Harvard Civil Rights-Civil Liberties Law Review
Winter, 1999

*99 THE AMERICANS WITH DISABILITIES ACT: A WINDFALL FOR DEFENDANTS

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The popular media has often portrayed the Americans with Disabilities Act [FN1] ("ADA") as a windfall statute for plaintiffs. Columnist Ruth Shalit, for example, reported in the New Republic that the ADA has created a "lifelong buffet of perks, special breaks and procedural protections" for people with questionable disabilities. [FN2] A senior editor at Reader's Digest asserted that plaintiffs "have used the ADA to trigger an avalanche of frivolous suits clogging federal courts." [FN3] Following the United States Supreme Court's 1998 landmark interpretation of the ADA in Bragdon v. Abbott, [FN4] holding that the ADA covered an asymptomatic HIV-infected dental patient, the New York Times proclaimed that it was now clear that the "law would also cover other conditions ... including infertility, well-controlled diabetes, and cancer that is in remission after treatment." [FN5]

In response to the media's portrayal of the ADA, the United States Commission on Civil Rights has recently blamed "misleading and sometimes inaccurate news coverage" for the public's negative perception and "gross misunderstanding" of the ADA. [FN6] Indeed, contrary to popular media ***100** accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases [FN7] decided on the merits at the trial court level. [FN8] Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. [FN9] These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly. [FN10]

***101** While the media is correct to herald Bragdon as a landmark and possibly even liberal decision in the disability discrimination field, plaintiff Sidney Abbott has not yet prevailed. The Supreme Court remanded her case back to the court of appeals. [FN11] Furthermore, although the case liberalizes the interpretation of certain provisions of the ADA, these leanings are unrepresentative of ADA actions in general. This Article will consider whether Bragdon may reflect a turning point in ADA litigation, foreshadowing the development of more pro-plaintiff outcomes in the future.

My review of the litigation outcome data--combined with my individualized review of every appellate decision and many of the district court cases decided since the ADA became effective in 1992--leads to the conclusion that district and appellate courts are deploying two strategies that result in markedly pro-defendant outcomes under the ADA. Courts are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA.

Abuse of the summary judgment device takes two forms. First, district courts are refusing to send "normative" factual questions to the jury, such as issues of whether an individual has a "disability," [FN12] whether an individual is "qualified" to perform what are considered to be the "essential" functions of a job, [FN13] whether a requested accommodation is "reasonable," [FN14] whether the risk that an individual poses at the workplace is "significant" enough to constitute a "direct threat," [FN15] and whether the hardship imposed by an accommodation is "undue." [FN16] Instead, trial courts are substituting their own normative judgments for that of the jury. The ***102** question of whether cases go to the jury is significant because it can affect overall outcomes. Eisenberg has found, for example, that plaintiffs fare better in jury trials than in court trials in civil

rights, employment discrimination, and prisoner civil rights cases. [FN17] Thus, a reluctance to send cases to the jury may make a difference in substantive outcome under the ADA.

Courts are also abusing the summary judgment device by creating an impossibly high threshold of proof for defeating a summary judgment motion. In particular, courts are often ignoring elementary principles of who bears the burden of proof on issues in which a defendant seeks summary judgment. On issues like whether a plaintiff poses a direct threat to the health or safety of others, the ADA clearly requires the defendant to bear the burden of proof in employment discrimination cases. [FN18] Yet courts are often granting summary judgment for the defendant on that issue, despite what appear to be genuine issues of fact raised by the plaintiff.

Courts are also using another device to render pro-defendant results--refusal to defer to agency guidance in interpreting the ADA. This lack of deference has taken root with regard to the mitigating measures rule, [FN19] the subterfuge rule, [FN20] and the collective bargaining rule. [FN21] Despite the fact that the plain language of the ADA instructs courts to defer to agency interpretations, [FN22] many lower courts have refused to abide by that rule in deciding ADA cases. I argue that this result is due, in part, to a lack of respect for guidance provided by the Equal Employment Opportunity Commission ("EEOC"), and that such lack of respect is inappropriate in the context of guidance promulgated to enforce the ADA.

An important question at this juncture is what effect Bragdon may have on the use of these two pro-defendant devices. Bragdon involved the appeal of a summary judgment issue by a defendant [FN23] as well as the question of how to interpret a key statutory term--the definition of an individual with a disability. This definitional term is arguably the most important one in the statute, because an individual cannot file suit under ***103** the ADA unless he or she is found to be disabled. [FN24] Thus, the Bragdon Court had an opportunity to offer guidance on the use of the summary judgment device and the interpretation of one of the most important phrases in the ADA. The decision offers a ray of hope for reversing the trend of non-deference to EEOC guidance, but may do little to reverse improper use of the summary judgment device.

In Part I of this Article, I report my judicial outcome data, refuting the media portrayals of the ADA as a windfall for plaintiffs. In the next two parts, I discuss extensively the devices courts have used to render these pro-defendant results and assess what impact Bragdon might have on the use of these devices. In Part II, I examine how the courts have used the summary judgment device to the benefit of defendant-employers. These courts have both mischaracterized questions of law as questions of fact and set too high a threshold for a plaintiff to defeat a defendant's motion for summary judgment. In Part III, I discuss how courts have refused to defer to agency interpretations of the ADA, thereby rendering pro-defendant interpretations of the statute. This result stems from the historic second-class status of the EEOC, which has hindered its role as an agency charged with interpreting and enforcing the ADA.

I. Litigation Outcome Data

A. Methodology

I have examined all ADA appellate employment discrimination decisions available on Westlaw since the ADA became effective in 1992 through July 1998, supplemented by a few additional cases available through other electronic services. For each case, I recorded the procedural posture below (for example, verdict for plaintiff, dismissal, summary judgment) and the decision on appeal (for example, affirm, reverse, reduce verdict). I sorted and tabulated the cases by circuit as reported in Table I. [FN25] In addition, I examined aggregate trial court outcome data for ADA employment discrimination decisions.

***104** A decision to investigate litigation outcomes raises methodological problems because of the high rate of unavailable opinions at both the trial court and appellate levels. Peter Siegelman and John J. Donohue argue that focusing entirely on published opinions distorts understanding of trial court judicial outcomes. [FN26] The plaintiff win rate in employment dis-

crimination cases at the district court level, for example, is four times higher in published than in unpublished opinions. [FN27] At the district court level, where a decision to grant summary judgment is more likely to result in a written opinion than a decision to dismiss or enter a verdict, an emphasis on published opinions may skew data in the direction of overstating the prevalence of summary judgment decisions for defendants, while also failing to account for the large number of summary dismissals for defendants. [FN28]

The problem of unpublished opinions, however, is not limited to the trial court level. Since 1972, the Judicial Conference of the United States has taken the position that United States Courts of Appeals should publish opinions only where a decision has obvious precedential value, so that the body of judicially constructed law would not be "crushed by its own weight." [FN29] Unfortunately, each court of appeals has been allowed to create its own rules on publication, so the circuits lack a uniform policy on publishing opinions. Except for the Second Circuit, which has a sophisticated word searchable database that includes all unpublished opinions, there is no other circuit for which a researcher or litigant can retrieve all the unpublished opinions on a particular topic. [FN30]

In order to get a sense of the differing publication practices across circuits, I gained access to a stratified sample of appellate cases that contain all opinions in a subject area--labor law--irrespective of whether the opinions ***105** are available electronically. [FN31] These cases not only include all the published decisions, but all the unpublished decisions that are available on Westlaw, all the unpublished decisions that are not available on Westlaw and all the cases decided without an opinion. [FN32] Because of the breadth of this database, it is possible to speculate about what percentage of cases in each circuit are unavailable. [FN33] This is particularly helpful for the three circuits (Third, Fifth, and Eleventh) that do not make their unpublished opinions available to any electronic source.

A review of the stratified sample suggests that less than half (forty-two percent) of appellate affirmances are published in the official reporter system and another twenty-five percent are made available on Westlaw. The remaining affirmances are not readily available to the general public. Twenty percent of the affirmances result in decisions with reasoning that is not made available through the official reporters or Westlaw. Twelve percent result in decisions with a result (affirmance) but no reasoning whatsoever; those cases are also not available on Westlaw or the official reporter system. Because my overall data reflect that affirmances in the field of disability discrimination are nearly always affirmances of pro-defendant results at trial, [FN34] this practice results in a pro-plaintiff bias in my appellate database, possibly by as much as thirty-two percent. [FN35] Thus, based on the work of Siegelman and Donohue, as well as my own examination of the stratified sample, it appears that reliance on publicly available opinions overstates plaintiffs' success rates both at trial and on appeal. [FN36]

***106** In developing a data set, it is crucial to ensure that the data reliably indicate how often plaintiffs prevailed in cases that were worthy of litigation (i.e., were not entirely frivolous). The media portrayal of the ADA as a windfall statute for plaintiffs is often accompanied by an assertion that plaintiffs clog the courts with frivolous ADA cases. [FN37] To the extent that there are frivolous ADA cases that do result in litigation, [FN38] they should be excluded from the database. I therefore deleted the frivolous, unpublished opinions [FN39] from the database. [FN40] Fewer than a dozen cases were discarded by applying this frivolous criteria, but this process should add some reliability to the database as a measure of litigation outcomes in genuine ADA disputes.

***107** B. Litigation Outcomes

1. Appellate Data

I report the appellate data in Table I. [FN41]

TABLE I.

CIRCUIT BY CIRCUIT OUTCOMES IN ADA EMPLOYMENT DISCRIMINATION CASES

CIRCUIT	NO. OF CASES	DEFENDANT PREVAILED BELOW ON ADA ISSUES	DEFENDANT PREVAILED ON APPEAL	PLAINTIFF PREVAILED BELOW	PLAINTIFF PREVAILED ON APPEAL
First	16	14	9	2	2
Second	27	26	15	1	1 (but award substantially reduced)
Third	13 [FN-42]	13	9	0	0
Fourth	70	66	65	4	2
Fifth	30	25	23	5	1 (but award substantially reduced)
Sixth	63	62	56	1	0
Seventh	67	65	49	2	2
Eighth	45	40	35	5	3 (but award substantially

					reduced in one case; rehearing en banc scheduled for one additional case)
Ninth	61	58	47	3	1 (but award substantially reduced)
Tenth	50	50	49	0	0
Eleventh	23	20	13	3	2
D.C.	10	9	6	1	rehearing en banc pending
Total	475	448 (94%)	376 (84%)	27 (6%)	14 (52%)

***108** The data reveal some startling trends in judicial outcomes. Not only had defendants initially prevailed below through dismissal, judgment or verdict at a very high rate, but they prevailed at a similarly high rate on appeal. Defendants prevailed in 448 of 475 cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments. Plaintiffs prevailed in 27 of 475 cases (6%) at the trial court level and in 14 of 27 instances (52%) in which defendants appealed these judgments. [FN43] Of the few cases (14) in which plaintiffs prevailed both at the trial and appellate levels, their rewards were reduced on appeal in 4 of 14 cases (28%). Thus, both the trial and appellate court processes yielded results that were not hospitable to plaintiffs' discrimination claims.

The actual results are probably even more skewed toward a pro-defendant result than I have reported above. The results for the Third, Fifth, and Eleventh Circuits may understate their affirmance rate of summary decisions for defendants. [FN44] The Third Circuit data currently reflect only nine ADA affirmances at the appellate level. Those nine cases may, in fact, be only twenty percent of the affirmances decided in the Third Circuit, bringing the actual number of affirmances to forty-five. Similarly, the Fifth Circuit data currently reflect only twenty-three affirmances. Those twenty-three cases may, in fact, be only twenty-two percent of the affirmances decided in the Fifth Circuit, bringing the actual number of affirmances to 104. Finally,

the Eleventh Circuit data currently reflect only thirteen affirmances. Those thirteen cases may, in fact, be only fifty percent of the affirmances decided in the Third Circuit, bringing the actual number of affirmances to twenty-six. When corrected to reflect those estimations, the database contains an additional 131 cases in which defendants prevailed both at trial and on appeal. Defendants would then prevail below in 579 of 606 cases (95.5%) and in 507 of 579 instances (87.5%) in which plaintiffs appealed these adverse results. Because of the small number of cases in the stratified labor law sample, the results from the Fifth and Eleventh Circuits may not be entirely accurate, and these corrected outcomes cannot be calculated precisely. Nonetheless, there is no doubt that the unavailability of certain kinds of opinions--in particular affirmances--results in the underrepresentation of pro-defendant cases in the database.

The data set also reveals that plaintiffs and defendants are not equally likely to appeal decisions below. Reported appellate decisions are much more likely to reflect cases in which defendants prevailed below than cases in which plaintiffs prevailed below. The important question raised by this finding is whether the appellate data reflect the decisions at ***109** the trial court level. Are the appealed cases somehow unrepresentative of the district court decisions? A preliminary answer to this question lies in an examination of aggregate trial court data.

2. Trial Court Outcomes

To assess trial court outcomes, I received permission to analyze the trial court data, collected by the American Bar Association ("ABA"), of final trial outcomes. [FN45] The final trial court outcomes from the ABA data looked remarkably like the appealed trial court outcomes from my sample. Of the 615 cases in the ABA trial court database, the defendant-employer prevailed in 570 cases (92.7%). Of those 570 cases, 238 (38.7%) were resolved through summary judgment and 332 cases (54%) were resolved through a decision on the merits. By contrast, I found that defendant-employers prevailed at the trial court level in 448 of 475 (94%) appealed cases. Thus, the results for both appealed and unappealed trial court outcomes were virtually identical--around 93%.

The results at the trial court level are most likely even worse for plaintiffs than these data reflect, because the data only contain cases in which judges wrote opinions that were available to the public. As noted above, reported outcomes tend to be biased in favor of plaintiffs because they do not reflect the large number of summary opinions that exist in each court. Siegelman and Donohue found that the plaintiff win rate in employment discrimination cases at the district court level was four times higher in cases available through a printed or electronic source than those that were not available. [FN46] The actual outcome at the trial court level would likely be higher than ninety-three percent if those reporting practices were considered.

Plaintiffs' extremely poor record at the trial court level raises the question of why plaintiffs pursue appeals. How can we explain plaintiffs' decisions to appeal at all, given their limited chance of success?

One explanation is that plaintiff lawyers have a much more positive sense of their clients' cases than do the trial courts. They are making the calculation that an appeal is worth pursuing. Given the financial cost to the plaintiff bar of appealing an adverse decision, these lawyers must have a strong basis for their evaluation of a plaintiff's claim for relief. They may have determined that the district court made an egregious error that has some possibility of being corrected on appeal. Otherwise, their decision to appeal an adverse decision makes little sense. Furthermore, it is possible that the plaintiff bar is unaware of the stark statistics presented ***110** here. They may have been influenced by the media portrayal of the ADA as a windfall for plaintiffs or, at least, been unaware of the kinds of statistics collected here. Alternatively, plaintiff lawyers are generally aware of the trends in this area, but may not believe they apply to the individual case they are litigating.

In the first generation of cases interpreting a statute, another explanation is also possible. The decision of plaintiff lawyers to bring and appeal cases may be colored by their experience litigating similar cases under section 504 of the Rehabilitation Act

of 1973 [FN47] ("section 504"), Title VII of the Civil Rights Act of 1964 [FN48] ("Title VII"), or the Age Discrimination in Employment Act [FN49] ("ADEA"). Thus, it would seem highly likely that plaintiff lawyers would overestimate their chance of success in bringing ADA claims if their experience in related areas of the law has been more favorable.

In particular, plaintiff lawyers may not have anticipated the ways that courts would adjudicate ADA cases. There are two devices that help account for the unfavorable results for plaintiffs--the overuse of summary judgment motions and the failure to defer to regulations promulgated by the EEOC. These devices are most often used in the circuits with the most pro-defendant results. The use of these devices is also counter to prior court decisions under section 504, and therefore may not have been anticipated by plaintiff lawyers.

II. The Summary Judgment Device

This Part discusses how courts have misused the summary judgment rules to the disservice of plaintiffs in ADA employment cases. First, I discuss how courts should decide what is fact and what is law under the ADA. Second, I examine how much evidence should be necessary to send a factual issue to the jury under the ADA. Third, I appraise the actual practices of the courts under the ADA in applying the summary judgment device, arguing that they have failed to follow settled precedent with regard to both of these issues. Finally, I consider what clarity Bragdon v. Abbott [FN50] may add to this area of the law.

A. Fact Versus Law Distinction

It is well-settled precedent that questions of fact go to the jury and questions of law are decided by the judge. [FN51] It is not always easy to tell, ***111** however, whether an issue is one of fact or law. If the question in a case is the speed at which defendant was driving his car, it is easy to see that the issue is a factual one. But if the speed at which defendant is driving is given, and the question is whether driving at that speed on a rainy day is "negligence," then we are asking someone to make a normative judgment or "inference" from these facts. A general rule is that "the litigants are entitled to have the jury draw those inferences or conclusions that are appropriate grist for juries." [FN52] Yet this rule begs the question and only demonstrates the murkiness of this area: How do we know what is "appropriate grist for juries"?

Although there is substantial disagreement over how to separate fact from law, there is general accord that the determination whether an issue is "factual" is a murky area. [FN53] Despite this murkiness, the authors of a monograph commissioned by the Federal Judicial Center state that courts have "generally used a functional test, assessing whether the question is more suitable for resolution by a court or a jury." [FN54] The authors add that: "[T]he conscientious judge confronted with a motion for summary judgment, concerned not only with arriving at a correct and well-grounded decision but also with the sound administration of justice, will strive for a principled resolution of the court-versus-jury issue." [FN55]

Under the functional test for determining whether certain ADA issues should go to the jury, the prior practices of the courts on similar issues should be highly relevant. The best source of analogy would be the case law under section 504, [FN56] which bans discrimination on the basis of disability. This analogy is more than judicially inferable; Congress explicitly required the ADA to be interpreted consistently with section 504. [FN57]

The section 504 case law [FN58] strongly suggests that many of the normative questions raised by ADA cases, such as whether the plaintiff has a ***112** disability, whether an accommodation is reasonable, whether a hardship is undue, or whether a purported threat poses a significant risk to the health and safety of others, should be decided by juries rather than judges if the evidence presents a genuine issue of material fact. The cases make clear that these kinds of determinations require normative judgments and factual inferences that are in the province of the jury rather than the judge. [FN59]

The Supreme Court and lower courts have mostly characterized disability-related issues under the Rehabilitation Act as factual in nature. In School Board v. Arline, [FN60] the Supreme Court emphasized the "factual" nature of the direct threat de-

fense in a case involving the contagiousness of a school teacher with a record of tuberculosis. The Court's factual approach required the district court to conduct an "individualized inquiry" and make "appropriate findings of fact." [FN61]

Nearly all the circuits have reached similar conclusions regarding the factual nature of many of the basic inquiries under the Rehabilitation Act, although most circuits have not specifically relied on the Arline decision for their holding. [FN62] The First Circuit has held that the questions of whether a plaintiff is disabled and whether a plaintiff was fired because of his or her disability are questions of fact, so long as the facts make these issues a "debatable question." [FN63] The Second Circuit has held that ***113** whether one is a "substance abuser" and an "otherwise qualified" individual with a disability are questions of fact that should not be resolved by the judge on a motion for summary judgment. [FN64] The Fourth Circuit has used the Arline decision to emphasize the need for detailed factual determinations before a judge even considers a summary judgment motion [FN65] on issues such as whether a plaintiff is otherwise qualified, entitled to reasonable accommodation, or disabled. [FN66] The Fifth Circuit has held that the question of whether an accommodation is reasonable is a question of fact for the jury. [FN67] The Sixth Circuit has held that whether a plaintiff is "otherwise qualified" is a question of fact for the jury. [FN68] The Seventh Circuit has held that the question of whether a plaintiff is "otherwise qualified" is a question for the jury. [FN69] The Eighth Circuit has held that the issues of "reasonable accommodation," [FN70] and whether a plaintiff has a ***114** disability [FN71] are questions of fact. The Ninth Circuit has held that whether an individual is disabled is factual in nature and proper for submission to a jury so long as a plaintiff has presented credible evidence of his or her condition. [FN72] The Eleventh Circuit has held that whether a plaintiff was discriminated against solely on the basis of a disability is a question of fact. [FN73]

Research on civil rights statutes outside the area of disability-based discrimination provides further support for the argument that issues of the kind that arise under the ADA are ripe for jury determination. Courts have held that the question of whether a rule is a "bona fide occupational qualification" ("BFOQ") under the ADEA is preferably one for the jury, [FN74] as well as the question of whether there is sufficient evidence to prove discrimination, [FN75] whether a constructive discharge occurred, [FN76] and whether plaintiff was performing his job satisfactorily. [FN77] Under Title VII, the courts have held that "reasonable diligence" is a question of fact, [FN78] as is the question of whether an employer has reasonably accommodated an individual's religious beliefs. [FN79]

In sum, the ADA is a statute that uses commonplace phrases like "substantial limitation," "direct threat," "reasonable accommodation," and "undue hardship" requiring some normative evaluation. Although a judge would need to instruct a jury on the statutory definitions of those terms, ultimately some person or group must determine whether a limitation places an individual outside the norms of society, [FN80] whether a threat to ***115** health or safety is significant, [FN81] whether there is a reasonable accommodation that would permit a plaintiff to perform the essential functions of the job, [FN82] and whether a hardship is "undue." [FN83]

A somewhat harder question is whether the term "disability" is one that requires jury deliberation. The statute [FN84] and regulations [FN85] clearly intend an individualized inquiry into that issue. Although that requirement may create some inconsistency and unpredictability in the law, it appears Congress intended the courts to conclude that "[s]ome impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors." [FN86] The Supreme Court approved this approach in Bragdon, when it concluded that plaintiff Abbott was an individual with a disability as a result of her HIV infection, but declined to rule that HIV infection is inherently a disability under the ADA. [FN87]

Where a genuine issue of material fact exists, it is the jury, not the judge, that should decide these issues. Their resolution of these issues will depend upon individualized findings in each case. [FN88] The decisions under the ADA, however, have not

followed this section 504 precedent; ***116** instead, judges are routinely deciding fact-intensive cases without sending them to the jury.

