

## CHAPTER 21

# THE AMERICANS WITH DISABILITIES ACT: CONTRADICTIONS IN PUBLIC POLICY

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Bonnie G. Mani  
*East Carolina University*

The Americans with Disabilities Act (ADA) was passed by Congress in 1990 (ADA 1990). Concerned that the judicial and executive branches' interpretation and implementation of the law were not consistent with legislative intent, in 2008 Congress passed the Americans with Disabilities Act Amendments Act (ADAAA 2008). Three years later the U.S. Equal Employment Opportunity Commission (EEOC) issued regulations for disability policy implementation that were consistent with legislative intent specified in the ADA Amendments Act of 2008 (EEOC 2011b). Simply stated, the goal of these policies was to eliminate discrimination against people with disabilities. Achieving the goal was complicated by vague terminology in the ADA of 1990, differences in application of the law to federal, state, and local government employees, and conflicts between the legislative, judicial, and executive branches of government.

To comply with the ADA, to take full advantage of available human resources, and to avoid costly litigation, employers need to know the provisions of this law. Thus this chapter discusses federal legislation and regulations, case law, and scholarly research analyzing the laws' effects on employment and wages of Americans

with disabilities. Specific disabilities, such as human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS), alcohol and drug abuse, and mental health and emotional problems are discussed to a more limited extent.

### *Americans with Disabilities and Employment*

Approximately 29.9 million people of the 250.1 million total U.S. population ages 16 and older have disabilities. Of the total population with disabilities, 17.5% are employed. But 64.7% of those without disabilities are employed (U.S. Census Bureau 2011). While the purpose of the law was to improve their employment rates, DeLeire reported that employment rates of disabled men actually decreased 7.2 percentage points after the Americans with Disabilities Act of 1990 was passed (DeLeire 2000). See Table 21.1.

Unemployment rates for Americans with disabilities differ significantly based on disability status and gender. The 11.7% unemployment rate for Americans with disabilities is greater than the 5.3% unemployment rate for those without disabilities. Also, for the unemployed who have disabilities there are differences between the sexes. In March 2015, for those with disabilities

**Table 21.1 Americans with Disabilities and Employment in 2013**

	Total Population	With Disabilities	Without Disabilities
U.S. population ages 16 years and older	250.1 million	29.9 million	220.2 million
<b>Employment status:</b>			
Percentage employed	59.3%	17.5%	64.7%
Percentage not in the labor force	37.2%	80.2%	31.7%
<b>Unemployment rates:</b>			
Total	5.5%	11.7%	5.3%
Male	5.6%	13.8%	5.8%
Female	5.3%	11.2%	5.0%

Source: U. S. Bureau of Labor Statistics (2015b, 2015d).

the unemployment rate was 13.8% for men and 11.2% for women. For those without disabilities the unemployment rate was the slightly different for men and women—5.8% and 5.0%, respectively (U.S. Bureau of Labor Statistics [BLS] 2015a, 2015b).

With regard to income, since 1980 those with disabilities realized a slight increase then a decrease. See Table 21.2. That is, 10 years before the Americans with Disabilities Act of 1990 was signed into law, median household income for households including a man or woman with a disability was \$32,700 per annum (in 2010 dollars). In 1990 and 2000 the statistic increased slightly. But two years after the Americans with Disabilities Act Amendment Act of 2008 was signed, the median household income decreased to \$30,000 (Nazarov and Lee 2012). Furthermore, in 2013 28.8% of those with disabilities lived below the poverty level, compared with 12.3% of those without disabilities; the median income of those with disabilities was about 67.5% of the median income of those without disabilities; and those with disabilities were less likely to have higher but more likely to have lower per annum incomes than those without disabilities (U.S. Census Bureau 2013). Regardless of the disability-based wage gap, DeLeire argues that those with disabilities who remained employed still gained as

a result of the Americans with Disabilities Act because their employers likely provided greater accommodations for their disabilities (DeLeire 2000).

Employment, wages, and education generally are related. At each education level, those with disabilities are less likely to be employed than those without disabilities. For example, compared with the 50.6% of those without disabilities, 7.6% of those with disabilities who reported the highest level of education they completed was less than a high school (HS) diploma were employed in 2013. And 27.8% of those with disabilities but 75.9% of those without disabilities who reported they completed a bachelor's degree or higher were employed in 2013 (U.S. Bureau of Labor Statistics 2015a; 2015c).

### *Disability Policies*

Before July 26, 1992—the effective date of the ADA of 1990—many people with disabilities experienced discrimination in employment but had no legal recourse. In the workplace, they faced intentional exclusions as a result of qualification standards and criteria along with structural barriers. As a result these employees had limited access to services, programs, activities, benefits, jobs, and other opportunities. In general, the 1990 law prohibits such discrimination against qualified

**Table 21.2 Household Income, Poverty, and Education**

	With or Without a Work Limitation or Disability	With a Work Limitation or Disability	Without a Work Limitation or Disability
<b>Median Household income in 2010 dollars:</b>			
1980	\$50,400	\$32,700	\$52,100
1990	\$53,700	\$33,300	\$56,600
2010	\$54,900	\$30,000	\$59,500
<b>Percentage living below the poverty line in 2013:</b>			
	13.6%	28.8%	12.3%
<b>Percentage employed by educational attainment in 2013:</b>			
Less than a high school diploma	41.2%	7.6%	50.6%
High school graduate no college	54.2%	15.3%	61.8%
Some college or associate degree	64.4%	21.9%	69.3%
Bachelor's degree or higher	72.5%	27.8%	75.9%

*Sources:* Disability Statistics from the Current Population Survey (Nazarov and Lee 2012). Income and Poverty in the United States: 2013 (DeNavas-Walt and Proctor, 2014).

