive style. *See* ANASTASI, *supra* note 243, at 527-28. An individual's MMPI results are translated into a "profile" that may be compared to the MMPI profiles of individuals whose personal and psychological histories are well-documented. *See generally* JOHN R. GRAHAM, THE MMPI—A PRACTICAL GUIDE 3 (2d ed. 1987) (stating profile serves as basis for generating inferences about individual who was examined).

245. *See, e.g.*, Black, *supra* note 89, at 88-89 (discussing problems of faked and socially desirable responses and inadequacy and difficulty of defining size and representativeness of normative sample without taking into account subcultures of respondents); Craig Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 INDUS. REL. L.J. 1, 60 (1982) (recognizing personality tests discount situational factors in employee behavior); Donald H.J. Hermann III, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 75 (1971) (listing invasion of individual privacy among criticisms of personality screening); Daniel Sommer & Jean-Claude Lasry, *Personality and Reactions to Stressful Life Events*, CANADA'S MENTAL HEALTH, Sept. 1984, at 19 (stating personality tests overlook stress and impact on stress-related factors); G. Stephen Taylor & Thomas W. Zimmerer, *Personality Tests for Potential Employees: More Harm Than Good*, 67 PERSONNEL J. 60, 60 (1988) (stating personality tests fail to measure individual motivation as factor in job performance).

involves a test's ability to predict the future job-related behavior of an employee or applicant. A lack of strong test predictability may produce false-negative results (i.e., treating an individual with psychiatric illness as lacking such a characteristic) or false-positive results (i.e., characterizing an individual as having a condition when he does not).[246]

An additional methodological issue inherent in psychological testing is the problem of restricted range.[247] A test's actual true- and false-positive rates may be unavailable because those applicants who are identified as having certain characteristics are not hired. Without such information, it is difficult to assess the degree to which qualified job applicants are unjustifiably denied employment.

Detailed analysis is required of the psychological, organizational and economic impact of medical testing on qualified job applicants and employees with disabilities.[248] One promising study examined the relative impact of company characteristics—such as company size, labor market and whether the company has a self-funded insurance plan—on the prevalence of the use of medical testing.[249] The findings show that the economic characteristics of companies help predict the prevalence of their medical testing. The authors of the study suggest that Title I implementation may have substantial economic benefits to society in curtailing overly

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A new version of the MMPI, the MMPI-2, addresses some of the criticisms of the MMPI by eliminating outdated or biased questions. It uses a more representative normative sample of individuals from different socio-economic backgrounds and expanding measurements that reflect concerns of employers such as eating disorders, substance abuse, readiness for treatment or rehabilitation and family functioning. *See* Jane C. Duckworth, *The Minnesota Multiphasic Personality Inventory-2: A Review*, J. COUNSELING & DEV., July-Aug. 1991, at 564, 564-65 (describing revised instrument and its advantages and disadvantages). *But see* John R. Graham, *Comments on Duckworth's Review of the Minnesota Multiphasic Personality Inventory-2*, J. COUNSELING & DEV., July-Aug. 1991, at 570, 571 (arguing that Duckworth's analysis of the MMPI-2 is incorrect and misleading).

246. *See* Travis, *supra* note 242, at 1729.

247. *See* Deirdre Hiatt & George E. Hargrave, *Predicting Job Performance Problems with Psychological Screening*, 16 J. POLICE SCI. & ADMIN. 122, 122 (1988) (defining restricted range problem as result of missing outcome data). Hiatt and Hargrave state that "the restricted range problem often limits researcher's and police departments' access to complex data for evaluating the tests." *Id.*; *see* Travis, *supra* note 242, at 1730.

248. Study is needed to examine the relationship between changes in test content and test validity. *See* M. A. Nester, *Employment Testing for Handicapped People*, 13 PUB. PERSONNEL MGMT. 417, 417-34 (1984) (discussing testing for persons with different disabilities).