B. Genuine Issue of Material Fact

If a genuine issue of material fact exists, then a case is supposed to go to the jury. In recent years, however, the Supreme Court has created a significant burden on the nonmoving party to establish that there is a genuine issue of material fact. [FN89] In Anderson v. Liberty Lobby, Inc. [FN90] the Court found that the

movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict .... [The nonmoving party] may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. [FN91]

Later, the Court reiterated that the nonmoving party "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." [FN92] The Court held that "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." [FN93] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." [FN94]

Nonetheless, the Supreme Court has not intended these statements to take from juries their primary function of assessing factual evidence. [FN95] Although the nonmoving party must go beyond the pleadings to defeat a ***117** motion for summary judgment, he or she "need only present evidence from which a jury might return a verdict in his favor." [FN96] The evidence need not compel only one reasonable conclusion.

An important aspect of Anderson is that the amount of evidence needed to defeat a motion for summary judgment will depend on the type of inquiry at issue. "[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." [FN97] In the Anderson case itself, the plaintiff brought a libel suit against publisher Jack Anderson for his allegedly libelous statements about Liberty Lobby. Because Liberty Lobby was considered a "public figure," it could only prevail under the New York Times v. Sullivan [FN98] standard if it proved by clear and convincing evidence that the defendant had acted with actual malice. In order to defeat the defendant's motion for summary judgment, Liberty Lobby had to show there was sufficient evidence such that a reasonable jury might find that actual malice had been shown with convincing clarity. [FN99] Consequently, the burden on the plaintiff to defeat a motion for summary judgment was unusually high; it was not the "preponderance of the evidence" standard that usually applies to civil litigation, but instead the "clear and convincing evidence" standard. In light of the Court's holding in Anderson, one must therefore consider the evidentiary standards of proof in deciding how much evidence is necessary to defeat a motion for summary judgment. In many cases, the burden on the plaintiff will be lower than in Anderson.

Burden allocation takes on particular significance when applying the Anderson standard in the ADA litigation context. Under Anderson, a court should determine whether a plaintiff can defeat a motion for summary judgment on these issues by taking into consideration plaintiff's evidentiary burden. [FN100] Plaintiffs bear the burden of proving that they are disabled [FN101] and that an accommodation is reasonable [FN102] under the ADA, while defendants bear the burden of proving that a proposed accommodation creates an undue hardship, [FN103] that a risk of harm poses a "direct threat," [FN104] or that a medical examination of an incumbent employee is "job-related and consistent with business necessity." [FN105] Thus, it should be ***118** easier for a plaintiff to defeat a defendant's summary judgment motion on the issues of "direct threat" or "undue hardship" than on the issue of the definition of "disability" or "reasonable accommodation." Even for those issues on which the plaintiff bears the ultimate burden of proof, while the "mere existence of a scintilla of evidence" [FN106] is not sufficient

to defeat a motion for summary judgment, the plaintiff also does not have to offer uncontroverted proof simply to get the case to the jury. Unlike the plaintiffs in Anderson, ADA plaintiffs only need offer proof under the preponderance of the evidence standard, not the clear and convincing evidence standard.

***119** C. ADA Summary Judgment Decisions

The overwhelming trend under the ADA has been for judges to decide most of the normative, factual issues themselves and rarely send cases to the jury. I have documented this trend in the First, [FN107] Second, [FN108] Fourth, Fifth, [FN109] Sixth, Eighth, [FN110] Tenth, [FN111] and Eleventh Circuits. [FN112] I will ***120** discuss representative examples from the Sixth and Fourth Circuits. The Sixth Circuit examples involve the question of whether an issue is suitable for jury deliberation at all, as well as the question of how much evidence is necessary to create a genuine issue of material fact. The Fourth Circuit examples primarily involve the latter question. [FN113]

1. Sixth Circuit

The Sixth Circuit has decided two cases under the summary judgment standard without following Anderson's [FN114] instruction to consider the evidentiary burden of proof in deciding whether summary judgment for the defendant is appropriate. In both cases, the defendant bore the burden of proof, yet the court indicated that summary judgment for the defendant was appropriate despite the plaintiff's introduction of sufficient evidence to raise a genuine issue of material fact.

In EEOC v. Prevo's Family Market, [FN115] the issue was whether the employer had unlawfully conditioned the plaintiff's continued employment as a produce worker upon his turning over the results of an HIV examination. [FN116] The trial court had granted summary judgment for the plaintiff and the jury had awarded him compensatory and punitive damages totaling $55,000. [FN117] The Sixth Circuit reversed the grant of summary judgment for the plaintiff and ruled that the trial court should have granted summary judgment for the defendant; the court of appeals did not consider the proper allocation of the burdens of proof in reaching this decision. [FN118] Indeed, in overturning the trial court, the Sixth Circuit did not even consider the fact that the defendant had the burden of proving that the medical examination request was lawful. [FN119]

***121** Its decision also implied that the record did not contain any genuine issues of material fact. However, the jury's award of $45,000 in punitive damages strongly suggests that it did not agree with the defendant's argument that it was acting reasonably and in good faith. By instructing the lower court to grant summary judgment for the defendant-employer on remand, the court of appeals sent a strong message to lower courts to grant motions for summary judgment even on such disputed factual records and even on issues on which the moving party bore the burden of proof.

Similarly, in Estate of Mauro v. Borgess Medical Center, [FN120] the Sixth Circuit affirmed a summary judgment decision for the defendant-employer in a case involving an HIV-positive surgical technician. Neither the trial court nor the Sixth Circuit considered the fact that the defendant bore the burden of proof on this issue for which the defendant sought summary judgment. [FN121] Although Judge Boggs dissented, [FN122] he failed to point out the court's most fundamental error: ignoring the proper allocation of the burden of proof on the direct threat issue.

The overall trend in the law of employment discrimination in recent years has been to raise the threshold of proof for sending a case to the jury, [FN123] but that trend has reflected the expectation that the plaintiff bears ***122** the burden of proof on the issue before the court. Courts want plaintiffs to allege more than a mere prima facie case to have a case go to the jury. Yet where the burden of proof has shifted to the defendant in the nature of an affirmative defense, courts need to be cautious in deciding what should be the plaintiff's threshold of proof to send the case to the jury. In cases where the parties disagree on the degree of risk posed by plaintiff's HIV status, and the defendant has the burden of proving that the risk is significant--for example, Prevo's Family Market and Borgess Medical Center--courts should not grant summary judgment for the defendant.

2. Fourth Circuit

Like the Sixth Circuit, the Fourth Circuit has characterized factual questions as matters of law in order to avoid sending them to the jury. [FN124] Yet the Fourth Circuit has also created one of the highest thresholds of proof for establishing that there is a genuine issue of material fact. This threshold standard deserves close scrutiny.

The Fourth Circuit's application of its high threshold standard in summary judgment cases can be seen in Ennis v. National Association of Business & Educational Radio, Inc., [FN125] one of its early ADA cases. The plaintiff was a bookkeeping clerk at the National Association of Business and Educational Radio ("NABER") when she decided to adopt a boy who was infected with HIV. She argued that she was discharged because of her relationship with a disabled person. [FN126] In support of this theory, she offered evidence that the director of human resources had circulated a memo to all employees one month before she was suspended and six ***123** months before she was fired stating that "if we have a couple of very expensive cases, our rates could be more dramatically affected than they currently are." [FN127] Ennis also offered evidence that the company recently had "the first of the 'couple of very expensive cases.'" [FN128] Based on these statements, Ennis asked the court to find that her association with her son was the basis for her discharge. The district court considered that evidence too insubstantial to permit an inference of discrimination, and the court of appeals affirmed, emphasizing that:
Mere unsupported speculation, such as this, is not enough to defeat a summary judgment motion. Although courts must carefully consider summary judgment when intent is an issue, "[t]he summary judgment rule would be rendered sterile ... if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." [FN129]

Thus, the Fourth Circuit acknowledged the normal rule that juries should render decisions about state of mind, but concluded that the highly inferential nature of the proof was insufficient to send the case to the jury.

One must wonder, however, what better evidence a plaintiff could have in a case concerning a decisionmaker's state of mind. Since meetings are rarely recorded, office memoranda are often the best indicators of state of mind. Given that the plaintiff usually will not be in attendance at management meetings where their rationale might be explained, one might argue that a memo can function as helpful inferential data. Yet the Fourth Circuit held otherwise, giving lower courts room to grant summary judgment even on cases involving state of mind evidence, so long as they conclude that the evidence requires too much inference.

The Ennis holding was extended in Runnebaum v. NationsBank. [FN130] This case seems further to embolden district court judges who prefer to decide contested factual issues themselves rather than send them to the jury. The plaintiff, an asymptomatic individual infected with HIV, brought suit against NationsBank of Maryland after being discharged from his position in the bank's trust department.

After concluding that NationsBank deserved summary judgment on the question of whether Runnebaum was an individual with a disability, [FN131] ***124** the trial court turned to the question of whether he had introduced enough evidence of disability-based discrimination to send the case to the jury. Runnebaum's direct supervisor had testified in a deposition that he knew of Runnebaum's HIV status, that he "panicked" from such knowledge, and that he notified the relevant decisionmaker, Pettit, of Runnebaum's HIV status. [FN132] Nonetheless, the trial court held that Runnebaum had not established a prima facie case of discrimination and that there were no triable issues of fact regarding the reason for his discharge. [FN133]

A divided panel of the Fourth Circuit reversed, holding that Runnebaum introduced sufficient evidence to create "a genuine issue of material fact as to whether he was fired because he was regarded as having a disability." [FN134] A sharply divided en banc panel reversed, concluding that the district court was correct to grant summary judgment for the defendant-employer.

The dissent to the en banc panel criticized the majority for not following elementary rules concerning summary judgment motions to reach its decision. It argued that the court failed to follow "the most basic principle of summary judgment: 'all justifiable inferences are to be drawn in ***125** [the nonmovant's] favor.' The majority states this principle ... but then fails to follow it in this most important instance." [FN135]

While the dissent focused on the rule that inferences must be drawn in the favor of the nonmoving party, the majority focused on Ennis in which the court stated that: "Mere unsupported speculation ... is not enough to defeat a summary judgment motion." [FN136] To reach its conclusion, the Fourth Circuit had to rely on Ennis rather than the Supreme Court's decision in Anderson, [FN137] because the Supreme Court has only said that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." [FN138] Moreover, it is simply highly inaccurate to characterize Runnebaum's evidence as "mere unsupported speculation." [FN139] He offered direct proof of a positive, written memorandum sent to him by the key decisionmaker after she had supposedly decided to fire him and comparative evidence that his work performance greatly exceeded that of a co-employee who was retained. [FN140] This is the kind of "affirmative evidence" that Anderson suggests should defeat a motion for summary judgment and require the judge to send a case to the jury. [FN141]

3. Conclusion

My investigation of the cases in which courts of appeals have affirmed summary judgment decisions in favor of defendant-employers suggests that courts may be too quick to take cases from juries as well as too willing to render judgments in favor of defendants in ADA cases. In addition, my evaluation of trial court data collected by the ABA suggests that these appellate cases are reflective of a similar pattern at the trial ***126** court level. [FN142] Of the 615 cases decided by trial courts that were not appealed, I found that 238 cases (38.7%) were resolved through summary judgment in favor of the defendant-employer and 332 cases (54%) were resolved in favor of the defendant-employer on the merits. By contrast, only 6 cases (1%) were resolved through summary judgment in favor of the plaintiff-employee, and 39 cases (6.3%) were resolved in favor of the plaintiff-employee on the merits. Due to the limited coding scheme used by the ABA, I cannot determine what percentage of the cases decided on the merits went to a jury. It is clear, however, that a minimum of 39.7% of the cases were decided by the judge without assistance from the jury. Thus, the summary judgment tool was a device used with great frequency at the trial court level to dispose of ADA cases in favor of defendants. [FN143]

These results at the trial and appellate levels are very troubling because they appear to run counter to Congress' intent in passing the ADA. When Congress passed the statute, it stated in the findings and purpose section that it sought to eliminate discrimination for the 43 million Americans with disabilities. [FN144] Its recitation of the 43 million figure suggests that it did not intend the courts to consider acts of discrimination to be rare, isolated events. It intended the courts to use realistic burdens of proof to reflect Congress' belief that discrimination was widespread and needed to be swiftly redressed. Creating unduly high burdens of proof does not help redress the "serious and pervasive social problem" [FN145] that Congress hoped to solve by enacting the ADA.

D. Bragdon's Impact on the Law of Summary Judgment

The issue on appeal in Bragdon was the propriety of the grant of summary judgment by the trial court. The case, therefore, gave the Supreme Court the opportunity to comment on the correct use of the summary***127** judgment standard under the ADA. However, the Bragdon opinion is generally unhelpful in giving lower courts guidance on when it is appropriate to grant summary judgment rather than send a case to the jury under the ADA.

Sidney Abbott, a woman who was HIV-positive, sought dental treatment in the office of Dr. Randon Bragdon. After determ-

ining that Abbott had a cavity that needed to be filled, Dr. Bragdon refused to treat her unless she agreed to have the work performed at the local hospital. Abbott considered his request unreasonable and inappropriate and brought suit against him in federal district court under ADA Title III, which prohibits discrimination "on the basis of disability in the ... enjoyment of the ... services ... of any place of public accommodation by any person who ... operates [such] a place." [FN146] Dr. Bragdon disputed the illegality of his actions, claiming that Abbott was not an individual with a disability under the ADA and that, even if she were an individual with a disability, Bragdon should prevail under the affirmative defense that treating Abbott in his office posed a direct threat to the health or safety of others. After discovery, both parties moved for summary judgment.

The district court ruled in favor of the plaintiff. [FN147] First, it found that Abbott was an individual with a disability as a matter of law. Second, it found that Dr. Bragdon had raised no genuine issue of material fact concerning the significance of risk posed by treating Abbott in his office. [FN148] The court of appeals affirmed. [FN149] The Supreme Court granted Dr. Bragdon's petition for certiorari, but limited his petition to three of the five questions he presented. [FN150] These questions brought two general issues to the Supreme Court's attention: (1) whether the plaintiff was an individual with a disability, and (2) whether the defendant dentist produced enough evidence to avoid summary judgment on the question of whether treating Abbott would pose a direct threat to the health or safety of others. Both issues gave the Supreme Court the opportunity to consider when it is appropriate for a judge to decide an issue rather than send it to the jury, because the district court had granted judgment for Abbott on both issues.

***128** The original petition for certiorari also raised two questions relevant to the propriety of the grant of summary judgment by the trial court with regard to the second issue--the direct threat issue. Question number 4 in the certiorari petition asked: "What is the proper standard of judicial review under Title III of the ADA of a private health care provider's judgment that the performance of certain invasive procedures in his office would pose a direct threat to the health or safety of others?" [FN151] Question number 5 asked: "Did petitioner, Randon Bragdon, D.M.D., raise a genuine issue of fact for trial as to whether he was warranted in his judgment that the performance of certain invasive procedures on a patient in his office would have posed a direct threat to the health or safety of others?" [FN152] The Supreme Court did not grant certiorari on either of these two issues, a decision that ultimately came back to haunt the Court. In failing to grant certiorari on these questions, Justice Kennedy concluded that "the briefs and arguments presented to us [the Supreme Court] did not concentrate on the sufficiency in light of all of the submissions in the summary judgment proceeding." [FN153]

Moreover, the Supreme Court did not even consider a more fundamental question in the Bragdon case: should judges or juries decide issues such as whether Ms. Abbott was disabled or whether a risk is significant? If these issues are questions of fact, or mixed questions of fact and law that are appropriate for jury determination, then they should have gone to the jury.

Not only did the Court fail to offer sufficient guidance on these fundamental issues, but it muddled the area by not clearly distinguishing between its treatment of the disability and direct threat issues. Regarding the disability issue, the plaintiff had the burden of proving that she had a physical or mental impairment that substantially limited one or more major life activity. [FN154] There is little doubt that HIV infection is an "impairment," but the more difficult question was whether that impairment caused a "substantial limitation" of a "major life activity." [FN155]

Abbott argued that the major life activity of reproduction was substantially limited as a result of her HIV infection. In support of that theory, she testified that she no longer desired to reproduce due to her knowledge of her HIV status. No jury was permitted to assess the credibility of that statement, nor was it subjected to cross-examination. Justice Kennedy assumed in his opinion for the Court that her view was reasonable because she would not want to risk infecting her male partner or her fetus. [FN156] The trial court opinion, however, made no mention of her fear of ***129** infecting a male partner. [FN157] And, of course, reproduction is possible through artificial insemination without the direct involvement (through intercourse) of a male

partner.

In the trial court opinion, the court explained that Abbott testified at her deposition that she chose not to reproduce out of fear that (1) childbirth would pose a risk of physical harm, (2) she would infect the fetus, and (3) she would be unable to care for and raise a child. [FN158] The trial court then ruled for Abbott, concluding that "Defendant does not dispute any of Plaintiff's asserted reasons for not having children." [FN159] The court failed to note that cross-examination might have undermined the credibility of her claims. Did the plaintiff ever have any plans or intentions to have a child, which changed when she became aware of her HIV status? [FN160]

The Court's treatment of the direct threat issue was equally problematic. For example, little consideration was given to the fact that the defendant, not the plaintiff, bore the burden of proof on the direct threat issue. Whereas direct threat is clearly an affirmative defense under ADA Title I [FN161] and, therefore, operates analogously under ADA Title III, [FN162] the issue of whether the plaintiff had a disability was one for which the plaintiff clearly bore the burden of proof. [FN163] The fact that direct threat was arguably an affirmative defense should have made it easier for the plaintiff ***130** to prevail on that issue than on the issue of whether she had a disability. [FN164]

The defendant's evidence on the direct threat issue was quite scanty. As the Supreme Court acknowledged, "[p]etitioner [Bragdon] failed to present any objective, medical evidence showing that treating respondent in a hospital would be safer or more efficient in preventing HIV transmission than treatment in a well-equipped dental office." [FN165] Given Bragdon's burden of proof, such a lack of evidence might have been sufficient to support the plaintiff's motion for summary judgment on the direct threat issue. But the plaintiff did not simply point out the paucity of the defendant's evidence; she also offered substantial evidence to refute the defendant's claim of significant risk. The Supreme Court quibbled with the conclusiveness of some of this evidence, while also recognizing that "the record contains substantial testimony from numerous health experts indicating that it is safe to treat patients infected with HIV in dental offices." [FN166] Despite the paucity of the defendant's evidence and the strength of the plaintiff's evidence, the Court declined to affirm the grant of summary judgment for Abbott on the direct threat issue; it remanded back to the court of appeals for further consideration of this issue.

