

**REASSESSING THE RECESSION:
DISCRIMINATION IN HIRING AND FIRING OF
PEOPLE WITH DISABILITIES**

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I. INTRODUCTION

The current recession has resulted in the highest rates of unemployment since 1983.¹ Despite evidence suggesting that the hiring of people with disabilities is beneficial to the national economy,² unemployment rates are rising faster among people with disabilities than those without. During January 2009, the recession's worst single month for layoffs and job losses, nine percent of workers with disabilities lost or left their jobs, almost double the rate of workers without disabilities in the same period.³ From October 2008 to June 2010, a disproportionately large percentage of people with disabilities lost their jobs; approximately twelve percent of people with disabilities were terminated during the hardest months of the recession, as compared to approximately three percent for people without disabilities.⁴ The current recession's broad and lasting

¹ In 2010, the unemployment rate reached 9.6%, the highest rate since 1983. U.S. BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES 2010 1 (2011), available at <http://www.bls.gov/cps/cpsaat1.pdf>.

² According to a recent New York Times article, the need to provide employment opportunities for workforce-eligible persons who collect Social Security Disability is increasingly great: “[F]or the last five years, Social Security has paid out more in benefits to disabled workers than it has taken in from payroll taxes. Government actuaries forecast that the disability trust fund will run out of money by 2018.” Motoko Rich, *Disabled, but Looking for Work*, N.Y. TIMES, Apr. 6, 2011, at B1. Cf. Robert Haveman and Barbara Wolfe, *The Economics of Disability and Disability Policy*, 1B HANDBOOK OF HEALTH ECONOMICS 995, 1051 (2000); see also Thomas N. Chirakos, *Aggregate Economic Losses from Disability in the United States: A Preliminary Essay*, 67 MILBANK Q. 59 (1989).

³ 4.7% of workers without disabilities lost or left their jobs in January 2009. H. Stephen Kaye, *The Impact of the 2007-09 Recession on Workers with Disabilities*, 133 MONTHLY LABOR REV. 19, 26 (2010).

⁴ *Id.* at 22.

impact on the United States' economy offers a powerful lens through which to examine people with disabilities' access to the workplace. Of course, discrimination against employees with disabilities is not unique to the current recession. At every economic downturn, people with disabilities are often the first fired and last hired.⁵

This article attempts to contextualize the phenomenon of employers' unconscious, implicit bias against people with disabilities during economic downturns. It will explain how employers, improperly associating employees with disabilities with high cost, reduced work product, or other ungrounded, stigmatic beliefs, use recessions to rationalize discriminatory behavior. Focusing on hiring and firing practices, Part II of this article highlights the history of employment barriers that people with disabilities face in the Federal and private sectors. Part III critiques contemporary antidiscrimination law in the context of unconscious, implicit bias against people with disabilities and negative employment outcomes. Part IV describes the strengths, limitations, and drawbacks of the Americans with Disabilities Act⁶ ("ADA"), and compares the potential successes of the ADA's reasonable accommodations in the workplace with the law's failure to improve hiring practices for people with disabilities. Part V describes the ways in which the recent ADA Amendments and regulations may or may not be able to correct some of the Act's earlier limitations. Finally, Part VI provides recommendations for employers and job applicants with disabilities to understand and effectively utilize the ADA's reasonable accommodation provisions at the various stages of the employment process.

II. BARRIERS TO EMPLOYMENT

The history of workplace discrimination against people with disabilities in the United States is long and well documented.⁷ Data

⁵ See, e.g., LAURA TRUPIN, DOUGLAS S. SEBESTA, EDWARD YELIN & MITCHELL P. LAPLANTE, TRENDS IN LABOR FORCE PARTICIPATION AMONG PERSONS WITH DISABILITIES 1983-94 (U.S. Dep't of Educ., Nat'l Inst. on Disability and Rehabilitation Research, 1997).

⁶ Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified in scattered sections of 29, 42, 47 U.S.C.)

⁷ See, e.g., 485(II), reprinted in 1990 U.S.C.C.A.N. 267, 313 [hereinafter *House Report*] (quoting testimony before the House Subcommittee on Select Education and Employment Opportunities).

suggest that since the establishment of the ADA in 1990, some people with disabilities have experienced less discrimination and greater accommodation on the job than before the ADA; however, research also shows that other groups of people with disabilities have had no apparent increases in hiring or job retention.⁸ For example, both private and public-sector employers still maintain negative attitudes toward hiring persons with mental and/or psychiatric disabilities.⁹ Many employers believe that people with disabilities present a risk of poor attendance and productivity.¹⁰ Some employers have expressed concern about these individuals' ability to interact with other employees.¹¹ Across disability levels, since the recession began, both Federal and private sector employees and applicants with disabilities have faced disproportionately increasing rates of termination and rejection upon application.¹² In the past year, the employment-population ratio of people with disabilities (which measures the number of working people relative to the overall population) has dropped from 18.4% to 17.7%, while the ratio for people without disabilities has increased from 63.6% to 63.8%.¹³ Even now, as the economy begins to improve, people with disabilities are facing the opposite trend in employment than the workforce population without disabilities.

Federal employment has long been praised for the promotion of diversity in its hiring practices.¹⁴ From 1998 to 2007, the total

⁸ GINA A. LIVERMORE & NANETTE GOODMAN, A REVIEW OF RECENT EVALUATION EFFORTS ASSOCIATED WITH PROGRAMS AND POLICIES DESIGNED TO PROMOTE THE EMPLOYMENT OF ADULTS WITH DISABILITIES 23 (2009).

⁹ See generally U.S. Equal Employment Opportunity Comm'n, Meeting of March 15, 2011: Employment of People with Mental Disabilities (Mar. 15, 2011), <http://www.eeoc.gov/eeoc/meetings/3-15-11/index.cfm>.

¹⁰ Darlene D. Unger, *Employers' Attitudes Toward Persons with Disabilities in the Workforce: Myths or Realities?*, 17 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 2, 3-10 (2002).

¹¹ See *id.*

¹² See generally, Kaye, *supra* note 3, at 29-30.

¹³ BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, ECONOMIC NEWS RELEASE, TABLE A6, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX, AGE, AND DISABILITY STATUS, NOT SEASONALLY ADJUSTED (2011), <http://www.bls.gov/news.release/empstat.t06.htm>.

¹⁴ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N., OFFICE OF FEDERAL OPERATIONS, ANNUAL REPORT ON THE FEDERAL WORKFORCE (2009),

Federal workforce increased by nearly 130,000 employees—a net expansion of approximately five percent.¹⁵ However, during this same period, the number of federal employees with disabilities¹⁶ dropped to less than one percent of the total Federal workforce—a net loss of approximately fourteen percent of employees with disabilities.¹⁷ According to the National Council on Disability, employees with disabilities now exit the Federal government at twice their rate of hire.¹⁸ When employees with disabilities retire, they tend to be replaced by new hires without disabilities.¹⁹ The private sector has a similar story. Workforce-eligible people with disabilities are over three times less likely as those without disabilities to be employed.²⁰ Such high rates of unemployment result when employers disproportionately fail to hire people with disabilities or decline to provide accommodations on the job. The current recession has exacerbated this problem; people with disabilities have fared far worse in both hiring and job retention than people without disabilities.²¹

available at <http://www.eeoc.gov/Federal/reports/fsp2009/upload/FY-2009-Annual-Report.pdf>.

¹⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N. (EEOC), ANNUAL REPORT ON THE FEDERAL WORKFORCE, FY 2007, tbl.A-1 (2008), available at <http://www.eeoc.gov/Federal/reports/fsp2007/index.html>.

¹⁶ The federal government, as a matter of policy, has specifically identified particular "targeted disabilities" for data collection, including: "deafness, blindness, missing extremities, partial paralysis, complete paralysis, convulsive disorders, mental retardation, mental illness, and distortion of limb and/or spine." *Id.* at tbl.A-6b.

¹⁷ *Id.* at tbl.A-1.

¹⁸ For example, in 2006, nearly 2,100 employees with disabilities left Federal employment, but there were only about 1,300 new employees with disabilities hired. NATIONAL COUNCIL ON DISABILITY, FEDERAL EMPLOYMENT OF PEOPLE WITH DISABILITIES, 25, 67 (2009), available at http://www.ncd.gov/newsroom/publications/2009/pdf/Federal_Employment_of_People_with_Disabilities.pdf [hereinafter NATIONAL COUNCIL ON DISABILITY].

