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## Those Lost but Not Forgotten: Applicants with Severe Disabilities, Title I of the ADA, and Retail Corporations

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## NOTE

### THOSE LOST BUT NOT FORGOTTEN: APPLICANTS WITH SEVERE DISABILITIES, TITLE I OF THE ADA, AND RETAIL CORPORATIONS

#### I. INTRODUCTION

Throughout American history, individuals with severe disabilities have been seen as “inauthentic workers,” thereby automatically denied consideration in employment opportunities.<sup>1</sup> With the enactment of the Americans with Disabilities Act (the “ADA”)<sup>2</sup> Congress sought to eliminate the misconceptions prevalent among employers.<sup>3</sup> Unfortunately, congressional intentions have fallen short and biases continue to be widespread.<sup>4</sup> Even though the issue endures, many question the importance of finding employment for individuals with disabilities—let alone those with severe disabilities—when injustices exist in so many areas of their lives.<sup>5</sup> However, working is significant because it provides individuals with severe disabilities a sense of self worth and independence, while making them feel valued in the community.<sup>6</sup> It is this combination of factors which makes finding and

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1. See Michael E. Waterstone & Michael Ashley Stein, Review Essay, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1361-62 (2008).

2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

3. See *id.* § 12101(b).

4. Congress realized that biases were prevalent and needed to be eradicated from the workplace, and further realized while enacting the ADA Amendments Act of 2008 (the “ADAAA”) that these biases were still prevalent. See ADA Amendments Act of 2008, § 2(b)(1), 122 Stat. at 3554 (finding that one of the purposes of the ADAAA was to broaden “the scope of protection to be available under the ADA”).

5. See H.R. REP. NO. 101-485(II), at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 323 (detailing the ways in which people with disabilities were excluded from society based on “good intentions” and “self evident” propositions (internal quotation marks omitted)).

6. See *Community FAQs*, NAT’L INST. FOR THE SEVERELY HANDICAPPED, [http://www.nish.org/NISH/Rooms/DisplayPages/LayoutInitial?Container=com.webridge.entity.Entity\[OID\[3F0721059E660747BD94D392659F9B02\]\]](http://www.nish.org/NISH/Rooms/DisplayPages/LayoutInitial?Container=com.webridge.entity.Entity[OID[3F0721059E660747BD94D392659F9B02]]) (last visited Apr. 20, 2012) (finding that

creating employment opportunities essential. Aptly stated: “[n]ot working is perhaps the truest definition of what it means to be disabled.”<sup>7</sup>

While biases persist, some businesses have taken affirmative steps to employ individuals with severe disabilities.<sup>8</sup> In particular, large retail corporations have made such efforts.<sup>9</sup> Considering these employers, the legislation itself, and subsequent court decisions reveals that applicants with severe disabilities are “qualified” for many of the positions these retailers offer.<sup>10</sup> Further, these employers report success in their employment of individuals with severe disabilities.<sup>11</sup> With a focus on these corporation’s experiences, efforts to integrate applicants with severe disabilities into the totality of American employment can be made.<sup>12</sup>

The way to effectuate change and create employment opportunities for Americans with severe disabilities is through educating employers.<sup>13</sup> The best way to educate employers is through actions taken by the executive branch of the federal government.<sup>14</sup> The executive has already made passive efforts—which have produced few results—to educate employers, including holding summits, engaging in business dialogues, and organizing think tanks.<sup>15</sup> But, rather than these passive efforts, the executive must aggressively enforce Title I of the ADA (“Title I”) through the Equal Employment Opportunity Commission (the “EEOC”) and “lessons learned”<sup>16</sup>—which are effectuated by fully prosecuting and

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severely disabled workers benefit “in terms of self-esteem, value to the community, [and] increased independence”).

7. Francine J. Lipman, *Enabling Work for People with Disabilities: A Post-Integrationist Revision of Underutilized Tax Incentives*, 53 AM. U. L. REV. 393, 398 (2003) (alteration in original) (quoting Bob Dole, *Are We Keeping America's Promises to People with Disabilities?—Commentary on Blanck*, 79 IOWA L. REV. 925, 928 (1994)) (internal quotation marks omitted).

8. See, e.g., Press Release, Walgreens Co., Walgreens Recognized as Private-Sector Employer of the Year for People with Disabilities (Apr. 15, 2010), available at <http://www.iminers.com/render.php?eid=138235437&symbol=WAG&whichmodule=portal> (describing Walgreens’s efforts to employ applicants with disabilities, such as individuals with mental retardation and vision impairment, and the benefits Walgreens has seen thus far).

9. See, e.g., *id.*

10. See *infra* Part IV.A. See also ADA Amendments Act of 2008, 42 U.S.C. § 12111(8) (2006 & Supp. II 2009) (defining “qualified individual” as someone who “can perform the essential functions”).

11. See Arthur Kimball-Stanley, *Disabled Employees Find Jobs at CVS Are a Good Fit*, PROVIDENCE J., Nov. 26, 2006, at H2 (finding that CVS experienced positive benefits from employing those with severe disabilities).

12. See *infra* text accompanying notes 350–54.

13. See *infra* text accompanying notes 246–54.

14. See *infra* Part V.A.

15. See *infra* text accompanying notes 270–85.

16. “Lesson learned” is a term used in this Note to describe a scenario where an employer

publicizing Title I claims, and, most vitally, demanding in settlement negotiations and court orders that violators have ADA compliance trainings, collect data, and initiate alliances with the executive.<sup>17</sup>

As a preliminary matter, this Note focuses on individuals with severe disabilities—an ambiguous term which needs to be defined. The U.S. Census Bureau considers an individual “who is unable to perform one or more activities, or who uses an assistive device to get around, or who needs assistance from another person to perform basic activities” to have a severe disability.<sup>18</sup> This definition includes both physical and mental disabilities.<sup>19</sup> For the purposes of this Note, the definition will be narrowed in two respects. First, the severe disability must be overt. A disability is overt in the sense that the employer is immediately aware the applicant is disabled.<sup>20</sup> Without this immediate awareness employers would have no reason to discriminate based on the applicant’s disability. Second, this narrowed definition includes a desire to work and actual efforts to seek employment. This is necessary because some individuals with severe disabilities are unable, due to mental and physical constraints, to work.<sup>21</sup> Hence, with this addition, it is assumed that the individual is employable.

This Note works to systematically deconstruct the issues applicants with severe disabilities face in an effort to structure an effective and efficient solution. Part II of this Note examines the history of the ADA. Next, Part III reviews the research, the issues with this research, and the realities applicants with severe disabilities face. Part IV, focusing on large retail corporations, finds that applicants with severe disabilities are qualified for many positions and actually provide benefits to employers. Part V then argues that the solution to increasing the employment of

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learns from the negative implications of a case brought against it. These implications can include attorney’s fees and negative publicity. See, e.g., Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 335 (2008) (discussing, briefly, the negative publicity employers receive from Title I violations).

17. See *infra* Part V.B.

18. U.S. BUREAU OF THE CENSUS, CENBR/97-5 CENSUS BRIEF: DISABILITIES AFFECT ONE-FIFTH OF ALL AMERICANS (1997) [hereinafter CENSUS BRIEF], available at <http://www.census.gov/prod/3/97pubs/cenbr975.pdf>.

19. See *id.* Examples of these disabilities are endless and include “difficulty performing certain functions (seeing, hearing, talking, walking, climbing stair and lifting and carrying), or . . . difficulty performing activities of daily living, or . . . difficulty with certain social roles (doing school work for children, working at a job and around the house for adults).” *Id.*

20. This modification mirrors the definition of “overt” found in *Black’s Law Dictionary*: “open and observable; not concealed or secret.” BLACK’S LAW DICTIONARY 1214 (9th ed. 2009).

21. See Richard V. Burkhauser & David C. Stapleton, *Introduction to THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 2* (David C. Stapleton & Richard V. Burkhauser eds., 2003). Some people with disabilities have no “meaningful alternative” other than to remain unemployed. *Id.*

Americans with severe disabilities is through education, which can be accomplished through aggressive enforcement of Title I. Finally, Part VI concludes.

## II. UNPACKING THE HISTORY, INTENT, AND LANGUAGE OF TITLE I

The disability rights movement came to a forefront with the passage of the ADA in 1990.<sup>22</sup> Prior to the ADA's passage, people assumed individuals' disabilities made them inferior, thus justifying their exclusion from society.<sup>23</sup> Congress hoped the ADA would "provide a clear and comprehensive national mandate" to end such discrimination.<sup>24</sup> To clarify its intentions and expand its coverage, the ADA was amended by the ADA Amendments Act of 2008 (the "ADAAA").<sup>25</sup>

While the ADA discusses exclusion in general terms, Title I focuses on the workplace.<sup>26</sup> It was intended not only to eliminate exclusion from the workplace, but also to eliminate the pervasive misconceptions, biases, and prejudices which existed.<sup>27</sup> As written, Title I prohibits employers from discriminating against "qualified individual[s] on the basis of disability."<sup>28</sup> A qualified individual is an applicant "who, with or without reasonable accommodation," is able to execute "the essential functions of the . . . position."<sup>29</sup> This single prohibition contains numerous phrases which need to be unpacked and defined in order to understand the obligations, rights, and responsibilities stemming from Title I.

To begin, it is essential to define disability. The ADA's definition of disability is expansive.<sup>30</sup> It includes an impairment that substantially limits a major life activity and a history or a belief by an employer that

22. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (2006), *amended by* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

23. H.R. REP. NO. 101-485(II), at 41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 323. One example of this exclusion was a public school's effort to prohibit students with mental retardation from educational facilities, thereby denying these students an education. *See* Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (1971).

24. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1).

25. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3)–(8), 122 Stat. 3553, 3553-54 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2009)).

26. H.R. REP. NO. 101-485(II), at 33, *reprinted in* 1990 U.S.C.C.A.N. at 315.

27. *Id.* at 30-31, 1990 U.S.C.C.A.N. at 312.

28. ADA Amendments Act of 2008, 42 U.S.C. § 12112(a).

29. *Id.* § 12111(8).