Thus, the Supreme Court found the evidence sufficient to support a ruling as a matter of law for the plaintiff on the question of whether the plaintiff was disabled, although the plaintiff bore the burden of proof on that issue, but remanded for further clarification on whether the record could sustain a grant of summary judgment for the plaintiff on the direct threat issue, although the defendant arguably bore the burden of proof on that issue. It is hard to explain these differences in outcome except under the assumption that the Court intended to require a higher standard for summary judgment on the direct threat issue than the disability issue because of the importance of the direct threat issue to health care workers. [FN167] Yet if that is true, then the appropriate remand on the direct threat issue would have been back to the trial court with instructions to send that issue to the jury. How much risk should there have to be before that risk becomes "significant"? Is "significant risk" a scientifically determinable standard, or should a jury decide how much risk we should expect health care workers to bear during the normal course of treatment? Instead, ***131** the Supreme Court chose the middle course of remanding the case back to the court of appeals for further clarification on its direct threat ruling. [FN168]

In sum, the Supreme Court has emphasized the individualized nature of the disability inquiry and the direct threat defense but, oddly, did not discuss the decision not to send these factual questions to the jury. It also offered no clear guidance on the underlying issue of how much evidence is sufficient to grant or defeat a motion for summary judgment on the direct threat issue, leaving the area muddled for future cases. The plaintiff offered substantial evidence to support a motion for summary judgment on the direct threat issue-- an issue on which the defendant arguably bore the ultimate burden of persuasion. The defendant offered only scanty evidence, yet that evidence was sufficient to require a remand on the summary judgment issue.

[FN169] How much stronger a case could be offered by a plaintiff to succeed on summary judgment on the direct threat issue? Is the Court really saying that this is not the kind of issue that is appropriate for summary judgment because of its inherent factual sensitivity? If so, explicit guidance would be helpful for the many future cases on this important defense under the ADA. [FN170]

It is important to remember, however, that the summary judgment issue comes up in an unusual procedural posture in Bragdon. Lower courts ***132** typically render summary judgment for the defendant on the direct threat issue in the employment discrimination context, despite the defendant's burden of proof on this issue. [FN171] In Bragdon, the trial court had granted summary judgment for the plaintiff on the direct threat issue, finding that her evidence was so overwhelming that it need not go to a jury. The Supreme Court remanded that unusual pro-plaintiff outcome; it is therefore important not to read its opinion as sanctioning the grant of summary judgment for the defendant on the basis of such evidence. Although there were cross-motions for summary judgment filed in the Bragdon case, the Supreme Court gave no serious consideration to the possibility that defendant was entitled to summary judgment on this issue. The sole purpose of its remand back to the court of appeals was to determine if it wanted to re-affirm the pro-plaintiff summary judgment decision or remand the case back for a jury trial on that issue. Bragdon, therefore, should not embolden lower courts to grant summary judgment for defendants on the direct threat issue, although the opinion is quite ambiguous as to how much evidence a plaintiff must garner in support of a motion for summary judgment.

Despite the muddled nature of the Court's consideration of the summary judgment issue in Bragdon, two aspects of the Court's decision may provide the basis for reversing the summary judgment trend in the future. First, Justice Kennedy's comments about the questions accepted for certiorari [FN172] would appear to reflect that he did understand that the Court has a role in offering more guidance on the use of the summary judgment device in ADA cases in the future. Maybe the Court will be inclined to accept certiorari in a future case on the proper standard of judicial review or how much evidence is necessary to raise a genuine issue of fact for trial (the rejected fourth and fifth certiorari questions in the Bragdon case). The Court's opinion suggests that such guidance would be useful, and its reasoning in the Bragdon decision is a classic example of why such further guidance is needed.

Second, the Supreme Court emphasized a basic rule of statutory interpretation at the outset of its decision--that the Court should inform its interpretation of the statute "by interpretations of parallel definitions in previous statutes." [FN173] This rule received special force under the ADA because Congress specifically stated when it passed the ADA that it should be interpreted in light of the prior interpretations of a related statute--section 504 of the Rehabilitation Act of 1973. [FN174] The Supreme Court has applied this principle extensively in determining whether a plaintiff should qualify as an individual with a disability as a matter of law. But the Court did not look for guidance under section 504 in considering the ***133** did not look for guidance under section 504 in considering the question of what kinds of questions should go to the jury for deliberation.

Based on prior case law under section 504, Congress should have been aware that many of the key definitional terms in the statute were highly factual in nature and, as such, proper jury fodder under section 504. [FN175] The main message from the section 504 case law was that determinations of whether an individual is disabled, whether a reasonable accommodation is possible, or whether a particular risk is significant are "individualized inquiries" that would appear to be perfect for jury deliberation. Although Bragdon does not deal explicitly with the judge versus jury issue, it adds to the case law emphasizing the individualized nature of these kinds of decisions. [FN176] Nonetheless, the holding in Bragdon affirms the grant of judgment as a matter of law by the trial court on the question of a plaintiff's disability, thereby sending the message that the evidence for some individualized inquiries can be so profound that no delegation to the jury is necessary. That ruling does not undermine the central holding that the question of disability is individualized; it simply means that there was no genuine dispute of that material fact raised in this particular lawsuit because the defendants apparently made no attempt to dispute the plaintiff's

central factual claims on the disability issue.

In sum, Bragdon sets forth a general framework for considering ADA cases that may help undermine the trend toward widespread application of the summary judgment standard to the disservice of plaintiffs. Nonetheless, the specific holding on the summary judgment issue in Bragdon failed to take advantage of an opportunity to note the heavy burden of proof that should be allocated to the defendant when the direct threat issue arises in a case. The delicate question of the health and safety of health care workers in the context of treating individuals with AIDS may have distracted the Court from its important role of offering guidance on the statutory language provided by Congress. Congress intended defendants to bear the burden of proof when justifying their decisions based on health and safety concerns; the courts need to be more mindful of that statement of intent in future cases.

III. Refusal to Defer to Agency Guidance

The orthodox method of judicial statutory interpretation is the two step process laid out in Chevron U.S.A., Inc. v. National Resources Defense Council, Inc. [FN177] At step one, the Court uses traditional tools of ***134** statutory construction to determine whether Congress has "directly spoken to the precise question at issue." [FN178] If Congress' intentions cannot be discerned clearly, then at step two, the court should defer to the agency charged with enforcing the statute so long as that view is "a reasonable interpretation." [FN179]

Statutory interpretation is even more straightforward when Congress specifically instructs the courts to defer to agency views. Congress has done this in two ways with the ADA. First, the plain language of the ADA requires courts to defer to the EEOC's historic views under section 504 as well as its contemporaneous view under the ADA. [FN180] Congress has expressly delegated enforcement of the employment discrimination provisions of the ADA to the EEOC. [FN181] The Act required issuance of employment regulations within one year of the date of enactment. [FN182] On July 26, 1991, exactly one year after the passage of the ADA, the EEOC published final rules to enforce the ADA; these rules, like the prior proposed rules, contained an appendix entitled Interpretive Guidance. [FN183] Not only was the EEOC required by Congress to draft regulations, but it did so in a manner that is usually accorded the highest judicial deference.

Second, regulations are particularly entitled to deference when it is clear that Congress has put its stamp of approval on them. [FN184] By directly incorporating pre-existing section 504 EEOC regulations into the ADA, [FN185] Congress clearly indicated that it approved of the agency's historical interpretations of disability discrimination law. This is the second time that Congress has drafted disability discrimination statutory language against the backdrop of regulatory language; Congress first did so when it strengthened ***135** the power of federal agencies to enforce section 504 in 1978 [FN186] and drafted statutory language that embodied the pre-existing regulatory language. [FN187] Its incorporation of section 504 regulations into the statutory law of disability discrimination reflects its satisfaction with the regulatory process, as well as its expectation that courts will defer to agency expertise when interpreting the statutory language.

Because the language of the ADA states that courts should interpret the ADA consistently with the prior law under section 504, it is necessary to examine that prior law to see how much deference Congress intended to be accorded the views of the administrative agencies charged with enforcing the laws prohibiting disability discrimination. As shown in Part III.A, the Supreme Court has repeatedly stated that lower courts should defer to the views of the United States Department of Health, Education and Welfare ("HEW") or the Department of Health and Human Services ("HHS") in interpreting section 504. The degree of deference accorded EEOC under Title VII [FN188] or the ADEA, [FN189] however, as stated in Part III.B, has never been particularly strong. Yet given Congress' clear statement of intentions, the courts should defer to the views of the EEOC under the ADA.

Nonetheless, as shown in Part III.C, many lower courts have refused to defer to the EEOC's views under the ADA. The EEOC's ADA regulations ***136** have been a victim of the agency's historic second-class status; the courts continue to disregard its regulations and guidance, even when a very strong case can be made that Congress intended courts to give deference to those rules under the ADA. In Part III.C, I will argue that Bragdon may help reverse this trend.

Thus, I focus on the EEOC's second-class status to explain the lack of deference accorded EEOC regulations promulgated under the ADA. But the same argument--that courts are rendering inappropriately narrow interpretations of the ADA--could be made using a plain language argument, [FN190] a canons of statutory interpretation argument, [FN191] or a legislative ***137** history argument. [FN192] The choice between the use of legislative history or agency regulations should not be viewed as precluding either option. In this setting, they produce identical results so that courts can use both tools to reinforce their conclusions. [FN193] I have chosen to employ an agency deference argument in this Article because of Congress' clear intention to use that tool of statutory construction.

A. Historical Deference Accorded HEW and HHS Under Section 504

Courts interpreting the ADA have not accorded the EEOC the same deference that has been historically accorded HEW or HHS under section 504. When Congress passed section 504 in 1973, it contained no provision explicitly giving enforcement authority to a federal agency. In 1976, however, President Gerald Ford issued Executive Order No. 11,914 [FN194] giving enforcement and coordination authority to the Secretary of HEW. This executive order specifically provided that "[t]he Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices." [FN195] Congress had encouraged the President to take this step. [FN196] In 1978, Congress ***138** explicitly delegated broad authority to federal agencies to promulgate regulations under section 504, requiring that the "head of each ... agency shall promulgate such regulations as may be necessary to carry out the amendments to this section." [FN197]

In early cases interpreting section 504, the Supreme Court often failed to defer to the views of HEW [FN198] or HHS. [FN199] In 1983, however, reciting the general principle that the Court generally defers to "contemporaneous regulations issued by the agency responsible for implementing a congressional enactment," the Court found in Consolidated Rail Corp. v. Darrone [FN200] that agency deference was particularly appropriate under section 504. As the Darrone Court explained, "the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form." [FN201]

In 1987, the Supreme Court rearticulated the deference to be accorded regulations enforcing section 504. In School Board v. Arline, [FN202] the Supreme Court was faced with the difficult interpretive question of whether Congress intended the term "disability" to include an individual with tuberculosis. Referring back to the decision in Darrone, the Court announced that the HHS regulations were "of significant assistance" and provided "an important source of guidance on the meaning of section 504." [FN203] In deciding one of the most controversial issues to arise under the law of disability discrimination--whether Congress intended to cover contagious diseases--the Supreme Court relied heavily on HHS' position. [FN204] Not only did the Court cite HHS' regulations with approval, but it also used the appendix to these regulations for further guidance. [FN205] Concluding that the legislative history also supported a broad interpretation of the term "disability," the Court found that Congress intended section 504 to cover individuals who are rendered disabled by virtue of a contagious disease when it enacted the statute. [FN206]

***139** Thus, the section 504 case law sent a strong message of deference to agency regulations. It was against this backdrop that Congress passed the ADA and decided how much regulatory authority to delegate to the agencies charged with enforcing it. [FN207]

B. Historic Deference Accorded EEOC

In contrast to section 504, the courts have not accorded much deference to the EEOC under Title VII or the ADEA. Having grown accustomed to disregarding the EEOC's views under Title VII and the ADEA, courts are reflexively disregarding the EEOC's views under the ADA.

1. Title VII

When Title VII was originally enacted, the EEOC was only given limited authority to promulgate "procedural regulations ... in conformity with the standards and limitations of the Administrative Procedure Act." [FN208] When Title VII was amended in 1972, the EEOC was given enhanced enforcement responsibility, but its authority to promulgate regulations was left unchanged. [FN209] President Carter attempted to expand the EEOC's regulatory authority in 1978 with the issuance of Executive Order No. 12,106. [FN210] The President, however, does not have the power to increase the stature of an executive agency's regulations; the delegation doctrine reserves that power for Congress.

Despite the weak authority afforded the EEOC, it promulgated some substantive regulations shortly after Title VII was enacted. It published Guidelines on Discrimination Because of Sex in 1966 [FN211] and Guidelines on Discrimination Because of Religion in 1967. [FN212] The EEOC took a cautious position in these early regulations, using phrases like the Commission ***140** "believes" [FN213] and "it does not seem to us" [FN214] to express its viewpoint. It was not until the mid-1970s that the EEOC began publishing regulations on more controversial subjects like the coverage of pregnancy discrimination under Title VII. Yet the EEOC had trouble attaining deference for these regulations given that they were not--and arguably should not have been--promulgated contemporaneously with the enactment of the statute in 1964.

When cases were first brought under Title VII, the Supreme Court did defer to EEOC guidance. [FN215] Despite repeated references to the idea that the EEOC guidelines on Title VII are entitled to "great deference," the Supreme Court has increasingly found situations where it rejects EEOC guidance. [FN216]

While it is impossible to know whether the Supreme Court correctly assessed Congress' intentions when it refused to defer to the EEOC's positions under Title VII, it is true that subsequent Congresses have often amended Title VII to overturn these decisions. [FN217] One might infer from these legislative actions that Congress was signaling to the courts that it agreed with the EEOC's current positions and wanted them accorded increased deference. [FN218] Certainly, Congress was aware of these conflicts between the EEOC and the courts when it enacted the ADA. [FN219]

***141** 2. ADEA

Congress has given the EEOC somewhat stronger enforcement and regulatory authority under the ADEA than under Title VII. When Congress initially enacted the ADEA in 1967, it gave enforcement authority to the Secretary of Labor. [FN220] In 1978, subject to Executive Order No. 12,106, the President transferred enforcement authority over the ADEA to the EEOC. [FN221] Due to this belated grant of enforcement authority, the EEOC could not possibly have promulgated regulations until the statute was more than ten years old. Of course, where the Court has maintained the Department of Labor's substantive position, it can benefit from the deference due to the Department of Labor's regulations, which were promulgated shortly after the passage of the ADEA. Yet in situations where the Department of Labor was slow to announce substantive regulations, the EEOC suffered from the errors of a predecessor agency.

In early cases interpreting the ADEA, the Supreme Court started with the premise that EEOC regulations are entitled to "great deference." [FN222] Nonetheless, the EEOC has not fared well in recent years. The Court's interpretation of the term "subterfuge" under the ADEA particularly deserves close examination, because this term also arises under the ADA. Should

the fact that the Supreme Court has consistently refused to defer to the EEOC's interpretation of "subterfuge" under the ADEA signal that it should reject the EEOC's parallel interpretation of the term under the ADA?

The meaning of the term "subterfuge" has arisen twice under the ADEA, most recently in 1989 in Public Employees Retirement System v. Betts. [FN223] The plaintiff became disabled at age sixty-one. Under her employer's disability and retirement plans, she was permitted to receive retirement benefits, but could not receive disability benefits (which would have been higher) because she was over the age of sixty. The plaintiff filed an age discrimination charge against the Public Employees Retirement System ("PERS"). PERS relied on the bona fide benefit plan exemption to argue that its plan was lawful. [FN224] Under that exemption, age-based employment decisions taken pursuant to the terms of "any bona fide employee benefit plan ... which is not a subterfuge to evade the purposes of" the Act are exempt from the prohibitions of the ADEA. [FN225] ***142** Relying on interpretive regulations promulgated by the EEOC, the district court held that employee benefit plans qualify for the exemption only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Since PERS could not meet that standard of proof, the district court concluded that PERS was not entitled to the exemption. [FN226] A divided court of appeals affirmed. [FN227] The Supreme Court granted certiorari and reversed. [FN228]

The issue before the Supreme Court in Betts was the meaning of the word "subterfuge." In United Air Lines, Inc. v. McMann, a 1977 decision interpreting the bona fide plan exemption under the ADEA, the Supreme Court had interpreted the term "subterfuge" to mean "a scheme, plan, stratagem, or artifice of evasion." [FN229] Congress disagreed with the McMann holding and amended the bona fide plan exemption in 1978 to state specifically that it did not apply to benefit plans that "require or permit the involuntary retirement of any individual ... because of the age of such individual." [FN230] Although Congress overturned McMann through legislative amendment, it did not remove the term "subterfuge" from the bona fide benefit plan exemption. In Betts, the Supreme Court was therefore faced with the question of whether the term "subterfuge" should mean "a scheme, plan, stratagem, or artifice of evasion" or whether Congress' amendment of the ADEA to overturn McMann signaled that it wanted the courts to defer to the EEOC's position that age-based distinctions in benefit plans must be cost-justified in order not to be subterfuges. [FN231]

Justice Kennedy wrote the opinion for the Court in Betts, concluding that the interpretive regulation construing the subterfuge rule was invalid. Although he supposedly followed Chevron in reaching that conclusion, his analysis in fact is not consistent with the decision. Under Chevron, the Court is supposed to ask first whether Congress has "directly spoken ***143** on the precise question at issue." [FN232] If the language is plain and unambiguous, the Court is supposed to resolve the issue before it without resort to consideration of the agency's interpretation. By contrast, if the statute is "silent or ambiguous with respect to the specific issue," then the Court should defer to the agency view so long as that view is based on a "permissible construction of the statute." [FN233]

Thus, the first question Justice Kennedy should have asked was whether Congress clearly expressed its intentions with respect to the issue before the Court. But Kennedy did not begin his analysis at this step. Instead, he immediately launched into an analysis of the rule that the EEOC had propounded. He concluded that no deference was due to the EEOC position because it was "at odds with the plain language of the statute itself." [FN234] Because he found a conflict between the plain language of the statute and the EEOC rule, he contended that there was no reason to investigate the arguable consistency of the EEOC rule with the legislative history. [FN235]

Chevron, however, instructs the Court to determine whether Congress has "directly spoken on the precise question at issue" through reference to Congressional intent, as manifested in the "traditional tools of statutory construction," not simply through reference to the statutory language. [FN236] Justice Kennedy should have examined the statutory language along

with evidence of Congressional intent through tools of construction, such as legislative history, to determine whether Congress had "directly spoken on the precise question at issue." Only if Justice Kennedy concluded that there was ambiguity in Congress' intentions should he have turned to the agency's regulations for further guidance.

Kennedy, however, never took a position on whether he thought Congress had clearly expressed its intention. When he rejected the agency guidance, he implied that the plain language of the statute could resolve the issue before the Court. Yet, several paragraphs later he concluded that the statutory language was ambiguous, stating that fashioning the correct rule of law was a "difficult task," and that there was more than one plausible construction of the key statutory terms. [FN237] At this point, he turned to the legislative history for guidance, but, oddly, focused entirely on the ADEA's 1967 (pre-enactment) legislative history to derive his own meaning for the term "subterfuge," entirely ignoring the 1978 (post-enactment) legislative history. He therefore relied on an odd and selective reading of the pre-enactment legislative history to support ***144** his rule while denying the EEOC the right to rely on the post-enactment legislative history to justify its rule. [FN238] Whether the case belonged under the plain meaning or ambiguity prongs of Chevron, the post-enactment legislative history should have been an important tool to glean Congress' intentions.