249. *See* Leslie I. Boden & Howard Cabral, *Company Characteristics and Workplace Medical Testing*, J. PUB. HEALTH, Aug. 1995, at 1070, 1070-75. Analysis controlled for variance by firms in employee exposure to workplace hazards. *Id.*

broad medical testing policies that disproportionately shift the costs of workplace illness to workers.[250]

Effective medical testing in the workplace must balance employers' legitimate goals of maximizing worker productivity, health and safety with equal employment opportunity for qualified workers with disabilities. The prior discussion is not meant to suggest that employers, insurance companies and others do not have an important interest in promoting medical testing to identify, place and treat qualified employees with disabilities.[251]

Identifying health risks or heightened susceptibility to injury from workplace exposures is another valid goal of medical testing.[252] But caution is warranted to the extent that biased attitudes about the predictability and usefulness of medical tests may lead to increased discrimination against qualified people and their relatives. In the employment realm, discrimination based on misinformation from medical tests may preclude qualified people from being hired or promoted, serve as a basis for firing or result in the denial or unwarranted limitation of health coverage for particular conditions.[253]

IV. TRACKING ATTITUDES AND BEHAVIOR OF AN EMERGING WORKFORCE

The previous Parts of this Article identified the need for study of attitudes and behavior associated with Title I implementation with a focus on the unique issues involving hidden and perceived

250. *See id.*

251. *See* Billings et al., *supra* note 100, at 476 ("Insurance companies, private employers, governments and educational institutions all have an immediate or potential interest in promoting large-scale genetic screening to identify individuals carrying disease-associated genes.").

252. *See* Marne E. Brom, Note, *Insurers and Genetic Testing: Shopping for the Perfect Pair of Genes*, 40 DRAKE L. REV. 121, 138 (1990) ("Faced with concerns of an employee's job performance, co-workers' safety, and the public's safety, employers have considerable incentive to predict who might be susceptible to occupational exposure.").

253. *See* Alper et al., *supra* note 204, at 354 (stating that advances in development of genetic tests and pressures on insurance companies and employers to use them are increasing frequency of genetic discrimination); Geller et al., *supra* note 110, at 72 (stating safeguards must be developed to minimize inappropriate uses of genetic information); *see also* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (providing assurance of insurance portability for individuals with insurance coverage in prior 12 months even if individual has chronic illness or disability); *Prepared Statement of Dr. Collins*, FED. NEWS SERV., Apr. 23, 1996, *available in*, LEXIS, News Library, Curnws File (reporting that lack of health insurance often precludes fighting genetic risks with necessary level of surveillance or therapy and discussing consequences).

disabilities. In addition to studies of the kind previously mentioned,[254] long-term evaluation of the emerging workforce of qualified persons with disabilities is needed for several reasons.

First, prospective study of attitudes and behavior toward the workforce of qualified persons with disabilities may aid in long-term Title I implementation, as well as interpretation of related initiatives such as welfare, health care and health insurance reform. The Health Insurance Portability and Accountability Act of 1996 ("Health Insurance Reform Act"),[255] for instance, is written to ensure access to portable health insurance for employees with chronic illness or disabilities who lose or change their jobs. Under the law, group health plan premium charges may not be based solely on disability status or the severity of an individual's chronic illness.[256] In addition, the law prohibits discrimination on the basis of a genetic predisposition for illness in the provision of health insurance.[257] The combined impact of the Health Insurance Reform Act and Title I on reducing employment discrimination facing qualified persons with disabilities is a promising area for study.[258]

Second, study limited to the analysis of litigation and the EEOC charges associated with Title I, while necessary, tends to focus discussion on the "failures" of the system, as opposed to strategies designed to enhance a productive workforce and identify potential disputes before they arise. Independent of study of the enforcement of the civil rights guaranteed by Title I, the long-term goal of the law to foster equal employment opportunity for quali-

254. For a review of studies of attitudes and behavior associated with Title I implementation, see *supra* notes 149-62 and accompanying text.