Bureau of Labor Statistics (2015a; 2015c).

US Census Bureau 2013.

individuals with disabilities. Employers must make reasonable accommodations so that qualified disabled employees can fulfill their job responsibilities. The law applies to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment” (ADA 1990).

The Americans with Disabilities Act was not Congress's first policy affecting employment rights of those with disabilities. The Rehabilitation Act of 1973 prohibited employment discrimination in hiring, placement, and advancement decisions in the federal government and allowed remedies and attorney's fees

when the law was violated (Pub. L. 93-112, 1973). The Rehabilitation Act was amended after the broader ADA was passed. Now, the law prohibits employment discrimination against qualified employees with disabilities by any employer with 15 or more workers.

All of the states have addressed the need to protect employees and prospective employees. Most of the states (39 of them) have adopted the definition of disability given in the federal law. Others developed statutes that give more or less protection, based on broader or narrower definitions of disabilities. For example, some states specifically protect those with the human immunodeficiency virus (HIV) or related conditions like

the acquired immunodeficiency syndrome (AIDS), but other states have statutes that would allow some forms of discrimination. The ADA overrides state laws permitting such discrimination—such as North Carolina’s older statute. Many local governments—especially those communities with large numbers of citizens with HIV/AIDS like New York, Los Angeles, and San Francisco—specifically protect those with HIV (Gostin, Feldblum, and Webber 1999).

### Definitions

Many disputes to date have revolved around questions of coverage. The ADA gives a three-pronged definition of disability:

- an individual with physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment. (ADA 1990)

In the absence of more specific definitions and a clear understanding of congressional intent, in their decisions the federal courts developed case law based on their interpretation of disabilities and disabled individuals covered by the law, and the terms “substantially limits,” “major life activities,” the applicability of “mitigating measures,” and “regarded as” disabled. Disagreeing with the courts—especially the way their decisions limited disabled individuals’ coverage under the ADA of 1990—Congress passed the Americans with Disabilities Act Amendment Act of 2008 (ADAAA 2008). And in 2011 the EEOC issued new regulations (EEOC 2011b).

The 1990 law does not specifically define “physical or mental impairment.” However, the 1996 EEOC regulations for implementation state that the definition given in the Rehabilitation Act of 1973 will apply in ADA cases. According to the 1973 law, a physical or mental impairment is “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or

psychological disorder” (EEOC 1996). For example, a physiological disorder might affect neurological, musculoskeletal, respiratory, cardiovascular, digestive, and endocrine systems. Mental or psychological disorders could include mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities (EEOC 1996).

Also having the effect of broadening coverage of the 1990 law, Congress clarified their meaning of the phrase “regarded as” in the third prong of the definition of disabilities in the ADAAA of 2008. If employees start a rumor that a coworker is HIV positive when he is not, then is the victim of the gossip covered by the Americans with Disabilities Act? Yes, an employee who is *regarded* as having an impairment is covered by the ADA. An employee or applicant who is HIV positive but asymptomatic is also covered (*Bragdon v. Abbott* 1998). Employees who are subject to actions prohibited by the law—for example, they were not hired or were terminated—no longer need to show that their employer perceived they were substantially limited in a major life activity due to an impairment that was not minor or temporary. But employees in this category—“regarded as disabled”—are not entitled to accommodation (ADAAA 2008).

In the 1990 law Congress did not specifically define the term “the major life activities of an individual.” However, the EEOC—the federal agency with primary responsibility for implementation of the law—has given some guidelines. The EEOC refers to breathing, walking, standing, talking, learning, seeing, hearing, or other activities that the average person can perform with little or no problem, as major life activities (EEOC 1996). The ADAAA 2008 added the activities reading, bending, and communicating as well as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions (ADAAA 2008). The EEOC warns prospective employers that interview questions about these activities could violate the ADA because they would very likely yield information about disabilities. Before a conditional offer of employment

is made, the questions can be asked if and only if they specifically relate to the applicant's ability to perform the job (EEOC 1995).

The extent to which a major life activity is "substantially limited" must be determined on a case-by-case basis. At issue in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002) was the plaintiff's employer's denial of reasonable accommodation so she could perform her duties on an assembly line. Although she had carpal tunnel syndrome, the Supreme Court ruled that she was not covered by the Americans with Disabilities Act of 1990 because she was not substantially limited in performing major life activities—only one job task. In the Americans with Disabilities Act Amendment Act of 2008 Congress explained that their intent was not to set such a high standard for disabled individuals to be considered substantially limited in performing major life functions (ADAAA 2008). Subsequently the EEOC issued regulations more consistent with congressional intent, explaining the standard was lower than previously held by the courts. Yet the EEOC did not give a specific quantitative guideline that could be applied in every case (EEOC 2011b). One might have an impairment but not be disabled because the impairment presents no restriction on major life activities. To decide whether an impairment is a disability covered by the ADA, the court would ask how long the individual has been impaired, how severe the impairment is, and whether the problem is recurrent. As the 1990 law was interpreted by the courts, temporary impairments that will heal with treatment, such as a broken leg or a sprained wrist, would not substantially limit a major life activity (ADA 1990). But according to the ADAAA of 2008 individuals with impairments that are episodic or in remission are covered by the law if the impairment would substantially limit a major life activity when active (ADAAA 2008). Physical and personality characteristics and cultural and economic disadvantages are not impairments. To define this concept within the context of the workplace, "substantially limited" means that an individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes

as compared to the average person having comparable training, skills, and abilities" (Naeve and Servino 1998).