The dissent criticized the majority's analysis in strong terms: "[T] his is a case in which only so much blood can be squeezed from the textual stone, and in which one therefore must turn to other sources of statutory meaning." [FN239] Concluding that the EEOC's position was consistent with the 1967 and 1978 legislative history, the dissent argued that the agency's position should receive deference. "The majority today puts aside conventional tools of statutory construction and, relying instead on artifice and invention, arrives at a draconian interpretation of the ADEA which Congress most assuredly did not contemplate, let alone share, in 1967, in 1978, or now." [FN240] Earlier, the dissent asserted that the majority's methodology "is so manipulative as virtually to invite the charge of result-orientation." [FN241] The majority's lack of respect for the EEOC's position, however, would be consistent with the EEOC's status as a second-class agency.

As with the Title VII example, Congress rectified the situation in the Betts case by amending the statute and removing the term "subterfuge" from the ADEA. [FN242] Nonetheless, several months before it took this step, Congress used the word "subterfuge" in the bona fide benefit plan exemption under the ADA. Thus, it is very clear that Congress was aware of the conflict between the courts and the EEOC over the meaning of the term "subterfuge" when it enacted the ADA. One must understand Congress' use of the term "subterfuge" and delegation of authority to the EEOC under the ADA in light of Congress' displeasure with the Supreme Court's interpretation of that term under the ADEA.

C. ADA Agency Deference Decisions

In deciding cases brought under the employment discrimination provisions of the ADA, the courts have to consider if they should defer to regulations promulgated by the EEOC. Instead of considering how much deference Congress intended to be accorded to the EEOC under the ADA, the lower courts appear to have reflexively assessed the views of the EEOC in light of the second-class status accorded the EEOC under Title VII and the ADEA. Although the ADA has been in effect for only six years, lower courts have already rejected EEOC guidance on mitigating ***145** measures, [FN243] the subterfuge exception, [FN244] and the collective bargaining rule. [FN245] Accordingly, the EEOC's diminished status has continued in the First, Third, [FN246] Sixth, and Tenth Circuits. [FN247] In some cases, the ***146** courts have not rejected EEOC guidance, but have simply not given it the weight it deserves. In other cases, the courts have rejected the EEOC guidance outright. I will discuss one example from the Sixth Circuit where the court rejected the guidance outright and one case from the First Circuit where the court followed EEOC guidance, but without correctly understanding the weight that should be attached to it.

1. Rejecting EEOC Guidance

In Gilday v. Mecosta County, [FN248] the district court granted summary judgment in a case involving a non-insulin-dependent diabetic who was discharged from his EMT position. The Sixth Circuit, sharply divided in its reasoning, reversed the trial court decision and refused to defer to EEOC guidance. [FN249]

The issue before the trial court was whether the plaintiff was a "qualified individual with a disability" under the ADA. In order to meet that definition, Gilday had to demonstrate that he was a person with a physical impairment that substantially limits one or more major life activities. [FN250] All parties agreed that Gilday's diabetes constituted an impairment; the remaining question was whether this impairment substantially limited one or more major life activities.

The trial court rejected the EEOC's interpretive guidance, concluding that it was inconsistent with the plain language of the ADA. The ***147** EEOC guidance states that "the determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." [FN251] Finding that Gilday's diabetes, when properly treated and controlled, does not substantially limit his ability to work or any other major life activity, the trial court granted summary judgment for the defendant-employer, finding that Gilday did not meet the statutory definition of a person with a disability.

The court of appeals agreed that the EEOC guidance should be disregarded, but nonetheless reversed and remanded. It concluded that a genuine issue of material fact existed on the question of whether Gilday was an individual with a disability. The three judges, however, offered three different rationales for the rule that should apply on remand. Judge Moore concluded that the EEOC interpretive guidance should be followed because it is consistent with the ADA's text, purposes, and legislative history. From this posture, she determined that there were sufficient facts in the record to withstand a motion for summary judgment.

Writing separately, Judge Kennedy concluded that courts should not follow the EEOC interpretive guidance on mitigating measures because it conflicts with the text of the ADA and the EEOC's own regulations concerning the definition of "substantially limits." Although Judge Kennedy recognized that the guidance is arguably consistent with the legislative history, she ignores this history through her determination that the text is unambiguous. She does not "believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medications." [FN252]

In another opinion, Judge Guy took the middle ground. Like Judge Kennedy, he concluded that the EEOC's interpretive rule with respect to mitigating measures should not be followed because it conflicts with the plain language of the statute. Instead, Judge Guy proposed that:
[T]he impact of mitigating measures must be decided on a case-by-case basis. In some cases a person with a "controlled" medical problem or condition will be completely functional and should be evaluated as such. In other cases a person with a controlled medical condition may still be under a disability as defined by the Act. Indeed, what is necessary to "control" the condition may be part of what makes the person disabled. [FN253]

***148** Applying this rule to Gilday, Judge Guy agreed that the case should be reversed and remanded to determine disputed material questions of fact that preclude summary judgment on the question of disability.

Thus, two judges explicitly rejected the EEOC guidance on mitigating measures. Not one of the three judges on the panel appreciated the process used by the EEOC to promulgate the mitigating measures interpretive guidance. Judge Moore followed the EEOC guidance but stated:
Because the appendix consists of interpretive, rather than legislative, rules, a reviewing court must conduct an independent evaluation of these guidelines, rather than simply following them if they are reasonable interpretations of the statute .... Non-

etheless, such rules "are still entitled to some weight on judicial review." ... To the extent that the guidelines interpret the EEOC's regulations, they are "controlling [as to the regulations' meaning] unless plainly erroneous or inconsistent with the regulation." [FN254]

Similarly, Judge Kennedy stated:
The appendix constitutes a set of interpretative, rather than legislative, rules and is, therefore, not binding law .... Nevertheless, "[s]uch administrative interpretations ... 'do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" .... An interpretive rule is still entitled to "some deference" where the rule is a '"permissible construction of the statute.'" [FN255]

(Judge Guy's concurrence did not mention whether he considered the guidance to be an interpretive rather than legislative rule, but he decided not to follow that guidance.)

In determining the weight to be given to the EEOC's interpretive guidance under the ADA, the judges cite cases that are not relevant to the issue. For example, Judge Moore cited Auer v. Robbins [FN256] for the proposition that the guidelines are controlling unless they are plainly erroneous or inconsistent with the regulation they are interpreting. Auer, however, involved an entirely different situation in which the Secretary of Labor's interpretation was offered through an amicus brief, rather than through the notice and comment process of federal regulations. Nevertheless, the Court held that the Secretary's interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" [FN257] Judge Moore ***149** used this language to argue for the appropriate deference to be accorded the EEOC's interpretive guidance under the ADA.

The EEOC's interpretive guidance is much closer to the Auer regulations than the amicus brief later discussed by the Auer Court. The EEOC's interpretive guidance is not a post-hoc explanation of what its regulations mean. They were attached as an appendix to the regulations when they were first published as proposed rules in 1991. [FN258] Similarly, Judge Moore misapplies Martin v. Occupational Safety & Health Review Commission. [FN259] This case also involved an agency's post-hoc interpretation of regulations. The Court said this type of interpretation is entitled to "some weight," but is less controlling than formally promulgated regulations. The relevance of the Martin holding to the EEOC guidance under the ADA is, therefore, doubtful.

2. Accepting EEOC Guidance but Without Sufficient Deference

One of the First Circuit's most recent opinions supports an EEOC regulatory position, but does not support deference to the EEOC in general. In Arnold v. United Parcel Service, Inc., [FN260] the First Circuit reversed and remanded the grant of summary judgment for the defendant-employer. The plaintiff alleged that United Parcel Service refused to hire him because of his disability, diabetes mellitus. Rejecting the mitigating measures rule, the district court "evaluated Arnold's diabetes in its treated state, after taking into account the ameliorative effects of his insulin medication." [FN261] On appeal, Arnold argued that the First Circuit's position was an error as a matter of law because the language and history of the ADA, as well as the EEOC's position, supported the mitigating measures rule.

The First Circuit held for the plaintiff. Relying on Chevron, it first looked at the statutory language regarding how to define the term "disability." Finding that language ambiguous, it concluded that the legislative history makes it "abundantly clear that Congress intended the analysis of an 'impairment' and of the question whether it 'substantially limits a major life activity' to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures." [FN262] The court then explored the broad remedial purposes of the ADA and, finally, the EEOC interpretive guidance on this issue. Despite the ADA's explicit instruction under section 12201(a) that courts should defer to prior case law and ***150** regulations issued under section 504 to interpret the ADA, the court made no

mention of that material.

The EEOC's interpretive guidance on the mitigating measures rule did not figure prominently in the court's decision. [FN263] Finding that the EEOC's position was consistent with the ADA's legislative history and broad remedial purposes, the First Circuit elected to follow it. But the Arnold court failed to recognize the deference due to the EEOC given the notice and comment period that it followed, the contemporaneous nature of the interpretive guidance, and the EEOC's consistent position on that subject. It claimed to give the EEOC's guidance less deference than it would give other kinds of regulations because the guidance has "not undergone the full APA promulgation process." [FN264] The First Circuit's authority for that proposition was Meritor Savs. Bank, F.S.B. v. Vinson, [FN265] a case involving EEOC Title VII guidelines. The Title VII guidelines were issued in 1980, sixteen years after the passage of the statute, and were not promulgated as a result of a specific delegation by Congress. [FN266] Rather than turning to such questionable precedent to determine the weight of the EEOC guidance on mitigating measures, the court should have explored Congress' intentions to give weight to the EEOC's position under the ADA as well as the careful process whereby the EEOC promulgated the mitigating measures guidance. [FN267] Thus, even where the court adopts a position on mitigating measures consistent with that of the EEOC, the structure of the court's reasoning does not accord with Congress' statement of how such issues should be resolved.

D. Bragdon's Impact on the Law of Agency Deference

In Bragdon, the Supreme Court makes clear that lower courts should accord substantial deference to agency views under the ADA. In determining whether an individual with HIV infection met the statutory definition of disability, the Court made fleeting reference to the statutory language and then announced that it needed to inform itself with "interpretations of parallel ***151** definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question." [FN268] In addition, the Court "reinforced" its conclusion through reference to the Department of Justice's regulations implementing Title III of the statute. [FN269] Not only did the Court cite the regulatory language with approval, but it also referred to the Department of Justice's technical assistance manual as well as the appendix to the department's regulations. [FN270] All of these sources received deference from the Supreme Court.

The ADA's statutory language justified Bragdon's emphasis on agency interpretations. [FN271] Even the Bragdon dissent recognized that section 12201(a) instructed it to examine the pre-existing section 504 regulations. [FN272]

In addition to instructing courts to consider the pre-existing section 504 regulations and case law when deciding ADA cases, the ADA also instructed various federal agencies to promulgate enforcement regulations. The ADA instructed the Department of Justice to promulgate regulations to enforce Title III, [FN273] and the EEOC to promulgate regulations to enforce Title I. [FN274] The Bragdon Court stated that the Department of Justice regulations enforcing Title III were entitled to "deference," citing Chevron. [FN275] The same principle of deference should apply to the EEOC's Title I regulations.

Even though the Bragdon Court cited Chevron in concluding that the Department of Justice regulations should be entitled to deference, the Court did not follow the orthodox application of Chevron by first finding the statutory language to be ambiguous. Although the Court does not justify its application of the second step of Chevron, possibly it would have justified this step with the plain language of the statute itself. Where Congress expresses its approval of agency regulations in the legislative text, the Court may conclude that it should defer to agency regulations without a preliminary finding of ambiguity.

***152** While giving great weight to the prior section 504 rules, the Bragdon Court acknowledged that the previous validity of these rules under section 504 was a matter of some dispute. The Court stated:

Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. Every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV. Re-

sponsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under [Chevron]. It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [FN276]

The Bragdon decision should, therefore, reflect a shift in the deference accorded to the EEOC. Where the EEOC rules previously existed in the same or similar form under section 504, there would appear to be a very strong presumption of validity. Nonetheless, those rules became the centerpiece of the Bragdon decision because of Congress' explicit instructions to consider them and the Court's view that they reflected a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." [FN277] In other words, the plain language of the statute required the Court to give considerable weight to the prior section 504 regulations without traveling through the Chevron doctrine itself.

Not only does Bragdon place considerable weight on the prior section 504 regulations, but it gives current ADA regulations its strong stamp of approval. Although it ducked the question of whether the prior section 504 regulations could meet Chevron's deference standard, it explicitly held that the current ADA regulations "are entitled to deference" under Chevron. [FN278] Once again, the Court reached that step without a predicate finding that the statutory language is ambiguous. Bragdon, therefore, provides a strong foundation for judicial deference to EEOC regulations without a predicate conclusion that the statutory language is ambiguous.

Three regulations promulgated by the EEOC have received a hostile reaction by some courts: the mitigating measures rule, [FN279] the subterfuge rule, [FN280] and the collective bargaining rule. [FN281] I have already discussed the ***153** First and Sixth Circuits' consideration of the mitigating measures rule under the ADA. [FN282] Although I have not yet discussed the subterfuge rule under the ADA, I have discussed a parallel rule under the ADEA. [FN283] In the next two subparts of this Article, I will revisit the mitigating measures and subterfuge rules in light of Bragdon to discuss how the Bragdon framework applies to those rules.

1. Mitigating Measures Rule Revisited

The lower courts are split on the appropriateness of following the EEOC's mitigating measures rule. [FN284] The Fourth, [FN285] Sixth, [FN286] and Tenth [FN287] circuits have rejected the EEOC's position; the First, [FN288] Third, [FN289] Seventh, [FN290] Eighth, [FN291] Ninth, [FN292] and Eleventh [FN293] circuits have deferred to the EEOC's position. The Fifth Circuit has both followed and criticized the rule and, most recently, has adopted a compromise position on the mitigating measures rule. [FN294]

According to Bragdon, the resolution of the mitigating measures issue should involve a two-step process. First, one should inquire about the status of that rule under prior section 504 regulations and case law. Second,***154** one should inquire about the status of that rule under current ADA regulations.

The mitigating measures rule was not promulgated under section 504 of the Rehabilitation Act. Although the courts did not explicitly consider the rule under section 504, their holdings are consistent with its application. In the ten cases brought under section 504 by individuals with conditions often controllable with medication such as epilepsy or diabetes, the courts assumed that these individuals were "disabled" without discussion of the significance of their medication's ameliorative effects. [FN295] Thus, the section 504 case law supports a mitigating measures rule although no case directly addressed the appropriateness of such a rule. [FN296]

Although the mitigating measures rule did not exist as part of the prior section 504 regulations, it was mentioned repeatedly

in the ADA legislative history. [FN297] The EEOC referred to this legislative history when it promulgated the mitigating measures rule. [FN298]

The mitigating measures rule was promulgated through notice and comment under the ADA. The interpretive guidance attached to the regulations originally issued by the EEOC listed the mitigating measures rule in the context of defining an impairment, but not in the context of defining a substantial limitation. The "substantially limits" part of the guidance did not mention a mitigating measures rule, but it did contain this example: "[A] diabetic who without insulin would lapse into a coma would be substantially limited because the individual can only perform major life activities with the aid of medication." [FN299] This language implies that despite the lack of specific language in the interpretive guidance, factfinders should determine whether someone is substantially limited without considering mitigating measures.

In its final rule, the EEOC wrote specifically on the mitigating measures issue. As it explained in its comments,
***155** [t]he Commission has revised the Interpretive Guidance accompanying § 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. [FN300]

Accordingly, the EEOC added the following sentence to the interpretive guidance: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." [FN301]

Thus, the EEOC carefully followed standard procedures regarding notice and comment in promulgating the mitigating measures rule. [FN302] Since the notice was effective and the new language was the logical outgrowth of the regulatory process as well as reflective of the legislative history, the EEOC's position should be granted substantial deference. [FN303]

Some might disregard the mitigating measures rule because it was promulgated as part of the appendix to the EEOC regulations and labeled "Guidance." Therefore, it may not receive the kind of deference accorded ***156** to standard regulations that are promulgated through notice and comment. This view, however, would be contrary to the way the Supreme Court considered similar guidance promulgated by HHS under section 504. In School Board v. Arline, [FN304] the Supreme Court considered the appendix that HHS published with its section 504 regulations when it decided whether tuberculosis is a disability covered by section 504. [FN305] The Court made no suggestion that the comments in the appendix were entitled to less weight than the regulations themselves, and its holding was entirely consistent with the position set forth in the appendix--that the definition of disability should not be limited to so-called "traditional handicaps." [FN306] Presumably, when Congress instructed the EEOC to promulgate regulations to enforce the ADA, it was aware that the agencies had a practice of publishing regulations with an interpretive appendix as part of the regulatory process. Congress offered no signal that the interpretive appendix should be given less weight than the regulations to which it is attached. It is therefore inappropriate for lower courts to craft a distinction between those two types of guidance at this time. [FN307]

2. Subterfuge Rule Revisited

Title V of the ADA exempts bona fide benefit plans from claims of disability-based discrimination as long as the disability-based exemption is "not ... used as a subterfuge to evade the purposes of [the Act]." [FN308] Lower courts have struggled to interpret the term "subterfuge" under the ADA. Should it be interpreted consistently with the Supreme Court's interpretation of that term under the ADEA, [FN309] or should it be interpreted consistently with the legislative history of the ADA, [FN310] which explicitly ***157** rejects the ADEA precedent? The EEOC has taken a position consistent with the ADA legislative history but inconsistent with the Supreme Court's decisions under the ADEA. [FN311]

The lower courts are split on the correct interpretation of "subterfuge" under the ADA. The Third Circuit, [FN312] the Eighth Circuit, [FN313] the D.C. Circuit, [FN314] and numerous lower courts [FN315] have followed the Supreme Court's decisions under the ADEA interpreting "subterfuge" and rejected the EEOC's position. No appellate court [FN316] has adopted the EEOC position, but various lower courts [FN317] have taken a position consistent with the legislative history and EEOC guidance. Courts that reject the applicability of the Supreme Court's interpretation of "subterfuge" from the ADEA to the ADA, however, often rely exclusively on the ADA's legislative history, [FN318] making no more than passing reference to the EEOC guidance. Once again, it seems that courts are uncomfortable deferring to the EEOC's position, even when the EEOC's views are consistent with their own.

***158** The subterfuge rule was not contained in prior regulations or case law under section 504 because insurance policy coverage was a new feature of the ADA. The bona fide exemption rule with the subterfuge language was carefully drafted to meet the needs both of the insurance industry and individuals with disabilities. Congress filled the legislative history with clear and consistent statements that it intended the term "subterfuge" to require insurance companies to base their disability-based distinctions on sound actuarial principles. [FN319] It was against this backdrop that the EEOC promulgated rules interpreting the term "subterfuge."

In its interpretive guidance, the EEOC rejected the McMann interpretation of the subterfuge language under the ADEA: [FN320] "Whether or not these activities are being used as a subterfuge is to be determined without regard to the date the insurance plan or employee benefit plan was adopted." [FN321] The EEOC also rejected the Betts interpretation of "subterfuge" under the ADEA: [FN322] "[A]n employer or other covered entity cannot deny a qualified individual with a disability equal access to insurance or subject a qualified individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." [FN323]

In light of Bragdon, the relevant question is whether the courts should defer to the EEOC's interpretation of the term "subterfuge" despite the Supreme Court's decisions in McMann and Betts. Bragdon instructs ***159** lower courts to resolve that question by looking to the prior case law and regulations under section 504 before considering the regulations promulgated under the ADA. Because this issue was not addressed under section 504, the only useful interpretive source would be the EEOC's current regulatory position under the ADA.