255. Pub. L. No. 104-191, 110 Stat. 1936 (1996). *See generally* Peter D. Blanck et al., *Socially-Assisted Dying and People with Disabilities: Some Emerging Legal, Medical, and Policy Implications*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 538, 538-43 (1997) (discussing relation of health care needs for people with disabilities and recent cases involving physician-assisted suicide).

256. *See* 110 Stat. at 1936 (exempting individual insurance plans from application of antidiscrimination provisions); *cf.* EEOC v. CNA Ins. Co., 96 F.3d 1039, 1045 (7th Cir. 1996) (rejecting view that ADA Title I requires parity among physical and mental health benefits provided by employers).

257. *See Hearing of the Senate Labor and Human Resources Committee, Subject: Genetics*, FED. NEWS SERV. July 25, 1996, at 13, *available in* LEXIS, News Library, Curnws File (noting limitations of application of ADA to genetic discrimination, including fact that EEOC interpretive regulations have less force than would proposed law).

258. Likewise, study is needed of the interaction of Title I and the 1996 Welfare Reform Law. For instance, study is needed of the impact on persons with disabilities of the requirement under welfare reform that the head of any family on welfare must work within two years or lose benefits. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 10 Stat. 2105 (1996) (providing welfare guidelines).

fied persons requires the collection of information on attitudes and behavior. Related analysis is required of other social forces impacting on the law, such as those of public opinion, politics, culture and ideology.[259]

Third, some evidence suggests that Title I implementation has coincided with larger numbers of qualified persons with severe disabilities participating in the workplace. In 1996, the U.S. Census Bureau released data showing that the employment to population ratio for persons with severe disabilities has increased from roughly twenty-three percent in 1991 to twenty-six percent in 1994, reflecting an increase of approximately 800,000 people with severe disabilities in the workforce.[260] How will researchers study employer and societal attitudes and behavior toward these individuals entering the workforce? How will Title I implementation help to prevent discrimination and prejudice against this sector of the workforce? And, how will this new generation of qualified people with disabilities continue to advocate for their rights in employment and in other areas?

A. *Longitudinal Study*

This section highlights new empirical information from a longitudinal investigation of an emerging workforce of persons with disabilities.[261] The investigation follows the lives of some 5000 adults and children with mental and physical, hidden and apparent disabilities, by collecting information on attitudinal, behavioral, health, economic and other measures.[262] The information was first collected in 1990, two-and-a-half years before the July 26, 1992 ef-

259. *See, e.g.*, NATIONAL ACADEMY OF SOCIAL INSURANCE, PRELIMINARY STATUS REPORT OF THE DISABILITY POLICY PANEL 135 (1994) (providing findings and recommendations of the disability policy panel). The ideas are derived also from discussion with Professor Paul Burstein. *See* Professor Burstein, Remarks at the University of Iowa, Department of Sociology Lecture Series (Oct. 11, 1996).

260. *See Six Years After Signing of Law, ADA Has Been Cited in More Than 1,000 Suits*, DISABILITY COMPLIANCE BULL. (LRP Publications, Horsham, PA), Aug. 15, 1996, at 1 (observing that data reflects 27% increase in number of persons with severe disabilities in workforce from 1991 to 1994); *cf.* Rosen, *supra* note 27, at 22 (indicating that according to 1980 census, 15 million of 22.5 million persons with disabilities did not work).

261. This Article reports the 1995 findings for the first time (data tables are available from the first author). Earlier articles have described in detail the array of information collected since 1990. *See* Blanck, *supra* note 105, at 693 (describing empirical investigation of employment provisions of ADA); Blanck, *supra* note 6, at 853 (same).