¹⁹ *Id.*

²⁰ In February 2011, for individuals ages 16 to 64, the percentage of people with disabilities in the labor force was 20.6%. By contrast, the percentage of people without disabilities in the labor force was 69.5%. BUREAU OF LABOR STATISTICS, ECONOMIC NEWS RELEASE: THE EMPLOYMENT SITUATION MARCH 2011 17 (2011), available at http://www.bls.gov/news.release/archives/empsit_04012011.htm.

²¹ See, e.g., Kaye, *supra* note 3, at 29-30.

In the broader context of economic downturns, employers often make cost-based business judgments with greater magnitude and frequency. Many of these decisions involve the hiring and firing of employees.²² Due to employers' general bias against people with disabilities, including beliefs that these individuals will be too costly to maintain or cannot adequately perform job duties, job applicants and employees with disabilities will be particularly affected during these periods.²³ Employers reduce costs they associate with employing people with disabilities in several ways: (1) not hiring applicants with disabilities;²⁴ (2) paying employees with disabilities less to offset the presumed costs associated with their employment;²⁵ or (3) denying requests for reasonable accommodations.²⁶ Although seemingly grounded in neutral market forces, these business decisions are skewed by the employers' personal beliefs about which employment practices may lead to greater business expenses.²⁷

Substantial research indicates that employers' implicit biases about people with disabilities makes them reluctant to hire or retain these individuals. This bias reflects a systemic undervaluing of

²² Geoffrey Moore, *Business Cycle Indicators*, 35 AM. ECON. REV. 737 (1961).

²³ See NATIONAL COUNCIL ON DISABILITY, *Recruitment and Retention of People with Disabilities, Employment Issue Brief No. 1*, in EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 73, 74-5 (2007).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Under the ADA, reasonable accommodation requests may be informal, and may even be requested by someone other than the individual with a disability. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N., DEP'T OF LABOR, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 19-20 (2002). Due to the informality of the accommodations process, some employers may not even recognize an accommodation request when presented with an employee with a disability or advocate, and, accordingly, may deny the request without engaging in the ADA-mandated *interactive process*.

²⁷ These types of decisions may be motivated by intentional discrimination, but more arise from the kinds alluded to by Justice Thurgood Marshall five years prior to the enactment of the ADA: "Discrimination against [people with disabilities] was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

applicants and employees with disabilities by employers.²⁸ For example, even when equally qualified, applicants and employees with disabilities receive less favorable hire recommendations than those without disabilities.²⁹ In order to effectively combat the systemic obstacles to workplace access faced by people with disabilities, we must first understand how this bias interferes with hiring, job advancement, and retention.

III. IMPLICIT BIAS AGAINST EMPLOYEES & APPLICANTS WITH DISABILITIES

The Americans with Disabilities Act emerged to address gaps in contemporary civil rights jurisprudence on behalf of people with disabilities. Acknowledging the limits of this jurisprudence and in particular anti-discrimination law as a remedy for racial injustice, Derrick Bell described the process by which those with power will work to better the lives of those without.³⁰ In Bell's admittedly skeptical view, for racial justice to occur, external factors must incentivize those in power to work towards change. He labels this phenomenon the "interest convergence dilemma."³¹ Bell's interest convergence dilemma engages in a systemic critique of the formalism in the judicial system, arguing that *Brown v. Board of Education*, perhaps the Supreme Court's most tangible articulation of "corrective" racial justice, was not decided or motivated by altruism; instead, Bell argues that the Court's holding in *Brown* was motivated by external political factors. In that case, the Court was incentivized to integrate schools by public and international relations in the context of the Cold War.³² Critiques of *Brown* are particularly

²⁸ See NATIONAL COUNCIL ON DISABILITY, *Recruitment and Retention of People with Disabilities*, *supra* note 23, at 74.

²⁹ *Id.* at 75.

³⁰ Bell's interest convergence dilemma is grounded in economic theory and corroborated by a history of self-serving governmental intervention, perceived as "neutral," but resulting in the consolidation of power within groups previously possessing it; although Bell's work focused on interest convergence in the context of racial justice, the same themes are relevant in the context of people with disabilities as a politically powerless minority. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

³¹ *Id.*

³² *Id.*

poignant in the context of the disability rights movement. The landmark decision pushed both race and disability components of the civil rights movements forward, fostering contemporary special education and disability rights law in the United States by ensuring that “where the state has undertaken to provide it, [access] must be made available to all on equal terms.”³³ Bell's analysis of *Brown* has similar traction with the disabilities rights movement's greatest anti-discrimination achievement – the ADA. The ADA was not entirely motivated by altruism, or even paternalism.³⁴ Looking to the context of the law's enactment, while the ADA's statutory language expresses the central goal of “elimination of discrimination,”³⁵ the Act was only able to gain broad, bipartisan support through resting on principles of welfare reform.³⁶

Though useful for interrogating the subjective and sometimes ulterior motives behind the judicial and legislative decision-making processes, Bell's interest convergence dilemma extends far beyond the context of civil rights law. Indeed, it can be argued that the “free market” acts under much of the same motivations as judicial decision-making in Bell's analysis: to consolidate power for the powerful and to subordinate the powerless, only breaking free from this pattern of subjugation when doing so serves to benefit the dominant group.³⁷ When the interest convergence dilemma is applied to economics, the “market” becomes more than a neutral force; the market emerges as a human construction—an actor, preserving power at the expense of “outsider” groups, including racial and gender minorities, and people with disabilities.³⁸ These outsider

³³ *Brown v. Board of Education of Topeka*, 347 U.S. 482, 493 (1954).

³⁴ Salient critiques have been made about the existence of paternalism in many disability rights laws; while these may indeed be relevant, they are somewhat distinct from the “charitable” motivations that Bell cites to in his interest convergence dilemma, in which a concrete benefit has been conferred upon those in power. For more on paternalism in disability rights advocacy, see JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 3 (1998); see also Samuel Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1010-12 (2003).

³⁵ See 42 U.S.C. § 12101(b)(1) (2010).

³⁶ See Bagenstos, *supra* note 34.

³⁷ See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 564 (1933) (arguing that “[t]hose who prove weak in a state of anarchic competition may become strong in a state of wise regulation and protection.”).

³⁸ See generally Simon Deakin & Frank Wilkinson, *Rights vs. Efficiency: The*

groups are particularly susceptible to socially constructed biases, which infiltrate their daily interactions with those in power, leading to further subordination.³⁹

“Implicit bias,” long used by social justice advocates to progress antidiscrimination jurisprudence beyond the doctrine of intentional discrimination in the context of race and gender, also has substantial bearing on discrimination law for people with disabilities.⁴⁰ At its core, implicit bias theory refutes the view that human actors are guided solely by explicit intentions.⁴¹ In contrast, implicit biases suggest that an actor's social perceptions and judgments are not always controlled by conscious, intentional motivation.⁴² In the context of disability, some have argued that the very mechanisms that attach social advantage or disadvantage to particular physical or mental abilities are what create the very category of “people with

Economic Case for Transnational Labour Standards, 23 *INDUS. L.J.* 289, 294 (1994) (describing the “structural imperfections,” such as seniority, loyalty and human error that prevent purity in free-market salary determinations):

‘Market-determined’ wage structures are no guide to relative skills or productivity as workers of equal, or potentially equal, skills and abilities are employed at widely varying levels of pay. This availability to employers of undervalued labour acts as a source of productive inefficiency in its own right In effect, ‘unregulated’ labour markets generate false labour standards which can be countered only by institutional intervention aimed at ensuring both greater equality of opportunity and equity in the treatment of workers.

³⁹ See generally Anthony Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4 (1995) (describing the process by which stereotypes and attitudes held by and about outsider groups implicitly reinforce themselves, concluding that drawing attention to implicit bias, even in individuals who disavow such bias, helps to reverse or lessen its effects).

⁴⁰ For a discussion of the legal literature on implicit bias, including critiques and responses to critiques, see generally, e.g., Samuel R. Bagenstos, *Implicit Bias, “Science” and Antidiscrimination Law*, 1 *HARV. L. & POL’Y REV.* 477 (2008).

⁴¹ See Greenwald & Banaji, *supra* note 39 (describing implicit social cognition); see also Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 *PSYCHOL. REV.* 3 (2002) (establishing the strength of the implicit bias theory as evidenced by its predictive validity relative to self-reporting).