The EEOC's policy position on the meaning of the bona fide exemption rule has been the EEOC's consistent and contemporaneous position on this issue; it is also consistent with the legislative history. The EEOC's initial version of its proposed regulations contained the identical subterfuge rule that was eventually codified in the Code of Federal Regulations. [FN324] The EEOC also issued interim enforcement guidance on the application of the ADA to disability-based distinctions in employer-provided health insurance one year later. [FN325] This guidance further clarified the EEOC's belief that employers must justify disability-based distinctions in health insurance policies with sound actuarial data in order to avoid classification as a subterfuge. [FN326] The EEOC's position respects Congress' intentions, reinforcing its entitlement to substantial deference. [FN327]

If Bragdon is applied, the EEOC's subterfuge rule should be followed by the lower courts. Ironically, Justice Kennedy, who wrote Bragdon, also wrote Betts. Justice Kennedy's own opinion in Bragdon can be useful fodder to reach a conclusion somewhat inconsistent with his prior opinion in Betts. In fact, since Congress overturned Betts, Kennedy should reconsider Betts' plain language approach and employ Bragdon's regulatory approach. [FN328]

***160** IV. Conclusion

In the first major empirical study of appellate employment discrimination decisions under the ADA, I have found that de-

fendants prevail at an astonishingly high rate on appeal. I have argued that the pro-defendant results reflect two major errors of law. First, courts have misused the summary judgment device by reserving issues for the judge that should have gone to the jury and by setting an inappropriately high evidentiary burden for plaintiffs to defeat defendants' motion for summary judgment. Because juries are more hospitable to civil rights claims than judges, this abuse of summary judgment results in pro-defendant results. Second, courts have refused to defer to agency interpretations of the ADA. [FN329]

The Bragdon decision may actually contribute to the first problem but, at the same time, help solve the second problem. By remanding the direct threat summary judgment issue back to the court of appeals, the Supreme Court unfortunately provided little guidance on the proper use of summary judgment in ADA cases. Yet by strongly deferring to the historical views of the administrative agencies charged with enforcing section 504 of the Rehabilitation Act of 1973 [FN330] and the contemporaneous views of the agencies charged with interpreting the ADA, the EEOC's status as a second-class agency may be coming to an end under the ADA.

Although it is impossible to know why the use of these two devices has become so commonplace, some speculation is possible. First, conservative judges may simply be hostile to the ADA. They do not want to defer to the EEOC's expertise, which they view as pro-plaintiff, and want to keep cases away from what they perceive to be run-away juries. These conservative judges' experience under Title VII of the Civil Rights Act of 1964 [FN331] and the Age Discrimination in Employment Act of 1967 [FN332] may also contribute to this hostility, since they have grown accustomed to disregarding EEOC expertise under both statutes. [FN333] Second, judges may have become unhappy with jury verdicts under Title VII and the ADEA and transferred those ill feelings to the ADA by avoiding jury trials.

***161** But if those explanations are true, why, one might ask, did these trends not arise under section 504? Courts did not abuse summary judgment and fail to defer to agency regulations under section 504. Why do we see this fundamental shift in the law after the enactment of the ADA?

One explanation may be that judges felt more comfortable rendering favorable judgments under section 504 than under the ADA because the defendants in section 504 claims were entities receiving federal financial assistance, often branches of local government. Wholesale coverage of the private sector did not yet exist. When the ADA, by contrast, began to look more like Title VII and the ADEA by prohibiting employment discrimination against the private sector, judges started to look more to Title VII and the ADEA than to section 504 for guidance. To examine that hypothesis more fully, one would need to examine the results rendered under section 504 before the ADA was enacted. Am I correct to hypothesize that plaintiffs had a higher success rate under section 504 than they currently have under the ADA? Have the results under section 504 become more adverse to plaintiffs since the passage of the ADA?

The results reported in this Article reflect trends that require further verification. How do the results change if pro se litigation is taken out of the database? What if cases involving back injuries are excluded from the database? Do certain kinds of disabilities fare better in litigation? Does the presence of other claims, such as race or age claims, correlate with unsuccessful ADA claims? Do blue collar workers fare worse than white collar workers under the ADA? Do Title III cases typically fare better than employment discrimination cases? [FN334] As the news gets out that plaintiffs are overwhelmingly losing ADA cases, will plaintiffs begin to make more conservative litigation decisions, and thereby produce more balanced judicial outcomes? I hope to answer these and other questions in future articles. For now, however, there is sufficient data to conclude that the ADA has not been a windfall for plaintiffs. The sources of plaintiffs' lack of success require further examination.

***162** APPENDIX A

RESULTS FROM STRATIFIED SAMPLE OF LABOR LAW CASES [FN335]

CIRCUIT	NO OPINION [FN336]	UNPUBLISHED COPY [FN337]	WESTLAW [FN338]	FEDERAL REPORTER [FN339]	TOTAL
First	1 (25%)	1 (25%)	0 (0%)	2 (50%)	4
Second	0 (0%)	18 (72%)	0 (0%)	7 (28%)	25
Third	20 (57%)	8 (23%)	0 (0%)	7 (20%)	35
Fourth	0 (0%)	0 (0%)	9 (69%)	4 (31%)	13
Fifth	4 (44%)	3 (33%)	0 (0%)	2 (22%)	9
Sixth	0 (0%)	1 (2%)	27 (63%)	15 (35%)	43
Seventh	0 (0%)	5 (16%)	0 (0%)	26 (84%)	31
Eighth	0 (0%)	3 (23%)	0 (0%)	10 (77%)	13
Ninth	3 (6%)	11 (22%)	15 (31%)	20 (41%)	49
Tenth	0 (0%)	2 (22%)	4 (44%)	3 (33%)	9
Eleventh	6 (37.5%)	2 (12.5%)	0 (0%)	8 (50%)	16
D.C.	0 (0%)	2 (7%)	14 (50%)	12 (43%)	28
Total	34 (12%)	56 (20%)	69 (25%)	116 (42%)	275

[FNa1]. Ruth Colker, Heck-Faust Memorial Chair in Constitutional Law, Ohio State University College of Law. Numerous people and entities provided assistance with this project. The Socio-Legal Center at Ohio State University College of Law provided a grant that supported the empirical aspect of this project. Professors James Brudney and Deborah Merritt offered very helpful guidance on how to construct a useful database. Kristen Carnahan, Leslie Kerns, and Theodore Wern provided invaluable research assistance. Wendy Watson provided assistance in constructing the coding scheme. Professors James Brudney, Arthur Greenbaum, Alan Michaels, Allan Samansky, and Peter Swire provided extremely helpful written comments on an earlier draft. Finally, I would like to thank the participants in the faculty workshop at Ohio State University College of Law who were a wonderful and helpful audience when I presented an earlier draft of this paper.

[FN1]. 42 U.S.C. §§ 12101-12213 (1994).

[FN2]. Ruth Shalit, Defining Disability Down, NEW REPUBLIC, Apr. 25, 1997, at 16.

[FN3]. Trevor Armbrister, A Good Law Gone Bad, READER'S DIG., May 1998, at 145, 149; see also John Leo, Let's Lower the Bar, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19 (arguing the ADA has the potential "'to force the rethinking and watering down of every imaginable standard of competence, whether of mind, body, or character'" (quoting WALTER OLSON, THE EXCUSE FACTORY (1997))).

[FN4]. 118 S. Ct. 2196 (1998).

[FN5]. Linda Greenhouse, Ruling on Bias Law: Infected People Can Be Covered Even With No Symptoms, N.Y. TIMES, June 26, 1998, at A1. Ten days earlier, the Court rendered a unanimous decision in which it concluded that the ADA covers claims brought by state prison inmates who are disabled. See Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952 (1998). This decision also resulted in an expansive interpretation of the statute.

[FN6]. See Federal Enforcement of ADA Falls Short, Civil Rights Commission Says in Report, 67 U.S.L.W. (BNA) 2199 (Oct. 13, 1998) (summarizing U.S. CIVIL RIGHTS COMM'N, HELPING EMPLOYERS COMPLY WITH THE ADA AND HELPING STATE AND LOCAL GOVERNMENT COMPLY WITH THE ADA (1998)).

[FN7]. Of the 620 ADA appellate cases in my database, 475 were employment discrimination cases, 122 were non-employment actions against public entities, and 23 were non-employment actions against public accommodations. Thus, the employment discrimination cases constituted 76% of the database. Because there were so few non-employment actions in the database, I have not analyzed the results in those cases in depth at this time. Of the 122 non-employment cases brought against public entities, I have found that defendants were successful in 101 (82.8%) of the cases. Because there were only 23 cases brought against public accommodations under Title III of the ADA, I have not attempted to categorize those cases at all.

[FN8]. My trial court data were obtained from the American Bar Association's Commission on Mental and Physical Disabilities. For further discussion of this database, see infra Part I.B.2.

[FN9]. My appellate database includes employment discrimination cases brought against both public and private entities. I have attempted to include only potentially meritorious cases by excluding patently frivolous cases from the database and coding whether cases are brought pro se. As discussed in the methodology section, see infra Part I.A, I have also attempted to determine the rate of publication in each circuit and the likelihood of additional unavailable opinions in which the defendant may have prevailed. Finally, I have distinguished between appellate and district court litigation, while carefully noting the

result below in the appellate cases.
My preliminary data are consistent with the data collected by other researchers. The editors of the National Disability Law Reporter and Disability Compliance Bulletin collected 261 decisions in which federal courts of appeals have issued rulings on claims made under the ADA. In 209 of 261 decisions decided between 1994 and 1997, they found that the appellate panel sided with the defendant on the ADA claim or claims, in employment and non-employment cases, resulting in an 80% success rate for ADA defendants overall. See DISABILITY COMPLIANCE BULL., Nov. 20, 1997, at 1, 8-9. The American Bar Association's Commission on Mental and Physical Disability Law conducted a formal study on the outcome of all ADA Title I cases decided from 1992 until March 31, 1998. They concluded that of the 760 decisions in which one party or the other prevailed, employers prevailed in 92.11% of those cases. See Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998). Similarly, the Equal Employment Opportunity Commission has reported that it achieved "merit resolutions" in only 13.6% of all cases filed with the commission for fiscal years 1992 through 1997. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 STATISTICS FY 1992 THROUGH FY 1997 (on file with author). "Merit resolutions" are defined as "charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations." Id. Thus, it would be inaccurate to explain the low success rate at the appellate level by speculating that the "good" cases have all been favorably settled. The success rate for plaintiffs at the pre-trial level is extraordinarily low, as it is at the appellate level.

[FN10]. By examining all cases tried between 1978 and 1985 for which the Administrative Office of United States Courts reported an outcome, Theodore Eisenberg has found plaintiff success rate in civil rights actions for a seven-year period (1978-1985) to range from voting rights cases (53%) to prisoner civil rights cases (14%). See Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 GEO. L.J. 1567, 1578 (1989). Employment discrimination cases, which are most analogous to the ADA cases studied in my database, were found to have a success rate of 22%. See id.
The comparison between ADA cases and other kinds of cases is not a perfect comparison because the data sets differ. Eisenberg's data on civil rights and prisoner cases rely on trial court outcome data maintained by the Administrative Office of the United States Courts. These data include all dispositions--including dismissals and verdicts. Because the Administrative Office of the United States Courts does not make available trial court outcome data for ADA cases, ADA researchers have not been able to look at as complete a data set as Eisenberg examined. Instead, ADA researchers have been limited to outcomes that are available through an electronic or printed source. How these missing data may distort ADA data deserves further examination. Eisenberg's data are also from a different time period--1978 to 1985--than ADA data, which will be from a time period from 1992 to 1998, which may affect any comparisons and deserves further examination.

[FN11]. Although the Bragdon plaintiff, Sidney Abbott, initially prevailed at both the district court and appellate court levels on a motion for summary judgment in her ADA Title III (public accommodations) case, the Supreme Court vacated the grant of summary judgment on the issue of whether providing dental treatment to Abbott would pose a direct threat to the dentist and remanded her case back to the court of appeals for further guidance on that issue. See Bragdon v. Abbott, 118 S. Ct. 2196, 2213 (1998). The lower courts held, however, and the Supreme Court affirmed, that she was deserving of judgment as a matter of law on the question of whether she was an individual with a disability.

[FN12]. See 42 U.S.C. § 12102(2) (1994) (defining "disability").

[FN13]. See id. § 12111(8) (defining "qualified individual with a disability" with reference to "direct threat").

[FN14]. See id. § 12111(9) (defining "reasonable accommodation").

[FN15]. See id. § 12113(b) (defining "qualification standards").

[FN16]. See id. § 12111(10) (defining "undue hardship").

[FN17]. See Eisenberg, supra note 10, at 1596.

[FN18]. See 42 U.S.C. § 12113(b) (1994) (listing "defenses," including the direct threat defense).

[FN19]. See 29 C.F.R. app. § 1630.2(j) (1998).

[FN20]. See id. § 1630.16(f).

[FN21]. See id. § 1630.15(d).

[FN22]. 42 U.S.C. § 12201(a) (1994) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 791-794(e)) or the regulations issued by Federal agencies pursuant to such title."); see also id. § 12116 (requiring EEOC to promulgate regulations); id. § 12117(b) (requiring agencies to coordinate enforcement of the ADA).

[FN23]. My data suggest that summary judgment decisions in ADA Title I cases are usually granted in favor of the defendant and are appealed by the plaintiff. See infra Part I.B. Both the procedural posture and outcome of the Bragdon case are therefore quite unusual.

[FN24]. The ADA only forbids discrimination for those individuals who are found to be individuals with disabilities. See 42 U.S.C. § 12112(a) (1994). Unlike other anti-discrimination statutes, the ADA requires a complex judgment as to whether an individual may qualify for statutory protection at all. People without disabilities may not bring suit under the ADA unless they have an associational claim of discrimination or are subject to unlawful medical examinations. See id. §§ 12112(b)(4), 12112(d). Thus, the determination of whether one is an individual with a disability is a critical predicate to the ADA. Many of the summary judgment decisions issued in favor of defendant-employers involve the issue of whether plaintiff is an individual with a disability. That predicate issue was central to the Bragdon case. For further discussion, see Ruth Colker, Hypercapitalism: Affirmative Protections for People with Disabilities, Illness, and Parenting Responsibilities under United States Law, 9 YALE J.L. & FEMINISM 213, 220-25 (1997).

[FN25]. See infra Part I.B.1.

[FN26]. See Peter Siegelman & John J. Donohue III, Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 L. & SOC'Y REV. 1133 (1990); see also Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L.J. 984, 1055 (tracing the significant increase over time in the rate of unpublished opinions).

[FN27]. See Siegelman & Donohue, supra note 26, at 1155.

[FN28]. See id.

[FN29]. Daniel N. Hoffman, Nonpublication of Federal Appellate Court Opinions, 6 JUST. SYS. J. 405, 406 (1981).

[FN30]. Four circuits (Sixth, Ninth, Tenth, and D.C.) send their unpublished opinions to Westlaw and, in some cases, (Sixth

and Tenth) also to Lexis. The electronic services then publish these opinions selectively. Four circuits (First, Second, Fourth, and Seventh) send their unpublished opinions to a service called the Public Access to Court Electronic Records ("PACER"). Westlaw then downloads the unpublished opinions from PACER and publishes them selectively. One circuit has its own internet site (Eighth). Westlaw downloads unpublished opinions from this site and then publishes them selectively. Three circuits (Third, Fifth and Eleventh) do not send their unpublished decisions to any site. Their unpublished opinions are not available except directly from the court upon request or from the parties themselves. Finally, an electronic service other than Westlaw or Lexis contains all the unpublished opinions of two circuits (Second and Eighth) so that one can get all the unpublished opinions from these circuits without the filter of Weslaw or Lexis.

[FN31]. James Brudney has developed an extensive database that contains all the appellate labor law decisions decided between 1986 and 1993--even results for cases in which the court summarily affirmed with no written explanation. See James J. Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L. REV. 939 (1996).

[FN32]. See infra Appendix A.

[FN33]. Although labor law publication rates might have some unique features, courts generally make publication decisions based on "generic" factors not related to the subject area. There is no reason to believe that the publication rate in the area of labor law would be markedly different than the publication rate for another area of the law, like disability discrimination.

[FN34]. Of the 475 cases in my database, 376 reflected affirmances of pro-defendant results below and only 14 reflected affirmances of pro-plaintiff results below. See infra Part I.B.1. (The remaining 85 cases were reversals.) Thus, of the 390 cases that were affirmances, 96% were affirmances of pro-defendant results below. The cases that I did not have access to-- unpublished copies and no opinion decisions--are therefore very likely to be affirmances of pro-defendant results.

[FN35]. The "no opinion" and "unpublished copy" results added up to 32% of Brudney's stratified sample of affirmances. See infra Appendix A; see also supra note 34.

[FN36]. The Third Circuit data for available opinions are the most difficult to assess, because its publication practices are so far from the norms of the other circuits (70% unavailable as compared with 32% for the sample as a whole). Not only does the Third Circuit not make its opinions readily available to the public, but the stratified sample reveals that 57% of its decisions result in no written decision. Thus, the Third Circuit often does not even provide guidance to the litigating parties of its reasoning in a particular case. In a majority of cases in the stratified sample, the Third Circuit data presents two problems: first, the Third Circuit is only providing its reasoning in a small percentage of cases, and second, it is summarily affirming more than half of its docket without providing a result that is readily available to researchers. (Where no opinion is rendered, one can reasonably assume that the result was a summary affirmance since a reversal requires explanation.) The Third Circuit ADA data, which are drawn from publicly available decisions, should be adjusted to reflect the Third Circuit's unusual publication practices.

[FN37]. See, e.g., Armbrister supra note 3, at 149.

[FN38]. The view that most litigation is frivolous, especially appellate litigation, is not particularly plausible given the resources required to litigate and appeal cases as well as the possible sanctions against frivolous litigation. Pro se cases are more likely to be frivolous. Even there, there are strong disincentives to bringing suit, especially at the appellate level where plaintiffs must personally bear costs. Furthermore, it is unlikely that frivolous litigation is skewing judicial outcome data in favor of plaintiffs, because ADA judicial outcome data do not yet include opinions that are not available through a printed or

electronic source. The data do not include the large number of summary dismissals, which prior researchers have concluded greatly outnumber verdicts in comparable areas of the law. In addition, it is clear that frivolous litigation cannot be clogging the courts. The EEOC reports that it has received 90,803 ADA charges for the time period of July 26, 1992 to September 30, 1997, with the majority of those cases being resolved before trial. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, supra note 9. Nonetheless, because of the persistence of the frivolous litigation argument, it is important to try to control for that problem in developing an ADA data set.

[FN39]. Excluded cases included those that sued a non-covered entity, sued for conduct that occurred before the ADA became effective, or otherwise brought a claim that could not possibly be covered by the ADA.

[FN40]. There were no frivolous published decisions.

[FN41]. More complete data are available on my web site. See Ruth Colker, Colker Appendix (visited Dec. 3, 1998) <http://www.osu.edu/units/law/colkerapp-a.htm>.

[FN42]. Based on my review of a stratified sample of appellate cases in labor law, see supra Part I.A, the number of available opinions may understate the existing decisions in this area by as much as 75%.

[FN43]. With corrected Third Circuit data, see supra Part I.A, this figure would be slightly more favorable to defendants.

[FN44]. See supra Part I.A.

[FN45]. The ABA data consist of all final trial court outcomes, including both state and federal trial courts. More than 90% of the cases are federal trial courts. The data only include employment cases against ADA Title I defendants and exclude employment cases brought against public entities. Moreover, the data do not screen out frivolous litigation.

[FN46]. See Siegelman & Donohue, supra note 26.

[FN47]. 29 U.S.C. § 794 (1994).

[FN48]. 42 U.S.C. § 2000e1-2000e17 (1994).

[FN49]. 29 U.S.C. §§ 621-634 (1994).

[FN50]. 118 S. Ct. 2196 (1998).

[FN51]. See Fed. R. Civ. P. 56(c). When judges render judgment under Rule 56(c), especially in summary decisions, they often do not specify whether they are rendering summary judgment because there is no genuine issue of material fact or judgment as a matter of law because a rule of law dictates the result in the case. Thus, I can only report cases based on whether "judgment" was rendered for a party and cannot distinguish between summary judgment and judgment as a matter of law.

[FN52]. Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978).

[FN53]. See William W. Schwarzer et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 458 (1992).

[FN54]. Id.

[FN55]. Id. at 461.

[FN56]. 29 U.S.C. § 794 (1994).

[FN57]. See 42 U.S.C. § 12201(a) (1994).

[FN58]. Although not all courts agreed that plaintiffs were ever entitled to jury trials under the Rehabilitation Act, the practice had moved in that direction by the time Congress passed the ADA in 1990. (Technically, either party can request a jury trial, but plaintiffs are typically the party that make the request because of the perception that juries are more likely to render larger awards than judges.) Thus, there is some case law under the Rehabilitation Act in which appellate courts review whether an issue should have gone to the jury. In addition, there is case law on whether an appealed issue under the Rehabilitation Act was factual in nature so that the "clearly erroneous" standard was the correct standard of review on appeal.