262. Based on a sample size of 1127 adults, the demographics consisted of 57% (n = 643) men and 43% (n = 484) women; 84% (n = 950) white and 16% (n = 177) minority. Ages ranged from 18 to 72 years.

fective date of Title I. Information from the first five years of study focused on the participants' attitudes and behavior as indicators of progress and of the needs for policy planning in this area.[263]

In the investigation, a major outcome (i.e., behavioral) measure is defined as the participants' degree of employment integration in society, categorized by involvement in employment as competitive, supportive, sheltered or no employment.[264] Several other measures identify trends in employment integration. These predictor variables include assessments of personal backgrounds, individual capabilities and qualifications, and attitudes about inclusion, empowerment in society and ADA implementation. The research is meant to help identify the variables to be studied to achieve an understanding of attitudes and behavior toward disability and employment opportunity and advancement.[265]

Consistent with the 1996 findings of the U.S. Census Bureau, the principal findings of the investigation show that from 1990 to 1995, almost half of the participants (forty-three percent) moved into more integrated employment settings.[266] The proportion of individuals engaged in competitive employment more than doubled from six percent in 1990 to fifteen percent in 1995.[267]

The growth in the attainment of employment is dramatic for persons with high job-related skills (i.e., arguably those most "qualified"), with gains in their attainment of employment more than doubling from twelve percent in 1990 to twenty-five percent in 1995.[268] Other measures of labor market outcomes for persons with different disabilities are necessary, including measures of earning parity with persons without disabilities in similar jobs.

Individuals with higher capabilities and qualifications, particularly those with better job skills and health status, are significantly

263. *See* Blanck, *supra* note 6, at 886-87 (stating findings are descriptive and exploratory, presenting view over time of participants' backgrounds, attitudes and behaviors relevant to employment integration under Title I).

264. For a model for the study of employment, see *id.* at 859.

265. "Disability" is analyzed as a function of the skills of the person (e.g., highlighted by measures such as "capabilities and qualifications") and the environment (e.g., highlighted by measures such as "inclusion" and "empowerment"). Other measures must be studied to achieve an understanding of employment integration under Title I.

266. Forty-seven percent showed no change in their employment status, and 10% regressed into less-integrated employment.

267. *See id.* at 870-72 (supplying data).

268. Relative unemployment levels for all participants decreased from 39% in 1990 to 12% in 1995. For those participants with high job-related skills, unemployment levels dropped from 20% in 1990 to 5% in 1995.

more likely to attain integrated and competitive employment.[269] Qualified persons in integrated employment are more likely to reside in integrated community settings, supporting the view that independent living is central to inclusion into society for many persons with disabilities.[270] Individuals in integrated employment report that they are more satisfied with their work and life activities.[271] This finding is consistent with studies showing that positive employment outcomes result in increased self-esteem for persons with disabilities.[272]

Attitudes and behavior about inclusion and empowerment in the workplace and society are measured in several ways (e.g., by degree of independence in living and reported satisfaction in employment and daily living). From 1990 to 1995, the proportion of individuals in community living increased substantially. Satisfaction with work and daily life also improved significantly during this period.[273]

Several measures explore individual empowerment activities. One measure reflects the participants' involvement in self-advocacy

269. Pearson correlation coefficient was .37, $p < .01$, for job-related skills and degree of integration in employment and was .70, $p < .001$, for job-related skills and 1995 earned income. Pearson correlation coefficient was .23, $p < .01$, for health status and degree of integration in employment and was .32, $p < .001$, for health status and 1995 earned income. Analysis of those participants aged 21 to 25 years entering the workforce support the findings that high job skill is related to the ability to attain employment (e.g., in the 21 to 25 year-old age category, 95% of participants in competitive employment show high job skill).

270. *See* JULIE A. RACINO & JUDITH E. HEUMANN, INDEPENDENT LIVING AND COMMUNITY LIFE, GENERATIONS: AGING & DISABILITIES 45 (1992) (describing importance of community integration to developmentally disabled adults); Beverly Lozano, *Independent Living: Relation Among Training, Skills, and Success*, 98 AM. J. MENTAL RETARDATION 249, 249 (1993) (same).