30. *See id.* § 12102(1). "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . ." *Id.*

the individual has such an impairment.<sup>31</sup> Major life activities range from reading to breathing and the ailments incorporated into this definition span from diabetes to alcoholism.<sup>32</sup> The ADAAA further expanded this definition.<sup>33</sup> It overruled Supreme Court decisions narrowly interpreting disability, including *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*<sup>34</sup> and *Sutton v. United Airlines, Inc.*<sup>35</sup> Within the ADAAA, Congress explicitly stated that disability must “be construed in favor of broad coverage.”<sup>36</sup>

Next, “essential functions” are the skills fundamental, not simply marginal, to the position in question.<sup>37</sup> To determine essential functions, courts give great deference to the job descriptions posted by employers.<sup>38</sup> Therefore, if a particular applicant is unable to perform the tasks required within the job description, courts will find that the applicant lacked the essential functions.<sup>39</sup> This determination leaves the applicant outside of Title I’s protection.<sup>40</sup>

Moving forward, “reasonable accommodation” is an open concept which has led to varying interpretations within the courts.<sup>41</sup> Due to the massive costs employers feared, reasonable accommodations have arguably been the most controversial portion of Title I.<sup>42</sup> Examples of

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31. *Id.*

32. See Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 430-31 (2010) (discussing the definition of disability and its range from diabetes to monocular vision).

33. ADA Amendments Act of 2008, 42 U.S.C. § 12102(2)(A).

34. 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.). *Toyota* equated “substantially limited” to “significantly restricted.” *Id.* at 200.

35. 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.). *Sutton* held that mitigatory measures were to be considered when analyzing “impairment.” *Id.* at 482.

36. ADA Amendments Act of 2008, 42 U.S.C. § 12102(4)(A).

37. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998).

38. See JOB ACCOMMODATION NETWORK, ACCOMMODATION AND COMPLIANCE SERIES: JOB DESCRIPTIONS 4 (2010) [hereinafter JOB DESCRIPTIONS], available at <https://askjan.org/media/downloads/JobDescriptionsA&C.pdf> (describing how qualifications given by employers are given deference by the court).

39. Gerald T. Holtzman et al., *Reasonable Accommodation of the Disabled Worker—A Job for the Man or a Man for the Job?*, 44 BAYLOR L. REV. 279, 288 (1992).

40. See ADA Amendments Act of 2008, 42 U.S.C. § 12112(a)(2). This is because Title I only applies to “qualified individuals.” *Id.*

41. Steven F. Stuhlberg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311, 1336 (1991).

42. See Samuel R. Bagenstos, Review Essay, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 556 (2004) (discussing the fears associated with reasonable accommodations).

reasonable accommodations are endless and range in expense.<sup>43</sup> Included within reasonable accommodations are modified work schedules, policies, and reassignment—all of which are relatively inexpensive to implement.<sup>44</sup> More costly accommodations include providing specialized equipment, qualified readers, interpreters, and personal assistants.<sup>45</sup> However, accommodations are not reasonable if they require modification of the essential functions of the position, are personal needs items, or would require the creation of an entirely new position.<sup>46</sup>

Finally, “undue hardship,” like reasonable accommodation, is an open concept which has led to radical variations among courts.<sup>47</sup> Undue hardship is a defense employers can utilize against any burdensome or irrational accommodation.<sup>48</sup> In determining whether an accommodation will result in an undue hardship, courts will consider the business’s size, financial resources, type, nature, and location, as well as the type and nature of the accommodation.<sup>49</sup> After this brief and systematic unpacking of the terminology, the obligations, rights, and responsibilities under Title I become clearer. With this clarity, the complexities and issues related to Title I can be properly analyzed.

### III. FAILING THOSE WITH SEVERE DISABILITIES: COMPARING RESEARCH AND REALITY

As was Congress’s intent, the ADA’s definition of disability is expansive.<sup>50</sup> Many have criticized this definition as being overly broad.<sup>51</sup>

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43. See, e.g., JOB ACCOMMODATION NETWORK, EMPLOYERS’ PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT 6, 23 (2009) [hereinafter ACCOMMODATION AND COMPLIANCE], available at <http://askjan.org/ERguide/ERGuide.pdf> (providing examples of reasonable accommodations and the different types of accommodations employers must pay for).

44. See *id.* at 6.

45. See *id.* at 23.

46. *Id.* at 17.

47. Stuhlbarg, *supra* note 41, at 1336 (finding that courts radically disagree as to when an accommodation becomes an undue hardship).

48. ADA Amendments Act of 2008, 42 U.S.C. § 12111(10)(A) (2006 & Supp. II 2009).

49. *Id.* § 12111(10)(B).

50. See *id.* § 12102(4)(1)(A). This definition includes fifty-three million Americans. PRESIDENTIAL TASK FORCE ON EMP’T OF ADULTS WITH DISABILITIES, PEOPLE WITH DISABILITIES: STRENGTHENING THE 21ST CENTURY WORKFORCE 9 (2002) [hereinafter PEOPLE WITH DISABILITIES], available at [http://www.workworld.org/ptfead/ptfead\\_2002.pdf](http://www.workworld.org/ptfead/ptfead_2002.pdf). The plethora of disabilities include ranges from mental retardation to alcoholism. See Cox, *supra* note 32, at 430-31; *Americans with Disabilities Act: Questions and Answers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.ada.gov/q&aeng02.htm> (last updated Nov. 14, 2008).

51. See, e.g., Kate S. Arduini, Note, *Why the Americans with Disabilities Act Amendments Act Is Destined to Fail: Lack of Protection for the “Truly” Disabled, Impracticability of Employer Compliance, and the Negative Impact It Will Have on Our Already Struggling Economy*, 2 DREXEL

In an attempt to determine the effects of the ADA, most research has melded itself into this definition.<sup>52</sup> The issue with both the ADA and this research is that it fails to differentiate between disabilities.<sup>53</sup> This failure could lead to a focus on the more prevalent non-severe disabilities and the issues related to such. With a focus on non-severe disabilities, the realities faced by those with severe disabilities remain concealed.

### A. *The Focus and Findings of Past and Present Research*

The research thus far, focusing on the broad definition of disability, has shown a general decline in the employment levels of those with disabilities and low accommodation costs.<sup>54</sup> Further, studies show that the mean household income has decreased by 2.9% and 5.6% for men and women with disabilities respectively.<sup>55</sup> Researchers disagree as to the cause of the decline and much theoretical consideration has gone into these debates.<sup>56</sup> One argument is that the decline directly relates to the

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L. REV. 161, 192-93 (2009). Arduini even argues that “internet addiction” falls under its umbrella. *Id.*

52. See Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278 (1996). Professor Blanck described the Sears, Roebuck and Co. (“Sears”) study and stated the Article’s goals:

(1) [to] stimulate further discussion and debate of the issues that Sears and other companies face regarding ADA Title I implementation; (2) to provide data collected from 1978 to 1996 on the costs and benefits of workplace accommodations and on dispute avoidance and resolution practices that transcend minimal ADA Title I compliance; and (3) to identify the broader implications of Sears employment-related experiences and its philosophy for future policy making in this area[.]

*Id.* See also D.J. Hendricks et al., *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, DISABILITY STUD. Q. (2005), <http://dsq-sds.org/article/view/623/800> (describing the Job Accommodation Network (“JAN”) study and the implications of the ADA economically). Both the Sears and the JAN studies appear to use the ADA’s broad definition of disability. See Blanck, *supra*, at 278; Hendricks et al., *supra*.

53. See *infra* Part III.B.

54. Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 277 (2000) (finding a decline in disability employment, even after the ADA’s implementation); see Daron Acemoglu & Joshu Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act 2* (Nat’l Bureau of Econ. Research, Working Paper No. 6670, 1998), available at <http://www.nber.org/papers/w6670> (finding that the ADA “had a negative impact on the employment of disabled men”).

55. Burkhauser & Stapleton, *supra* note 21, at 2. These estimates are from data collected between 1989 and 2000. *Id.*

56. See, e.g., Bagenstos, *supra* note 42, at 537-38 (arguing that the decline in disability employment after the ADA’s enactment was caused by the lack of enforcement and low success rate of Title I cases). But see Robert C. Bird & John D. Knopf, *Do Disability Laws Impair Firm Performance?*, 47 AM. BUS. L.J. 145, 174-75 (2010) (arguing that lower employment post-ADA could be attributable to the increase in litigation expenses).



enactment of the ADA.<sup>57</sup> An alternative argument cites the expansion and easement of eligibility criteria for social security benefits.<sup>58</sup>

In addition to showing general declines in employment, research has focused on accommodation costs in an attempt to ease employers' fears.<sup>59</sup> This research purports that accommodation costs are quite low.<sup>60</sup> Two of the most prominent studies conducted were by the Sears, Roebuck & Company ("Sears") and the Job Accommodation Network ("JAN").<sup>61</sup> The Sears study was an internal data collection survey which spanned from 1978 to 1996.<sup>62</sup> The JAN study was based off of voluntary responses posed to employers, employees, and applicants who made inquiries to its accommodation call center.<sup>63</sup> The Sears study found that out of the accommodations it made, 72% had no cost, 17% cost less than \$100, 10% cost less than \$500, and only 1% cost more than \$500.<sup>64</sup> The average cost of accommodating a disabled employee was a mere \$45.<sup>65</sup> Similarly, the JAN study found a median accommodation cost of \$250.<sup>66</sup> Far outweighing this cost was the median benefit of \$10,000 which JAN's data showed employers received from making these accommodations.<sup>67</sup>

### *B. How the Past and Present Research Has Failed Applicants with Severe Disabilities*

Regarding the focus on applicants with severe disabilities, the issues with the current research are numerous. The research focuses

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57. See Bird & Knopf, *supra* note 56, at 174-75 (arguing that it could be attributable to the increase in litigation expenses).

58. GINA A. LIVERMORE & NANETTE GOODMAN, REHAB. RESEARCH & TRAINING CTR. ON EMP'T POLICY FOR PERSONS WITH DISABILITIES AT CORNELL UNIV., A REVIEW OF RECENT EVALUATION EFFORTS ASSOCIATED WITH PROGRAMS AND POLICIES DESIGNED TO PROMOTE THE EMPLOYMENT OF ADULTS WITH DISABILITIES 22-23 (2009), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1262&context=edicollec>. This expansion occurred in 1984, and with the downturned economic situation in 1990, it is argued that many unemployed workers falling under the newly enacted ADA's definition chose to receive benefits opposed to search for employment. *Id.* In turn, opting for benefits increased the number of individuals with disabilities who remained unemployed. *Id.*

59. See, e.g., Blanck, *supra* note 52, at 278, 280 (detailing a study of the accommodation costs Sears experienced from 1978 to 1996).