⁴² Anthony Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *CALIF. L. REV.* 945, 946 (2006).

disabilities.”⁴³ Indeed, without a social valuing of particular abilities, and a consequential social definition of what is or should be the “norm,” divergence from “typical” abilities would not be conceived as “disabilities.”⁴⁴ Implicit biases are not only created by social judgments, but they also perpetuate stereotypic social perceptions against people with disabilities, further consolidating social value and power for those groups without disabilities.⁴⁵

When economies fluctuate, the rise of unemployment rates among people with disabilities reflects this consolidation of power. We suggest that the speed and frequency of discrimination against job candidates and employees with disabilities are too pervasive for an intentional, collaborative discriminatory scheme. Instead, something less explicit, but more pervasive, operates within the minds of employers to cause the disproportionate elimination of jobs and lack of hiring for people with disabilities: a kind of implicit bias that prevents full and sustained access to the workforce by people with disabilities. Here, Bell’s interest convergence suggests an alarming outcome of the ADA. Unlike the broader civil rights consequences of *Brown*, bringing about social justice despite potentially ulterior motivation, the Americans with Disabilities Act may be fostering a type of interest *divergence* for people with disabilities—in particular, the requirements of the ADA may force employees or job applicants with disabilities to be perceived as more expensive than employees without disabilities, thus incentivizing non-hiring or termination of employees with disabilities in market downturns.⁴⁶ In collaboration with pre-existing implicit biases unrelated to cost of accommodation, the result is devastating for people with disabilities.

As evidenced by the disproportionate experience of (non)hiring and (un)employment of people with disabilities, practitioners are

⁴³ Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 436 (2000).

⁴⁴ *Id.* at 436-7.

⁴⁵ See, e.g., NATIONAL COUNCIL ON DISABILITY, *supra* note 18, at 75.

⁴⁶ See SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW*, 154 (2009) (arguing that “[i]f employers are, as a practical matter, unlikely to face much consequence if they discriminate against job applicants with disabilities, but they will be required to provide accommodations to—and be less free to fire—employees with disabilities, they will have an incentive, all else equal, *not* to hire disabled job applicants.”).

unable to find effective solutions to hiring and retention gaps by conventional antidiscrimination mechanisms. In part, conventional mechanisms like litigation fail because most antidiscrimination precedent imposes the burden of establishing discriminatory intent before succeeding on the merits of the claim.⁴⁷ Several scholars have critiqued the intent doctrine because discriminatory intent is often irrelevant in the face of actual effects, or can be concealed despite broad, disproportionate burden against minority groups.⁴⁸ Just as it poses barriers to enforcement of racial equality under the Equal Protection Clause or the prohibition of gender discrimination in the Title VII context, the intent doctrine freezes enforcement of rights for people with disabilities.⁴⁹

The intent doctrine poses particular challenges in the hiring context. It is often difficult to establish whether discriminatory intent factored into an employer's decision to select or retain a particular applicant or employee with a disability over another without a disability. Due to the fact that "disability" is a broad and nebulous categorization,⁵⁰ it can be difficult, for example, to gather evidence of disability discrimination to corroborate a discrimination claim.⁵¹ Furthermore, evidence suggests that some people may be biased against certain types of disabilities over others. This selective discrimination makes it even more difficult for plaintiffs to prove

⁴⁷ Several critics have argued against a doctrine of intentional discrimination, emphasizing discriminatory effect rather than intent. *See, e.g.,* Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HRV. L. REV. 1388, 1419-21, 1424-29 (1988) (criticizing the intent doctrine for its inadequacy at addressing modern de facto discrimination, and arguing that racial minorities should also be free of racially subordinating practices even when harms are inflicted "without any intentional design whatsoever").

⁴⁸ *See, e.g.,* Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination*, 47 STAN. L. REV. 1161 (1995); *see also* Charles Lawrence, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁴⁹ *See generally* Eva Paterson, Kimberley Thomas Rapp, & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 4 (2008).

⁵⁰ For example, under the ADA, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (2010).

⁵¹ *See* Bagenstos, *supra* note 34, at 154.

discrimination on the basis of disability.⁵² Social conceptions reflect a hierarchy of disabilities, with physical disabilities at the top and those with mental or psychological disabilities at the bottom. For example, a certain employer may hire one qualified individual⁵³ who uses a wheelchair, but choose not to hire a qualified applicant with a cognitive impairment. Such selective hiring decisions combat future allegations of discrimination by giving preference to the former hire with a kind of disability-related exceptionalism at the expense of the latter.⁵⁴ During times of recession in particular, implicit biases form the basis upon which these types of decisions are made.⁵⁵ Unfortunately, existing law contains few tools to target discrimination occurring as a result of such bias.

IV. THE LIMITATIONS OF THE AMERICANS WITH DISABILITIES ACT (“ADA”)

The ADA acknowledges and attempts to combat implicit bias against people with disabilities.⁵⁶ In creating Title I of the ADA in 1990,⁵⁷ Congress explicitly recognized that implicit fears, prejudice, and animus toward people with disabilities are pervasive in the

⁵² See generally John L. Tringo, *The Hierarchy of Preference Toward Disability Groups*, 3 JOURNAL OF SPECIAL EDUCATION 295 (1970).

⁵³ “Qualified individuals” protected under the ADA Amendments Act of 2008 are defined as those who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *ADA Amendments Act*, Pub. L. No. 110-325 (2008); compare Americans with Disabilities Act, 42 U.S.C. § 12111 (1990) (“individual[s] with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”) (emphasis added).

⁵⁴ The argument would go something like, “We hired Mr. X, therefore we aren’t prejudiced against people with disabilities.”

⁵⁵ Unger, *supra* note 10, at 2-10.

⁵⁶ The ADA not only protects individuals with substantial physical or mental impairments, but also individuals who are incorrectly *regarded as* having a disability, even when no disability exists. See 42 U.S.C. § 12102(1)(C) (2010). In other words, the ADA anticipates employers’ negative views, fears, and misconceptions about people with disabilities, and prohibits discriminatory treatment against people with and without disabilities in the workforce on the basis of disability—whether real or perceived.

⁵⁷ In 2008, Congress passed the ADA Amendments Act to restore the intent and the protections of the of 1990 Act. *ADA Amendments Act*, Pub. L. No. 110-325 (2008).

workplace, finding that employment discrimination often reaches beyond the intended targets of decision-makers.⁵⁸ Title I of the Americans with Disabilities Act states that a *covered entity* shall not discriminate against a *qualified individual with a disability* in job application procedures, hiring, advancement and discharge of employees, job training, and other terms, conditions, and privileges of employment.⁵⁹ The term “qualified individual”⁶⁰ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired.⁶¹ The ADA requires employers to make effective “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer].”⁶² Reasonable accommodations may include, for example: (1) making existing facilities readily accessible to individuals with disabilities, (2) job restructuring, (3) part-time or modified work schedules, (4) reassignment to a vacant position, (5) acquisition or modification of equipment or devices, (6) appropriate adjustment or modification of examinations, training materials or policies, and (7) the provision of qualified readers or interpreters.⁶³ In determining which effective accommodations should be made, the Equal Employment Opportunity Commission recommends that employers use an “interactive process.” This process involves

⁵⁸ See, e.g., S. REP. NO. 101-116, at 7 (1989).

⁵⁹ See generally The Americans with Disabilities Act, 42 U.S.C. § 12111 (1990); see also *supra*, note 53.

⁶⁰ It should be emphasized that qualification standards must be based on the *essential functions of the job*, or what constitutes a direct threat to health or safety, and not on assumptions about disabilities or on how the job is usually (or has traditionally been) performed. See 29 C.F.R. § 1630.2(n) (2011). For example, job announcements for jobs that require travel usually state that the job requires a driver’s license and access to a vehicle to travel between offices. In reality, such a job merely requires the ability to travel between offices (by public transportation, by taxi, by private vehicle driven by a friend or driver, etc.), but stating it as a driver’s license requirement unnecessarily forecloses applications by people with vision or mobility disabilities.

⁶¹ 42 U.S.C. § 12111(8) (1990); see also *supra* note 53.

⁶² 42 U.S.C. § 12112(b)(5)(A) (1990).