271. Pearson correlation coefficient was .13, $p < .05$, for job and life satisfaction and degree of integration in employment. Individuals in integrated employment scored higher on the self-advocacy "empowerment" measures. *See* Blanck, *supra* note 6, at 893 (providing correlation coefficient). The investigation examined earned income in 1995 and changes in gross income from 1990 to 1995 (e.g., from employment and other sources, while controlling for inflation). During the 1990 to 1995 period, income rose for participants. From 1993 to 1995, those in integrated employment showed higher levels of earned income. Individuals with higher incomes in 1995 scored higher on the capabilities and qualifications measures, were more likely to live in community settings, reported greater empowerment and satisfaction with their jobs and lives and were more involved in self-advocacy.

272. *See, e.g.*, Mary Sinnott-Oswald et al., *Supported and Sheltered Employment: Quality of Life Issues Among Workers with Disabilities*, 26 EDUC. & TRAINING MENTAL RETARDATION 388, 388-97 (1991) (examining differences in perceived quality of life between two groups of adults with mental retardation: community employed individuals and individuals employed in workshops).

273. Effect size correlation on scores between 1990 and 1995 is .67, $p < .001$.

programs designed to enhance skills and knowledge toward civil rights.[274] During the early years of Title I implementation, the proportion of participants involved in self-advocacy activities more than doubled from eighteen percent in 1990 to thirty-nine percent in 1995.[275] Individuals involved in self-advocacy are more likely to attain competitive employment and have higher earned incomes.[276]

In-depth examination of the development of attitudes and behavior concerning self-advocacy for the emerging workforce of people with disabilities is needed. Self-advocacy, by definition, teaches people to advocate and make decisions for themselves so that they may become more independent, empowered and understanding of their rights and responsibilities in society.[277] Growing self-perceptions of empowerment by persons with visible, hidden or perceived disabilities—and resultant disclosure of disability or advocacy behavior in employment—may assist in the effective use of the antidiscrimination provisions in Title I.[278]

Other measures in the investigation explore general attitudes concerning access to and rights in employment (ADA Title I issues), education and public transportation (ADA Title II issues) and public accommodations (ADA Title III issues).[279] From 1990 to 1995, reported accessibility to these areas fluctuated.[280] From

274. *See also* Beth S. Levy, *Self-Advocacy Skills Training for Adolescents with Physical Disabilities* (1996) (Ph.D. dissertation, Pace University), *in* 57/04-B DISSERTATION ABSTRACTS INT'L 2947 (finding importance of self-advocacy training to knowledge of attitudinal and structural biases against people with disabilities).

275. This result is statistically significant, with effect size correlation of .35, $p < .001$.

276. Pearson correlation between self-advocacy involvement and 1995 employment category was .12, $p < .01$, and with 1995 earned income was .34, $p < .001$.

277. *See* Blanck, *supra* note 6, at 883 & n.144 (citing other sources).

278. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A CIVIL RIGHTS MOVEMENT 328-29 (1994) (stating ADA rights are license for people with disabilities to "get angry, instead of politely asking for help"); Alison B. Miller & Christopher B. Keys, *Awareness, Action, and Collaboration: How the Self-Advocacy Movement is Empowering for Persons with Developmental Disabilities*, 34 MENTAL RETARDATION 312, 312 (1996) (describing analysis of self-advocacy as weapon against discrimination).

279. *See* 1995 HARRIS STUDY, *supra* note 147 (stating more persons with disabilities believed access to employment opportunities had improved between 1990 and 1994 than regressed (44% in 1994 compared to 28% in 1990)). For public transportation, the percentages of persons with disabilities believing that access had improved were 60% and 13%, respectively, and for public facilities, the percentages were 75% and 6%. *See id.*

280. *See* Peter D. Blanck, *Assessing Five Years of Employment Integration and Economic Opportunity Under the Americans with Disabilities Act*, 19 MENTAL & PHYSICAL DISABILITY L. REP. 384, 388 (1995) ("[F]indings . . . suggest that from 1990 to 1994, the participants' perceptions of their rights and access to work and daily life have fluctuated.").