60. *Id.* at 280 (finding, based on an internal study at Sears, an average cost of accommodating disabled employees to be \$45).

61. *Id.* at 278; Hendricks et al., *supra* note 52.

62. Blanck, *supra* note 52, at 278.

63. Hendricks et al., *supra* note 52.

64. Blanck, *supra* note 52, at 278.

65. *Id.*

66. Hendricks et al., *supra* note 52.

67. *Id.*

solely on employees,<sup>68</sup> focuses on positions that applicants with severe disabilities are unqualified,<sup>69</sup> and fails to represent employers as a whole.<sup>70</sup> These issues culminate to the most important issue—that scholars and policy makers are using this skewed research to analyze and improve the law.<sup>71</sup>

First, the research focuses on employees, not applicants.<sup>72</sup> Specifically, the Sears study looked solely at accommodations the corporation made for its employees, giving no regard to applicants.<sup>73</sup> Also, of the inquiries JAN received, only 4% regarded new hires and 15% regarded applicants.<sup>74</sup> Given this information, it is clear that these studies have focused on employees. This data, then, sheds no light on issues faced by applicants, let alone those with severe disabilities.<sup>75</sup>

Second, these studies seem to focus on positions for which applicants with severe disabilities are unqualified or simply not being hired.<sup>76</sup> Sears, for example, reported that its workforce consisted of 6.7% of employees with disabilities.<sup>77</sup> However, 20% of Americans have a disability—meaning they are greatly underrepresented in the Sears workforce.<sup>78</sup> This leads to one of two conclusions—either individuals with disabilities are not applying to Sears or Sears is simply not hiring them. Further, out of the employees who employers sought to accommodate, JAN found that 37.7% had their high school diploma or

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68. See, e.g., Blanck, *supra* note 52, at 278 (discussing the Sears study, which focused solely on current Sears employees).

69. See, e.g., Press Release, Disabilityworks, DePaul University Study of Costs and Benefits of Employing People with Disabilities Finds Few Risks to Employers (Jan. 28, 2007), available at <http://www.disabilityworks.org/downloads/disabilityworksDePaulStudyPressRelease.pdf> (describing a study which focused on positions such as doctors and high level management, for which, using this Note's definition, many applicants with severe disabilities are unqualified).

70. See Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1677 (2000) (arguing that these studies may fail to represent employers in other enterprises).

71. See H.R. REP. NO. 101-485(II), at 34 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 315-16 (showing that Congress considered internal data collected by Sears when enacting the ADA).

72. See, e.g., Blanck, *supra* note 52, at 278 (describing the Sears study which focused solely on accommodating employees).

73. *Id.*

74. Teresa Moore, *Americans with Disabilities Act: The Disabled Have Made Great Strides, but the Most Vulnerable Still Don't Get Hired*, HEALTHDAY, <http://consumer.healthday.com/encyclopedia/article.asp?AID=646519> (last updated Mar. 20, 2011).

75. See, e.g., Blanck, *supra* note 52, at 278 (detailing the Sears study which collected data on Sears employees, not applicants). Without collecting data on applicants, the data collected neglects to provide information on the struggles applicants face.

76. See *id.* (describing the Sears study, in which Sears employed a disproportionately low number of people with disabilities as compared to their representation in the community); Hendricks et al., *supra* note 52 (describing the JAN study which focused on positions requiring high levels of education—something many with severe disabilities are unable to obtain).

77. Blanck, *supra* note 52, at 278.

78. CENSUS BRIEF, *supra* note 18.

GED, 29.8% graduated from a four year college, 9.9% had an associates degree, and another 13% had some kind of graduate or professional degree.<sup>79</sup> These levels of education are simply unobtainable by many applicants with severe disabilities who, on average, maintain inferior levels of education as compared to the general population.<sup>80</sup> With a focus on positions for which applicants with severe disabilities are unqualified, the realities of those with non-severe disabilities are demonstrated.<sup>81</sup> These positions inaccurately reflect those applicants with severe disabilities.<sup>82</sup>

Third, the research fails to represent the broad spectrum of employers.<sup>83</sup> It is difficult, if not impossible, to argue that Sears represents the totality of employers.<sup>84</sup> And even though the JAN study obtained data from numerous employers, it remains problematic to argue that these employers are representative of the whole.<sup>85</sup> Further questioning this representation is the fact that JAN obtained only 2020 responses between 1993 and 1999 out of an average of 32,000 inquiries to its call center per year.<sup>86</sup> With such low participation rates in a voluntary study, it is impossible to tell if these employers represented those who made inquiries to JAN, let alone the aggregate of American employers.<sup>87</sup>

Finally, this research is used by analysts and scholars in efforts to effectuate change in policy and the law.<sup>88</sup> But, as discussed, these studies focus on non-severe disabilities and accommodation costs.<sup>89</sup> With this

79. Hendricks et al., *supra* note 52.

80. June E. Downing & Stephanie McFarland, *Education and Individuals with Severe Disabilities: Promising Practices*, INT'L ENCYCLOPEDIA OF REHABILITATION, 1 (2010), [http://cirric.buffalo.edu/encyclopedia/en/pdf/severe\\_disabilities\\_education\\_and\\_individuals\\_with\\_severe\\_disabilities\\_promising\\_practices.pdf](http://cirric.buffalo.edu/encyclopedia/en/pdf/severe_disabilities_education_and_individuals_with_severe_disabilities_promising_practices.pdf).

81. See, e.g., Blanck, *supra* note 52, at 278 (detailing the Sears study); Hendricks et al., *supra* note 52 (describing the JAN study). The Sears and JAN studies focused on non-severe disabilities. See Blanck, *supra* note 52, at 278; Hendricks et al., *supra* note 52.

82. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P70-117, AMERICANS WITH DISABILITIES: 2005, HOUSEHOLD ECONOMIC STUDIES 8 (2008) [hereinafter HOUSEHOLD ECONOMIC STUDIES], available at <http://www.census.gov/prod/2008pubs/p70-117/pdf> (showing disparities between the incomes and poverty levels of those with severe and non-severe disabilities).

83. Stein, *supra* note 70, at 1677. "While the studies . . . are informative, reliance upon these findings requires a great deal of caution. The conclusions drawn from overall studies of specific corporations, such as Sears . . . may not be representative of other enterprises." *Id.*

84. See *id.*

85. *Id.*; see Hendricks et al., *supra* note 52.

86. Hendricks et al., *supra* note 52.

87. See Stein, *supra* note 70, at 1677 (arguing that these studies may fail to represent employers in other enterprises).

88. See, e.g., *id.* at 1674-77 (showing that Professor Stein used various accommodation cost studies in his analysis of Title I's implications).

89. See *supra* text accompanying notes 72-87.

narrow focus, the issues pertaining to applicants with severe disabilities are left concealed.<sup>90</sup> Without openly discussing these issues and collecting accurate data, solutions will never be found.<sup>91</sup> Of particular concern is the cyclical nature of this process. When the research focuses solely on accommodations and non-severe disabilities, analysts and scholars will then debate and scrutinize that data, and in turn encourage policy makers to find solutions to these limited issues.<sup>92</sup> The cyclical nature of this process has already been demonstrated in this context—prior to the ADA’s enactment, Sears had collected data on a small subset of employees who appear to be non-severely disabled.<sup>93</sup> This data was then analyzed by scholars,<sup>94</sup> and ultimately some of this data was cited within the legislative history of the ADA as evidencing low accommodation costs.<sup>95</sup> Hence, the problems with the current research are extremely detrimental to applicants with severe disabilities.<sup>96</sup>

### C. *The True Predicament of the Applicant with a Severe Disability*

While the research shows hardships continue to exist for all people with disabilities, it neglects to comment on those with severe disabilities.<sup>97</sup> The reality is that individuals with severe disabilities are in a worse position than the research portrays or neglects to mention.<sup>98</sup> The

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90. See, e.g., Blanck, *supra* note 52 (failing to distinguish between Sears employees with severe and non-severe disabilities). The issue is that those with severe disabilities are in a worse position than individuals with non-severe disabilities, meaning that focusing on disabilities as a whole tends to negate the reality of those with severe disabilities. HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8 (finding that individuals with severe disabilities have higher poverty and unemployment rates than those with non-severe disabilities).

91. See OFFICE OF DISABILITY EMP’T POLICY, U.S. DEP’T OF LABOR, TECHNICAL REPORT, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES 6 (2008) [hereinafter SURVEY OF EMPLOYER PERSPECTIVES], available at [www.dol.gov/odep/documents/survey\\_report\\_jan\\_09.doc](http://www.dol.gov/odep/documents/survey_report_jan_09.doc) (finding that data on “employer perspectives on employing people with disabilities will help ODEP formulate targeted strategies and policies for increasing employment opportunities for people with disabilities”).

92. See H.R. REP. NO. 101-485(II), at 34, 63-64 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 315-16, 346. The legislative history of the ADA cites to information collected by Sears and discusses the “reports that it is possible to accommodate many employees with relatively simple and inexpensive assistive technology” made by JAN and its accumulation of “16,585 available solutions from which businesses may draw.” *Id.* at 63-64, 1990 U.S.C.C.A.N. at 346.

93. See Blanck, *supra* note 52, at 278 (analyzing the Sears study, which focused on non-severely disabled employees).

94. *Id.*

95. H.R. REP. NO. 101-485(II), at 34, reprinted in 1990 U.S.C.C.A.N. at 315-16.

96. This is demonstrated by the cyclical nature of the current research, which leads to a naïve policymaking body. See *id.*

97. See, e.g., Hendricks et al., *supra* note 52 (neglecting to differentiate or consider the subcategory of applicants with severe disabilities).

