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**\*533 EMPIRICAL STUDIES: HOW DO DISCRIMINATION CASES FARE IN COURT? PROCEEDINGS OF THE 2003 ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, SECTION ON EMPLOYMENT DISCRIMINATION**

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Professor Monique C. Lillard [FN1]: Good afternoon. I'm Monique Lillard, from the University of Idaho. I am very pleased to inform you these proceedings will be published by the Employee Rights and Employment Policy Journal. I want to acknowledge that EEOC Commissioner Paul Miller is in the audience. [To Commissioner Miller] It's a pleasure to have you here again. I think that your presence is well suited to this particular panel because what we are trying to do here is talk about the real world. As professors we teach theory, we parse words, we weigh burdens, but our question today is what really happens in court, what really happens to the cases that are brought.

I started planning this program over a year ago. I didn't intend to be trendy, but perhaps I inadvertently was because there are at least three other sessions in this AALS conference that deal with empirical research. I am delighted to say that we have with us today two people who have done considerable empirical research and are pioneers in empirical research in the employment area. It's a cliché to say that people need no introductions, but it's certainly true here. We are going to hear first from Ruth Colker, professor of law at Ohio State University, and then from Stewart Schwab, professor of law at Cornell. After that we will have considerable time for questions, and I look forward to the discussion. And now let me turn the podium over to Ruth Colker.

Professor Ruth Colker [FN2]: Thank you Monique for your gracious invitation. The topic for today is how empirical research might benefit us in thinking about employment discrimination issues, and that is something that is near and dear to my heart. I decided a few years \*534 ago, when I joined the Ohio State faculty, that I wanted to create a data base that would look at what has happened under the Americans with Disabilities Act [FN1] B what has the first decade of enforcement looked like? The statute, as people in this room know, was enacted in 1990 and went into effect roughly in 1992. So, in around the year 2000, I began to ask what the first decade looks like, and I collected data that roughly spanned the years 1994 to 1998 to see what kind of glimpse I could get at judicial outcomes under the ADA. One reason I started collecting this data was that I was at synagogue one day, waiting for my daughter to be finished with Hebrew school, and my rabbi asked me if I had seen Ruth Shalit's article in the New Republic, reprinted in the Columbus Dispatch, on the ADA. [FN2] I said, "No," and he said, "You have to read it." I read the article, in which Ruth Shalit described the ADA as a buffet of perks for the questionably disabled. She had other nasty things to say about the ADA, making it look like a windfall for plaintiffs. This was around 1997 and, when I read this piece, it didn't ring true because of published opinions I had read. But maybe I was only remembering the cases in which the plaintiffs lost, and I thought that it might make sense for me to look systematically at ADA results and see what we would really find.

So, that's what I decided to do and what I'm going to do is share with you today some of the data that I've collected. My data are a little different from the data Stewart's going to discuss. I actually read all the cases that are in my data. I've coded them for various characteristics, and later in this talk I'll share with you some of the characteristics of the cases that I've coded.

First, let me give you a sense of what the ADA looks like compared to the other employment discrimination statutes that most of you are familiar with. As you know, the three leading statutes are Title VII, [FN3] the Age Discrimination in Employment Act, [FN4] and the ADA, and for those of you who want to see these results in more detail, I published most of this material in the Ohio State Law Journal, [FN5] and I'm writing a book about this which should come out in \*535 a couple of years.

Anyway, this is what I found when I looked at the ADA historically as compared to Title VII and the ADEA. The data in Table 1 come from the EEOC website. The EEOC breaks down the data by category and types of cases. Anyone who has an ADA case has to file a charge with the EEOC to eventually go to trial, and the website shows how frequently the EEOC has obtained what it calls 'merit resolutions' in various kinds of cases. [FN6] I thought this would provide a glimpse at how the ADA looks compared to the other two major employment statutes, and the data involve 126,000 complaints that the EEOC has handled. I certainly haven't read any of these cases. These are just complaints.

Table 1

#### EEOC Enforcement: Percentage Merit Resolutions

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In the first couple of years, the EEOC had a very high merit resolution rate in ADA cases, higher than Title VII and the ADEA. I think that's easy to explain. There probably was a backlog of people who had discrimination complaints and employers weren't yet \*536 educated as to what they should be doing. I wasn't surprised to see in the first couple of years that the ADA fared very well in the initial complaint process, and better than Title VII or the ADEA. Starting around 1994, the numbers dip lower and then, for some odd reason, they start moving back up again in 1999 and 2000. But for 1994 to 2000, if you look across the table at the three columns, you see that the ADA, Title VII, and the ADEA look roughly similar. I don't think those results are going to be statistically significant in their differences although, if anything, ADA's faring a little bit better than those other two discrimination statutes. And there are people who think that in the early years of a statute you should expect to see a somewhat higher success rate by plaintiffs than you might see later in a statute's history, because members of the defendant community may not yet be particularly well educated about what their responsibilities are and they will learn over time as corrective action is taken.