1990 to 1992, during the first two years of implementation, perceptions of ADA effectiveness and of access to society increased substantially.[281] Starting in 1992, attitudes about rights and access began to drop, and by 1995, reported levels were almost comparable to those reported in 1990.[282]

The trends suggest that upon passage of the ADA, especially during the two-year period from 1990 to 1992, hopes were high for a new civil rights era for people with disabilities. In just five years, however, the reality of implementation may not have achieved the promise of full inclusion and empowerment in society. Although it is too early to make definitive conclusions about these trends, research must examine over time the relation of attitudes and behavior in society to equal employment opportunity for qualified persons.[283]

The present research cannot yet inform policy makers, employers, the disability community and others about many of the complex issues related to implementation.[284] It also cannot address the potential for ADA backlash driven by attitudinal differences between the emerging generation of self-advocating individuals with disabilities and "the stereotypical thinking of the rest of the country."[285]

B. *Implications for Future Study*

Despite encouraging trends, some estimates of unemployment levels for persons with disabilities exceed fifty percent.[286] As a result, the continued reality of structural, attitudinal and behavioral discrimination[287] increasingly may lead qualified individuals to as-

281. *See id.*

282. Although the present findings show changes from 1990 to 1995 on many of the measures, in time, changes may occur at a less dramatic pace. *See generally* THOMAS D. COOK & DONALD T. CAMPBELL, QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS 32 (1979) (providing comprehensive guide to quasi-experimental research in social and behavioral sciences).

283. *See* Paul Wehman, *Employment Opportunities and Career Development in* THE ADA MANDATE FOR SOCIAL CHANGE 145, 255 (Paul Wehman ed., 1993) (discussing unemployment levels of persons with disabilities).

284. The individual measures are starting points for understanding the elements of employment integration for persons with disabilities, however, there is much to be learned about this research model and others.

285. *See, e.g.*, SHAPIRO, *supra* note 278, at 70-73, 328 (discussing backlash against disability rights movement).

286. *See* Wehman, *supra* note 283, at 154 (discussing continued employment discrimination).

287. *See* PAUL WEHMAN ET AL., SUPPORTED EMPLOYMENT: STRATEGIES FOR INTEGRATION OF WORKERS WITH DISABILITIES 54-58 (1992) (discussing effect of sup-

sert their Title I rights in the future.[288] Several implications may be derived from the studies examined in this Article.

First, research is lacking on strategies to assist qualified persons with obvious, hidden and perceived disabilities entering the work force. Analysis of job retention, assessment, advancement, disclosure and accommodation strategies are needed to help qualified individuals keep jobs and achieve their potential.[289] Studies must address the economic and social factors (e.g., the impact of health insurance reform) and structural and cyclical changes in labor markets that influence employment opportunity for persons with different disabilities. Study should include factors such as types of jobs attained (e.g., entry level, service-related or production), geographic differences in labor markets and hiring patterns, turnover, productivity, retention, wage and promotion rates, availability of transportation to work and accommodations.[290]

Second, analysis of existing research suggests that employment discrimination against qualified persons with disabilities cannot be resolved solely by strict enforcement of Title I. Questions about the genesis of employment discrimination on the basis of hidden or perceived disabilities must be examined within the context of underlying attitudes, behavior and corporate environments. Study of informal dispute resolution practices in different business sectors is required and may prove useful in raising awareness about implementation.

Third, study is needed of the growing use of medical testing in the employment context.[291] Analysis of Title I prohibitions involving medical testing during the application process and the im-

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ported employment for persons with disabilities on wages, community integration and ongoing supports).

288. *Cf.* William J. Hanna & Elizabeth Rogovsky, *On the Situation of African-American Women with Physical Disabilities*, 23 J. APPLIED REHAB. COUNSELING 39-45 (1992) (commenting on compounding effect of racial discrimination in relation to disability-based discrimination). The authors note that 25% of black women with disabilities are employed full-time, as compared to 77% of white men, 57% of black men and 44% of white women with disabilities.

289. *See* Tom Harkin, *The Americans with Disabilities Act: Four Years Later—Commentary on Blanck*, 79 IOWA L. REV. 935, 936 (1994) (stating disability is natural part of human experience).