98. See HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8-9 (finding that people with

ways in which the realities differ are in the employment and poverty rates, and the accommodation costs associated with applicants with severe disabilities.<sup>99</sup>

When considering the poverty levels and wages of those with severe disabilities, a great disparity becomes obvious.<sup>100</sup> Americans with severe disabilities have poverty rates that are nearly three times higher than those with non-severe disabilities.<sup>101</sup> Additionally, those with severe disabilities earn about sixty-five cents per dollar earned by a worker with a non-severe disability.<sup>102</sup> Theories have postulated as to why these disparities exist.<sup>103</sup> Some suggest that employers are simply unwilling to hire applicants with severe disabilities.<sup>104</sup> This unwillingness stems from employers' desire to hire the most able applicants with the highest capabilities.<sup>105</sup> Others similarly suggest that employers are "cream-skimming."<sup>106</sup> This theory holds that employers, to avoid liability under Title I, hire the least disabled applicants.<sup>107</sup> These applicants also appear to have lower accommodation costs, leading employers to what they perceive are further savings.<sup>108</sup> However, due to the failures of researchers to specifically consider the severely disabled subcategory of disability, these theories are unsupported by data.<sup>109</sup>

In addition to the disparities in poverty rates and wages, it is important to note that accommodation costs for those with severe

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severe disabilities had higher poverty rates and received lower wages than those with non-severe disabilities).

99. H.R. REP. NO. 101-485(II), at 34, *reprinted in* 1990 U.S.C.C.A.N. at 315 (discussing the potentially expensive costs of accommodating individuals with blindness, deafness, and mobility impairments).

100. See HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8-9.

101. *Id.* at 8. In 2005, out of working-age Americans, 27.1% with severe, 12% with non-severe, and 9.1% with no disability were in poverty. *Id.*

102. *Id.* at 9. Median monthly earnings were \$1458 for people with severe disabilities, compared to \$2250 for those with non-severe and \$2539 for those with no disability. *Id.*

103. See, e.g., Jolls, *supra* note 54, at 275 (proposing that employers hire more people with less severe disabilities to protect themselves from legal challenges by those with more severe disabilities).

104. See Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 399-400 (1997) (finding that the growth in employment since the ADA's enactment "is dramatic for persons with high job-related skills (i.e., arguably the most 'qualified')").

105. *Id.*

106. See Jolls, *supra* note 54, at 275 (describing "cream-skimming" as the process employers use to "immunize" themselves from litigation); Stein, *supra* note 70, at 1680 (describing "cream-skimming" as "a practice in which employers hire workers with minimal disabilities").

107. Jolls, *supra* note 54, at 275.

108. See Stein, *supra* note 70, at 1680.

109. *Id.*

disabilities are likely much higher than research suggests.<sup>110</sup> This is important because accommodation costs have been a key fear of employers and barrier to employment for those with disabilities.<sup>111</sup> Due to these failures it is difficult to ascertain whether the costs truly vary.<sup>112</sup> Nevertheless, it can be logically inferred, due to the nature and extent of the accommodations required by applicants with severe disabilities, that the costs are much higher.<sup>113</sup> Applicants with severe disabilities require the most costly accommodations, including but not limited to assistants, readers, specialized equipment, interpreters, and renovations.<sup>114</sup> This is opposed to applicants with non-severe disabilities who require inexpensive accommodations, such as modification of work schedules, which the JAN study, focusing on non-severe disabilities, found to be the most common accommodation made.<sup>115</sup> Employers implicitly realize accommodation costs are higher for applicants with severe disabilities and therefore do not hire them.<sup>116</sup> In addition, research focuses on “hard” costs—those which are easily quantifiable, such as renovations and the purchase of new equipment.<sup>117</sup> So-called “soft” costs, such as additional training and supervision, have not been quantified.<sup>118</sup> Generally, those with severe disabilities have high “soft” costs, meaning the actual costs of accommodation are significantly underplayed.<sup>119</sup> Research looking

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110. See Arduini, *supra* note 51, at 182 (describing how the costs of reasonable accommodations “are almost certainly larger than the costs of litigating wrongful discharge claims”). Employers resoundingly believe that accommodation costs are high, as seen by data finding that “[n]ot knowing how much accommodations will cost and the actual cost of accommodating disability are major concerns associated with hiring.” SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 25.

111. Arduini, *supra* note 51, at 182 (arguing that employers fear Title I reasonable accommodation claims more than they fear wrongful termination claims).

112. See Stein, *supra* note 70, at 1680.

113. See, e.g., H.R. REP. NO. 101-485(II), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 315 (suggesting visually impaired employees will have higher accommodation costs).

114. See *id.* (showing that the legislature anticipated these costs); Holtzman et al., *supra* note 39, at 307 (determining that the cost of an assistant is “much more onerous” than permanent accommodations).

115. Hendricks et al., *supra* note 52.

116. See Jolls, *supra* note 54, at 277-78 (arguing that research shows low accommodation costs because employers will only implement low-cost accommodations); Arduini, *supra* note 51, at 182 (hypothesizing that accommodation costs are higher than litigation, and therefore employers refuse to hire disabled applicants).

117. Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 109 (2003) (finding that “soft” costs are overlooked within research).

118. *Id.*

119. *Id.* “Soft” costs include increased supervision and training. *Id.* Applicants with severe disabilities, by definition, require increased supervision, training, and management costs. See CENSUS BRIEF, *supra* note 18. For example, applicants with mental retardation will require greater amounts of training and increased supervision. See David Mank et al., *Patterns of Support for Employees with Severe Disabilities*, 35 MENTAL RETARDATION 433, 433 (1997) (finding that

into these costs would shed light onto the realities. As argued below, even if this research shows that costs are much higher, the benefits to employers far outweigh such expenses.<sup>120</sup>

#### IV. BEYOND QUALIFIED—APPLICANTS WITH SEVERE DISABILITIES ARE PROFITABLE

While applicants with severe disabilities are qualified for a range of positions, due to the many factors discussed below, they are especially qualified in the realm of large retail corporations.<sup>121</sup> These retailers have experienced the benefits of hiring such applicants and focusing on these corporations has real benefits.<sup>122</sup> Specifically, the experiences and findings of these corporations have the potential to show qualification in other industries and encourage such employers to hire similar applicants.<sup>123</sup>

##### A. *Wholly Efficient—How These Applicants Are Qualified*

Title I does not protect applicants who are unqualified for a particular position.<sup>124</sup> To determine qualification, one must ask whether the applicant, with or without reasonable accommodation, can perform the essential functions of the position.<sup>125</sup> As far as accommodations are concerned, theorists have categorized accommodations as either wholly efficient, semi-efficient, or wholly inefficient.<sup>126</sup> Many assume that those with severe disabilities are wholly inefficient, thereby concluding their exclusion is completely warranted.<sup>127</sup> Due to the nature and limitations

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employees with mental retardation benefit from natural supports from co-workers as well as “‘typical’ company human resource processes”).

120. See *infra* Part IV.B.

121. See, e.g., *Brady v. Wal-Mart Stores, Inc.*, No. CV 03-3843(JO), 2005 WL 1521407, at \*1 (E.D.N.Y. June 21, 2005) (finding that Wal-Mart violated the ADA when an applicant/employee with cerebral palsy had difficulty with the application process and employment in a part-time sales associate position).

122. See, e.g., *Kimball-Stanley*, *supra* note 11, at H2 (discussing CVS’s positive outcomes from hiring disabled employees).

123. See Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 144-45 (2003).

124. See ADA Amendments Act of 2008, 42 U.S.C. § 12112(a) (2006 & Supp. II 2009).

125. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998).

126. Stein, *supra* note 117, at 151, 167, 178. Wholly efficient accommodations allow both the employer and employee to realize net gains. *Id.* at 151. Semi-efficient accommodations allow both parties to benefit but the employer could have had the potential to benefit more, if not for accommodating. *Id.* at 167. Wholly inefficient accommodations are so unprofitable for an employer that the employee’s exclusion is warranted. *Id.* at 178.

127. See *Waterstone & Stein*, *supra* note 1, at 1361-62. Before the ADA’s passage, many

of severe disabilities this is, at times, true.<sup>128</sup> However, within large retail corporations, many individuals with severe disabilities are qualified for the positions and, when reasonably accommodated, are wholly efficient.<sup>129</sup> Leading to this conclusion are the “natural supports,”<sup>130</sup> job descriptions,<sup>131</sup> hiring practices,<sup>132</sup> and size and wealth of these corporations.<sup>133</sup>

To begin, many of these large retail stores have developed “natural supports” for employees with disabilities.<sup>134</sup> Natural supports are strategies utilized within the workplace enabling an employee with a disability to perform his or her job requirements.<sup>135</sup> This support can include sensitivity training and mentoring programs.<sup>136</sup> Arguably, this demonstrates that these employees can succeed with the reasonable accommodation of a natural support system, which has not been shown as unduly burdensome on employers.<sup>137</sup> Demonstrating the ease and success of initiating such supports are Walgreens’s and CVS’s integrated training programs.<sup>138</sup> Walgreens operates a distribution center in which

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people thought that the only way to provide for people with disabilities was to completely exclude them from not only the workforce but society as a whole. *See* H.R. REP. NO. 101-485(II), at 31-32, (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313.

128. Burkhauser & Stapleton, *supra* note 21, at 2. Some people with disabilities have no “meaningful alternative” other than to remain unemployed. *Id.*

129. *See* Debra Ruh, *Promoting Your Disability Employment Milestones*, G3ICT (Dec. 23, 2009), [http://g3ict.org/resource\\_center/newsletter/news/p/newsletterId\\_149/id\\_193](http://g3ict.org/resource_center/newsletter/news/p/newsletterId_149/id_193).

130. *See* Mank et al., *supra* note 119, at 433 (defining natural support “as a set of strategies that include the support of co-workers and supervisors in helping provide support and assistance that allow an individual with disabilities to secure and maintain a job”). *See, e.g.*, WAL-MART STORES, INC., DIVERSITY AND INCLUSION 2008: A YEAR OF ACCOMPLISHMENTS, GROWTH AND SUCCESS 13 (2008) [hereinafter DIVERSITY AND INCLUSION], available at <http://www.walmartstores.com/download/3698.pdf> (demonstrating an effort made by Wal-Mart to educate its workforce about disabilities).

131. *See, e.g.*, Brady v. Wal-Mart Stores, Inc., No. CV 03-3843(JO), 2005 WL 1521407, at \*1 (E.D.N.Y. June 21, 2005).