[FN59]. Although the cases decided under the Rehabilitation Act can offer guidance, some introductory words are necessary to understand this precedent fully. Appellate courts usually find it necessary to classify whether an issue is "factual" for two separate, although related, reasons. First, as discussed above, they must determine whether an issue is factual when they decide whether the court below erred in not sending it to the jury. Under the prevailing test, a factual issue upon which a genuine issue of material fact exists should go to the jury for resolution and is not appropriate for a summary judgment decision. See Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita v. Zenith Radio, 475 U.S. 574 (1986). Second, an appellate court must determine whether an issue is one of law or fact in determining what is the correct standard for appellate review. Legal issues are generally resolved de novo and factual issues are generally resolved under the clearly erroneous standard. Under this standard, an appellate judge should not set aside a factual finding unless it is "clearly erroneous." See Fed. R. Civ. P. 52(a). In cases where there has not been a jury trial, either because one was not available or one was not elected, the appellate court will still have to decide whether an appealed issue is one of fact or law in order to determine the correct appellate standard of review. The standard for determining whether an issue is one of fact or law is the same irrespective of whether an appellate judge is deciding whether to send a case to a jury or review it under the clearly erroneous standard.

[FN60]. 480 U.S. 273 (1987).

[FN61]. Id. at 287. There was no jury in the Arline case, so these were instructions to the lower court on how to make appropriate findings of fact for appellate review under the clearly erroneous standard.

[FN62]. I have attempted to survey all the section 504 cases that discuss whether issues are questions of fact or law. I am only aware of one case in which an appellate court considered the reasonable accommodation issue to be a mixed question of fact and law that should be reviewed de novo rather than under the clearly erroneous standard. See Carter v. Bennett, 840 F.2d 63, 64-65 (D.C. Cir. 1988).

[FN63]. See Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996).
[W]e have to conclude that [plaintiff] did provide enough evidence to reach the jury on the issue of perception which, as already noted, does constitute disability within the meaning of the Act .... The third element of plaintiff's case, that [plaintiff] was fired because of a disability, or that his disability was a motivating factor in City Metal's decision to fire him ... also was a question of fact for the jury.
Id. at 33.

[FN64]. See Teahan v. Metro-North Commuter R.R. Co., 951 F.2d 511, 520 (2d Cir. 1991) (finding that plaintiff's "status as

a current substance abuser as of April 11, 1988 is a question of fact that requires resolution on remand"; the issue of whether plaintiff is otherwise qualified "is also a question of fact that must be resolved on remand").

[FN65]. See Pandazides v. Virginia Bd. of Educ., 946 F.2d 345 (4th Cir. 1991).

[FN66]. See Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994).

[FN67]. See Brennan v. Stewart, 834 F.2d 1248, 1262 (5th Cir. 1988) (concluding that "our precedent requires that the 'reasonable accommodation' question be decided as an issue of fact--meaning, of course, that it is one for the trial court or jury, subject to 'clearly erroneous' ... review"); see also McGregor v. Louisiana State Univ., 3 F.3d 850 (5th Cir. 1993).
As we recognized in Brennan, whether a handicapped person is otherwise qualified, and consequently whether the accommodations are reasonable, are questions of fact .... So we can affirm the lower court's findings only if reasonable men could not differ from the conclusions that the [defendant] provided reasonable accommodations and [plaintiff] was not otherwise qualified.
Id. at 855.

[FN68]. See Tuck v. HCA Health Serv., Inc., 7 F.3d 465 (6th Cir. 1993).
[I]t is a question of fact for the jury whether the employment for the duration of the restricted duty time period consists of the light duties assigned in the restricted duty program indicating the employee was "otherwise qualified" to do the work once the light duty restriction was lifted .... We believe that the issue of what constituted the "duties required by the employment sought" was a question of fact for the jury to decide.
Id. at 470.

[FN69]. See Fedro v. Reno, 21 F.3d 1391, 1396 (7th Cir. 1994) ("Whether [[[[plaintiff] was qualified ... was a question of fact for the jury to decide.").

[FN70]. See Frye v. Aspin, 997 F.2d 426, 428-29 (8th Cir. 1993) (concluding that "reasonable accommodation" is ordinarily a question of fact, requiring an individualized inquiry, but that summary judgment was appropriate because plaintiff failed to create a factual dispute concerning the reasonableness of the offered accommodations).

[FN71]. See Oesterling v. Walters, 760 F.2d 859, 861 (8th Cir. 1985).

[FN72]. See Collings v. Longview Fibre Co., 63 F.3d 828, 835 (9th Cir. 1995) (considering whether plaintiff was disabled under Washington disability discrimination statute); Doe v. Attorney Gen., 44 F.3d 715 (9th Cir. 1995) (reviewing findings on whether plaintiff posed a significant risk to others and was otherwise qualified under the clearly erroneous standard).

[FN73]. See Jackson v. Veterans Admin., 22 F.3d 277, 281 (11th Cir. 1994) (citing Teahan v. Metro-North Commuter Railroad Co., 951 F.2d 511 (2d Cir. 1991), with approval on the fact/law issue).

[FN74]. See EEOC v. Boeing Co., 843 F.2d 1213, 1216 (9th Cir. 1988) ("The validity of a BFOQ turns upon factual findings, preferably ones by a jury."); see also Grant v. General Motors Corp., 908 F.2d 1303, 1311 (6th Cir. 1990) ("'It will be a rare case where the lawfulness of such a [BFOQ] policy can be decided on the defendant's motion for summary judgment.'" (quoting UAW v. Johnson Controls, Inc., 886 F.2d 871, 906 (7th Cir. 1989) (Posner, J., dissenting))).

[FN75]. See Evans v. McClain, Inc., 131 F.3d 957, 964 (11th Cir. 1997); see also Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997).

[FN76]. See Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1411 (9th Cir. 1996) ("Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury.").

[FN77]. See Ryther v. Kare 11, 84 F.3d 1074, 1086 (8th Cir. 1996).

[FN78]. See Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1045 (5th Cir. 1998).

[FN79]. See EEOC v. Hacienda Hotel, 881 F.2d 1504, 1512 (9th Cir. 1989).

[FN80]. Under the EEOC regulations, the term "substantially limits" means:
(i) Unable to perform a major life activity that the average person in the general population can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
29 C.F.R. app. § 1630.2(j)(1) (1998).

[FN81]. Under the EEOC regulations, the term "direct threat" means: "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Id. § 1630.2(r).

[FN82]. Under Title I of the ADA, the term "qualified individual with a disability" means: "[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994).

[FN83]. See id. § 12111(10) (defining "undue hardship").

[FN84]. See id. § 12102(2) ("The term 'disability' means, with respect to an individual -- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual ....").

[FN85]. See 29 C.F.R. app. § 1630.2(j) (1998).
The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.
Id.

[FN86]. Id.

[FN87]. See Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1998) ("In view of our holding, we need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA.").

[FN88]. See School Bd. v. Arline, 480 U.S. 273, 274 (1987).

[FN89]. For a historical discussion of this evolution, see Marcy J. Levine, Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court, 37 EMORY L.J. 171 (1988); Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 OHIO ST. L.J. 95 (1988).

[FN90]. 477 U.S. 242 (1986).

[FN91]. Id. at 256.

[FN92]. Id. at 257.

[FN93]. Id. at 249-50 (citations omitted).

[FN94]. Id. at 252.

[FN95]. The Court held that:
Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.
Id. at 255 (citation omitted).

[FN96]. Id. at 257 (emphasis added).

[FN97]. Id. at 252.

[FN98]. 376 U.S. 254 (1964).

[FN99]. See Anderson, 477 U.S. at 252-56.

[FN100]. See id. at 254.

[FN101]. See 42 U.S.C. § 12112 (1994) (general rule against discrimination).

[FN102]. See id. § 12111(9) (setting forth reasonable accommodation standard).

[FN103]. See id. § 12112(b)(5)(A) (providing defense if the "covered entity can demonstrate that the accommodation would impose an undue hardship").

[FN104]. See id. § 12113(b) (listing the direct threat rule as a "defense"). Defendants can also offer a defense that a rule is "job-related and consistent with business necessity." Id. § 12113(a).

[FN105]. Id. § 12112(d)(4)(A).
A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.
Id.

[FN106]. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

[FN107]. See, e.g., EEOC v. Amego, 110 F.3d 135 (1st Cir. 1997) (affirming summary judgment on direct threat issue); Soileau v. Guilford, 105 F.3d 12 (1st Cir. 1997) (disregarding a position of the EEOC, the court found that no reasonable jury

could conclude that the plaintiff had a substantial limitation of a major life activity although he had offered significant evidence to support his theory); Flynn v. Raytheon Co., 94 F.3d 640 (1st Cir. 1996) (unpublished table decision) (declining to send to the jury the question whether the plaintiff is no longer engaging in substance abuse).

[FN108]. In at least two cases, the Second Circuit failed to reverse lower courts' inappropriate use of summary judgment when factual disputes existed. See, e.g., Sinopoli v. Regula, 125 F.3d 844 (2d Cir. 1997) (unpublished table decision) (finding plaintiff's allegations of ridicule too conclusory and granting summary judgment, thereby precluding live testimony at trial); Curran v. All-Waste Sys., 133 F.3d 844 (2d Cir. 1997) (unpublished table decision) (rejecting argument that the timing of defendant's job offer to plaintiff should have raised a triable issue of fact as to whether a position had actually been available for which plaintiff was qualified before he filed suit).

[FN109]. See, e.g., Robinson v. Global Marine Drilling Co., 101 F.3d 35 (5th Cir. 1996) (finding that jury's verdict should be overturned as a matter of law because plaintiff did not present sufficient evidence of disability under any of the three available methods of proof); Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995) (substituting appellate court's evaluation of direct threat issue for that of the jury). The Daugherty opinion quoted from a Fifth Circuit unpublished opinion in which the court said: "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." Chandler v. City of Dallas, 2 F.3d 1385, 1395 (1993) (citing Collier v. City of Dallas, No. 86- 1010, slip op. at 3 (5th Cir. 1993)). This raises the question of why the Daugherty jury did not sympathize with the defendant-employer. If the jury can decide the question of negligence in the motor vehicle accident setting, then it should decide the question of acceptable risk in the ADA setting. The Daugherty holding is counter to a core requirement of the ADA--that decisions be made on an individualized basis. The direct threat rule is codified in the ADA as an individualized inquiry. See 42 U.S.C. § 12113(b) (1994) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." (emphasis added)); see also 29 C.F.R. app. § 1630.2(r) (1998) ("Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis.").

[FN110]. See, e.g., Roberts v. Unidynamics Corp., 126 F.3d 1088 (8th Cir. 1997) (overturning jury verdict in favor of plaintiff against both the employer and the union).

[FN111]. See, e.g., Bolton v. Scrivner, 36 F.3d 939 (10th Cir. 1994) (affirming summary judgment for defendant-employer on a very high threshold of proof standard). Subsequent to Bolton, summary judgment was granted (and affirmed on appeal) in 11 other Tenth Circuit cases on the issue of whether the plaintiff was substantially limited in a major life activity. See, e.g., Adams v. Strombecker Corp., 153 F.3d 726 (10th Cir. 1998) (unpublished table decision); Murphy v. United Parcel Serv., 141 F.3d 1185 (10th Cir. 1998) (unpublished table decision); Jackson v. Analyst Int'l Corp., 134 F.3d 382 (10th Cir. 1998) (unpublished table decision); Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1998); Siemon v. AT&T Corp., 117 F.3d 1173 (10th Cir. 1997).

[FN112]. See, e.g., Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998) (affirming grant of summary judgment for defendant-employer on issues of whether plaintiff was disabled and whether she had been provided with reasonable accommodation); Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278 (11th Cir. 1998) (affirming grant of summary judgment in reasonable accommodation case); Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997) (affirming grant of summary judgment in reasonable accommodation case); Moses v. American Nonwovens, 97 F.3d 446 (11th Cir. 1996) (affirming grant of summary judgment in reasonable accommodation and direct threat case).

[FN113]. Many of these examples involve individuals with AIDS. I have not deliberately chosen AIDS examples; they

simply provide good illustrations of some of the problems that I have discovered.

[FN114]. 477 U.S. 242 (1986).

[FN115]. 135 F.3d 1089 (6th Cir. 1998).

[FN116]. The ADA says that "a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability ... unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A) (1994).

[FN117]. See EEOC v. Prevo's Family Mkt., Inc., No. 1:95 CV446, 1996 WL 604984, at *6 (W.D. Mich. Aug. 27, 1996), rev'd in part, vacated in part, 135 F.3d 1089 (6th Cir. 1998).

[FN118]. See Prevo's Family Mkt., 135 F.3d at 1090-91.

[FN119]. The burden of proving that an examination is "job-related and consistent with business necessity" is on the defendant. In this particular case, the employer's defense for the medical examination requirement was that Mr. Sharp posed a direct threat at the workplace if he were HIV-positive. The direct threat rule is also a defense under the ADA and is listed in the "defenses" part of the statute. See 42 U.S.C. § 12113(b) (1994).

[FN120]. 137 F.3d 398 (6th Cir. 1998).

[FN121]. The defendant-employer justified its decision to remove the plaintiff from the operating room by arguing that he posed a "direct threat" to the health and safety of others. This argument is a listed defense under the ADA. See 42 U.S.C. § 12113(b) (1994). Under the applicable Center for Disease Control ("CDC") guidelines, the plaintiff would not pose a significant threat to the health of patients unless his hands would be in the body cavity of a patient in the presence of sharp instrumentation. See Borgess Med. Ctr., 137 F.3d at 403 (discussing CDC guidance). Testimony was offered on this issue, with the plaintiff testifying that he was unsure of hospital procedures or whether such circumstances ever occurred during his job. See id. at 404. The trial court, however, granted summary judgment on this issue, precluding the case from going to the jury. See Mauro v. Borgess Med. Ctr., 886 F. Supp. 1349, 1354 (W.D. Mich. 1995).

[FN122]. Judge Boggs argued that in a case in which the risk of injury to others can be quantified as somewhat smaller than .0024%, it is appropriate for the jury to determine whether this risk is "significant." See Borgess Med. Ctr., 137 F.3d at 409 (Boggs, J., dissenting).
More than a few people refuse to fly, though commercial airlines are said to be safe compared to other modes of transportation. There may be some people who refuse to cross streets. Others go bungee-jumping. So there is an inescapable normative component to the judgment of whether the chance that even a great peril will come to pass is "significant" or not.
Id. In addition, Judge Boggs argued that the significance of the risk will depend upon whether the fact finder believes that the plaintiff is particularly careful and takes all possible precautions to preclude risk to others. Whether the plaintiff took prescribed antiviral medications that might reduce his degree of contagiousness to others would also be an appropriate jury question. Yet none of these factual issues received discussion by the trial court because the judge simply concluded that plaintiff Mauro posed a significant risk as a matter of law. See id. at 411-12.

[FN123]. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (holding that a fact finder's disbelief of employer's proffered justification for the disciplinary employment action under Title VII does not compel a jury verdict for the plaintiff). Lower courts interpreting Hicks have recently wrestled with the question of whether a plaintiff is entitled to have a case sent

to the jury where the plaintiff has met the elements of the prima facie case of discrimination and offered evidence disputing the defendant's reason for the adverse job action. The Third Circuit has held: "[O]nce the court is satisfied that the evidence meets this threshold requirement [prima facie case plus evidence of pretext], it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer." Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc). The Fifth Circuit, by contrast, has held that proof of the elements of the prima facie case and proof of pretext are not always enough to get a case to the jury. See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). This debate about how much evidence of discrimination is necessary to go to the jury is at the forefront of Title VII litigation. (The Third and Fifth Circuit opinions, for example, were lengthy en banc decisions with vigorous dissents.) Because many of the ADA cases are resolved at a more preliminary stage--such as whether plaintiff has a disability or is qualified for the position in question--they do not frequently get to the stage of assessing whether there is sufficient proof of discrimination.

[FN124]. See, e.g., Runnebaum v. NationsBank, 123 F.3d 156 (4th Cir. 1997) (concluding as a matter of law that plaintiff's HIV status did not constitute a disability).

[FN125]. 53 F.3d 55 (4th Cir. 1995).

[FN126]. See id. at 56. Associational discrimination is explicitly prohibited by 42 U.S.C. § 12112(b)(4) (1994).

[FN127]. Ennis, 53 F.3d at 57.

[FN128]. Id. The appellate opinion does not state whether Ennis' insurance claims were one of those expensive cases, although the opinion implies that her son was healthy at the time of her discharge. See id. at 60. The appellate opinion is silent with respect to what course of treatment, if any, he was receiving and how expensive was that course of treatment. There is no reported trial court opinion.

[FN129]. Id. at 62 (citations omitted).

[FN130]. 123 F.3d 156 (4th Cir. 1997) (en banc).

[FN131]. The court held that "HIV infection is simply not an impairment: without symptoms, there are no diminishing effects on the individual." Id. at 168. That part of the court's decision would appear to be overruled by Bragdon v. Abbott in that the Supreme Court did conclude that Sidney Abbott, an individual with asymptomatic HIV infection, was entitled to summary judgment on the question of whether she was an individual with a disability. See Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998). Although the Court declined to rule that all individuals with HIV infection necessarily meet the definition of an individual with a disability, it clearly disapproved Runnebaum's holding that an asymptomatic individual can never be considered impaired or therefore disabled. The Fourth Circuit, therefore, erred in ruling as a matter of law on an issue that, at a minimum, should have gone to the jury for consideration.

[FN132]. Runnebaum introduced evidence that he informed a supervisor, Michael Brown, that he was HIV-positive. This information was relayed while they were at a nonbank-related social event. Brown described his reaction at his deposition:
And I can remember just thinking--I remember being in a state of panic, panic because I was thinking how am I going to work, you know and be a friend to somebody who is HIV positive .... But, you know, suppose he dies on me. Should I tell [Pettit] at this point, should I tell [NationsBank]? I remember feeling panicky, uncontrolled.
Runnebaum, 123 F.3d at 162.

[FN133]. Both Brown and Pettit testified at their depositions that Brown did not tell Pettit about Runnebaum's status until after she had decided to fire him. Pettit testified that Brown told her toward the end of November and that she made her decision at the beginning of November. Nonetheless, she made no record of her decision at that time and, as late as December 9, sent him a very complimentary note about his work performance. (Runnebaum was not notified that Pettit had problems with his work performance until January 7.) Runnebaum also introduced evidence that the bank knew he was HIV-positive because packages containing AZT, which were addressed to Runnebaum, were twice inadvertently opened by bank personnel. Id. at 162.

[FN134]. Runnebaum v. NationsBank, 95 F.3d 1285, 1297 (4th Cir. 1996).

[FN135]. Runnebaum, 123 F.3d at 188 (en banc) (Michael, C.J., dissenting (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

[FN136]. Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 62 (4th Cir. 1995).

[FN137]. 477 U.S. 242 (1986).

[FN138]. Id. at 252.

[FN139]. Ennis, 53 F.3d at 62; see also Runnebaum, 123 F. 3d at 163- 64 (en banc).

[FN140]. See Runnebaum, 123 F.3d at 187-88 (en banc) (Michael, C.J., dissenting).

[FN141]. The dual decisions in Ennis and Runnebaum give lower court judges significant latitude to grant motions for summary judgment despite the existence of state of mind issues and inferences that might favor the plaintiff. This trend to disregard inferential testimony mirrors a trend under Title VII. See 42 U.S.C. §§ 2000e1-2000e17 (1994). Although the majority view at one time under Title VII may have been that one could get a case to the jury solely with evidence of a prima facie case and evidence that the defendant's proffered reason for the adverse employment action was not the real reason, some courts now require additional proof. See, e.g., Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 442-45 (11th Cir. 1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993-95 (5th Cir. 1996); Woods v. Friction Materials, Inc., 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); see also Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 HASTINGS L.J. 57, 87-88 (1991). This trend of raising the threshold of proof to defeat a motion for summary judgment is also now arguably infecting the ADA.

[FN142]. See supra note 45 and accompanying text.