290. *See* Jerry L. Mashaw & Virginia P. Reno, *Overview, in* DISABILITY, WORK AND CASH BENEFITS 22 (Jerry L. Mashaw et al. eds., 1996) (noting structural changes in economy affect job opportunities for workers with different disabilities). *See generally, Economics of the ADA*, *supra* note 172, at 877-914 (1997) (discussing economic analysis of Title I).

291. For a discussion of needed medical study in the employment context, see *supra* notes 248-53 and accompanying text.

proper use of test results for other purposes is required.[292]

Finally, study is lacking on the extent to which individuals who undergo testing understand their privacy rights,[293] as well as issues concerning informed consent and confidentiality in related research, diagnosis and therapy.[294] Ethical issues surrounding testing in employment increasingly are prominent as medical and other personal records are placed in computer data bases that are accessible to individuals and companies.[295] These and other questions are related to the study of employment discrimination based on attitudes and behavior toward perceived and hidden disability.

V. CONCLUSION

ADA Title I has reflected a dramatic shift in American attitudes and behavior toward the equal employment of qualified persons with disabilities. Yet, five years after the law's effective date, in part because of a lack of systematic study, ambiguity remains in the concept of employment discrimination, the required provision of ac-

292. *See* McGoodwin, *supra* note 192, at C03 (stating genetic discrimination "is beginning to unfold far before the law is ready"). Commentators have suggested that a universal health system is needed to address the problem of the uninsured. *See, e.g.*, Billings et al., *supra* note 100, at 481-82 (stating genetic discrimination will continue absent changes in prevailing American health care system); Natowicz et al., *supra* note 94, at 473-74 (discussing possible solutions to problems posed by genetic testing).

293. *See Genetic Testing for Cancer Susceptibility ASCO Statement Published*, PR NEWSWIRE, May 1, 1996, *available in* LEXIS, News Library, Curnws File (observing that American Society of Clinical Oncology advises oncologists on genetic testing issues and recommends counseling be provided for individuals at risk for inheriting cancer susceptibility gene and that patients and their families be informed about potential for genetic discrimination by insurers or employers).

294. For a discussion of informed consent and confidentiality issues, see *supra* notes 251-53 and accompanying text. *Cf.* Abigail Trafford, *Ethics and Genetics*, WASH. POST, Apr. 16, 1996, at Z06 (reporting that after litigation over military's policy of collecting genetic information from members of armed services for inclusion in "DNA registry" to identify bodies of soldiers killed in battle, Pentagon modified policy from keeping DNA records for 75 years to destroying them upon request once people leave military).

295. *See* Lori B. Andrews & Ami S. Jaeger, *Confidentiality of Genetic Information in the Workplace* 17 AM. J.L. & MED. 75, 76 (1991) ("The practice of genetic testing in the workplace raises issues about who should have access to the results."); Natowicz et al., *supra* note 94, at 473; *see also* Elaine A. Draper, *Social Issues of Genome Innovation and Intellectual Property*, RISK: HEALTH SAFETY & ENV'T, Summer 1996, at 201 (analyzing information control and data banks on job applicant and employee genetic conditions); *On-Line Service Checks Job Applicant Histories*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 28, 1996, *available in* 1996 WL 5186849 (reporting that employers access online information about job applicants' past workers' compensation claims and health-related information even though it violates ADA for employer of 15 or more employees to ask applicants about past workers' compensation claims or to not hire person because of past work injuries).

commodations, the boundaries of medical testing and the implementation of other discretionary terms of Title I.

The debate over implementation has been fueled by suggestions, in the absence of data, that Title I is not cost effective and has distorted the market value of American labor, requiring employers to take "affirmative" and costly measures to accommodate qualified persons with disabilities.[296] These conclusions are not supported by the findings that the costs of accommodating qualified workers are low and the relative economic benefits high, that the costs of not accommodating and not retaining qualified workers are relatively high, and that most Title I disputes have been resolved at a low cost without extensive trial litigation.[297]

Independent of economic or other empirical study associated with Title I implementation, future definition of social policies toward the employment of qualified persons with disabilities must be guided by the societal and moral values embodied in the civil rights set forth in the law.[298] Many economic and societal benefits associated with Title I implementation remain to be discovered and will need to be documented. Dialogue and study are needed to raise awareness and understanding of the complex attitudes and behavior underlying implementation of these values.