So, that's the first glimpse we can get into the ADA, through EEOC's website and the enforcement data it collects. One reason I collected this data is that as we get to judicial outcomes, we see that ADA plaintiffs fare very, very poorly, and a lot of people say to me, "Oh, that's because all the good cases are resolved earlier in the process before the EEOC." I think that we can see that plaintiffs are not particularly successful before the EEOC and in the most successful year they're winning less than a quarter of their cases at the EEOC merit resolution stage, and in a more typical year they're winning 15 to 16 percent of their cases. So, it's not as if there's a huge siphoning off effect that's happening because of all the successful resolutions that the EEOC is able to help people attain during the complaint process. So, I also collected data to dissuade people from the hypothesis that I

often hear.

Next, I read cases to see what was happening at the trial court and appellate levels. Now, at this point in my research I could have looked at trial court outcomes. I did not do so because I was limited to research on cases available on Westlaw, and a very small percentage of all trial court cases are reported on Westlaw. I felt I'd have a huge selection bias problem if I looked at trial court cases on Westlaw. A higher percentage of cases are available on Westlaw when you look at appeals. Plus appeals create precedent and it seemed to me that that precedent would affect trial court outcomes as well. Therefore, I decided that I would look at appellate outcomes, and there are roughly 789 cases I've looked at, for the time period \*537 1994 to 1998, that involved appellate court outcomes.

Table 2

#### ADA Appellate Outcomes in Employment Discrimination Cases

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Table 2 shows how defendants and plaintiffs are faring on appeal. When the defendant was successful at trial, in 88 percent of the cases, that victory was retained on appeal with an affirmance. Twelve percent of the time the plaintiff obtained a reversal on appeal. By contrast, when plaintiffs won at trial, only 40 percent of the time were they able to retain their successful verdicts on appeal. Sixty percent of the time, the defendants obtained a reversal. That bottom figure, the reversal rate, is what I tend to focus on in the following tables. I think that's what empirical researchers tend to focus on. So that bottom row, 12 percent and 66 percent, is what I'll be focusing on later. What you see is a very strong differential between plaintiffs and defendants on appeal. Not only do plaintiffs infrequently win at trial, but when they win at trial they have a 60 percent chance of having their cases reversed.

I decided to see how these ADA reversals compared to other areas, and here I've relied on some data collected by Stewart Schwab and Ted Eisenberg. My data are a little different than their data because my data are based on cases available on Westlaw, which includes published and non-published opinions available on Westlaw. \*538 Their data include all judicial outcomes because the Administrative Office of the U.S. Courts keep track of judicial outcomes by various categories. ADA is not a category that it uses, so no one can collect data for all ADA cases. It uses broader categories like employment, commercial, and civil, and you can get all the data that are out there, all the judicial outcomes on appeal. So my universe is a little bit smaller than Schwab and Eisenberg's, and there's a little bit of a comparison problem, but it's the best that one can do.

Table 3

#### Plaintiff and Defendant Reversal Rates on Appeal

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Table 3 shows reversal rates on appeal. As we saw from the previous table under the ADA, the plaintiff reversal rate is 12 percent. That's not too different from the data that's available for other areas on appeal. Employment discrimination cases generally had a 6 percent figure, civil litigation had a 12 percent figure, and commercial law had a higher plaintiff reversal rate. The interesting contrast is the defendant reversal rate. The defend-

ant reversal rate \*539 under the ADA is much higher than it is in the area of employment, commercial, or all civil categories. That 60 percent rate does seem to be a high rate, higher than other areas of the law, which causes one to wonder why there is this hostility on appeal to ADA cases when the plaintiff has been able to win below. Therefore, I tried to generate hypotheses about why defendants are doing so well on appeal in ADA cases.

Table 4

## ADA Pro-D Outcomes: 1994-1999

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One explanation that I came up with was that the defense bar may be very sophisticated in figuring out over time what are the better cases and so they're going to come up with this higher reversal rate. What I found, in fact, was that the defendant success rate over time is pretty flat. Now, when I say pro-defendant outcomes, I'm not just talking about the reversal rate. Here I'm talking about any outcome that's successful for defendants on appeal, so that would be an affirmance of their victory at trial, as well as reversal of a plaintiff's trial victory, and when you look at the data that way these are the figures over time. I did it this way because the numbers are much larger. I can look at a larger universe of cases. Basically, ADA defendants have been doing great on appeal over time. It doesn't seem to matter how plaintiffs reorient themselves over time, to try to \*540 adjust their behavior to be more successful. They just keep losing at the courts of appeals. That to me was a pretty disturbing finding. I would have expected that if a defendant success rate is 83 percent, plaintiffs would modify their behavior, since plaintiffs' lawyers usually take cases on a contingency fee basis, and start being more selective in the cases they accept to appeal, and that over time this would create a higher plaintiff success rate, and that they would not be stuck with a 17 percent success rate for the entire period of the statute's enforcement.