[FN143]. It may not be surprising that trial court judges used the summary judgment device with great frequency because it is one of the few tools for disposing of a case at the trial court level other than entering a jury's verdict or entering a summary dismissal. Most entries of verdict and summary dismissal will not be published. Thus, a database of available opinions will not include such cases. In further research, I hope to document all trial court outcomes, including jury verdicts and summary dismissals, so that I can better understand the significance of the high rate of summary judgments. Prior research, however, suggests that a failure to include such unpublished results actually skews the data in favor of defendants, because the rate of summary dismissals is much higher than the rate of verdicts for plaintiffs. See Siegelman & Donohue, supra note 26.

[FN144]. The ADA states that "Congress finds that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1) (1994). The ADA

also states that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2) (1994).

[FN145]. Id. § 12101(a)(2).

[FN146]. Id. § 12182(a).

[FN147]. See Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995).

[FN148]. Id. at 591.

[FN149]. See Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997).

[FN150]. See Bragdon v. Abbott, 118 S. Ct. 554 (1997) (mem.). The Court granted certiorari on three questions under the ADA:
(1) Is reproduction a major life activity, (2) Are asymptomatic individuals infected with HIV per se disabled, and (3) When deciding whether a private health care provider must perform invasive procedures on an infectious patient in his office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?
Petitioner's Brief, Bragdon v. Abbott, 115 S. Ct. 2196 (1998) (No. 97-156).

[FN151]. Bragdon v. Abbott, 118 S. Ct. 2196, 2209-10 (quoting Petition for Certiorari).

[FN152]. Id. at 2210.

[FN153]. Id. at 2213.

[FN154]. See 42 U.S.C. § 12102(2) (1994).

[FN155]. Id.

[FN156]. Bragdon, 118 S. Ct. at 2206.

[FN157]. See Abbott v. Bragdon, 912 F. Supp. 580 (D. Me. 1995).

[FN158]. Id. at 586.

[FN159]. Id. at 587.

[FN160]. In order to send the disability question to the jury, the trial court would have to conclude that there was a genuine issue of material fact on that issue. The trial court opinion states that Abbott was deposed. See id. One would expect defense counsel to have questioned Abbott about her desire to reproduce before becoming infected with HIV in order to question the credibility of her claim that her HIV status significantly affected her decision to reproduce. The trial court opinion, however, includes no excerpts from Abbott's deposition. One would have to read that deposition in order to assess whether the defendant could make a credible claim that there was a genuine issue of material fact on the disability issue. None of the briefs filed in the Supreme Court on behalf of Dr. Bragdon made reference to Abbott's deposition on the topic of her disability claim. It is possible that the defendant made a tactical error in this case by not challenging Abbott's assertions sufficiently at her depos-

ition, and thus failing to create a basis for disputing her assertions about reproduction. Once a plaintiff moves for summary judgment, the defendant has the burden to show a genuine issue of material fact by citing the deposition and other testimony. If the defendant completely failed to make any showing, then the Bragdon trial court may be correct in this instance. While credibility may be an issue sufficient to defeat a motion for summary judgment, the question in part is whether the defendant raised that issue. Based on the record available in this case, it is impossible to make that determination.

[FN161]. 42 U.S.C. § 12113 (1994) (listing direct threat rule under "defenses" section of ADA Title I).

[FN162]. See id. § 12182(b)(3) (direct threat rule for ADA Title III); see also 28 C.F.R. § 36.208 (1997) (requiring the public accommodation to make an "individualized assessment" to ascertain the "nature, duration, and severity of the risk").

[FN163]. See 42 U.S.C. § 12112(a) (1994) (setting forth general principle of nondiscrimination).

[FN164]. By failing to grant certiorari on questions number 4 and 5, the Supreme Court also lost an opportunity to clarify whether direct threat is an affirmative defense under ADA Title III, as it is under ADA Title I. See Bragdon v. Abbott, 118 S. Ct. 2196, 2209-10 (1998) (quoting Petition for Certiorari).

[FN165]. Id. at 2211.

[FN166]. Id. at 2212.

[FN167]. See id. at 2213 ("Resolution of the issue will be of importance to health care workers not just for the result but also for the precision and comprehensiveness of the reasons given for the decision."); see also id. at 2214 (Ginsburg, J., concurring) ("I further agree, in view of the 'importance [[[[of the issue] to health care workers,' ... that it is wise to remand, erring, if at all, on the side of caution.").

[FN168]. The Court concluded that
the proper course is to give the Court of Appeals the opportunity to determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk .... A remand will permit a full exploration of the issue through the adversary process.
See id. at 2213.

[FN169]. Alternatively, one could understand the Court's resolution of the disability issue as meaning that it considered HIV infection to be a per se disability, given the many profound ways that such an impairment affects one's life. The EEOC, in fact, takes that position in its interpretive guidance. See 29 C.F.R. app. § 1630.2(j) (1997). The Supreme Court, however, expressly refused to reach that issue. See Bragdon, 118 S. Ct. at 2207 ("In view of our holding, we need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA."). Had the Court relied on that rule, then it could have justified its decision not to send the disability issue to the jury by noting that a genuine issue of material fact could not exist on that issue given the inherent serious implications of HIV infection.

[FN170]. Risk assessments are particularly difficult kinds of assessments for judges or juries to make. Justice Breyer has argued that neither courts nor juries are qualified to make these assessments. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 58-59 (1993). Breyer's criticism, however, is mostly directed at how the regulatory system makes risk assessments. Although I have argued for deference to agency views in this Article, I am not suggesting that agencies should try to codify what is a "significant risk" under the ADA. While I recognize that lay people may not always make the best assessments of what kinds of risks should be considered significant, the kinds of

risks addressed by the ADA are not the highly technical sort that Breyer discusses under the Occupational Safety and Health Administration or the Environmental Protection Agency.

[FN171]. See supra Part II.C.

[FN172]. See Bragdon, 118 S. Ct. at 2209-10.

[FN173]. Id. at 2202.

[FN174]. See id. (quoting 42 U.S.C. § 12201(a) (1994)).

[FN175]. See supra Part II.A.

[FN176]. See Bragdon, 118 S. Ct. at 2207 (declining to rule that HIV infection is a per se disability; instead, relying on the individualized nature of the plaintiff's disability claim).

[FN177]. 467 U.S. 837 (1984).

[FN178]. Id. at 842.

[FN179]. Id. at 844.

[FN180]. See 42 U.S.C. § 12201(a) (1994).

[FN181]. See id. § 12116.

[FN182]. See id. In 1990, the EEOC issued an advance notice of proposed rulemaking in which it sought comments on the definition of terms like disability, reasonable accommodation, and undue hardship. See 55 Fed. Reg. 31,192 (1990). Seven months later, the EEOC published a notice of proposed rulemaking. See 56 Fed. Reg. 8578 (1991). This proposed rulemaking included both regulations and an appendix containing interpretive guidelines.

[FN183]. See 56 Fed. Reg. 35,726 (1991).

[FN184]. See Conrail v. Darrone, 465 U.S. 624, 634 (1984).

[FN185]. Compare 42 U.S.C. § 12111(9) (1994) (defining "reasonable accommodation") with 29 C.F.R. § 1613.704(b) (1998) (defining "reasonable accommodation"); see also Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 444 (1991).
Title I adopts the section 504 model for many provisions, but varies from it to some degree, particularly in adding a greater level of specificity. According to the Senate Committee report, Title II of the Act was largely an attempt to apply the prohibition against discrimination on the basis of disability set out in the section 504 regulations to all programs, activities, and services of state and local government.
Id. at 444.

[FN186]. See Burgdorf, supra note 185, at 444. It was the intent of Congress to work with the various agencies to preserve the intent of section 504.
Subsequent to enactment of the 1973 law, staff of the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor worked closely with representatives of Health, Educational, and Welfare (HEW), the Depart-

ment of Labor, and the Civil Service Commission to insure that implementation of the provisions of the Act would be accomplished in accordance with the intent of Congress. These meetings were generally useful and satisfactory. By-products of these discussions were the issuance on May 28 and July 2, 1974, by the Secretary of Health, Education, and Welfare of proposed regulations to implement the new Act which were in most respects reflective of underlying congressional intent, and the determination by the Committee that certain clarifying and perfecting changes in the Act would be required in order to permit the full implementation of Congressional intent.
S. REP. NO. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6376.
Nonetheless, Congress was not universally pleased with the regulations promulgated by federal agencies under section 504. See id. at app., reprinted in 1974 U.S.C.C.A.N. 6373, 6425-26 (letter from U.S. Senate Committee on Labor and Public Welfare to the Secretary of Labor expressing displeasure with the definition of "handicapped individual" as inappropriately narrow).

[FN187]. See 45 C.F.R. § 84.3(j)(1) (1978) (definition of "handicapped person"). This rule was adopted through notice and comment on May 4, 1977, see 42 Fed. Reg. 22,677 (1977), before section 504 was amended in 1978 to embody that definition of "handicapped person." See Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95- 602, § 122, 92 Stat. 2984 (codified as amended at 29 U.S.C. § 705(20) (1998).

[FN188]. 42 U.S.C. § 2000e1-2000e17 (1994).

[FN189]. 29 U.S.C. §§ 621-634 (1994).

[FN190]. The ADA contains a statement of findings and purpose in the statutory text. See 42 U.S.C. § 12101 (1994). The purpose of the ADA is to provide "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Id. § 12101(b)(2). Such language can be used to argue that the courts should interpret key definitional terms like "individuals with disabilities" broadly so that the 43 million Americans with disabilities can receive strong protection from discrimination. Because these findings and purpose are written directly into the statutory language, they are entitled to significant consideration under a plain meaning interpretation of the statute. Under Justice Scalia's view--that one should examine the statute holistically--the statutory text should be given meaning in light of Congress' clear statement of findings and purpose.
Not all judges consider a plain meaning approach inconsistent with a legislative history approach. Although Justice Scalia explores plain meaning without regard to legislative history, Justice Stevens considers plain meaning in light of the legislative history. See INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (Stevens, J.) ("The message conveyed by the plain language of the Act is confirmed by an examination of its history."). But see id. at 452-53 (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

[FN191]. Under the canons of statutory construction, remedial legislation should be intepreted broadly. See Peyton v. Rowe, 391 U.S. 54, 65 (1968) ("This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed."); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[R]emedial legislation should be construed broadly to effectuate its purposes."). Canons of construction, however, have been held in ill-repute by scholars, for example, WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION (1988) and judges, for example, Richard A. Posner, Statutory Interpretation--in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800, 806 (1983) ("You need a canon for choosing between competing canons, and there isn't any."). One reason for this disregard for statutory canons is that "there are two opposing canons on almost every point." Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395,

401 (1950). In particular, the remedial purpose canon is disfavored. See, e.g., East Bay Mun. Util. Dist. v. United States Dep't of Commerce, 142 F.3d 479, 484 (D.C. Cir. 1998) ("We have recently expressed our general doubts about the canon that remedial statutes are to be construed liberally, since virtually any statute is remedial in some respect."); Ober United Travel Agency, Inc. v. United States Dep't of Labor, 135 F.3d 822, 825 (D.C. Cir. 1998) ("[W]e have recognized that in a post-Chevron era such policy-oriented canons of statutory construction may not be used to evaluate agency interpretations of ambiguous statutes."); Bushendorf v. Freightliner Corp., 13 F.3d 1024, 1026 (7th Cir. 1993) ("It will not do to intone the hoary canon that remedial statutes are to be construed liberally. That is one of the least persuasive of the canons; in Contract Courier Services, Inc. v. Research & Special Programs Administration, 924 F.2d 112, 115 (7th Cir. 1991), we called it 'useless.'"). Despite the ill-repute of the remedial purpose canon, some courts have invoked it to interpret various statutes liberally, including civil rights statutes. See, e.g., Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 (3d Cir. 1994) ("We also bear in mind that, as remedial statutes, Title VII and ADEA should be liberally construed to advance their beneficent purposes."); Irvington Moore v. Occupational Safety & Health Review Comm'n, 556 F.2d 431, 435 (9th Cir. 1977). Other courts have described this canon as a "tie-breaker." See, e.g., Mechmet v. Four Seasons Hotels Ltd., 825 F.2d 1173, 1177-78 (7th Cir. 1987). Other courts have used this canon as a tool to resolve "close cases." See, e.g., Hale v. Marsh, 808 F.2d 616, 621 (7th Cir. 1986). Finally, some courts have used this canon as a guideline that must give way to contrary legislative intent. See, e.g., Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 (D.C. Cir. 1984).

[FN192]. The use of legislative history has its critics. Justice Scalia has suggested that young staffers may seek to transform obscure district court cases into the law of the land by planting language in congressional committee reports. See Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring). Even Judge Mikva, who is less skeptical of legislative history than Justice Scalia, acknowledges that colloquies on the floor of Congress are often not worthy of serious consideration. See Abner J. Mikva, A Reply to Judge Starr's Observations, 1987 DUKE L.J. 380, 384 (1987). Nonetheless, because the ADA was passed by an overwhelming margin, its legislative history is arguably entitled to significant weight. See Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring) (arguing that the drafting history is "useful to conscientious and disinterested judges" when a statute has "bipartisan support and has been carefully considered by committees familiar with the subject matter"). The House of Representatives approved the conference report on the ADA by a vote of 377-28 on July 12, 1990, and the Senate approved the conference report on July 13, 1990, by a vote of 916. See Congress Clears Sweeping Bill to Guard Rights of Disabled, CONG. Q. 2227 (July 14, 1990). Thus, the ADA is a consensus statute whose legislative history should arguably be given much deference.

[FN193]. Congress intended the definitions under the ADA to track the prior definitions contained in regulations promulgated by HHS or HEW under section 504 and the agencies have consistently followed that instruction. See generally Burgdorf, supra note 185, at 445-52 (discussing ADA legislative history and its relationship to prior HEW regulations).

[FN194]. 41 Fed. Reg. 17,871 (1976).

[FN195]. Id. § 1.

[FN196]. See Lane v. Pena, 518 U.S. 187, 206 n.8 (1996) (Stevens, J., dissenting). The responsibility for enforcing section 504 was subsequently transferred to the Secretary of HHS when HEW was divided into the Department of Education and the Department of Health and Human Services. See The Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified as amended at 20 U.S.C. §§ 3401-3510 (1994)).

[FN197]. 29 U.S.C. § 794 (1994).

[FN198]. See, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[FN199]. See, e.g., Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986).

[FN200]. 465 U.S. 624, 634 (1984).

[FN201]. Id.

[FN202]. 480 U.S. 273 (1987).

[FN203]. Id. at 279.

[FN204]. Id. at 279-80.

[FN205]. Id. at 280 n.5.

[FN206]. Professor William N. Eskridge, Jr., has explained the Supreme Court's deference to agency views as a matter of concern for congressional override. According to Eskridge, the 1987 "Congress (perhaps by veto-proof margins) favored a liberal approach to the Rehabilitation Act." William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation, 101 YALE L.J. 331, 403 (1991). According to Eskridge, what is important about this decision is the Court's concern of a congressional override, not that the Court considered it independently important to defer to agency views. Although Eskridge may be correct as a general matter in explaining how courts often decide difficult questions of statutory interpretation, this example does not fit his thesis as well. The litigants in Arline saw the case as addressing whether section 504 should cover individuals with AIDS, not only whether it should cover individuals with contagious diseases like tuberculosis. See Arline, 480 U.S. at 282 n.7. Given the hotly contested nature of the AIDS issue, particularly in 1987 when Arline was decided, it is hard to imagine that the Court calculated that Congress might override its views by veto-proof margins if it decided Arline differently.

[FN207]. See, e.g., James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 MICH. L. REV. 1 (1994).

[FN208]. Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(a) (1994).

[FN209]. See Pub. L. No. 92-261, 86 Stat. 107 (1972) (codified at 42 U.S.C. § 2000e-8 (1994)).

[FN210]. See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978). The order stated that the "Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order." Exec. Order No. 12,106, 44 Fed. Reg. 1053 § 5 (1979).

[FN211]. See 29 C.F.R. § 1604 (1966).

[FN212]. See 29 C.F.R. § 1605 (1967).

[FN213]. Id. § 1604.1.

[FN214]. Id. § 1604.3(a).

[FN215]. See EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988); EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981); Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1970). For example,

Griggs interpreted Title VII as forbidding tests having a disparate impact on the basis of race, "unless they are demonstrably a reasonable measure of job performance." Id. at 436. In reaching its decision, the Supreme Court relied on EEOC guidelines, concluding that the "administrative interpretation of the Act by the enforcing agency is entitled to great deference." Id. at 433-34. In a subsequent decision, the Supreme Court explained that it was deferring to the EEOC guidelines even though they were not promulgated pursuant to formal procedures established by Congress, because they constitute "[t]he administrative interpretation of the Act by the enforcing agency." Albermarle, 422 U.S. at 431.

[FN216]. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (rejecting EEOC position that Title VII applies extraterritorially to regulate employment practices of United States employers employing United States citizens abroad); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (rejecting EEOC guidelines on coverage of pregnancy-based discrimination under Title VII).

[FN217]. See, e.g., Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994) (overturning Gilbert); Civil Rights Act of 1991, id. § 2000e(f) (overturning Arabian Am.).

[FN218]. See Eskridge, supra note 206.

[FN219]. Professor Eric Schnapper has argued that
The lesson of the corrective legislation is that not only the holding in these cases, but their underlying methodology as well, were fatally flawed. The "plain language" cases, like the disasters at Gallipoli, Dieppe, and Dien Bien Phu, are important as illustrations of errors to be avoided in the future.
Eric Schnapper, Statutory Misinterpretations: A Legal Autopsy, 68 NOTRE DAME L. REV. 1095, 1103 (1993).

[FN220]. Section 628 of the ADEA specifically gave the Secretary of Labor authority to "issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter." 29 U.S.C. § 628 (1970). The Secretary's enforcement authority became effective eight days after the ADEA was enacted in 1967. See Pub. L. No. 90-202, § 15, 81 Stat. 607-08 (codified at 29 U.S.C. § 628 (1994)).

[FN221]. See Exec. Order No. 12,106, 43 Fed. Reg. 19,807 (1978).

[FN222]. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 760-61 (1979).

[FN223]. 492 U.S. 158 (1989).

[FN224]. Id. at 162-64.

[FN225]. See id. at 163 (quoting 29 U.S.C. § 623(f)(2) (1988)).

[FN226]. See Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1204 (S.D. Ohio 1986).

[FN227]. See Betts v. Hamilton County Bd. of Mental Retardation & Developmental Disabilities, 848 F.2d 692 (6th Cir. 1988).

[FN228]. See Betts, 492 U.S. at 158.

[FN229]. 434 U.S. 192, 203 (1977). The issue in McMann was the lawfulness of a mandatory retirement plan that pre-dated the passage of the ADEA. The Court ruled that such a plan could not be a subterfuge because plaintiffs could not establish

that the plan met the intent requirement embodied in the term "subterfuge." The plan failed to meet that requirement since the mandatory retirement rule was implemented before the ADEA became law. See id.

[FN230]. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 2(a), 92 Stat. 189 (1978) (codified as amended at 29 U.S.C. § 623 (1994)). For further discussion, see Brudney, supra note 207, at 97-99.

[FN231]. The cost-justification requirement had its genesis, in an interpretive bulletin issued by the Department of Labor in January 1969, as one of the ways through which an entity could establish that its benefit plan was not a subterfuge. See 29 C.F.R. § 860.120 (1970). In 1979, when the cost-justification rule was promulgated as a regulation, it became the exclusive means of escaping classification as a subterfuge. See 29 C.F.R. § 860.120 (1980).

[FN232]. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842 (1984).

[FN233]. Id. at 843.

[FN234]. Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989).

[FN235]. See id. at 172.

[FN236]. Chevron, 467 U.S. at 843 n.9.

[FN237]. Betts, 492 U.S. at 175.

[FN238]. Id.

[FN239]. Id. at 187 (Marshall, J., dissenting).

[FN240]. Id. at 194.

[FN241]. Id. at 185.

[FN242]. See Amendment to ADEA, 29 U.S.C. § 623(f)(2) (1994) (overturning Betts).

[FN243]. See 29 C.F.R. app. § 1630.2(j) (1998).

[FN244]. See id. § 1630.16(f).

[FN245]. See id. § 1630.15(d).