132. *See, e.g.*, Press Release, Walgreens Co., *supra* note 8 (detailing Walgreens’s efforts to employ applicants with severe disabilities).

133. *See* Jeffery Ivan Pasek et al., *Compliance by the Private Sector with the Americans with Disabilities Act*, 62 PA. B. ASS’N Q. 139, 141-42 (1991).

134. *See, e.g.*, *Walgreens Recruits Employees with Disabilities Through New, Highly Accessible Web Site*, MED. NEWS TODAY (July 8, 2006), <http://www.medicalnewstoday.com/articles/46777.php> [hereinafter *Walgreens Recruits*] (providing an example of Walgreens starting such a natural support program in one of its distribution centers).

135. Mank et al., *supra* note 119, at 433.

136. *See id.* at 434.

137. *See, e.g.*, Press Release, Walgreens Co., *supra* note 8. Walgreens distribution center has allowed people with severe disabilities to excel within their positions. *Id.* Further, Walgreens voluntarily initiated the program, and voluntarily continues the program. *Id.* Walgreens has never indicated that the natural support system is unduly burdensome. *Id.*

138. *Focusing on Their Future*, WASH. POST, Jan. 27, 2005, at 3 (describing CVS’s partnership with New Vision Photography); Press Release, Walgreens Co., *supra* note 8 (describing



43% of its workforce is comprised of individuals with severe disabilities.<sup>139</sup> These individuals are working “side-by-side” with non-disabled employees who support and develop learning and skills.<sup>140</sup> Similarly, CVS has initiated a program where individuals with severe mental disabilities work with others in film processing, with the ultimate goal of providing for their permanent employment.<sup>141</sup>

Additionally, the job descriptions posted by large retail corporations indicate that those with severe disabilities are qualified for many of the positions offered.<sup>142</sup> Generally, courts defer to the descriptions posted by employers in determining the essential functions and qualifications of a particular position.<sup>143</sup> Avoiding hindsight bias, the job description provides the court with the employer’s expectations prior to interviewing.<sup>144</sup> Analyzing the descriptions large retail stores post, it becomes obvious that many applicants with severe disabilities are qualified.<sup>145</sup> For example, in *EEOC v. Wal-Mart Stores, Inc.*,<sup>146</sup> the court determined that a plaintiff, severely limited with cerebral palsy, was qualified for the “People Greeter” and “Cashier” positions at Wal-Mart.<sup>147</sup> The “People Greeter” position required associates to assist customers in entering and exiting the store, offer carts, provide directions, and maintain a safe environment by cleaning spills.<sup>148</sup> The “Cashier” position required associates to bag, load and scan merchandise, make change, and use a computerized register.<sup>149</sup> Arguably, other courts would come to the similar conclusion that individuals, although severely disabled, would be able to accomplish these basic tasks with reasonable accommodations.<sup>150</sup> Briefly

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Walgreens’s efforts to employ applicants with severe disabilities and the benefits Walgreens has seen thus far).

139. Press Release, Walgreens Co., *supra* note 8.

140. *Id.*

141. *Focusing on Their Future*, *supra* note 138.

142. See JOB DESCRIPTIONS, *supra* note 38, at 4 (stating that employers’ job descriptions will be given deference by the courts).

143. ACCOMMODATION AND COMPLIANCE, *supra* note 43, at 10.

144. *Id.*

145. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 565-66, 569 (8th Cir. 2007) (finding that the severely disabled plaintiff was qualified for the “People Greeter” and “Cashier” positions); *Brady v. Wal-Mart Stores, Inc.*, No. CV 03-3843(JO), 2005 WL 1521407, at \*1 (E.D.N.Y. June 21, 2005) (finding that the severely disabled plaintiff was qualified for positions within Wal-Mart’s pharmacy).

146. 477 F.3d 561 (8th Cir. 2007).

147. *Id.* at 563, 569.

148. *Id.* at 565-66.

149. *Id.* at 566.

150. See, e.g., *Brady*, 2005 WL 1521407, at \*1 (finding a similarly disabled applicant qualified).

considering the job descriptions listed by other large retailers shows that the job descriptions generally consist of these basic tasks.<sup>151</sup>

Next, hiring practices establish a sort of precedent for similarly situated applicants.<sup>152</sup> Professor Seth Harris argues that the holding in *US Airways v. Barnett*<sup>153</sup> allows employees to establish that an accommodation is reasonable by demonstrating that the employer, or even another employer in the same industry, made such an accommodation in the past.<sup>154</sup> It seems plausible that Professor Harris's theory could be extended to employment qualification.<sup>155</sup> If extended, precedent would be established that an applicant was qualified when the employer previously hired a similarly situated applicant.<sup>156</sup> Utilizing the same logic, if an employer within a comparable industry hired a similarly situated applicant, the precedent would be that the applicant was qualified.<sup>157</sup> Looking at Wal-Mart's commitment to diversity and the hiring of people with severe disabilities,<sup>158</sup> Walgreens's aggressive hiring of applicants with severe disabilities,<sup>159</sup> and CVS's employment and training of applicants with mental disabilities seem to establish precedent.<sup>160</sup> All of these employment actions, following the extension of Professor Harris's theory, have the potential to be interpreted as creating an industry standard, leading courts to find similar applicants qualified for like positions.<sup>161</sup>

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151. See, e.g., Job Description of Target Grocery Position, TARGET: CAREERS, [http://sites.target.com/site/en/company/page.jsp?ref=nav\\_footer\\_careers&contentId=WCMP04-030796](http://sites.target.com/site/en/company/page.jsp?ref=nav_footer_careers&contentId=WCMP04-030796) (select "Hourly Jobs" from the "I am looking for:" menu and "Stores" from the "I want to search in:" menu, then follow the search hyperlink; then follow the "Start" hyperlink; then follow the "Find Jobs" hyperlink under the "Target Stores" category; then verify that you are eighteen and follow the "Continue" hyperlink; then under "Find a Store," enter "Levittown" in the "City" field, select "New York" from the "State" scroll-down list, and follow the "Find Stores" hyperlink; then under "Choose Store(s)" select the "Levittown" location by following the "Select This Store" hyperlink; once the "Levittown" store has been selected, follow the "Continue" hyperlink) (last visited Apr. 20, 2012). The job areas listed, such as "Grocery," require employees to perform basic tasks that many applicants with severe disabilities would be able to perform. See *id.*

152. See Harris, *supra* note 123, at 145 (arguing that making an accommodation for an existing employee sets a precedent with the particular employer and throughout the industry).

153. 535 U.S. 391 (2002).

154. Harris, *supra* note 123, at 145.

155. See *id.* at 144-46. Professor Harris's article does not explicitly limit his theory. See *id.*

156. See *id.* This is exactly as Professor Harris's theory suggests in the realm of accommodating existing employees. *Id.*

157. See *id.*

158. DIVERSITY AND INCLUSION, *supra* note 130, at 4 ("Diversity and inclusion are imperative to the growth and sustainability of our business.").

159. Press Release, Walgreens Co., *supra* note 8.

160. *Focusing on Their Future*, *supra* note 138, at 3.

161. See Harris, *supra* note 123, at 144-46.

Fourth and finally, the size of these stores may influence courts' determinations of reasonableness.<sup>162</sup> The larger, wealthier, and more resourceful the employer, the less likely courts will find accommodations unreasonable.<sup>163</sup> Large retail stores have astronomical earnings and profits.<sup>164</sup> Due to this, many courts will see even a costly accommodation, in comparison to these earnings, as completely reasonable.<sup>165</sup> As accommodation costs are viewed as less unreasonable, it is less likely they will be seen as an undue hardship, thereby leading to the conclusion that the applicant is qualified.<sup>166</sup> All of these factors combined make it fair to conclude that a court will find applicants with severe disabilities qualified for many positions within large retail corporations.

*B. Overcoming Misperceptions:  
Employees with Severe Disabilities Bring Gains*

While accommodation costs may initially discourage employers from hiring applicants with severe disabilities, "balancing [the] realities"<sup>167</sup> shows that these applicants are equally as productive and profitable to employ as applicants without severe disabilities.<sup>168</sup> This creates an incentive for employers to voluntarily hire these applicants.<sup>169</sup> The reality is that workers with severe disabilities increase the company's morale and productivity,<sup>170</sup> enable the employer to receive

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162. See Pasek et al., *supra* note 133, at 142.

163. See *id.*

164. See, e.g., Stephanie Rosenbloom, *Wal-Mart's Profit Rises, but a Key Indicator Slips: Sales at Stores Open at Least a Year Decline*, N.Y. TIMES, Nov. 13, 2009, at B3. For the months of August, September, and October of 2009, Wal-Mart had profits of \$3.24 billion and revenue of \$99.4 billion. *Id.*

165. See Pasek et al., *supra* note 133, at 142 (arguing that the larger and more resourceful the employer, the less likely the accommodation will be unreasonable).

166. See ADA Amendments Act of 2008, 42 U.S.C. §§ 12111(10), 12112(a) (2006 & Supp. II 2009) (stating that only "qualified individuals" cannot be discriminated against and providing the definition of "undue hardship").

167. ROADMAPS FOR ENHANCING EMPLOYMENT OF PERSONS WITH DISABILITIES THROUGH ACCESSIBLE TECHNOLOGY 17 (Assistive Tech. Indus. Assoc. & U.S. Bus. Leadership Network eds., 2007) [hereinafter ROADMAPS FOR ENHANCING], available at <http://www.dol.gov/odep/documents/Roadmaps1.pdf> (arguing that "business decisions need to balance [the] realities" of social responsibility, litigation, and profits).

168. See Ruh, *supra* note 129 (suggesting that the aggregate of benefits outweigh the costs of employing disabled individuals).

169. See Stein, *supra* note 117, at 147-48 (arguing that if the disabled employee is equally as productive as a nondisabled employee, companies will then hire them voluntarily).