Is a diabetic who is treated with insulin considered "substantially limited" and disabled? Initially, the EEOC said that an insulin-dependent diabetic is disabled and covered by the ADA. The First, Third, Seventh, Eighth, Ninth, and Eleventh Circuit courts agreed. However, the Fifth, Sixth, and Tenth Circuit courts *did* consider medications and other assistive devices when deciding whether an impairment substantially limits a major life activity. In these three circuits, if diabetes was treated the condition would not be considered "substantially limiting," and the diabetic would not be covered by the ADA (O'Neill 1998). These inconsistencies were resolved by the Supreme Court.

Is a visually impaired job applicant covered by the ADA? Although uncorrected vision might be an impairment, one's major life activities would not be limited if vision is corrected with lenses. Thus twin sisters who applied for positions as airline pilots were not covered by the ADA (*Sutton v. United Airlines, Inc.* 1999). After the Court issued decisions in the *Sutton* (1999) and *Murphy v. United Parcel Service, Inc.* (1999) cases, the EEOC revised its interpretive guidelines and stated that mitigating measures such as medications or assistive devices that eliminate or reduce the effects of an impairment *must* be considered in disability determinations. Congress disagreed with the Supreme Court's decision and the EEOC's earlier interpretive guidelines. The *Sutton* case was specifically referenced and rejected in the American with Disabilities Act Amendment Act of 2008 (ADAAA 2008). Congress did not intend for "ameliorative effects of mitigating measures" to eliminate those who are disabled from coverage under the ADA of 1990 (ADAAA 2008). The EEOC's 2011 regulations were more consistent with congressional intent. Ordinary glasses or contact lenses are mitigating factors that may be considered in determining whether someone is disabled and covered by the ADA—that is, vision is not impaired and a plaintiff is not covered by ADA if their vision is corrected by glasses or contact lenses. If, as United Airlines argued in the *Sutton* case, there is a business necessity for

a higher standard for uncorrected vision, then the disability may not be accommodated. And other individuals may still be considered disabled under the ADA even though their disability is mitigated by medication—for example, a diabetic whose condition is controlled with insulin (EEOC 2011b).

An “employer,” according to the ADA, is “a person engaged in an industry affecting commerce who has . . . employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” As of July 26, 1992, employers with 25 or more employees were affected by the ADA. In 1994 smaller companies—those with 15 or more employees—were phased in. An “employee” is any individual employed by an employer.

### *Hiring*

To reduce the likelihood that employers would discriminate during the hiring process, the ADA outlines procedures for screening job applicants. According to the ADA, employers cannot ask questions that would elicit information about physical or mental impairments before a job offer is made. Neither can prospective employers require medical examinations. Before the job offer, employers may ask applicants whether they would be able to meet the requirements of the job *with or without* accommodation. Applicants can answer questions phrased this way without revealing whether or not they are disabled.

Thus before a job is offered employers may require physical agility tests or physical fitness tests designed to measure whether an applicant could meet job requirements. However, the employer could not measure physiological or biological responses to exercise—heart rate or blood pressure—because these measurements would be considered medical examinations. Before a job is offered, an employer may ask applicants to take psychological tests that are related to job requirements as long as the tests do not identify mental disorders or impairments. For example, an employer may ask an applicant for a salesperson position to complete an instrument that measures extroversion, but not an instrument that

measures excessive anxiety, depression, or certain compulsive disorders. Instruments that assess mental impairments and disorders in the American Psychological Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM)* are medical examinations (American Psychiatric Association 2000). Extroversion would not be among these, but anxiety, depression, and certain compulsive disorders would be. Vision tests that assess an applicant’s ability to read material that they would have to read on the job or to distinguish between objects they would see on the job are not medical tests. But an examination by an optometrist or an ophthalmologist is a medical examination. The ADA permits tests to identify illegal drug users. These are not considered medical tests under the ADA. However, tests to measure alcohol consumption would not be permitted because these are medical tests and the ADA makes no exception for them (EEOC 1995).

After an employer has evaluated an applicant’s qualifications and other nonmedical information and made an authentic conditional job offer, questions about disabilities and medical examinations are permitted. If the employer finds that the applicant has a disability that prevents the applicant from performing the duties of the job with reasonable accommodations, then the employer may withdraw the conditional job offer for legitimate, job-related reasons (EEOC 1995). With this sequence of events, it would be clear that the applicant was rejected based on information obtained in the medical examination.

Employers must protect all medical information obtained during the hiring process. However, there may be legitimate reasons to share the information with first aid personnel, a new employee’s supervisor or manager, workers’ compensation state offices or insurance carriers, or government officials investigating compliance with the ADA. These reasons are excluded from the confidentiality requirements of the Act (EEOC 1995).