⁶³ 42 U.S.C. § 12111(9) (1990).

employers and applicants or employees with disabilities working collaboratively to determine accommodation options.⁶⁴ When employees with disabilities can more easily engage in the interactive process to achieve a reasonable accommodation, job retention increases among people with disabilities who already have jobs.⁶⁵ Unfortunately the ADA is inadequate at conquering and in some cases may even perpetuate employer bias and the broader trend of workplace discrimination against people with disabilities, especially during economic downturns.

An employer's implicit bias against people with disabilities can preclude individuals from accessing employment opportunities because "an employer's desire to exclude members of a disfavored group operates independently of—and in a sense preempts—any effort to assess the applicant's objective qualifications."⁶⁶ In a 2003 national survey, "reluctance of employers to hire" and "discrimination/prejudice" were the most common responses when employers were asked why barriers to employment exist for people with disabilities.⁶⁷ People with disabilities are perceived as having "conditions" that are expensive to accommodate or treat.⁶⁸ These perceptions of high cost and low productivity have roots in implicit biases against people with disabilities in general, but play an especially pervasive role in the business judgments of decision-makers who hold these beliefs during times of recession.⁶⁹

⁶⁴ U.S. Department of Labor Office of Disability Employment Policy, *The Interactive Process: Hurdles, Pitfalls and Getting Out of Your Own Way*, JOB ACCOMMODATION NETWORK ENEWS VOL. 9 ISSUE 2 (2011), <http://askjan.org/enews/2011/Enews-V9-I2.htm#2>.

⁶⁵ See NATIONAL COUNCIL ON DISABILITY, *Reasonable Accommodations, Employment Issue Brief No. 4*, in EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 119, 127 (2007); see generally *id.* at 28-33 (explaining best practices for recruitment and retention of employees with disabilities).

⁶⁶ Krieger, *supra* note 48, at 1182.

⁶⁷ K.A. DIXON, DOUG KRUSE, & CARL E. VAN HORN, JOHN J. HELDRICH CENTER FOR WORKFORCE DEVELOPMENT RESTRICTED ACCESS: A SURVEY OF EMPLOYERS ABOUT PEOPLE WITH DISABILITIES AND LOWERING BARRIERS TO WORK 21 (2003).

⁶⁸ Tatiana Solovieva, *Cost of Workplace Accommodations for Individuals with Disabilities: With or Without Personal Assistance Services*, 2 DISABILITY & HEALTH J. 4, 196 (2009).

⁶⁹ See, e.g., D.L. Stone, *A Model of Factors Affecting the Treatment of Disabled Individuals in Organizations*, THE ACADEMY OF MANAGEMENT REVIEW 21, 352-

While some theorize that the bias against hiring and retaining people with disabilities comes from generalized stigma against all people with disabilities,⁷⁰ others believe that the ADA itself provides a cost-based disincentive for employers to hire people with disabilities. First, because some employers perceive the ADA as increasing the costs associated with discharging people with disabilities, these employers, fearing litigation costs from potential discrimination claims, will be less likely to hire job applicants with disabilities.⁷¹ Second, and perhaps more commonly, the ADA's requirement of reasonable accommodation may be viewed as imposing a "special" type of cost that is different from the kinds of costs imposed by other employment discrimination statutes or the costs associated with hiring employees without disabilities.⁷² For

401 (1996) (stating that people with physical disabilities are perceived as "quiet, honest, gentle hearted, non-egotistical, benevolent, helpless, hypersensitive, inferior, depressed, distant, shy, unappealing, unsociable, bitter, nervous, unaggressive, insecure, dependent, unhappy, aloof, and submissive" when compared to people without disabilities); *see also* NATIONAL COUNCIL ON DISABILITY, *Recruitment and Retention of People with Disabilities*, *supra* note 23, at 74.

⁷⁰ *See, e.g.*, Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41 (1996).

⁷¹ Because the ADA creates a right to sue employers for discriminatory actions, some have argued that employers believe that all employees with disabilities are eventual liabilities for litigation. *See generally* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693 (2000).

⁷² Of course, in some cases, the mandate of a reasonable accommodation may be the only functional way of ensuring the needs of employees with disabilities and the needs of their employers are met and thus the ADA is doing precisely what it is supposed to. Nonetheless, for other analysis of the effects of the ADA's reasonable accommodation framework, *see* Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities? The Decline in Employment of People with Disabilities: A Policy Puzzle*, 25 BERKELEY J. EMP. & LAB. L. 527, 536 (2004) (summarizing the argument that the ADA poses a perverse disincentive to hire people with disabilities); Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (addressing critiques of the ADA as reverse discrimination against those without disabilities for treating "unequal people equally"); *see also* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (addressing critiques distinguishing disability law's

example, if an applicant's requested accommodation involves the purchase of an assistive technology device, such as a specialized keyboard, that would not be required for another applicant without a disability, an employer may choose to hire the latter because of the perceived cost difference, all other considerations aside. It is precisely because these views are so pervasive that several empirical studies of the ADA's initial employment effects concluded that the statute actually decreased the hiring of employees with disabilities.⁷³

The widely held belief that reasonable accommodations are always required when hiring employees with disabilities, and that such accommodations are prohibitively expensive, is misguided.⁷⁴ One study found that only a quarter of employers who oversee workers with disabilities have needed to make accommodations for any of them.⁷⁵ A frequently overlooked factor in the analysis of accommodation costs is the financial benefit to employers.⁷⁶ In fact, most reasonable accommodations cost nothing or actually save employers money;⁷⁷ three-fourths of accommodations cost \$500 or

mandate to accommodate, from "real" antidiscrimination law's mandate to treat people equally).

⁷³ See, e.g., Daron Acemoglu & Joshua D. Angrust, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); see also, Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693 (2000).

⁷⁴ It should be noted that, as per the ADA, reasonable accommodations need to be granted unless doing so would be an "undue hardship" on the employer; accordingly any reasonable accommodation made is almost necessarily *not* an undue hardship on an employer. 42 U.S.C. § 12111(10) (2010).

⁷⁵ NATIONAL COUNCIL ON DISABILITY, *Recruitment and Retention of People with Disabilities, Employment Issue Brief No. 1*, in EMPOWERMENT FOR AMERICANS WITH DISABILITIES: BREAKING BARRIERS TO CAREERS AND FULL EMPLOYMENT 73, 74 (2007).

⁷⁶ Schartz, H.A., Hendricks, D.J. & Blanck, P., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK: A JOURNAL OF PREVENTION, ASSESSMENT AND REHABILITATION 345 (2006), available at http://disability.law.uiowa.edu/lhpdc/publications/documents/hschartz/Work27_2006.pdf (explaining that the cost/benefit analysis of workplace accommodations is chronically understudied and concluding from survey results that the net benefit of workplace accommodations typically exceeds cost).

⁷⁷ See generally OFFICE OF DISABILITY EMPLOYMENT POLICY JOB ACCOMMODATION NETWORK, *WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT* (2010), <http://AskJAN.org/media/LowCostHighImpact.doc> [hereinafter JAN, LOW COST, HIGH IMPACT] (demonstrating that "a high percentage (56%) of accommodations cost absolutely nothing to make, while the rest typically cost only

less,⁷⁸ and almost half (49 percent) of all provided accommodations have no cost whatsoever.⁷⁹ Studies by the Job Accommodation Network⁸⁰ consistently show that the benefits employers receive from making workplace accommodations far outweigh the low investment threshold:⁸¹ employers report that providing reasonable accommodations to employees with disabilities results not only in the retention of valuable employees, but also in improved productivity and morale, as well as a reduction in certain costs, such as workers' compensation and training. Indeed, employers who used JAN's services report a median \$250 cost of accommodation with a median benefit of \$11,335.⁸² A study of employers who did not use JAN's services reported a direct financial benefit to the company of

\$600." Note that many tax credits are available to small employers to help reduce the costs associated with accommodations. See, e.g., OFFICE OF DISABILITY EMPLOYMENT POLICY JOB ACCOMMODATION NETWORK, TAX INCENTIVES (2010), <http://askjan.org/media/tax.html>.