People in law and economics would hypothesize that plaintiffs should be adjusting their behavior to attain a higher success rate. The success rate is supposed to hover near 50 percent. Defendants are certainly not supposed to be able to have it get out of control at this 87 percent level. So, what I then hypothesized was that what plaintiffs are really dealing with is a moving target when they are adjusting their litigation strategies. They adjust and the courts adjust in a more pro-defendant direction, and the results stay the same B they stay flat.

The question is whether justice is really being served. That's something that we as lawyers are supposed to believe in, and that's hard to believe in when the results are so consistently flat in favor of defendants. As I said, I didn't just look at statistical outcomes in the sense of whether defendants win, or plaintiffs win. I also wanted to have a sense of what the cases look like in which the plaintiffs win. So, I had to read all these cases and code them to figure that out. The results are contained in Table Five.

\*541 Table 5

## Factors in Predicting Appellate Outcomes

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Whether plaintiffs win in part will depend upon what happened below, and so here I'm coding for factors predicting successful appellate outcomes for plaintiffs. So, of course, if the plaintiff attained a verdict below, it's

statistically significant that the plaintiff will win on appeal since it's always easier to attain an affirmance than a reversal on appeal. It shouldn't matter whether plaintiffs won below in a bench trial or jury trial. They are very likely to win on appeal. That tells plaintiffs' lawyers, if you won below and the defendant wants to appeal, it is worth it to stick with that case despite the 60 percent reversal rate. That's the case in which you're most likely, at the end of the day, to be able to attain attorney's fees for a successful outcome. No great surprise.

A negative factor, not surprisingly, is whether the plaintiff is proceeding pro se. That's highly significant. I do not have a lot of those cases in my data base, but I saw I needed to control for that factor. I had a constant that I can't explain, but that's true in any data.

\*542 My next piece of data is Paul Miller's favorite, which is that if the EEOC writes an amicus brief, believe it or not, the plaintiff has a greater likelihood of succeeding on appeal. And I say believe it or not because I think we all know there is a lot of judicial hostility to the EEOC. This means that plaintiffs' lawyers spend their time wisely when they lobby the EEOC to write an amicus brief. Interestingly, if the EEOC itself brings the case, I did not find that statistically significant for successful outcome, but that's a much smaller universe than the number of cases in which the EEOC writes an amicus brief. So that could just be a small numbers problem. There were only twenty or so cases in my data base in which the EEOC brought the case and persisted on appeal, whereas there are 60 or 70 cases in which it had written an amicus brief.

Then I looked at the circuit in which the plaintiff litigated. That shouldn't matter, right? Justice should be the same everywhere in the country. Well, if you want to move and you're thinking about where to set up your practice and you're a plaintiff's lawyer, my recommendations are the D.C. Circuit, Second Circuit, or Third Circuit, and my recommendation is stay away from the Fourth Circuit. There is a high level of significance in rulings adverse to plaintiffs if they appeal in the Fourth Circuit. I don't think that's a surprise to anybody who reads the cases, but that's what I found. So, justice is not blind, as they say.

I also coded the type of impairment that the person alleged to see if that mattered. Some people think, Justice O'Connor thinks that the only truly disabled are what she calls the "wheelchair bound," [FN7] so I wanted to see if that is true. Does the type of impairment matter? Well, yes, extremities disability does include the category of paralysis, so the so-called wheelchair bound, Justice O'Connor's favorite category, does seem to be doing a little bit better than others on appeal. Surprisingly, that's only a trend level. I only had a 0.1 level of significance. So I wouldn't want to place any wagers on that result. Diabetes was interestingly positively correlated with success for plaintiffs. I don't think that's a result that will persist over time. If you've been following the judicial outcomes under the ADA, under the mitigating measures rules, Vaughn Murphy, as you all know, lost \*543 before the Supreme Court. [FN8] He had high blood pressure. He also had diabetes, but he never bothered to mention that in the litigation. It wasn't part of his case. I'm afraid we're not going to see the diabetes result persist over time, but during my data set it does.

No other type of disability was significantly correlated with judicial success, either positively or negatively. I thought back injuries might be negatively correlated with success, but this wasn't true. I thought mental health impairments might be negatively correlated with success, but that wasn't true. When you collect data, it's just as interesting what you don't find as what you do find, and so I found no significant results for type of impairment.