Suppose a prospective employer makes a conditional job offer, then learns that an applicant is impaired and withdraws it. There are two significant issues: whether the applicant is otherwise qualified and whether the

employer could provide a reasonable accommodation that would enable the applicant to perform the job. First, the ADA defines a qualified individual with a disability as someone who could perform the essential functions of the job with or without accommodations. Employers' job advertisements and job descriptions written before a job is advertised are evidence of employers' perceptions of essential functions. Second, according to the ADA reasonable accommodations may include job restructuring, part-time work schedules, reassignments to vacant positions, acquisition of equipment or devices, or changes in existing facilities so that employees with disabilities have access. Accommodations might include qualified readers for the blind, interpreters for the hearing impaired, job restructuring, or adjustments in policies related to administration of examinations.

### *Reasonable Accommodations*

With regard to the ADA of 1990, the judicial branch found interpreting the legislature's "poorly-crafted statute" difficult (Issacharoff and Nelson 2001). Two concepts central to disputes under the law—reasonable accommodation and undue hardship—are ill defined (Issacharoff and Nelson 2001). As the law was originally written, employers were required to provide accommodations to disabled workers unless the costs would threaten the existence of the business (Tucker and Goldstein 1991). The law that was passed was more ambiguous and vague, saying that employers must make accommodations unless doing so would provide an "undue hardship." There are four criteria used to analyze the degree of hardship for an employer:

- Nature and cost of accommodation needed.
- The financial resources of the facility and the impact that accommodations would have on operations; also, the number of employees and the effect that providing the accommodations would have on expenses and resources.
- Overall financial resources of the employer, employment agency, labor organization, or joint labor-management committee (the covered entity); the

overall size of the business; and the number, type, and location of facilities.

- The composition, structure, and functions of the workforce; geographic autonomy of units; and relationship between the facility where the employee would work and the covered entity. (ADA 1990)

So, for instance, it would be very difficult for a university campus that is part of a state system to prove that providing accommodations would present an undue hardship when resources could be augmented by the legislature. On the other hand, a small private company might be unable to accommodate a hearing-impaired employee who would need an interpreter and special equipment to perform the essential functions of a job.

An employer would not want to spend time or money accommodating an employee when accommodation is not necessary. But failing to provide reasonable accommodation for an employee can lead to costly litigation. Moreover, employers who lose talented employees pay other costs that are more difficult to quantify—like knowledge, skills, and abilities that may be hard to find in others.

Care must be taken to avoid discrimination against those with disabilities as a way of avoiding costs of accommodations. Employers may ask applicants about their attendance records in prior jobs since there may be many reasons for absenteeism. However the interviewer must avoid any questions that might require the applicant to reveal any information about impairments or disabilities. For example, questions about an applicant's workers' compensation history would certainly reveal information about medical conditions. These questions can only be asked after a real, conditional offer of employment has been made.

Suppose a recruiter must decide whether to withdraw a conditional job offer extended to an individual after finding that the individual is disabled. First, the recruiter needs to determine whether the applicant would be able to perform essential job functions. Then there is a need to determine whether the accommodations that the applicant would require are reasonable. The ADA does

*not* eliminate the need for the applicant to perform essential job functions. Job descriptions may include duties that are not truly *essential*. In these situations employers should consider restructuring the job to remove nonessential duties. Whether this is a reasonable accommodation would be decided on a case-by-case basis. Note that the ADA does not lower performance standards and requirements for disabled employees.

The choice of accommodations should be made by both the employer and the employee on a case-by-case basis. There should be an informal, interactive process to define the limitations of the disability and the accommodation options. For example, Patrick Jackan held a safety and health inspector (SHI) position that required driving, climbing ladders, and crawling through small spaces. He passed the physical examination and his performance was satisfactory for the first year. Then he underwent spinal surgery. After he recuperated his doctors cleared him for work at a desk job because he could no longer lift or crawl. He asked to be transferred to the job he held before he was transferred to the SHI position but his request was denied. One year later he was fired. The Second Circuit Court of Appeals dismissed his ADA claim. The Court agreed with the employer who said that civil service rules prohibited his transfer because preferred lists or reemployment rosters were used to fill the job that he wanted. There were no suitable vacancies. According to the Second Circuit, an employee who requests a transfer must show that a vacancy exists, and then the burden shifts to the employer to accommodate the request or prove that the request would pose an undue hardship (*Patrick C. Jackan v. New York State Department of Labor* 2000). Suppose the employer and disabled employee identify a reasonable accommodation. The employee can reject the accommodation. But the consequence of that rejection—if the employee is then unable to perform the essential functions of the job he or she holds—is that the employee will no longer be considered a qualified employee with a disability. So if there is an adverse personnel action—such as a reprimand, suspension, or firing—then the employee cannot claim discrimination under the ADA (EEOC 2011b).

Rulings on whether employees who are regarded as disabled have rights to accommodations varied in the federal courts until the ADAAA of 2008. Recall that the third prong of the ADA definition of an individual with a disability includes those who are regarded as disabled. Bonnie Cook's case serves as an example. In 1999, when Bonnie Cook reapplied for a job she held twice before and voluntarily left twice, she was not rehired. The Rhode Island hospital that refused to hire her predicted that she would not be able to perform the duties of the job because she was morbidly obese, even though the pre-hire physical revealed that she was physically able to perform the duties of the job for which she applied. The hospital claimed that she would be unable to quickly evacuate patients in an emergency and that she was more susceptible to infections than those who are not obese. The hospital claimed that if she was hired, Cook would be more likely to be absent and more likely to file workers' compensation claims than other employees. The EEOC supported her claim that she was covered by the ADA because she was regarded as disabled by her prospective employer. The First Circuit Court of Appeals ruled in Cook's favor (*Cook v. State of Rhode Island* 1993). If she had been hired, would she have been entitled to reasonable accommodation? Although she was perceived to be disabled, she claimed she was not. What accommodation could an employee who is *not* disabled request? None, according to the ADAAA of 2008. Note also, the courts decided Cook was covered by the ADA because she was regarded as disabled and ruled in her favor because her potential employer's determination that she was not qualified was deemed unreasonable. Other obese job applicants will not prevail, however, if they are not otherwise qualified (Bradbury 2007).