170. See, e.g., Helen A. Scharz et al., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 349 (2006) (finding empirical evidence showing increased productivity and morale).

certain tax benefits,<sup>171</sup> help the employer avoid the litigation costs of Title I violations,<sup>172</sup> and produce a positive image by fostering goodwill within the community.<sup>173</sup>

To begin, accommodating workers with disabilities has been shown to increase morale and productivity.<sup>174</sup> Several factors may account for these increases, with some arguing that the work ethic of disabled employees has positive effects on peers.<sup>175</sup> Others suggest that the accommodations provided to disabled employees are utilized by all, and that these accommodations allow nondisabled employees to increase their own productivity.<sup>176</sup> Specifically, assistive technologies, such as computers and other devices, have widespread use among nondisabled workers.<sup>177</sup> Alternatively, if employers continuously deny accommodating disabled applicants, morale may decrease as resentment builds against a cold and uncaring employer.<sup>178</sup> In addition, the hiring of severely disabled applicants demonstrates a company's willingness to accommodate.<sup>179</sup> In turn, the environment this portrays attracts disabled applicants who are perhaps better qualified.<sup>180</sup> One should note, though, that some argue that accommodating disabled employees actually

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171. See Tax Relief and Health Care Act of 2006, 26 U.S.C. § 51(d) (2006 & Supp. IV 2011) (offering a tax deduction for hiring applicants with severe disabilities); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11611, 104 Stat. 1388, 1388-501 (codified as amended at 26 U.S.C. § 190 (2006 & Supp. IV 2011)) (offering a tax deduction for removing physical barriers).

172. See, e.g., Sharona Hoffman, *Title I of the ADA: What We Know and Don't Know About Its Impact in the Workplace*, ADMIN. & REG. L. NEWS, Summer 2008, at 10 (finding that the average settlement obtained by the EEOC for ADA claims was \$16,171).

173. Ruh, *supra* note 129 (arguing that hiring disabled applicants increases public image and brand loyalty).

174. See, e.g., Schartz et al., *supra* note 170, at 349. Professor Helen A. Schartz, analyzing data collected by JAN, found that when an employer made an accommodation morale was increased in 60.7% and productivity was increased in 57% of situations. *Id.*

175. See Letter from Thomas J. Donohue, President & Chief Exec. Officer, U.S. Chamber of Commerce (Oct. 2003), in U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS. & U.S. CHAMBER OF COMMERCE CTR. FOR WORKFORCE PREPARATION, DISABILITY EMPLOYMENT 101, at vii (2005), available at <http://www.enableamerica.org/pdfs/disabilityemployment101.pdf> (finding that disabled employees work ethic had a positive effect on morale and productivity of colleagues).

176. See Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 905 (1997) (finding that accommodations are utilized by all employees and often help increase productivity).

177. See Stein, *supra* note 117, at 105-06 (finding that all workers utilize accommodations, thereby increasing productivity).

178. See Hoffman, *supra* note 16, at 329 (arguing that employers risk poor morale by continuously denying disabled employees reasonable accommodations).

179. See Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 57 (2007) (describing accommodations as potentially the most important factor for a disabled applicant when seeking employment).

180. See *id.* at 56-57.

decreases morale.<sup>181</sup> However these arguments are not directed toward severe disabilities, as defined in this Note, and hence inapplicable to the current analysis.<sup>182</sup>

Next, employers benefit from tax deductions, such as the Work Opportunity Tax Credit (the "WOTC")<sup>183</sup> and the Architectural Barrier Removal Tax Deduction.<sup>184</sup> The WOTC provides employers with a tax deduction, normally up to \$2400 per adult new hire (or 40% of their qualified wages, capped at \$6000).<sup>185</sup> This deduction is available if the new employee falls within one of twelve target groups.<sup>186</sup> Within these target groups, people with severe disabilities often fall under those referred by vocational rehabilitation centers, are Social Security Income recipients, or are disabled veterans.<sup>187</sup> The WOTC has been extensively utilized by large retail corporations.<sup>188</sup> However, because the employers

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181. See, e.g., Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1009-10 (1997) (arguing that morale is hurt because employees perceive the accommodations as preferential treatment). See also Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 318-19, 333 (2007) (showing that accommodations may put burdens on nondisabled workers).

182. See Key, *supra* note 181, at 1041 ("[M]aking an accommodation to an employee with a disability, particularly when coupled with an inability to disclose the reason behind the accommodation, can lead to perceptions of unfair or preferential treatment on the part of co-workers, which, in turn, can lead to lowered morale."). However, co-workers will know why a severely disabled applicant is being accommodated and likely sympathize with the individual. See *supra* notes 18-21 and accompanying text (defining severely disabled for the purposes of this Note as an overt disability, meaning that the disability would be immediately visible to any co-worker).

183. Tax Relief and Health Care Act of 2006, 26 U.S.C. § 51 (2006 & Supp. IV 2011); *Tax Benefits for Businesses Who Have Employees with Disabilities*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/small/article/0,,id=185704,00.html> (last updated Feb. 21, 2012) [hereinafter *Tax Benefits*]. In a similar vein, some have pointed out that employing individuals with disabilities will decrease the overall tax burden because fewer people would be relying on public assistance, thereby leading to lower overall tax rates. See, e.g., PEOPLE WITH DISABILITIES, *supra* note 50, at 9.

184. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-501, (codified as amended at 26 U.S.C. § 190 (2006)); *Tax Benefits*, *supra* note 183.

185. Tax Relief and Health Care Act of 2006, 26 U.S.C. § 51(a), (b)(3).

186. *Id.* § 51(d). Target groups include long-term Temporary Assistance for Needy Families ("TANF") recipients, other TANF recipients, veterans, eighteen- to thirty-nine-year-old food stamp recipients, eighteen- to thirty-nine-year-old designated community residents, sixteen- to seventeen-year-old summer youths, vocational rehabilitation referrals, ex-felons, Social Security Income recipients, Hurricane Katrina employees, unemployed veterans, and disconnected youths. *Id.*; *Temporary Assistance for Needy Families (TANF)*, ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., [http://www.acf.hhs.gov/programs/region4/program\\_info/tanf.html](http://www.acf.hhs.gov/programs/region4/program_info/tanf.html) (last visited Apr. 20, 2012).

187. Tax Relief and Health Care Act of 2006, 26 U.S.C. § 51(d); *Tax Benefits*, *supra* note 183.

188. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-39, BUSINESS TAX INCENTIVES: INCENTIVES TO EMPLOY WORKERS WITH DISABILITIES RECEIVE LIMITED USE AND HAVE AN UNCERTAIN IMPACT 4 (2002), available at <http://www.gao.gov/new.items/d0339.pdf> ("Of the estimated \$254 million in work opportunity credits reported in 1999, corporations accounted for

are not required to specify which target group the employee falls under, it is uncertain whether the WOTC has benefited applicants with disabilities.<sup>189</sup> Nonetheless, through the WOTC employers have an opportunity to accumulate large tax deductions, creating yet another incentive to hire applicants with severe disabilities.<sup>190</sup> In addition, the Architectural Barrier Removal Tax Deduction allows employers to deduct up to \$15,000 per year for the removal of physical barriers.<sup>191</sup>

Additionally, hiring and accommodating those with severe disabilities avoids litigation and its ensuing costs.<sup>192</sup> Since 1992 there have been over 11,000 charges brought under Title I, leading to over \$174 million in settlements.<sup>193</sup> These figures do not take into consideration legal fees, which can be astronomical.<sup>194</sup> Many estimates have been made as to the average settlement, with figures ranging from \$16,111 to \$62,111.<sup>195</sup> However, these estimates only take into consideration the “hard” costs of litigation—but litigation entails rarely calculated “soft” costs.<sup>196</sup> These “soft” costs are the negative publicity inherent in litigation.<sup>197</sup> This publicity decreases goodwill towards the company and creates a negative public image.<sup>198</sup> These negative images can lead to extreme actions such as boycotts—devastating to any

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\$222 million, and corporations in the retail and service industries accounted for the largest share of the corporate credits.”).

189. *Id.* at 10.

190. *See id.* at 4.

191. Omnibus Budget Reconciliation Act, 26 U.S.C. § 190(a), (c) (2006 & Supp. IV 2011); *Tax Benefits*, *supra* note 183.

192. *See, e.g.,* Kuehl v. Wal-Mart Stores, Inc., 909 F. Supp. 794, 803 (D. Colo. 1995) (holding that Wal-Mart avoided liability by providing reasonable accommodations).

193. Acemoglu & Angrist, *supra* note 54, at 4.

194. *Id.* *See also* 2 JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 13:5, at 13-7 (2d ed. 2011) (“All litigation is expensive and employment discrimination litigation is particularly so.”).

195. *See, e.g.,* Hoffman, *supra* note 172, at 10-11 (providing estimates from the EEOC, which found average awards of \$16,171 for ADA claimants, and from a study of Chicago magistrate judges, where the mean settlement was \$62,111).

196. *See* Donna K. McElroy, *Compulsory Arbitration Agreements . . . Issues Concerning the Enforcement of Compulsory Arbitration Agreement Between Employers and Employees*, 31 ST. MARY’S L.J. 1015, 1016 (2000).

197. *See* Hoffman, *supra* note 16, at 335 (purporting that an obvious “soft” cost is negative media attention).

198. *See* ROADMAPS FOR ENHANCING, *supra* note 167, at 12 (finding that utilizing assistive technologies will increase goodwill and avoid lawsuits that have the potential to create “negative public relations”).

business.<sup>199</sup> Of course, these costs can be completely avoided by reasonably accommodating disabled applicants.<sup>200</sup>

Finally, employers obtain publicity and increased goodwill from hiring applicants with severe disabilities.<sup>201</sup> Studies show that hiring individuals with disabilities increases positive public image and brand loyalty.<sup>202</sup> Similar findings show that when companies incorporate people with disabilities into their advertisements, goodwill towards that company is increased and consumers are more likely to purchase the company's products.<sup>203</sup> The importance of hiring those with disabilities is becoming increasingly important as the American population ages and as disabilities become more prevalent.<sup>204</sup> According to the U.S. Census Bureau, one out of every five Americans has a disability.<sup>205</sup> The prevalence of disabilities increases with age, and over half of those over the age of sixty-five have some disability.<sup>206</sup> Today, 12% of Americans are over the age of sixty-five; however, by 2030, the U.S. Census Bureau estimates that 20% of the population will be over sixty-five—meaning that as the population ages disabilities will increase.<sup>207</sup> Businesses need to take advantage of this ever-increasing consumer base.<sup>208</sup> By hiring severely disabled applicants, employers are showing their support for the disabled community and at the same time developing cost efficient and effective marketing techniques.<sup>209</sup> Some suggest it is logical that as disabilities increase, employers will hire more disabled employees to reflect their consumer base.<sup>210</sup> And reflecting this consumer base is vital due to its size, with studies finding that fifty-three million Americans have a disability and that these individuals have \$180 billion in

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199. See, e.g., Jim Hightower, *Boycott Wal-Mart: Why You Should Wipe That Smiling Yellow Face off Your Shopping List*, INDEP. WKLY., May 8-14, 2002, at 25, 26, 30 (calling for a boycott of Wal-Mart due to, among other reasons, its history of disability discrimination).