I also coded the type of discrimination that was alleged, whether a person was seeking a job, seeking a promotion, being harassed, or had other types of claims. Interestingly, people who alleged that they had been unlawfully demoted were the ones who statistically were the most likely to prevail, and I thought about that and

thought, well, maybe that's because those are the people with long work records. People who were demoted obviously were employed, and they weren't fired, they were just demoted, and so I thought, well, maybe that's a somewhat more favorable posture to be in, to say to the court, well, they didn't hate me so much they fired me, they just hated me so much that they demoted me and maybe, for some reason, people in that position find themselves in a little bit better judicial posture. Anyway, that's the only kind of discrimination factor that I found was significant. I coded all sorts of other things like the type of job the person had, but it didn't matter. If you read my article in the Ohio State Law Journal, you'll find the raw data and much more extensive results, and you can see the other factors I coded that were not significant.

In my remaining minutes, let me turn to another statute that most of you probably don't think about much because it's not usually in an employment discrimination course, which is Section 504 of the Rehabilitation Act, [FN9] the precursor of the ADA. I began to worry that, maybe, the ADA was killing Section 504 because we had this long-standing statute, since 1973, that people with disabilities could use to obtain successful outcomes and I found all these unsuccessful outcomes under the ADA and I wondered, is the ADA having a \*544 ripple effect on Section 504? I can't prove causation, but I can at least hypothesize that there might be some causation. Is there at least a correlation between unsuccessful outcomes under the ADA and unsuccessful outcomes under Section 504? So I did some more coding, and this was really cursory coding, but I looked at how the ADA compared to Section 504 and I found that under Section 504, before there were significant numbers of ADA cases in the appellate courts, before 1994, there was a defendant success rate of 64.9 percent. Now that's the kind of defendant success rate I would have expected to find under the ADA but, of course, I didn't. And then, after 1994 when the ADA started to affect judicial outcomes, we see the defendant success rate on appeal jump to 87.5 percent. I checked that for statistical significance and confirmed that it is statistically significant under a chi square analysis. We see, not surprisingly, that ADA and Section 504 employment cases look very similar since 1994. So, I do worry that not only has the ADA had its own problems in the appellate courts, but maybe it's been harming another statute that's near and dear to our hearts, Section 504.

Table 6

## § 504 Employment Cases: 1994 Split

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I then worried that maybe the ADA was also hurting education cases under Section 504. These are not cases that are brought under \*545 ADA Title I, but maybe we'll see an effect here. The only good news I can report is that, so far, the success rate under Section 504 education cases has not gotten as bad for plaintiffs as it has under the employment cases. We've seen an increase in defendants' success rate, from 63.6 percent to 73.3 percent. That's not statistically significant and so, maybe, we can hope that it will stay there, that it won't get worse. My hypothesis is that these are mostly higher education cases, and maybe universities, like those that we work for, actually care enough about disability issues that they will often do the right thing even though they might think they can win in court, that maybe there's more voluntary compliance, a little bit less aggressive litigation strategies by many universities when it comes to disability matters than we find in the ADA Title I private discrimination cases. I don't know. That's my hypothesis. Thank you.

Table 7

§ 504 Education Cases: 1994 Split

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Stewart Schwab [FN3]: Professor Schwab gave an oral summary of his paper, the full text of which immediately follows.

[FN1]. Professor of Law, University of Idaho College of Law, Section Program Chair and Moderator.

[FN2]. Heck-Faust Memorial Chair and Professor in Constitutional Law, The Ohio State University, Michael E. Moritz College of Law.

[FN1]. 42 U.S.C. §§ 12101-12117 (2000).

[FN2]. Ruth Shalit, *Defining Disability Down*, *The New Republic*, Aug. 25, 1997, at 16; see also Ruth Colker, *Letters to the Editor: Perpetuation of Stereotypes Unfair to Learning Disabled*, *The Columbus Dispatch*, Sept. 13, 1997 at 11A (criticizing *Defining Disability Down*).

[FN3]. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 4-2000e-14 (2000).

[FN4]. Age Discrimination in Employment Act, 28 U.S.C. §§ 621-34 (2000).

[FN5]. See Ruth Colker, *Winning and Losing under the Americans with Disabilities Act*, 62 *Ohio St. L.J.* 239 (2001); See also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 *Harv. C.R.-C.L. L. Rev.* 99 (1999).

[FN6]. See <<http://www.eeoc.gov/stats/enforcement.html>> (last visited Nov. 3, 2003).

[FN7]. See *Sutton v. United Air Line*, 527 U.S. 471, 488 (1999) ( 'individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run').

[FN8]. *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999). Sutton and Murphy were decided on the same day, and both opinions were written by Justice O'Connor.

[FN9]. 29 U.S.C. § 794 (2000).

[FN3]. Allan R. Tessler Dean and Professor of Law, Cornell Law School.  
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