### *Discrimination and Prejudice*

Cook's case is an example of *discrimination* based on *prejudice*. The terms are different. Prejudice is "an adverse or hostile attitude toward a person who belongs to a group, simply because he belongs to that group and is, therefore, presumed to have objectionable properties ascribed to that group" (Allport 1954). Prejudice may



cause discrimination, that is, decisions about employment or wages that are not based on productivity (Phelps 1972). But—all else being equal—if wages are based on productivity and an employer pays a disabled employee a lower wage because he or she is less productive than a nondisabled employee, then the employer has not discriminated (Johnson and Lambrinos 1983).

Fears and stereotypes lead some people to perceive that others are disabled when there is no real impairment. The law gives some specific examples of such conditions and states that these are not covered by the ADA. For example, homosexuality and bisexuality; compulsive gambling, pyromania, and kleptomania; conditions resulting from the use of illegal drugs; and transvestism, and other sexual behavior disorders are among the conditions that are not considered disabilities according to the ADA. If individuals with these conditions experience discrimination they cannot file charges under the ADA.

#### *Practical Application: HIV/AIDS*

Employers and coworkers tend to fear and prejudice employees who have contracted the HIV virus. Meanwhile, the number of Americans with HIV infections and AIDS is increasing in the population and workforce. See Table 21.3. In the 50 states, the District of Columbia, and six dependent areas with confidential name-based reporting systems, there were 1,201,100 cumulative HIV infections reported in 2011, 914,826 individuals lived with HIV in 2012, and 160,300 cases had not yet been diagnosed at the end of 2011. The Centers for Disease Control also reports nearly 50,000 new HIV infections each year—with blacks about 150% as likely to be infected compared to whites. By the end of 2012, 13,712 persons with HIV infections died (Centers for Disease Control and Prevention [CDC] 2015).

At the end of 2012 in the same reporting areas, there were 1,194,039 cumulative AIDS diagnoses reported—26,688 diagnoses were reported in 2013 alone. At the end of 2012, in the same areas 508,845 individuals were living with AIDS, and 658,507 individuals with an AIDS diagnosis died (CDC 2015).

**Table 21.3 Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS)**

<b>HIV:</b>	
Cumulative HIV infections reported, 2011	1,201,100
Individuals living with HIV, 2012	914,826
HIV cases not yet diagnosed, 2011	160,300
New HIV infections each year, 2010	47,500
Deaths of those with HIV infections, 2012	13,712
<b>AIDS:</b>	
Cumulative AIDS infections reported, 2012	1,194,039
Individuals living with AIDS, 2012	508,845
AIDS cases diagnosed in 2013	26,688
Cumulative deaths of those with AIDS diagnoses, 2012	658,507

*Source:* Centers for Disease Control, 2015. Data reported by 46 states and six dependent areas with confidential name-based reporting systems.

Prior to *Bragdon v. Abbott* (1998) many believed that the ADA did not cover those with asymptomatic HIV. But the 2008 ADAAA specified that “functions of the immune system . . . and reproductive functions” are major life activities covered by the law (ADAAA 2008). Bragdon told her dentist, Dr. Abbott, that she was HIV positive. He, therefore, refused to fill her cavity in his office. She filed suit and the Court ruled that she was indeed disabled according to the Americans with Disabilities Act. One of her major life activities, reproduction, was substantially limited because she was HIV positive. The major life activity that was impaired—reproduction—is not the most significant issue for employers. But the determination that HIV is a disability covered by the ADA is very significant to them. In an employment setting, Bragdon would be covered by each of the three prongs of the ADA definition of individuals

with disabilities. First, the Supreme Court specified that Bragdon was substantially limited in a major life function. Also, those with HIV are more vulnerable to certain infections that are only *intermittent* physical impairments. An employee who learns that he or she is HIV positive will go through emotional adjustments such as depression, which, as a mental impairment, is covered by the ADA. Second, there would be a record of such an impairment, even after the HIV employee recovers from opportunistic infections or depression. Third, even though they are asymptomatic, HIV-positive employees may be regarded as being disabled. Thus public misconceptions about the disease may lead to prejudice and disparate treatment similar to Bragdon's treatment by her dentist (*Bragdon v. Abbott* 1998; Slack 1997).

In the EEOC complaints Priority Charge Handling Procedure (PCHP), HIV infection discrimination complaints are considered high priorities cases for investigations. Likely this is due to the high success rate in court because those with HIV infection are generally able to perform all the essential job tasks with or without accommodation (Moss et al. 2001).