200. See, e.g., *Kuehl v. Wal-Mart Stores, Inc.*, 909 F. Supp. 794, 803 (D. Colo. 1995) (holding that Wal-Mart avoided liability by providing reasonable accommodations).

201. See Ruh, *supra* note 129 (discussing the positive benefits of employee persons with disabilities).

202. *Id.*

203. U.S. DEP'T OF EDUC. OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS. & U.S. CHAMBER OF COMMERCE CTR. FOR WORKFORCE PREPARATION, *DISABILITY EMPLOYMENT 101*, at 3, 7 (2005) [hereinafter *DISABILITY EMPLOYMENT 101*], available at <http://www.enableamerica.org/pdfs/disabilityemployment101.pdf>.

204. See CENSUS BRIEF, *supra* note 18.

205. *Id.*

206. *Id.*

207. See *id.*

208. See Robert S. Cole, Comment, *Profiting from the Disabilities Act*, AM. BANKER, Mar. 18, 1992, at 4 (describing the benefits of targeting disabled customers and employees for banking institutions).

209. *DISABILITY EMPLOYMENT 101*, *supra* note 203, at 2.

210. *ROADMAPS FOR ENHANCING*, *supra* note 167, at 11.

discretionary income.<sup>211</sup> Specifically, hiring severely disabled applicants clearly shows that the corporation is willing to employ those with disabilities and in turn dedicated to the disability community as a whole.<sup>212</sup> Hiring those with non-severe and often “hidden” disabilities does not have an equivalent effect.<sup>213</sup> Consumers will not recognize the employers’ hiring efforts, and without this immediate recognition, the benefit will be dismissed.<sup>214</sup> As shown, the reality is that the employment of applicants with severe disabilities can be profitable and these profits outweigh the uncertain costs of accommodation.<sup>215</sup>

### C. Real World Examples of the Benefits Obtained

Several large retail corporations have initiated efforts to hire applicants with severe disabilities.<sup>216</sup> Looking at the hiring practices of CVS and Walgreens provides a clear example of how corporations have found ways to benefit.<sup>217</sup> In particular, CVS has fostered ties with the disability community through its alliance with the Office of Disability Employment Policy (the “ODEP”).<sup>218</sup> This alliance obligates the ODEP to provide information and resources to CVS in order to assist CVS in “recruiting, hiring, and advancing employees with disabilities.”<sup>219</sup> Not only has CVS’s relationship with ODEP been widely publicized, thereby bolstering its image within the disability community, but CVS has noted that disabled employees have helped its “bottom line” with superior attendance and lower turnover rates compared to non-disabled

211. PEOPLE WITH DISABILITIES, *supra* note 50, at 9.

212. See *Top 50 Employers: Careers and the disABLED Magazine’s 2012 Reader’s Choice*, EQUAL OPPORTUNITY PUBLICATIONS: AWARDS PAGE (last visited Apr. 20, 2012), <http://www.eop.com/awards-CD.php> [hereinafter *Top 50 Employers*] (showing *Careers and the disAbleD Magazine’s* Top 50 Employers who hire and support the disabled community).

213. By this Note’s definition, people with severe disabilities are easily distinguishable because their disability is overt. See *supra* text accompanying notes 18–21.

214. The fact that studies have found that using people with disabilities in advertising increases goodwill and the likelihood of consumers purchasing products demonstrates that the benefits of hiring people with disabilities, at least in regards to increased publicity, goodwill, and loyalty, will be seen if consumers recognize that the employee is disabled. DISABILITY EMPLOYMENT 101, *supra* note 203, at 3.

215. See Ruh, *supra* note 129 (arguing that employees with disabilities maximize return on investment).

216. See, e.g., *Focusing on Their Future*, *supra* note 138, at 3 (discussing a film development training program at CVS for people with mental disabilities).

217. See, e.g., *id.*; *Top 50 Employers*, *supra* note 212 (ranking Walgreens fourteenth for the top disability employers in 2012).

218. *Agreement Establishing an Alliance Between the Office of Disability Employment Policy U.S. Department of Labor and CVS/Caremark*, OFFICE OF DISABILITY EMP’T POLICY, U.S. DEP’T OF LABOR, <http://www.dol.gov/odep/alliances/cvscaremark.htm> [hereinafter *ODEP-CVS Alliance*].

219. *Id.*



employees.<sup>220</sup> In many instances, CVS has gone further than the agreement requires, such as its partnership with New Vision Photography (“New Vision”).<sup>221</sup> As described earlier, this partnership provides employment opportunities to individuals with mental retardation and developmental disabilities.<sup>222</sup> Individuals are trained by New Vision in photographic development and are then placed in various CVS locations.<sup>223</sup> CVS is then provided with dependable employees and excellent publicity, being featured in the *Washington Post* on several occasions.<sup>224</sup>

Likewise, Walgreens’s efforts to employ applicants with disabilities has been recognized by *Careers and the disABLED Magazine*.<sup>225</sup> Walgreens has initiated multiple programs where applicants with disabilities are sought.<sup>226</sup> These programs include its South Carolina distribution centers’ efforts to comprise 43% of its workforce with disabled workers and its Dallas, Texas area efforts to comprise 10% of its sales associates with disabled workers.<sup>227</sup> Actions like these not only provide employment opportunities to disabled applicants, but also clearly show Walgreens’s support of the ever-increasing disability community.<sup>228</sup> Furthermore, Walgreens recently developed a website designed to provide applicants with severe disabilities an opportunity to learn about and easily apply to available positions.<sup>229</sup> The website “is designed to be accessible by people with sensory, physical, and cognitive disabilities.”<sup>230</sup>

While many corporations have experienced the benefits of hiring applicants with severe disabilities, others continue to discriminate and thereby create negative publicity and angst amongst the disability community.<sup>231</sup> A prime example is that of Wal-Mart.<sup>232</sup> Wal-Mart has

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220. Kimball-Stanley, *supra* note 11, at H2.

221. *Focusing on Their Future*, *supra* note 138, at 3.

222. *Id.*

223. *Id.*

224. *See id.* (describing CVS’s efforts with New Vision and its employment of severely disabled workers); *see also* Karlyn Barker, *Photography Offers Job Focus for Developmentally Disabled*, WASH. POST, June 24, 2004, at 3 (describing CVS’s then potential partnership with New Vision).

225. *Top 50 Employers*, *supra* note 212.

226. *See* Press Release, Walgreens Co., *supra* note 8.

227. *Id.*

228. *Id.* Walgreens was recognized as the “Private-Sector Employer of the Year” by *Careers & the disABLED Magazine*. *Id.*

229. *Walgreens Recruits*, *supra* note 134.

230. *Id.*

231. *See, e.g.,* WAL-MART WATCH, REASONABLE ACCOMMODATION DENIED: AN EMERGING TALE OF LAWSUITS, SETTLEMENTS, AND WAL-MART’S BROKEN PROMISES TO APPLICANTS AND EMPLOYEES WITH DISABILITIES 9-10 (2008), available at <http://walmart.3cdn.net/2851551578dcac>

efforts in place to recruit disabled applicants<sup>233</sup> and was ranked by *Careers and the disABLED Magazine* as one of the top disability employers.<sup>234</sup> However, there seems to be a discrepancy in Wal-Mart's legal track record.<sup>235</sup> Wal-Mart has had the most suits filed against it under Title I than any other corporation.<sup>236</sup> In 2001 alone, Wal-Mart paid \$6.8 million to settle a lawsuit brought by the EEOC to collect damages for disabled workers and applicants.<sup>237</sup> Also, juries have found that Wal-Mart violated Title I in numerous circumstances.<sup>238</sup> Further, Wal-Mart blatantly disregarded a federal court order to initiate programs to hire and accommodate deaf employees.<sup>239</sup> Many claim that "Wal-Mart has treated its responsibilities under the ADA as nothing more than a hindrance."<sup>240</sup> This accusation seems to hold true given the fact that despite Wal-Mart's press releases claiming diversity, the EEOC continues to bring charges against it.<sup>241</sup> All of these actions have created backlash in the disability community, with some even calling for boycotts.<sup>242</sup> If these boycotts were successful, Wal-Mart could see great losses.<sup>243</sup> As shown, corporations that have sought applicants with severe

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476e\_jrm6iyd87.pdf (detailing Wal-Mart's numerous violations of Title I and lawsuits brought by the EEOC).

232. *See id.*

233. *See* Press Release, Wal-Mart Stores, Inc., Wal-Mart's Diversity Commitment Translates into Support for the Disability Community (May 18, 2009), *available at* [http://walmartstores.com/media/factsheets/fs\\_2329.pdf](http://walmartstores.com/media/factsheets/fs_2329.pdf) (describing Wal-Mart's current efforts, implementations, and partnerships).

234. *Top 50 Employers*, *supra* note 212 (ranking Wal-Mart fourth out of the top fifty disability employers).

235. *See, e.g.*, WAL-MART WATCH, *supra* note 231, at 9-10 (detailing Wal-Mart's numerous violations of Title I and lawsuits brought by the EEOC).

236. *Id.* at 9.

237. *Id.* at 10.

238. Press Release, U.S. Equal Emp't Opportunity Comm'n, Wal-Mart Violates Disabilities Act Again; EEOC Files 16th ADA Suit Against Retail Giant (June 21, 2001), *available at* <http://www1.eeoc.gov/eeoc/newsroom/release/6-21-01.cfm?renderforprint=1>.

239. WAL-MART WATCH, *supra* note 231, at 11 (detailing Wal-Mart's violations of Title I).

240. *Id.* at 26.