⁷⁸ See Blanck, P.D., *Empirical Study of the Employment Provisions of the Americans with Disabilities Act: Methods, Preliminary Findings, and Implications*, 22 N.M. L. REV. 119, 144 n.154 (1992) (summarizing estimates of cost per accommodation); Peter David Blanck, *The Emerging Role of the Staffing Industry in the Employment of Persons with Disabilities: A Case Report on Manpower Inc.* (1998), available at http://disability.law.uiowa.edu/lhpdc/publications/documents/blancketaldocs/Manpower_Report.pdf (case study of the world's largest staffing firm finding no added costs resulting from workplace accommodations); Tatiana I. Solovieva, Denetta L. Dowler & Richard T. Walls, *Employer Benefits from Making Workplace Accommodations*, American Association on Health and Disability, 4 DISABILITY AND HEALTH J. 1, 43 (2011), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1936-6574/PIIS1936657410000348.pdf> (assessing employer costs for workplace accommodations, reporting median costs for one-time accommodations of \$50, mean \$1480, with annual median costs of \$0, mean \$2674; nearly one-quarter of respondents experienced no additional costs); Scharz et al., *supra* note 76 at 346 (summarizing case studies of cost per accommodation, finding an average ranging from \$0 to \$500). *But see* Acemoglu, D. & Angrist, J., *supra* note 73, at 919 (finding average cost to be \$930).

⁷⁹ Scharz et al., *supra* note 76, at 348; Solovieva et al., *supra* note 78.

⁸⁰ The Job Accommodation Network is a program provided by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP) and West Virginia University. About JAN, <http://askjan.org/links/about.htm> (last visited October 25, 2011).

⁸¹ Scharz et al., *supra* note 76, at 346.

⁸² *Id.* at 350.

\$1000 or greater in over sixty percent of cases.⁸³ Many small businesses (those with 15 or more employees) are already subject to the requirements of Title I of the Americans with Disabilities Act (ADA).⁸⁴ However, these studies suggest that even for smaller businesses not otherwise covered by the ADA or corresponding state law,⁸⁵ providing reasonable accommodations costs very little and results in positive outcomes for both employers and employees.

Accommodations determined through an interactive process are particularly low cost, as well as beneficial and effective.⁸⁶ But empirical evidence demonstrates that the interactive process and reasonable accommodations are most effective for *current* employees.⁸⁷ For those job applicants who do not have a “hidden

⁸³ Solovieva, *supra* note 78, at 44.

⁸⁴ 42 U.S.C. § 12111(5)(A) (2010).

⁸⁴ For example, California’s Fair Employment and Housing Act is similar to the provisions of the ADA and applies to employers with 5 or more employees. Cal. Gov. Code § 12926(d) (2011); 42 U.S.C. § 12102(2)(A) (2010). Hawaii’s Employment Practices law applies to employers with one or more employees. HRS § 378-1 (2011).

⁸⁶ Employers who made accommodations for employees with disabilities reported multiple benefits as a result. The most frequently mentioned direct benefits were: (1) the accommodation allowed the company to retain a qualified employee, (2) the accommodation increased the worker’s productivity, and (3) the accommodation eliminated the costs of training a new employee. The most widely mentioned indirect benefits employers received were: (1) the accommodation ultimately improved interactions with co-workers, (2) the accommodation increased overall company morale, and (3) the accommodation increased overall company productivity. The following table gives the percentage of employers who reported experiencing direct and indirect benefits as a result of having made an accommodation. JAN, LOW COST, HIGH IMPACT, *supra* note 77. Employers who implemented accommodations at the point they were interviewed were asked to rank the effectiveness of the accommodations on a scale of 1 to 5, with 5 being extremely effective. Of those responding, 76% reported the accommodations were either very effective or extremely effective. *Id.*; cf. Naomi Schreuer et al., *Workplace Accommodations: Occupational Therapists as Mediator in the Interactive Process*, 33 WORK: A JOURNAL OF PREVENTION, ASSESSMENT AND REHABILITATION 149 (2009), available at http://bbi.syr.edu/publications/blanc_docs/2009/Workplace_accomodation_2009.pdf (taking as its starting place the efficacy of the interactive process, discussing tools to enhance the process).

⁸⁷ JAN, LOW COST, HIGH IMPACT, *supra* note 77 (showing that employers provide accommodations so they can retain employees with disabilities but do not interview and hire new employees with disabilities).

disability”—i.e. those who use a wheelchair or for those who are blind—they may never have the opportunity to get to the interactive process stage because they may be excluded on the basis of their disability upon the initial meeting with an employer. Pre-employment inquiries into an applicant's disability are narrowly circumscribed, and a prospective employer is prohibited from asking questions designed to elicit information about the applicant's disability.⁸⁸ While the purpose of this restriction is to eliminate stereotyping and bias,⁸⁹ and to provide an applicant with an opportunity to compete for employment based on qualifications,⁹⁰ it places the entire burden of the accommodation process on the

⁸⁸ An employer cannot try to learn if applicant has a disability, either through direct questions or questions likely to solicit disability information. For example, an employer cannot ask questions such as “Do you have a disability?” or “Have you ever taken AZT?” The employer may not use medical exams, and whether something is a medical exam turns on the nature of the procedure, such as personality tests interpreted by medical personnel. An employer may ask questions regarding job related functions, e.g., “Can you meet our attendance policy?” or “Can you lift 20 pounds?” An employer may use things like general agility tests or test ability to read labels, if related to the job. The scope of permitted questioning increases if an applicant has a known disability, discloses a disability or asks for an accommodation. The employer may ask if reasonable accommodation is needed. If the response is yes, the employer can ask about the type of required accommodation; if no, the inquiry ends. 42 U.S.C. 12112(d)(2)(A) (2010); *see generally* EQUAL OPPORTUNITY EMPLOYMENT COMM’N., ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (2000), *available at* <http://www.eeoc.gov/policy/docs/medfin5.pdf>.

⁸⁹ It is unlawful for an employer to deny “employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make reasonable accommodation to the physical or mental impairments of the employee or applicant.” ADA, 42 U.S.C. § 12112(b)(5)(B) (2010).

⁹⁰ Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings Of Ignorance As Fairness In Employment Law And The Need For An “Information-Shifting” Model*, 30 HARV. J. L. & GENDER 99, 137-142 (2007) (noting favorably the ADA’s protection of an applicant’s disability-related information, which allows the employer to ask only limited questions and places the control of information with the applicant: “Articulating her particular needs to her employer allows the employee to become an embodied, encumbered self that is more complete and integrated . . . to incorporate a fuller conception of self, thereby reducing identity harm. Enabling employees to express their needs to employers and providing an opportunity for employers to fulfill those needs helps to build trust, mutual respect, and communication into the employment relationship.”).

applicant. Because accommodation required for a job interview is not necessarily one that will be required for employment, and because employers cannot ask whether an accommodation would be helpful, the burden generally remains on the applicant with a disability to understand that the reasonable accommodation and medical inquiry standards change again at the post-offer stage,⁹¹ and then again during employment.⁹² The ADA cannot be fully effective at generating accommodation solutions when its practical implementation rests primarily upon people with disabilities. In addition, the reasonable accommodation requirement has potentially created additional incentives for employers to avoid employing individuals with disabilities; at the very least, it is currently inadequate at conquering these deeply held beliefs about cost and productivity. However, in addition to the ADA's imposition of potential new reasons for discrimination by employers during the reasonable accommodation process, the law itself is too cumbersome to correct for all instances of discrimination against people with disabilities.

If an applicant or employee believes they have been discriminated against in the workplace, they can file a complaint against qualified employers⁹³ with the Equal Employment Opportunity Commission (“EEOC”). Employees with disabilities

⁹¹ At the post offer stage, an employer may ask disability-related questions. The employer may require medical exam of all employees, or all employees with similar tasks. It may be used to determine whether the prospective employee can perform essential functions of the job. If the exam is used to exclude a person, the employer must show that this qualification or requirement is job related and consistent with business necessity. All medical information must be kept confidential. 42 U.S.C. § 12112(d)(2) (2010); *see also id.*; EQUAL OPPORTUNITY EMPLOYMENT COMM’N., ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS, *supra* note 88.

⁹² During an interview an employer may not ask disability related questions unless specifically related to the abilities required by the job and consistent with business necessity. This is an objective standard. The employer can seek to determine whether the employee can perform the essential functions of the job if there is an objectively reasonable belief that employee has a disability that may interfere with job performance. 42 U.S.C. § 12112(d)(2) (2010). Importantly, while pre-employment inquiries are prohibited, nothing prevents an employer from telling *all* applicants and employees that reasonable accommodations can or should be requested.