James Slack (1997) gives public sector organizations several specific recommendations for dealing with HIV/AIDS employees and the Americans with Disabilities Act. First, analyze the agency's capacity to offer these employees reasonable accommodations. For example, analyze job descriptions and identify the essential functions of each job. Then consider job restructuring so that the employees will be able to remain in a job as long as they are able to perform essential functions. Employees with HIV/AIDS will want to conserve sick leave for later stages of the disease, so flex-time options in the earlier stages would be helpful. However, bear in mind that agencies may use discretion with flex-time options and sick or personal leave. Prepare to comply with the law's requirement for protecting employees' rights to confidentiality of medical information. Finally, provide employee assistance program (EAP) services. But be aware that asking employees about their problems and referring them to employee assistance programs are indications that the employer regards the employee as

disabled and this could come back to haunt an employer (*Holihan v. Lucky Stores, Inc.* 1997).

The costs of litigation associated with noncompliance with the ADA is high. For example, the ADA would be violated if an agency failed to hire an asymptomatic HIV-positive individual because he or she was HIV positive, when the applicant could perform the essential functions of the job. Thus it is important to develop policies, to develop and implement training programs to dispel employees' myths and misconceptions about HIV/AIDS, and to train anyone who plays a role in the hiring process (CDC 1998; Keeton 1993). The CDC can help agencies develop workplace policies and training programs and can provide information about health insurance options and costs (CDC 1998). Agencies' policies would have to comply with state statutes and, as previously mentioned, these differ.

#### *Practical application: Alcoholism*

Another costly problem for agencies is *alcoholism*. Alcoholism conforms to the ADA definition of a disability: "a physical . . . impairment that substantially limits one or more of the major life activities of such individual" (ADA 1990). Rates of alcohol use and substance dependence or abuse are associated with employment status, and employers pay high costs in the form of lower productivity, higher absenteeism rates, health care expenditures, crime, motor vehicle crashes, and fires (Harwood, Fountain, and Livermore 1998; Mani 1998).

In 2013 nearly 66% of full-time employed adults 18 years of age or older used alcohol and 30.5% of full-time employees reported binge drinking. See Table 21.4. In fact, over 76% of adult binge drinkers were employed full- or part-time in 2013. A subset of employed adults reported more serious problems of substance abuse or dependence: 9.5% of full-time employees and 9.3% of part-time employees (Substance Abuse and Mental Health Services Administration 2014).

According to the ADA of 1990 alcoholism is defined as a disability; but accommodations have generally been limited to time allowances for rehabilitation. The

**Table 21.4 Alcoholism among Employed Adults over Age 18 in 2013**

Percentage of full-time workers who used alcohol	65.8%
Percentage of full-time workers classified as binge drinkers	30.5%
Percentage of all binge drinkers and heavy drinkers employed full-time	76.1%
Percentage of full-time workers reporting substance abuse or substance dependence problems	9.5%
Percentage of part-time workers reporting substance abuse or substance dependence problems	9.3%

*Source:* Substance Abuse and Mental Health Services Administration (2014). Binge drinking is consumption of five or more drinks on one occasion on at least one of the 30 days prior to the National Survey on Drug Use and Health. Heavy drinking is binge drinking on at least five of the 30 days prior to the survey.

courts have not considered further accommodations reasonable. For example, alcoholics do not have a right to return to the job they held before treatment or the right to a work-release program after incarceration for driving under the influence of alcohol (*Bailey v. Georgia-Pacific Corp.* 2002; *Burch v. Coca-Cola Co.* 1997). Employers can legally hold alcoholics to the same performance standard as other employees (ADAAA 2008).

An employer that complies with the ADA unknowingly might hire a recovered alcoholic. During the pre-offer stage, employers may ask about drinking habits generally but may not ask any question that might elicit information about alcoholism specifically. The interviewer may ask applicants whether they drink alcohol or if they have been arrested for driving while intoxicated, but they may not ask how much applicants drink or whether they have participated in an alcohol rehabilitation program. There is no statutory exception for tests to measure alcohol consumption—these are medical tests and are not permitted during the pre-offer stage, even though there is a statutory exception for medical tests to identify illegal drug users (EEOC 1995). After a conditional job offer is made, employers may ask disability-related questions and may require a medical examination if those questions and the examination apply to all job applicants in that job category. If a disability is discovered, the offer may be withdrawn *only* if that disability is job related and based on a business necessity. That is, the employer must prove that the applicant could not,

with reasonable accommodations, perform the essential functions of the job (Naeve and Servino 1998).

#### *Practical Application: Mental Retardation and Mental Health*

Sometimes, fears and stereotypes lead people to discriminate against those with disabilities. Donald Perkl, a janitor with mental retardation working for Chuck E. Cheese's, was fired and his supervisor was criticized for hiring one of "those people" even though Perkl was fully qualified for his job and he received satisfactory performance ratings during his three weeks of employment. A jury awarded him \$13,070,000 in punitive and compensatory damages. Although the award had to be reduced because the maximum allowable award is \$300,000, the jury sent a strong message to corporations that discriminate against people with disabilities (*Perkl v. CEC Entertainment, Inc.* 2000).

Mr. Perkl represents a group of disabled Americans likely to be helped when employers comply with the law as Congress intended. A study that followed 1,100 individuals with mental retardation for three years after the law was passed showed increases in the average monthly income for all participants, substantial improvements in individuals' capabilities and qualifications, and levels of inclusion, accessibility, and empowerment in society. However 90% of individuals who were not employed at the beginning of the study were not employed at the end of the study (Blanck 1993).