Joseph Shapiro has identified the challenges ahead:

> What happens when Congress grants a new group minority rights, but society has little understanding that those rights have been awarded or why they are needed? As the newly recognized minority—disabled people—starts asserting those rights, there are many breakthroughs for equality. But there are also clashes, misunderstandings, even a backlash. . . . Now disabled people fear that a society that did the right thing—but without the benefit of significant consciousness-raising—has begun to question

296. *See* Shelly J. Lundberg, *Equality and Efficiency: Antidiscrimination Policies in the Labor Market, in* EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY, *supra* note 14, at 85-100 (reviewing efficiency of federal antidiscrimination policies); *cf.* Walter Y. Oi, *supra* note 12, at 112 (arguing that, without support of data, Title I discourages employers from searching for highly qualified persons, thereby leading to economic inefficiencies and opportunity costs to employer).

297. For a discussion of workplace accommodations and ADR mechanisms, see *supra* notes 141-62, 167-91 and accompanying text.

298. *See, e.g.*, Kavka, *supra* note 11, at 288 (stating economic analysis should not be primary criterion for defining social policy toward employment for qualified persons with disabilities).

those rights.[299]

299. SHAPIRO, supra note 278, at 323-24.

VI. APPENDIX

ANALYSIS OF ADA TITLE I: DEFINITION OF DISABILITY*

"KNOWN" IMPAIRMENT COVERED BY TITLE I

	No ("no substantial limitation on major life activity" or no impairment)	Yes ("substantial limitation on major life activity")
No Perceived Impairment	*Not Covered* (e.g., *personality or behavior problem)* CASES: Stewart v. County of Brown, 86 F.3d 107 (7th Cir. 1996) (excitability); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995) (arm injury); Fenton v. Pritchard Corp., 926 F. Supp. 1437 (D. Kan. 1996) (threatening behavior).	*Hidden, Asymptomatic Condition* (e.g., *genetic or psychiatric illness)* CASES: Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995) (primary amyloidosis); Johnson v. Boardman Petroleum, Inc., 923 F. Supp. 1563 (S.D. Ga. 1996) (depression); Stola v. Joint Indus. Bd., 889 F. Supp. 133 (S.D.N.Y. 1995) (anxiety disorder).
Yes Perceived Impairment	*Misdiagnosis, Misconceptions and Biased Attitudes* (e.g., *gay lifestyle equates with presence of HIV disease, obesity or heart disease equates with lack of present ability)* CASES: Deane v. Pocono Med. Ctr., No. 96-7174, 1997 WL 500144 (3d Cir. Aug. 25, 1997) (sprained wrist); Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996) (heart disease); La Paz v. Henry's Diner, 946 F. Supp. 484 (N.D. Tex. 1996) (homosexuality); EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996) (obesity).	*Obvious, Readily Apparent Impairment* (e.g., *cerebral palsy)* CASES: Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997) (HIV); Koblosh v. Adelsick, No. 95 C 5209, 1996 WL 675791 (N.D. Ill. Nov. 20, 1996) (cerebral palsy). or *Impairment Substantially Limiting Only as Result of Attitudes of Employer* (e.g., *toothlessness)* CASES: Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (paralysis (dicta)); Hodgdon v. Mt. Mansfield Co., 624 A.2d 1122 (Vt. Sup. Ct. 1992) (toothlessness).

* Categorization of a case in one of the four quadrants or cells does not indicate whether a person is "qualified" for the job in question for purposes of Title I analysis. Although the cases cited are illustrative of a primary cell category, factual aspects of a particular case may enable categorization in multiple cells. For instance, in many Title I cases, plaintiffs allege multiple charges of discrimination under each of the three prongs of the statutory definition of disability.