⁹³ The ADA only applies to employers with 15 or more employees. 42 U.S.C. § 12111(5)(A) (2010).

who are discriminated against at the workplace or fired from a job are much more likely to pursue protections through the ADA's complaint mechanisms than job applicants with disabilities who face discrimination during the application process.⁹⁴ Whereas employees can cite work emails, water-cooler discussions, and human resource meetings to corroborate a claim of discrimination, applicants for employment—if they make it to the interview stage at all⁹⁵—are left to parse through the subtle cues indicating discrimination, such as an interviewer's tone, or an uncomfortable glance.

In addition to the evidentiary obstacles involved in discrimination claims, it is often difficult and burdensome for applicants with disabilities to enforce their right to reasonable accommodation, or to file a discrimination charge against a potential employer. For example, the Department of Veterans Affairs regulations governing the processing of reasonable accommodation requests demonstrate the onerous process a job applicant with a disability must endure.⁹⁶ The regulations state that applicants with disabilities should make a request for a reasonable accommodation to the Human Resources Management Officer, or anyone encountered during the application process, engage in the “interactive process by working collaboratively with [the prospective employer's] representatives,” and, “[i]f the disability is not obvious, provide requested information from their health care professional in a timely

⁹⁴ The U.S. Equal Employment Opportunity Commission, the Federal agency which investigates ADA violation allegations filed against employers, does not separate charges made during the application process from those made during employment. U.S. Equal Employment Opportunity Commission, Charge Statistics, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Oct. 26, 2011) (showing collection of charges without designation as to whether filed by an applicant or an employee).

⁹⁵ Some data suggests that involvement in particular organizations on a resume triggers the same types of implicit bias that prevents advancement of visually determined characteristics upon interviewing. David Hector Montes, *Living Our Lives Online: The Privacy Implications Of Online Social Networking*, 5 J. L. & POL'Y FOR INFO. SOC'Y 507, 521-524 (2010) (otherwise impermissible inquiries or illegal questions may be gleaned from an applicant's MySpace or Facebook pages).

⁹⁶ Processing Requests for Reasonable Accommodations from Applicants and Employees with Disabilities, Department of Veteran Affairs, Directive 5975 1 (Sept. 17, 2010).

manner.”⁹⁷ This process is an unreasonable expectation for applicants with little knowledge of the inner workings of a prospective employer, especially when they may not want to risk not being hired for not only having a disability, but for rocking the boat by asking too many questions before hire.

The accommodations process is not the only area in which the ADA and other equivalent state laws do not protect applicants effectively: job applicants with disabilities are forced to engage in impractical solutions when confronted with potential discrimination from an employer. For example, if an applicant believes she or he has been discriminated against, California’s Department of Fair Employment and Housing⁹⁸ suggests that the applicant “first try to work with the immediate supervisor to resolve the issue. If there is still no resolution, they should contact the employer’s reasonable accommodation coordinator, a human resource representative or the person in charge of accommodation issues If the issue is still not resolved, the applicant or employee can contact the Department of Fair Employment and Housing at any time during the process and file a complaint.”⁹⁹ From a practical perspective, it is highly burdensome for an applicant with no internal knowledge of the organization’s operation outside of the application process to seek resolution from a discriminatory employer.¹⁰⁰ The impracticality of the ADA may prevent its effective use in accommodating applicants or employees or in meritorious challenges to discrimination. Whether through explicit risk evaluation by employers, such as improper

⁹⁷ *Id* at 9.

⁹⁸ In California, the Department of Fair Employment and Housing oversees the Fair Employment and Housing Act (FEHA), which offers similar protections, but is more protective than the ADA in several respects: whereas the ADA applies to private employers of 15 or more, FEHA applies to employers of 5 or more. In addition, while the ADA defines disability as “a mental or physical impairment that *substantially* limits one or more major life activities,” FEHA requires only that the impairment *limit* a major life activity (emphasis added). 42 U.S.C. §§12101-12213 (2010); Cal. Gov’t Code § 12940 (2011).

⁹⁹ CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, DISABILITY UNDER THE FAIR EMPLOYMENT AND HOUSING ACT: WHAT YOU SHOULD KNOW ABOUT THE LAW 7 (2009).

¹⁰⁰ These standards apply not only to employees or internal applicants, but also to external applicants who may have no knowledge of who their potential “supervisor” or the “person in charge of accommodation issues” would be, thus offering little guidance or hope to those who may actually have a claim.

calculation of accommodation costs, or other implicit biases against people with disabilities, the ADA may be creating hiring disincentives¹⁰¹ while failing to adequately address disproportionate burdens upon applicants with disabilities.

V. THE ADA AMENDMENTS AND REVISED REGULATIONS: HOPE FOR THE FUTURE

Given the litigation that ensued following the passage of the ADA, and courts' narrow interpretations focusing on the definition of disability, Congress passed the ADA Amendments Act of 2008, which became effective on January 1, 2009, to restore the intent and purpose of the ADA to combat implicit biases against people with disabilities—including that it should be construed in favor of broad coverage.¹⁰² EEOC Chair Jacqueline A. Berrien recently confirmed the intent behind the new regulations, stating, “[w]e want job seekers, workers, and employers to understand the requirements of the Americans with Disabilities Act and be well equipped to comply with them,” and that “[we now have] an important opportunity to dispel myths and learn about effective ways to dismantle barriers to employment for people with disabilities.”¹⁰³ The ADA Amendments Act overruled various U.S. Supreme Court cases that sought to limit the ADA purpose of ensuring equal employment opportunities for people with disabilities.¹⁰⁴ Although the regulations governing the

¹⁰¹ Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U.L. REV. 1213, 1242 (2003).

¹⁰² The ADA Amendments explicitly increased the scope of interpretation for the definition of disability. *ADA Amendments Act*, Pub. L. No. 110-325 (2008) (stating that “[t]he definition of disability ... shall be construed in favor of broad coverage ... to the maximum extent permitted”).

¹⁰³ Press Release, U.S. Equal Employment Opportunity Comm’n, *Myths and Stereotypes About Mental Disabilities Greatest Barrier to Employment* (March 15, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-15-11c.cfm>.

¹⁰⁴ See *Sutton v. United Airlines*, 527, 492-3 U.S. 471 (1999) (denying plaintiff protection under the ADA for failing to meet the categorical definition of “disabled” as having a “substantially limiting impairment,” because their severe visual impairment prevented them from holding the position denied to them by defendant but other types of employment remained open to them); *Albertsons, Inc. v. Kirkingburg* 527 U.S. 555, 576-577 (1999) (finding for defendant employer, who terminated plaintiff truckdriver on the grounds that his vision failed to meet Department of Transportation standards despite a waiver issued by the Department of Transportation); *Toyota Motor Manufacturing of Kentucky v. Williams*, 534

amended version of Title I of the ADA do not change the standards for reasonable accommodations process, the law's expansion of the definitions of *disability* and *major life activities* will likely improve employers' understanding of the reasonable accommodation process, and may have a tangible impact on job retention of people with disabilities.¹⁰⁵

The newly adopted regulations clarify the requirements of a reasonable accommodation, and thus the interactive process, at every stage in the employment process;¹⁰⁶ however, the actual benefits to

U.S. 184, 198 (2002) (denying plaintiff protection under the ADA for failing to meet the categorical definition of "disabled" as having a "substantially limiting impairment" because her impairment, severe carpal tunnel syndrome, did not prevent or severely restrict her from "doing activities that are of central importance to most people's daily lives."). Consistent with Congress' clearly expressed intent in the ADA Amendments Act that the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of "disability," the term "substantially limits," including the application of that term to the major life activity of working, shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis. *ADA Amendments Act*, Pub. L. No. 110-325 (2008); *See also* Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as amended, 74 Fed. Reg. 48,440 (Sept. 23, 2009) (codified at 29 C.F.R. 1630).

¹⁰⁵ The ADA Amendment's major changes were to the role of mitigating measures when considering the definition of disability (i.e. mitigating measures are not to be considered when determining disability, including any internal coping mechanisms, except that eyeglasses/contact lenses are taken into consideration). This overruled *Sutton v. United Airlines* and *Albertsons v. Kirkingburg*. The definition of "substantial limitation" did not include any textual change, but the ADA Amendments added language explaining that the definition of disability is to be construed in favor of broad coverage. Findings also made clear that it is meant to reject *Sutton*, *Albertsons*, and *Toyota*. Major life activities are now defined to include, but are not limited to: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. A 'major life activity' also includes the operation of major bodily functions, including, but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulator, endocrine, and reproductive functions." *ADA Amendments Act*, Pub. L. No. 110-325 (2008).