As a final example, consider emotional and mental health problems. See Table 21.5. At the time the Americans with Disabilities Act was passed in 1990, 56% of companies surveyed reported that mental health and emotional problems were fairly pervasive in their companies. Thirty-six percent of them reported that stress, anxiety, and depression greatly affected employees' ability to function on the job. According to the Substance Abuse and Mental Health Services Administration (1999), 6% of full-time employees and 8% of part-time employees reported a major depressive episode in the year of the survey—one of four mental health diagnoses examined. In addition, 1%–3% of employees reported diagnoses in each of three other categories—general anxiety, agoraphobia, and panic attacks (Substance Abuse and Mental Health Services Administration 2000).

Twenty years after the law was passed mental illness was even more prevalent. In 2013 nearly 44 million Americans over 18 years of age—18.5% of all adults in this country—reported a mental illness. This includes about 15.4% of full-time and 20% of part-time employed persons. There is a higher probability of mental illness—about 26% of those living below the poverty level—among people at lower income levels who also are more likely dependent on public assistance. An estimated 10 million—4.2% of all adults—suffer from serious mental illness and 9.3 million adults—about 4% of individuals

**Table 21.5 Percentage of Americans Reporting Mental Illness in 2013**

All Americans over age 18	18.5%
Full-time workers	15.4%
Part-time workers	20.3%
Those living below the poverty level	26.1%
Serious mental illness	4.2%
Serious thoughts of suicide	3.9%

Source: Substance Abuse and Mental Health Services Administration (2014).

over age 18—reported having serious thoughts of suicide in the last year (Substance Abuse and Mental Health Services Administration 2014).

Absenteeism, death, lost productivity, crime and incarceration, social welfare administration, family caregiving, accidents, and expenses associated with property destruction contribute to mental illnesses' total costs to employers. The 2008 \$700 billion bailout of Wall Street included mental health parity legislation that will affect employers' costs: health plans and self-insured employers must offer the same coverage for mental and physical health benefits (French and Goodman 2009).

Illnesses such as alcoholism, depression, paranoia, or post-traumatic stress disorder are covered by the Americans with Disabilities Act and the courts have made several decisions that favored employers of individuals with these impairments. These decisions likely were due to plaintiffs' difficulties substantiating their mental illness (Moss et al. 2001). Employers may discipline or terminate disabled employees for threatening behavior or misconduct as long as the personnel action imposed is the same action that would be imposed upon an employee who is not disabled—that is, it is no greater. In one case, a federal court of appeals upheld the termination of an employee who threatened to kill her supervisor. In another case, the court upheld the termination of a police officer who physically assaulted two people, one of whom was a fellow police officer (Bernert 1998). These decisions were supported by the ADA of 1990. First, the law defines a direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation” (ADA 1990). Second, the law allows employers to set qualifications standards that state that employees “shall not pose a direct threat to the health or safety of other individuals in the workplace” (ADA 1990).

### *Compliance*

If a disabled individual believes they have experienced discrimination in violation of Title I of the ADA 1990 or the ADA 2008, to whom should they complain? The EEOC, the U.S. attorney general, and the U.S. secretary

of transportation are empowered to enforce the ADAAA 2008. Many state and local government entities have fair employment practices agencies (FEPAs), and some FEPAs have agreements to share work with the EEOC in discrimination cases related to laws like the ADA (EEOC 2012).

In 2011 the EEOC reported receipt of 25,742 complaints of discrimination in violation of the Americans with Disabilities Act. About 15% of the cases were closed because the charging party could not be located, failed to respond to EEOC communications, failed to accept full relief, or requested withdrawal of the charges. Also included in this category are cases closed based on the outcome of related litigation or the determination that the EEOC has no jurisdiction in the case. Cases closed for these reasons are called administrative closures. In 2011 the EEOC resolved 27,873 cases—a number that exceeds the number of complaints since some cases routinely are carried over from the prior year. In almost 64% of those cases the EEOC found no reasonable cause but the cases that were resolved resulted in \$103.4 million in monetary benefits. Note that sum does not include monetary benefits received through litigation (EEOC 2011a).

To address some problems related to their burgeoning case load, the EEOC developed Priority Charge Handling Procedures (PCHP) and began giving cases priorities based on initial data given to them—cases with the highest priority were given the most thorough investigations. Moss et al. (2001) criticized the PCHP system for failing to achieve its goals and eliminate unnecessary layers of review, change the data collection process, address perceptions of unfairness, and encourage utilization of alternative dispute resolution. The agency struggled with inadequate resources to handle the number of complaints filed, so a small percentage—12.4%—of those who filed complaints between 1992 and 2000 realized any benefits and the EEOC evolved into a place where cases go stale (Moss et al. 2001).

It pays to comply. The remedies for noncompliance cases are the same as the remedies for noncompliance under the Civil Rights Act of 1991: punitive and compensatory damages such as future pecuniary losses,

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses (Civil Rights Act 1991). The previously mentioned Chuck E. Cheese case serves as an example (*Perkl v. CEC Entertainment, Inc.* 2000).