[FN246]. The Third Circuit has created two rules of law that are inconsistent with the EEOC's position and serve to take some ADA cases from the jury. In McNemar v. Disney Store Inc., 91 F.3d 610 (3d Cir. 1996), the court held that a plaintiff is estopped from claiming he is a qualified individual with a disability under the ADA if he has sought Social Security disability insurance benefits because his disability precludes him from working. The Third Circuit holds the minority view on this subject. This view has recently been questioned by one Third Circuit judge. See Krouse v. American Sterilizer Co., 126 F.3d 494 (3d Cir. 1997). The dominant view on this subject is that the Social Security Commission's definition of "disability" is not identical to that under the ADA. Under the ADA, one would ask whether an individual is qualified with reasonable accommodation. The reasonable accommodation inquiry is not part of the SSI test. Thus, other circuits have concluded that questions of whether an individual is qualified is a jury question in which the jury can consider the sworn statements that were

given to the Social Security Commission as one factor in the ultimate determination of disability. In reaching this conclusion, the Third Circuit had to disregard the position taken by the EEOC as amicus.

The Third Circuit has also adopted a per se rule for reasonable accommodation questions when collective bargaining agreements bar the accommodation requested by plaintiffs. See Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997). Although this per se view is the majority view in the circuits, it is inconsistent with the ADA's legislative history as well as the EEOC's position on this subject. The EEOC has stated in both its interpretive guidance and its Technical Assistance Manual that the terms of a collective bargaining agreement "may" be relevant to the question of whether an accommodation is reasonable, but the agency has not supported a per se rule of unreasonableness. See 29 C.F.R. app. § 1630.15(d) (1998); EEOC TECHNICAL ASSISTANCE MANUAL § 3.09, at III-16 (1998).

Despite disregarding the EEOC's position on two issues in order to create per se rules adverse to plaintiffs on issues of whether they are a qualified individual with a disability, the Third Circuit has recently decided to support one controversial EEOC guideline. In Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997), the Third Circuit decided to follow the mitigating measures guidance in determining whether an individual is disabled. The trial court had granted summary judgment to the defendant-employer in a case involving an individual with epilepsy. The plaintiff had suffered an epileptic seizure at work, was hospitalized for 17 days, and was given various restrictions by his physician for a five-and-a-half-month period. Taking a very narrow view of the meaning of "individual with a disability," the trial court had concluded that the plaintiff's six month restriction was temporary in nature and did not meet the "substantially limits" part of the statutory test. Concluding that the trial court "confuses the disease with its treatment," the court of appeals held that the decision should be reversed and the case remanded for jury determination on the issue of disability. See id. at 937.

The Third Circuit also instructed the trial court to follow the EEOC's mitigating measure guidance on remand. Nonetheless, like the other courts that have considered this issue, the Third Circuit misunderstood the status of the guidance, even in reaching that determination. It stated that "the EEOC's guidelines constitute an appendix to the regulations and therefore do not command the same degree of deference as the regulations themselves." Id. at 937. It then cited a Third Circuit case in which the relevant interpretive rules were not subject to public notice and comment procedures. The Third Circuit therefore reached the correct conclusion that the guidelines should be followed, but used an inappropriately high threshold of proof to reach that conclusion.

[FN247]. It is hard to characterize the Tenth Circuit's attitude toward EEOC regulations and guidance, except to say that it selectively applies them to the disadvantage of plaintiffs. In Smith v. Midland Brake, Inc., 138 F.3d 1304 (10th Cir. 1998), the Tenth Circuit affirmed a grant of summary judgment for a defendant-employer using a highly controversial interpretation of the EEOC regulations on reassignment as a reasonable accommodation. In a two to one decision, the three judge panel concluded that a plaintiff was only entitled to reassignment as a reasonable accommodation if he could perform the essential functions of his current position with accommodation. In such cases, the Tenth Circuit ruled, a plaintiff may seek reassignment where the accommodation would have posed an undue hardship on the employer. It reached that conclusion by relying heavily on the EEOC guidance that states "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship." Id. at 1308 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(o) (1998)). The dissent faults the majority for taking that one sentence out of context. But more importantly, the Tenth Circuit is not able to find support in the statutory language, legislative history, or case law outside its circuit for that unusual position.

While one might explain the result in Smith by saying that the Tenth Circuit believes strongly in the principle of regulatory deference, its earlier decision in Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997), runs counter to that view. In Sutton, the Tenth Circuit was the first circuit court to disavow the EEOC's mitigating measures rule. The case involved twins whose vision did not meet their employer's guidelines in its untreated state but, with lenses, was virtually normal. The court elaborated that it need not follow EEOC guidance because the agency's regulations were promulgated pursuant to the APA rather than the ADA. Yet a year later in Smith, it appeared to be enamored with EEOC guidance and felt compelled to give

meaning to one sentence of guidance that results in a decision contrary to the view of every other circuit that had considered the issue. Thus, it is unfortunately impossible to explain the Tenth Circuit's position without suggesting that it is applying or disregarding guidance for issue-outcome purposes.

[FN248]. 920 F. Supp. 792 (S.D. Mich. 1996).

[FN249]. See Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997).

[FN250]. See id. at 762 (quoting 42 U.S.C. § 12102(2)(A) (1994)).

[FN251]. 29 C.F.R. app. § 1620.2(j) (1998).

[FN252]. Gilday, 124 F.3d at 766-67.

[FN253]. Id. at 768.

[FN254]. Id. at 763 n.2 (citations omitted).

[FN255]. Id. at 766 (citations omitted).

[FN256]. 519 U.S. 452 (1997).

[FN257]. Id. at 461 (citation omitted).

[FN258]. See supra text accompanying notes 177-193.

[FN259]. 499 U.S. 144 (1991).

[FN260]. 136 F.3d 854 (1st Cir. 1998).

[FN261]. Id. at 856.

[FN262]. Id. at 859.

[FN263]. The Arnold court said:
We recognize that the EEOC interpretive guidelines are not controlling in the way that regulations promulgated pursuant to the Administrative Procedure Act, 5 U.S.C. § 552, are controlling. Nevertheless, such interpretive guidelines "'do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" They deserve at least as much consideration as a mere "internal agency guideline," which the Supreme Court has held is entitled to "some deference" as long as it is a permissible construction of the statute.
Id. at 864.

[FN264]. Id. at 866.

[FN265]. 477 U.S. 57 (1986).

[FN266]. See supra Part III.A.

[FN267]. See supra text accompanying notes 177-193.

[FN268]. Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998).

[FN269]. See id. at 2208-09.

[FN270]. See id. at 2209.

[FN271]. Section 12201(a) of the ADA instructs the courts to interpret the ADA no more narrowly than they or the administrative agencies previously interpreted section 504 of the Rehabilitation Act. The ADA specifically provides that "except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §§ 791-794(e) (1994)) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (1994).

[FN272]. See Bragdon, 118 S. Ct. at 2215 (Rehnquist, C.J., dissenting). Although the dissent referred to the pre-existing section 504 regulations, it never referred to the regulations promulgated by federal agencies to enforce the ADA pursuant to 42 U.S.C. § 12186(b). The majority, by contrast, referred both to section 12201(a), see 118 S. Ct. at 2202, and section 12186(b), see 118 S. Ct. at 2209.

[FN273]. See 42 U.S.C. § 12186(b) (1994 & Supp. II 1996).

[FN274]. See id. § 12116.

[FN275]. See Bragdon, 118 S. Ct. at 2209.

[FN276]. Id. at 2207 (citation omitted).

[FN277]. Id.

[FN278]. Id. at 2209.

[FN279]. See infra Part III.D.1.

[FN280]. See infra Part III.D.2.

[FN281]. See supra note 246 (discussing Third Circuit's consideration of the collective bargaining issue).

[FN282]. See supra Part III.C.

[FN283]. See supra Part III.B.2.

[FN284]. The EEOC guidance states: "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(h) (1998). Similarly, with respect to the substantial limitation requirement, the guidance states: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." Id. § 1630.2(j). Under the mitigating measures rule, one would ask whether an insulin-dependent diabetic is an individual with a disability without reference to the mitigating effects of medication on that individual's day-to-day life. Thus, a diabetic who would fall into a coma if he or she failed to take insulin would be an individual with a disability irrespective of whether a combination of medication, diet, and exercise might alleviate virtually all diabetic symptoms. See id.

[FN285]. See Runnebaum v. NationsBank, 123 F.3d 156 (4th Cir. 1997).

[FN286]. See Gilday v. Mecosta, 124 F.3d 760 (6th Cir. 1997).

[FN287]. See Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997).

[FN288]. See Arnold v. United Parcel Serv., Inc., 136 F.3d 854 (1st Cir. 1998); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998).

[FN289]. See Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997).

[FN290]. See Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998).

[FN291]. See Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997).

[FN292]. See Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996).

[FN293]. See Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1996).

[FN294]. Compare Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996) ("Arguably, on the other hand, had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity.") (emphasis added), with Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806 (5th Cir. 1997) (finding individual not disabled even if one disregarded mitigating measures). For the Fifth Circuit's current middle-ground position, see Washington v. HCA Health Servs., Inc., 152 F.3d 464 (5th Cir. 1998).

[FN295]. See, e.g., Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982) (diabetes); Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981) (epilepsy); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988) (diabetes); Salmon Pineiro v. Lehman, 653 F. Supp. 483 (D.P.R. 1987) (epilepsy); Martin v. Cardinal Glennon Memorial Hosp. for Children, 599 F. Supp. 284 (E.D. Mo. 1984) (diabetes); Chaplin v. Consolidated Edison Co. of N.Y., 579 F. Supp. 1470 (S.D.N.Y. 1984) (epilepsy); Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981) (epilepsy); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809 (E.D. Pa. 1977) (epilepsy).

[FN296]. But see Mackie v. Runyon, 804 F. Supp. 1508, 1510 (M.D. Fla. 1992) (finding individual with mental illness not substantially limited in one or more major life activities because medication stabilized her condition).

[FN297]. See Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 859-60 (1st Cir. 1998) (surveying legislative history).

[FN298]. See 29 C.F.R. app. § 1630.2(j) (1998).

[FN299]. Id. at 8593.

[FN300]. 56 Fed. Reg. 35,726, 35,727 (1991).

[FN301]. Id. at 35,741.

[FN302]. Pursuant to a Freedom of Information Act request, the EEOC produced 41 comments on the subject of mitigating

measures from disability rights groups; federal, state, and local governments; private employers and unions. See Correspondence from EEOC to Ruth Colker (July 21, 1998) (on file with author). Nearly all the comments supported the need for a mitigating measures rule in the interpretive guidance. For example, the American Federation of State, County and Municipal Employees, AFL-CIO submitted lengthy comments in which it supported a mitigating measures rule. It explained that without such a rule, "persons with traditional disabilities who are functioning well because of assistive devices or equipment or medication or reasonable accommodations, or simply because the disability is in remission or the individual with the disability has learned to minimize or eliminate the effects of the disability" would be excluded from statutory coverage. Comment No. 91-0661-ADA at 3, submitted Apr. 29, 1991 (on file with author).
Only two adverse comments were received. Edison Electric Institute filed comments on Apr. 29, 1991, stating that,
[i]t should be made clear that if an individual, through the use of an aid, an appliance, or the taking of medication, can work despite a disabling condition, but the individual is unwilling to utilize such an aid or appliance, or to follow a regular course of medication, that individual should not be 'substantially limited' from the 'major life activity' of working.
Comment No. 91-0405-ADA at 8, submitted Apr. 29, 1991 (on file with author). Similarly, the Associated General Contractors of Virginia, Inc., submitted comments on Apr. 17, 1991 in which they stated that, "'impairments' do not include readily correctable medical conditions." Comment No. 91-0114-ADA at 2, submitted Apr. 17, 1991 (on file with author). Despite these adverse comments, the comments provided overwhelming support for the EEOC's ultimate mitigating measures position.

[FN303]. See AMA v. United States, 887 F.2d 760 (7th Cir. 1989); National Black Med. Coalition v. FCC, 791 F.2d 1016 (2d Cir. 1986).

[FN304]. 480 U.S. 273 (1987).

[FN305]. See id. at 280 n.5.

[FN306]. Id.

[FN307]. See generally Recent Case, 111 HARV. L. REV. 2456 (1998).

[FN308]. 42 U.S.C. § 12201(c) (1994).

[FN309]. See supra Part III.B.2.

[FN310]. Courts disagree whether to defer to the legislative history of the ADA in deciding how to interpret the subterfuge clause, but no court has suggested that the history is ambiguous. For example, the Eighth Circuit has said:
[W]e are unpersuaded by the legislative history Krauel offers us, in the form of statements by a few individual members of Congress, on the definition of subterfuge. Congress enacted section 501(c)(3) on July 26, 1990, after the Supreme Court's decision in Betts. See Pub. L. No. 101-336, 104 Stat. 327. Had Congress intended to reject the Betts interpretation of subterfuge when it enacted the ADA, it could have done so expressly by incorporating language for that purpose into the bill that Congress voted on and the President signed. We thus decline to employ the proffered legislative history as a basis for rejecting the Betts definition of subterfuge as controlling the meaning of the term in section 501(c).
Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679 (8th Cir. 1996).
It is true that four members of Congress made statements in the Congressional record rejecting the Supreme Court's interpretation of the term "subterfuge" under the ADEA. See 136 CONG. REC. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards); 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); 136 CONG. REC. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman); 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen.

Kennedy). However, key House and Senate reports also rejected the ADEA interpretation of subterfuge. See H.R. REP. NO. 101-485, pt. 3, at 70 (1990); S. REP. NO. 101-116, at 85 (1989).

[FN311]. See RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY-BASED DISCRIMINATIONNNNN 618 (2d ed. 1998) (reprinting EEOC guidance).

[FN312]. See Ford v. Schering-Plough Corp., 145 F.3d 601, 611 (3d Cir. 1998).

[FN313]. See Krauel, 95 F.3d at 679.

[FN314]. See Moderno v. King, 82 F.3d 1059, 1064 (D.C. Cir. 1996).

[FN315]. See, e.g., Pallozzi v. Allstate Life Ins. Co., 998 F. Supp. 204, 208 n.8 (N.D.N.Y. 1998); Conner v. Colony Lake Lure, No. 4-97CVO1, 1997 WL 816511, at *9-*10 (W.D.N.C. 1997); Leonard F. v. Israel Discount Bank, 967 F. Supp. 802, 806 (S.D.N.Y. 1997); Piquard v. City of East Peoria, 887 F. Supp. 1106, 1125 (C.D. Ill. 1995).

[FN316]. The Sixth Circuit initially adopted the EEOC's position, see Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 193-94 (6th Cir. 1996), but withdrew that position in its en banc decision, see Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 n.7 (6th Cir. 1997) (en banc).

[FN317]. See Lewis v. Aetna Life Ins. Co., 7 F. Supp.2d 743, 746-47 (E.D. Va. 1998); Doe v. Mutual of Omaha Ins. Co., 999 F. Supp. 1188, 1195 (N.D. Ill. 1998); Chabner v. United of Omaha Life Ins. Co., 994 F. Supp. 1185, 1193 (N.D. Cal. 1998); Attar & Attar v. Unum Life Ins. Co., No. CA 3-96-CV-0367-R, 1997 WL 446439, at *12 (N.D. Tex. 1997); World Ins. Co. v. Branch, 966 F. Supp. 1203, 1207-08 (N.D. Ga. 1997); Cloutier v. Prudential Ins. Co., 964 F. Supp. 299, 306 (N.D. Cal. 1997); Hollander v. Paul Revere Life Ins. Co., No. 96 CIV.4911 (BSJ), 1997 WL 811531, at *2 (S.D.N.Y. 1997); Doukas v. Metropolitan. Life Ins. Co., 950 F. Supp. 422, 430-31 (D. N.H. 1996).

[FN318]. One of the best examples of this trend is Doukas, 950 F. Supp. at 422. Doukas was the first court to publish an interpretation of the subterfuge clause in the ADA. It was aware of the Supreme Court precedent under the ADEA for interpreting that term, but decided to reject it because "this case presents one of those perhaps rare situations when the legislative intent is so clearly and unmistakably expressed that it can overcome the customary meaning of the words within the statute." Id. at 431. The court made no reference to the EEOC's position on this issue, although the EEOC's guidelines had been published for more than two years before this case was decided.

[FN319]. Congress, when enacting the ADA, expressly declined to apply Betts to the ADA's definition of "subterfuge," explaining that:
The term "subterfuge" is used in the ADA simply to denote a means of evading the purposes of the ADA. It does not mean that there must be some malicious intent on the part of the insurance company or other organization, nor does it mean that a plan is automatically shielded because it was put into place before the ADA was passed. Indeed, there is currently a bill moving through Congress to overturn the Betts decision and we have no intention of repeating a decision with which we do not agree.
136 CONG. REC. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards); see also 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); 136 CONG. REC. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman); 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

[FN320]. McMann held that benefit plans that pre-dated the passage of the ADEA could never constitute a subterfuge. See

United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

[FN321]. 29 C.F.R. app. § 1630.16(f) (1998).

[FN322]. Betts held that the term "subterfuge" could not be interpreted to impose a cost-justification requirement on a defendant. See Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 175 (1989). For a careful discussion of the difference between the use of the term "subterfuge" under the ADEA and the ADA, see Brudney, supra note 207, at 99 n.395.

[FN323]. 29 C.F.R. app. § 1630.16(f) (1998). In other words, in order to avoid being considered an unlawful subterfuge, a disability-based insurance distinction requires a cost justification.

[FN324]. See Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 8578, 8603 (1991) (to be codified at 29 C.F.R. pt. 1630).

[FN325]. See COLKER & TUCKER, supra note 311, at 618.

[FN326]. See id. at 475-76.

[FN327]. Professor Eskridge has argued that the Supreme Court is more likely to be attentive to current legislative expectations than original legislative expectations when rendering interpretations of statutes. Eskridge, supra note 206, at 415. In particular, he argues that the Court looks over its shoulder at the possibility of a congressional override. Id. at 403. If his description of judicial conduct is accurate, then we should expect the Supreme Court to adhere to Congress' intentions under the ADA with respect to the meaning of the term subterfuge, because Congress has twice displayed its willingness to overturn a narrow interpretation of subterfuge.

[FN328]. Overturning Betts was part of a pattern in which Congress overturned narrow interpretations of civil rights laws issued by the Supreme Court. See generally Eric Schnapper, Statutory Misinterpretations: A Legal Autopsy, 68 NOTRE DAME L. REV. 1095 (1993). Professor Schnapper has argued that "[t]he lesson of the corrective legislation is that not only the holding in these cases, but their underlying methodology as well, were fatally flawed." Id. at 1103. If Schnapper is correct, then the Supreme Court should not insist on its Betts holding when it eventually considers the proper interpretation of the term "subterfuge" under the ADA.

[FN329]. It is interesting to note, however, that the next generation of ADA cases might continue to misuse these two devices, while not producing the disparate results reported in this Article. Plaintiff lawyers may start to make more conservative judgments about whether to bring ADA cases once they become more aware of these results. Those conservative judgments, in turn, should affect judicial outcome. It is only because I have been able to study the results before those results are well-known that I can connect the results to the misuse of certain devices by judges. The fact that the results are balanced, however, would not necessarily mean that those devices are not being misused. My conclusion that these devices are being misused results from my careful reading of the cases rather than the statistics themselves.

[FN330]. 29 U.S.C. § 794 (1994).

[FN331]. 42 U.S.C. § 2000e1-2000e1717 (1994).

[FN332]. 29 U.S.C. §§ 621-634 (1994).

[FN333]. I hope to report in a subsequent article whether judges tend to have equally negative (or positive) views of various

types of claims brought in the same lawsuit.

[FN334]. Bragdon was a Title III case, not an employment discrimination case. Based on my conversations with lawyers practicing in the field and my general review of the cases, I believe these cases may generally be more successful than employment discrimination cases. I will explore that hypothesis more fully in a subsequent article.

[FN335]. See Brudney, supra note 31.

[FN336]. "No Opinion" means that the court issued a decision without any explanation whatsoever.

[FN337]. "Unpublished Copy" means the court issued a decision with explanation but did not make that decision available to the public through electronic or other sources.

[FN338]. "Westlaw" means the court issued a decision with explanation which was made available on Westlaw but not in the official federal reporter.

[FN339]. "Federal Reporter" means the court issued a decision with explanation which was made available through the official reporter.

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