¹⁰⁶ The ADA prohibits discrimination against not only those who have a disability, but because the law strives to change social conceptions of disability, it also protects those who do not have a disability, but who are "regarded as" having a disability. However, the ADA Amendments and the new proposed regulations specifically exclude accommodating an individual who meets the definition of

employees and applicants with disabilities will likely come from the ADA's expansion of the definition of disability. While the former inquiry for whether an applicant or employee had a disability was whether that individual possessed an impairment that *significantly restricted* a major life activity, now the assumption is that any qualified individual has a disability if they have a *substantial limitation* of any major life activity.¹⁰⁷ The term "substantially limits" requires a lower degree of functional limitation than the previous standard.¹⁰⁸ Specifically, whether a disability substantially limits a major life activity is to be determined without regard to reasonable accommodations.¹⁰⁹ In addition to loosening the interpretation of "substantial limitation," the definition of "major life activity" is now significantly broader, including, but not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working".¹¹⁰ As a result of this expanded definition of disability, more applicants and employees with disabilities will qualify for accommodation and seek protection under the ADA. However, in their current form, the new ADA regulations may not successfully increase the hiring of job applicants with disabilities because regulation and enforcement alone will not eliminate the bias—conscious or otherwise—towards job-seekers with disabilities. Thus, within both the private and Federal employment sectors, there remains a need for improved policies toward people with disabilities, including greater enforcement, training programs, and other methods to combat negative stereotypes and preconceptions.

disability solely under the "regarded as" prong, which makes sense because in these cases there is no actual disability to accommodate. *ADA Amendments Act*, Pub. L. No. 110-325 (2008); Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48,431 (Sept. 23, 2009) (codified at 29 C.F.R. 1630).

¹⁰⁷ 42 USCA § 12101 (2010).

¹⁰⁸ *Id.*; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FACT SHEET ON THE EEOC'S FINAL REGULATIONS IMPLEMENTING THE ADA (2011), available at www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

¹⁰⁹ *Id.*

¹¹⁰ 42 USC § 12101 (2010). Note that the inclusion of certain major life activities such as "concentrating" or "thinking" increase the likelihood of accommodation for particular disabilities such as "chemobrain" after cancer treatment.

VI. RECOMMENDATIONS FOR EMPLOYERS AND ADVOCATES

This section will describe some effective strategies to address the hiring of qualified persons with disabilities. These strategies seek to avoid problematic strategies currently used, such as sheltered workshops,¹¹¹ exclusive hiring by disability organizations, jobs that pay less than minimum wage, or non-competitive employment. Recognizing that only broad societal change will bring about universal access for people with disabilities, the following recommendations, encompassing the legal, policy, private, and social sectors, seek to propose comprehensive, collaborative way to achieve such change.

A. Legal Responses

Fundamental to the rights of people with disabilities is the effective enforcement of disability statutes that seek to protect those rights. Through better enforcement of the ADA and state fair employment laws by the EEOC and corresponding state agencies, employment opportunities for people with disabilities will be better protected. However, although this paper has focused upon the Americans with Disabilities Act in the context of employment, all laws that seek to promote access on behalf of people with disabilities need to be fully enforced in order for the civil rights of people with disabilities to be protected. For example, better enforcement by the Department of Labor in the context of Federal contracting will lead to increased workforce opportunities in the governmental sector; better enforcement of other disability statutes, including the Individuals with Disabilities Education Act (“IDEA”), will lead to increased acceptance of people with disabilities by broader society and will improve the skill sets for people with disabilities who have

¹¹¹ The term “sheltered workshop” is used to describe a specific type of supportive model of employment environment for people with disabilities. *See, e.g.*, Robert Evert Cimera et al., *Do Sheltered Workshops Enhance Employment Outcomes for Adults With Autism Spectrum Disorder?* 15 *AUTISM* 263 (2011).

been “mainstreamed” through the provision of equal access to free, appropriate public education.¹¹²

The state specific Departments of Rehabilitation, which receive federal funding to advance the employment of persons with disabilities, should monitor employers that consistently fail to employ people with disabilities. A coordinated effort between the Departments of Rehabilitation and the state fair employment offices to identify and prosecute employers or industries that utilize discriminatory hiring practices would further employment opportunities.

Federal and state funding for supported working environments, segregated employment and sub-minimum wage jobs should be eliminated. Research demonstrates these programs do not prepare participants or lead to any further gainful employment in community workplaces.¹¹³

B. Policy Responses

Broad social and economic investment into the outcomes for people with disabilities can only come after policies are in place to protect and promote opportunities for people with disabilities both in and out of the workforce. In the employment context, one way of ensuring better outcomes for employees with disabilities is for the ADA regulations to include a notice requirement for employers about the true costs of employing individuals with disabilities. This notice would make employers aware of the many benefits that come alongside the minimal investment required to make accommodations.

In addition to policies increasing awareness about the true costs and benefits of reasonable workplace accommodations, public policy outside of the employment context will also improve outcomes for employees and applicants with disabilities. Continued funding for effective programs leading to employment is essential, as is

¹¹² See, e.g., Assistance to the States for Education of Children with Disabilities, Subpart A: Free Appropriate Education, 34 C.F.R. § 300.13 (2006).

¹¹³ See generally NATIONAL DISABILITY RIGHTS NETWORK, SEGREGATED AND EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK (2011), available at <http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf>.

improved communication to publicize these effective programs and practices. Just as there are tax incentives and other federal funding available to increase physical accessibility, there should be more similar tax and financial incentives to promote the employment of people with disabilities.¹¹⁴ The disability community is diverse and “one size” *does not* “fit all;” the success of these focused programs demonstrates that, given the resources and opportunity, people with disabilities are able to secure employment. To the extent that these incentives exist, more publicity is needed to help employers access these benefits.

In addition to publicizing potential opportunities for incentives, policies should focus upon improving outcomes for youth with disabilities. For example, by helping youth with disabilities learn employment skills while in secondary or post-secondary school, transition services help enhance future job opportunities. In addition, partnerships between disability organizations and service providers, and the federally funded Department of Rehabilitation and the Employment Development Department, must be better coordinated through secondary and post-secondary schools. Special education services, which begin at age sixteen, significantly improve future opportunities for youth, but greater enforcement and oversight by the state departments of education, school districts, and parents is essential to ensure that these services continue to exist and thrive.

The creation of programs to bridge the gaps to employment outside the conventional education context will also benefit people with disabilities. The Office of Disability Employment Policy (ODEP) of the U.S. Department of Labor funded pilot demonstration programs to address the unemployment and underemployment of

¹¹⁴ For example, the Work Opportunity Tax Credit is a Federal tax credit incentive that Congress provides to private employers for hiring individuals from twelve target groups who have consistently faced significant barriers to employment. These groups currently include disabled veterans, disabled persons participating in approved vocational rehabilitation programs, and recipients of Supplemental Security Income. *See generally* U.S. DEP’T. OF LABOR, ADDENDUM TO EMPLOYMENT AND TRAINING ADMINISTRATION HANDBOOK NO. 408 (3rd ed. 2012), *available at* http://www.doleta.gov/business/incentives/opptax/pdf/Aug_2009_Addendum_Recovery_Act_2009_Hdbk_408.pdf.

people with disabilities.¹¹⁵ Their research shows that effective programs significantly increased employment of people with disabilities, and the receipt of public benefits declined in all areas except subsidized public housing.¹¹⁶ The most successful programs involved “person-centered” individualized programming tailored for each individual, and the programs were effective in addressing even the most difficult cases.¹¹⁷ In addition, the best programs utilized non-mandated partners in order to take advantage of the best available community resources that might lead to better outcomes for youth and for employers.¹¹⁸ It will be necessary to generate guides for these resources, as well as to identify new ways for the programs to work collaboratively to meet employer and youth needs.¹¹⁹ ODEP’s pilot programs reported that collaborations and coordination assisted in the leveraging of resources, and contributed to programs’ overall sustainability. It created long-term relationships that translated into employment. In addition, financial counseling is an important training element required to sustain employment.¹²⁰

¹¹⁵ U.S. DEP’T. OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, EVALUATION OF DISABILITY EMPLOYMENT DEMONSTRATION PROGRAMS (2005), available at <http://www.dol.gov/odep/categories/research/DemoPrograms.pdf>.

¹¹⁶ *Id.* at 6.