Employees who are dissatisfied with their employer's proposed resolution of their complaint or the length of time the EEOC takes to resolve their case may request a right to sue letter and proceed to federal district court—unless the complainant is a state government employee (French and Goodman 2009; Kuykendall and Lindquist 2001). For example, two employees of the University of Alabama took their case to the federal courts. One was a nurse who was transferred to a lower-paying position when she returned to work after taking extended leave to complete treatment for breast cancer. The second employee was a man with asthma who first asked to be reassigned to a job where he would have less exposure to cigarette smoke and carbon monoxide and then asked to be reassigned to a day shift because he had sleep apnea—both his requests were denied. In the *Board of Trustees of the University of Alabama v. Garrett* (2001) the Supreme Court ruled that Congress exceeded its power by abrogating states rights to sovereign immunity under the 11th Amendment to the U.S. Constitution—that is, according to the 11th Amendment private citizens cannot sue a state for monetary damages. Congress had included in the ADA a provision for abrogating a state's 11th Amendment rights when plaintiffs prove a pattern of discrimination against disabled persons that violates the 14th Amendment's due process and equal protection clauses. But the two plaintiffs in the *Garrett* case could not present sufficient evidence to prove a violation of the 14th Amendment (*Board of Trustees of the University of Alabama v. Garrett* 2001). A recourse for state government employees would be a suit by the EEOC (French and Goodman 2009; Kuykendall and Lindquist 2001; Ricucci 2003). Private and municipal corporations and individuals may sue and be sued in court—unlike states, local government entities do not have the same 11th Amendment sovereign immunity rights (*Lincoln County v. Luning* 1890).

### *The ADA Debate*

The primary goal of the ADA is to reduce the 75% unemployment rate of Americans with disabilities. An impediment to accomplishing the policy goal is the prospective employers' cost-benefit analysis, but costs may be lower than employers expect. In 2011, the EEOC estimated the mean total cost of an employer's accommodation for one disabled employee to be \$715. But since each accommodation is likely an initial cost that will last five years—for example, keyboards, software, chairs, carts, sound absorbing panels—the average cost per year is \$143 (EEOC 2011b).

Employers tend to underestimate productivity of disabled workers because they have limited experience hiring people with particular disabling conditions. Disabling conditions may limit worker productivity but the costs of many accommodations that improve their productivity are small. So the cost-benefit analysis could still support hiring a disabled worker in many cases. If the disabled worker's productivity is lower than that of individuals without disabilities—even with accommodations—then there would be justifiable wage disparities (Johnson and Baldwin 1993).

Costs are not equitably distributed among those who might employ disabled workers, and benefits are not distributed equitably among all disabled potential workers. With regard to cost, companies with disabled patrons pay a one-time fixed cost for modifications to entrances, parking lots, and restrooms—a widely dispersed cost. But Congress failed to specify a cap on the additional costs—that is, reasonable costs that would not impose an undue hardship—that an employer would need to pay to accommodate an employee. Is it fair to say 10% of a company's budget is reasonable but 11% of its budget is an undue hardship? Is it fair that only a subset of all companies with 15 or more employees must pay these additional costs? Issacharoff and Nelson argue the intent of the ADA is nondiscrimination but that the law is, in fact, a redistributive public policy that discriminates against employers who hire disabled workers (Issacharoff and Nelson 2001).

Morin (1990) argues that the benefits of the ADA outweigh the costs. First, the ADA could reduce the \$60 billion federal expenditures for disability benefits and programs as well as supplemental security income and disability, medical, and food stamp payments because employed disabled individuals could become self-sufficient. Second, disabled individuals include a great, untapped pool of labor and are among the most dedicated and conscientious employees. Third, studies show over half of disabled employees require accommodations that cost virtually nothing (EEOC 2011b).

Nevertheless, employers perceived that the costs of accommodations would be high, even though hiring of people with disabilities actually decreased after the law was passed. In lieu of requiring employers to pay for disabled workers' accommodations, DeLeire argues a better approach to the problem would be expansion of the Earned Income Tax Credit (EITC). As it currently exists the EITC has encouraged low-income workers to enter and stay in the workforce, has increased workforce participation, and has reduced the poverty status of families. Creating an EITC for people with disabilities could do the same for them, decrease the cost of hiring and accommodating disabled workers, and reduce the costs of enforcing, through prosecution and litigation, the current laws (DeLeire 2000).

A survey of personnel managers in states reflected more support for than opposition to the ADA (Kellough 2000). The majority of the respondents reported the ADA had little effect in their organizations because they were covered by and in compliance with Section 504 of the Rehabilitation Act of 1973. Over 66% of the managers responded the ADA would not force them to hire people who would not have been hired before the law was passed, over 84% stated they would not be forced to hire people who were not qualified to work in their organization, and less than 16% believe employees in their organization were concerned they would be exposed to communicable diseases as a result of the ADA (Kellough 2000).

## CONCLUSION

One might argue that laws have neither narrowed the disability-based wage gap nor improved the unemployment rate for Americans with disabilities. However, Burgdorf argues, there is a compelling fiscal need for the law because a growing proportion—over one-third of working-age individuals with disabilities in 1990—are dependent on government benefits for their support (Burgdorf 1991). Between 1990 and 2003 the cost of Social Security disability benefits increased 93%, from less than \$40 billion to \$77 billion (U.S. Social Security Administration 2003). And the number of beneficiaries is expected to increase more than 40% between 2004 and 2030 (U.S. Social Security Administration 2006). The increasingly generous Social Security disability income and welfare reform laws are related to declining employment rates for disabled individuals, but laws improving access to education and employment could decrease dependence on government support (Burgdorf 1991; Hotchkiss 2004).

Additional research is needed to measure the effects of the ADA 2008 and the 2011 EEOC regulations on employment of Americans with disabilities. In future research effects of changes in the definitions of disabled Americans covered by the law should be controlled. Because—consistent with legislative intent—more recent public policies cast a wider net.

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