¹¹⁷ *Id.* Approximately 43% of those who self-disclosed their disability had a psychiatric or emotional disability, and 37% had never worked or had only worked in non-competitive employment environments. Significantly, 95% were now earning the minimum wage or higher in jobs obtained through the pilot programs. More than one-third of these people were earning more than \$8.15 an hour and 17% were receiving benefits such as health insurance or paid vacations, and 54% had opportunities for advancement. *Id.*

¹¹⁸ See, e.g., National Collaborative on Workforce and Disability for Youth, *Guideposts for Youth Programs, Continued*, INTERSECTION: NAVIGATING THE ROAD TO WORK, June 10, 2004, <http://www.ncwd-youth.info/intersection/archives/issue-002.html> (listing among best practices the opportunity for youth to engage in a range of experiences and workplace opportunities).

¹¹⁹ For example, in order to promote access to health care for children with disabilities in California, the Disability Rights Legal Center has recently published a Children’s Benefits Access Guide using precisely this model. See generally DISABILITY LEGAL RIGHTS CENTER, CHILDREN’S BENEFITS ACCESS GUIDE (2011), available at www.lacare.org/files/English/ChildrensBenefitsAccessGuidePDF.pdf.

¹²⁰ U.S. DEP’T OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, *supra* note 115, at 9, 12.

C. Business-Sector Responses

Particularly during economic downturns, shifting corporate culture in order to get the critical buy-in to successfully increase hiring and retention of people with disabilities may seem a challenging task. By understanding the benefits of employing people with disabilities in the workplace, the private sector can conquer its own generalized biases against people with disabilities and affect positive change across the realm of employment.

The purpose of the hiring process is to identify and select individuals who have the best mix of relevant skills and attributes for a particular job.¹²¹ In this light, one can think of accommodations in hiring in two ways: (1) that accommodations are obstacles to choosing a predetermined set of individuals, or that (2) they are mechanisms for ensuring that all qualified individuals can participate in the hiring process. However, the requirements for hiring a person with a disability are the same as any other applicant: “To be qualified job candidates, individuals with disabilities must have the necessary qualifications for the job (i.e., education, training, experience, skills, and/or licenses) and be able to perform the essential functions or duties of the job. A good rule of thumb is to ‘*Ask applicants about their abilities, not their disabilities.*’”¹²² Failing to utilize the skills, enthusiasm and resourcefulness of people who desire employment is a needless waste of resources: “Competence and flexibility are vital skills that employers seek in new hires. [B]usinesses need people with a demonstrated ability to adapt to different situations and circumstances, and people with disabilities possess precisely these attributes. Their disabilities require them to think creatively about how to solve problems and accomplish tasks. In the workplace, this resourcefulness translates into innovative thinking, fresh ideas and varied approaches to confronting business challenges and achieving success.”¹²³

¹²¹ U.S. Department of Labor Office of Disability Employment Policy, *Opening Doors to All Candidates: Tips for Ensuring Access for Applicants with Disabilities*, <http://www.dol.gov/odep/pubs/fact/opening.htm> (last visited Oct. 26, 2011).

¹²² U.S. DEP’T. OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, *DIVERSIFYING YOUR WORKFORCE* 5 (2010), <http://www.dol.gov/odep/pubs/20100727.pdf>.

¹²³ *Id.* at 2.

Studies demonstrate that employers not only improve their diversity when hiring people with disabilities, but they also increase their diversity portfolio. Employment of people with disabilities can increase the success of a business in a number of ways: by improving an organization's bottom-line, targeting and attracting talented human capital, accessing new marketing opportunities, and innovating diverse, socially responsible solutions. A review of the literature found that workplace culture has a significant impact on worker productivity and performance, shaping employee values and organizational citizenship, the economic productivity of the business, rates of retention, turnover and related human resource costs, the quality of employee interactions, and organizational policies.¹²⁴ In companies where employees report experiencing strong company fairness and responsiveness, employees with and without disabilities report higher job satisfaction, willingness to work hard, loyalty, and lower turnover intentions.¹²⁵ Notably, even positive social workplace benefits have cost-saving benefits: turnover is a significant employer expense, with the average administrative costs for replacing an employee being between \$1,800 and \$2,400.¹²⁶ Where fairness and responsiveness are reported to be low, employees generally report lower satisfaction, willingness, loyalty, and higher turnover intentions, and employees with disabilities report these factors even less favorably.¹²⁷ Overall, studies consistently show that employers who implement reasonable accommodations for employees and applicants with disabilities often benefit by retaining current employees, improving worker productivity, and avoiding turnover costs of job searches and new employee training.¹²⁸

D. Social Responses

Research shows that when people form new personal connections with members of a previously devalued group,

¹²⁴ D. Samant et al., *Corporate Culture and the Employment of People with Disabilities: Role of Social Workers and Service Provider Organizations*, 8 J. SOC. WORK DISABILITY REHAB. 171 (2009).

¹²⁵ L. Schur et al., *Is Disability Disabling in all Workplaces? Workplace Disparities and Corporate Culture*, 48 INDUS. RELATIONS 381, 402 (2009).

¹²⁶ Schartz et al., *supra* note 76, at 346.

¹²⁷ L. Schur et al., *supra* note 125.

¹²⁸ See, e.g., Solovieva et al., *supra* note 78, at 40.

preexisting negative implicit biases can be replaced by positive ones.¹²⁹ Accordingly, the more people with disabilities who are hired by employers, the more likely employers are to hire new applicants with disabilities in the future. In the field of Critical Race Studies, academics and practitioners have promoted knowledge of implicit bias as a way of ultimately conquering it. To this end, the analogy of race consciousness is significant when thinking about how to respond to stigmatization of people with disabilities in broader society: by raising the implicit biases to the level of the bias-holder's consciousness, we can use rational arguments to negate the impulse for discrimination.¹³⁰

Beyond the explicit work by practitioners and advocates, people with disabilities should be more visible in society—to create new, positive points of reference to negate the negative implicit biases which ultimately force people with disabilities out of the employment sector. One possible way to achieve this result is by celebrating figures and events significant to people with disabilities or to the disability rights movement more broadly. Positive images are extremely important to dispel old and propagate new stereotypes.¹³¹ Finally, use of “People First Language,” that is, positive language that empowers is important. When writing or speaking about people with disabilities, it is important to put the person first – to focus on the person, not the disability. Group designations, such as “the blind,” “the deaf” or “the disabled” are not empowering. It is important to use language that reflects individuality, equality or dignity – the person who is blind, the child who is deaf, the individual with a disability, for example.”¹³²

¹²⁹ See, e.g., Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCIENCE 785, 786 (2005) (reporting correlation between interracial dating and decrease in negative implicit bias).

¹³⁰ For example, once an employer becomes aware of their own biases against people with disabilities, they may become more receptive to positive facts such as statistical data about the costs and benefits of reasonable accommodation. This information may, in turn, positively impact employment outcomes.

¹³¹ See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1254 (2002) (arguing that it is “possible to counter stereotypes at the same preconscious level at which they are activated.”).

¹³² U.S. Department of Labor Office of Disability Employment Policy, *Effective Interaction: Communicating With and About People with Disabilities in the Workplace*,

VII. CONCLUSION

As people with disabilities disproportionately lose jobs in the current recession, their risk for facing hiring obstacles is doubled: not only do employers discriminate on the basis of disability, but the use of employment status to screen job applicants could also seriously impact people with disabilities' opportunities for future employment.¹³³ People with disabilities who lose their jobs in the recession due to conclusions about cost and economic risk (grounded in implicit bias against people with disability) are not only more likely to be discriminated against in future applications on the basis of their disability alone, but are now more likely to be compared against a significantly higher population of people without disabilities who were able to maintain their employment status after not having been subjected to the same set of cost evaluations, thus further reifying the systemic injustices against qualified applicants with disabilities who seek admission into the workforce. The only way to effectively build access to the workforce for people with disabilities is to champion the rights of people with disabilities in and out of the employment sector—thus conquering the outdated implicit biases that prohibit access to opportunity.

<http://www.dol.gov/odep/pubs/fact/effectiveinteraction.htm> (last visited June 24, 2011).

¹³³ See, e.g., Press Release, U.S. Equal Employment Opportunity Comm'n, *Out of Work? Out of Luck* (Mar. 15, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm> (describing the impact of employers considering only those currently employed to fill job vacancies).