241. *See, e.g.*, Press Release, Equal Emp't Opportunity Comm'n, Wal-Mart Sued for Disability Discrimination (Jan. 27, 2010) [hereinafter Press Release, Wal-Mart Sued], *available at* <http://www.eeoc.gov/eeoc/newsroom/release/1-27-10-b.cfm> (discussing the EEOC's suit against Wal-Mart for failing to accommodate a deaf employee by providing an ASL interpreter and/or comprehensive written notes).

242. *See, e.g.*, Hightower, *supra* note 199, at 26, 30 (calling for a boycott due to, among a list of complaints, Wal-Mart's continued violations of Title I).

243. As noted, the disability community is large and continues to grow. CENSUS BRIEF, *supra* note 18 (finding that the number of disabled Americans will greatly increase by 2030). The sheer size of the disability community could greatly impact Wal-Mart's revenues. *See, e.g.*, Cole, *supra* note 208, at 4 (arguing that banking institutions should cater to the disability community not only because of its growing size, but also because of the "relatives, friends, and people" who are affected and influenced by people with disabilities).

disabilities have seen benefits, while those that continue to discriminate have put themselves at substantial risk.

## V. TO THE EXECUTIVE WE SHALL GO

The key to increasing the employment of applicants with severe disabilities is educating employers.<sup>244</sup> If employers fail to understand the nature of severe disabilities and the possible benefits that can be obtained from employing such applicants, no other policy will prevail.<sup>245</sup> Researchers, employers, and the federal government seem to implicitly agree that education is essential to successful implementation of Title I.<sup>246</sup> Researchers have indicated that more robust data is needed for the purpose of educating employers.<sup>247</sup> With this education, the realities of hiring applicants with severe disabilities will become apparent.<sup>248</sup> Further, many employers have found education essential in successfully implementing Title I requirements.<sup>249</sup> And finally, the federal government itself has taken actions which indicate its approval of education as a tool to implement Title I. A prime example is the Department of Education's ("DOE") development and distribution of *Disability Employment 101*.<sup>250</sup> *Disability Employment 101* provides potential employers with "lessons" to find employees with disabilities, "cultivat[e]" these workers, learn from other businesses, and use this research within their own business.<sup>251</sup>

With education as a viable solution, we must now determine how this solution can be implemented. It becomes obvious that the executive

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244. See *infra* Part V.B (arguing that the best solution is for the executive to educate employers by aggressively enforcing Title I).

245. Congress realized that biases existed and needed to be eradicated from the workplace, and further realized while enacting the ADAAA that these biases were still prevalent. ADA Amendments Act of 2008, 42 U.S.C. § 12101(a)(8) (2006 & Supp. II 2009). It has been hypothesized that employers will "wait-and-see" the results of others. Bird & Knopf, *supra* note 56, at 180-81. Using the "wait-and-see" theory, by publishing the successes of others, employers who have been "waiting" will become educated and be encouraged to initiate such employment efforts. See *id.*

246. See, e.g., ROADMAPS FOR ENHANCING, *supra* note 167, at 25 (stating that the government needs to expand research initiatives "that can be used by businesses to help document business case i.e., business need more and better data").

247. See Hoffman, *supra* note 172, at 11 (arguing that data is needed and that the current "data sets are anemic in scope and number"); Stein, *supra* note 70, at 1688 (arguing that further data could "shed light on whether or how type disability . . . affect labor market participation rates").

248. Hoffman, *supra* note 172, at 11.

249. See, e.g., DIVERSITY AND INCLUSION, *supra* note 130, at 13 (describing Wal-Mart's successful educational events featuring a manager who is severely disabled).

250. See, e.g., DISABILITY EMPLOYMENT 101, *supra* note 203.

251. *Id.* at 3.

branch, consisting of numerous agencies,<sup>252</sup> is the most able to educate employers. In particular, the EEOC, ODEP, and DOE have shown their potential to educate employers.<sup>253</sup> However, the passive methods of education these agencies have utilized, thus far, have failed.<sup>254</sup> To truly educate employers an aggressive method of Title I enforcement must be initiated.<sup>255</sup> This aggressive method includes increasing enforcement, publicizing the claims brought, and mandating in settlements and court orders that employers conduct ADA compliance trainings, collect data, and form alliances with the ODEP to promote their positive experiences employing applicants with severe disabilities.<sup>256</sup>

*A. Questions Galore: Who Is Best to Handle the Issue—the Legislature or the Unsuccessful Executive?*

One could argue that Congress should enact specific legislation to deal with the employment of Americans with severe disabilities.<sup>257</sup> However, this argument fails to consider the time, complexity, and political support necessary to enact such legislation.<sup>258</sup> First, consider the timeframe in which it took to amend the ADA.<sup>259</sup> Although the ADA was flawed, and although the Supreme Court construed the ADA against the legislature's intent, it took Congress nearly twenty years to amend

252. See *Federal Executive Branch*, USA.GOV, <http://www.usa.gov/Agencies/Federal/Executive.shtml#> (last updated Jan. 5, 2012) (listing the numerous departments and agencies under executive control).

253. The ADA obligates the EEOC to enforce claims against employers. ADA Amendments Act of 2008, 42 U.S.C. § 12117 (2006 & Supp. II 2009). Also, the ODEP has made joint efforts with employers to promote disability awareness and employment. See, e.g., *ODEP-CVS Alliance*, *supra* note 218 (detailing the ODEP-CVS alliance, in which ODEP provided CVS with resources and information in order to assist CVS in hiring and promoting disabled applicants). And, the DOE has published informational materials that encourage the employment of those with severe disabilities. See, e.g., *DISABILITY EMPLOYMENT 101*, *supra* note 203, at 3 (providing potential employers with ways to find employees with disabilities, the best ways to prepare for their employment, and briefly describing benefits these employees bring).

254. See *HOUSEHOLD ECONOMIC STUDIES*, *supra* note 82, at 8 (demonstrating the high unemployment and poverty rates of Americans with severe disabilities).

255. See *infra* Part V.B.

256. See *infra* Part V.B.

257. See, e.g., Porter, *supra* note 181, at 357-58 (arguing that Title I needs to be statutorily amended, and that “[p]erhaps an amendment will help serve the purpose of educating the courts and the public”). Additionally, this argument is supported by the fact that Congress has already passed legislation dealing with the employment of disabled Americans as a whole. See ADA Amendments Act of 2008, 42 U.S.C. § 12101.

258. See ADA Amendments Act of 2008, 42 U.S.C. § 12101(a)(8) (noting that there was a “continuing existence of unfair and unnecessary discrimination” after the ADA’s passage, which required that an amendment be made).

259. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

the legislation.<sup>260</sup> This illustrates the cumbersome and time-consuming nature of the legislative process. Americans with severe disabilities have waited long enough and further delay would only add to their struggles. Second, consider the complexity of the legislation required. Among the issues needing to be addressed are the definition of severe disability, the disabilities included and excluded from such a definition, the details of enforcement, and the penalties for violating the proposed legislation.<sup>261</sup> Third, this legislation would need to garner enough popular support to pass through both houses of Congress and be signed into law by the President.<sup>262</sup> If the U.S. Census Bureau is correct, only 10% of Americans have a severe disability.<sup>263</sup> Of this 10%, only a small percentage is seeking employment—meaning this legislation would affect few and garner little popular support.<sup>264</sup> As shown, leaving the problem in the hands of Congress leads to a number of complications.

This leaves the executive branch as being the best situated, through educating employers, to efficiently and effectively produce changes.<sup>265</sup> The intention behind Title I was to end employment discrimination against those with disabilities.<sup>266</sup> This discrimination is both intentional and unintentional, meaning that there are underlying and pervading biases.<sup>267</sup> The only way to end unintentional discrimination, thereby fulfilling the full intent of Title I, is to educate employers.<sup>268</sup> With this

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260. See *id.* § 2(a)(3)–(8), 122 Stat. at 3553–54.

261. See ADA Amendments Act of 2008, 42 U.S.C. §§ 12102(1), 12117 (defining disability and discussing enforcement). These are all issues currently addressed in the ADA, but they would have to be addressed in regard to individuals with severe disabilities if legislation was to deal with this specific issue—meaning that Congress would have to define this subgroup of disability, inevitably including and excluding particular disabilities, and then determine ways to enforce and penalize violations, just as the ADA does. See *id.*

262. See U.S. CONST. art. I, § 7, cl. 2.

263. CENSUS BRIEF, *supra* note 18 (finding that one in ten Americans has a severe disability).

264. See *id.*; Burkhauser & Stapleton, *supra* note 21, at 9 (finding that some individuals falling within the definition of severely disabled have no “meaningful alternative” other than to remain unemployed). It is the Author’s assumption that far fewer than the 10% of Americans with severe disabilities will be actively seeking employment. This assumption is based on the fact that the U.S. Census Bureau’s definition of severe disability is wider than this Note, not restricting it to those actively seeking employment. See CENSUS BRIEF, *supra* note 18.

265. See, e.g., DISABILITY EMPLOYMENT 101, *supra* note 203, at 3 (discussing executive initiatives to help potential employers find employees with disabilities, prepare for their employment).

266. H.R. REP. NO. 101-485(II), at 22-23 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 304.

267. Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 133 (1998) (arguing that unintentional discrimination is pervasive).

268. See *id.* “Stereotypes and prejudices grow easily in the absence of day-to-day contact with human beings who are different. Research shows that employers who have no employees with disabilities have more negative attitudes towards workers with disabilities than those who have moderate or large numbers.” *Id.* Other scholars argue that these prejudices and stereotypes can be

education, the inaccuracies and misconceptions about applicants with severe disabilities can be eliminated.<sup>269</sup>

Even though the executive seems best situated to educate employers, the efforts it has taken have failed to produce results.<sup>270</sup> The reality is that the executive's efforts have been a passive response to a pervasive problem.<sup>271</sup> These efforts include initiating a task force, summit, and think tank in 2000 to discuss issues with the employment of individuals with significant disabilities.<sup>272</sup> Another effort was the formation of a business dialogue with the goal of increasing disability employment through employer recognition of the benefits disabled employees bring.<sup>273</sup> And further, efforts have been taken to connect applicants with disabilities to employers, including One-Stop Career Centers, JAN, and the Employer Assistance and Resource Network ("EARN").<sup>274</sup> One-Stop Career Centers, founded under the Workforce Investment Act, offer a "full range of assistance to job seekers and employers in one location," including individuals with disabilities.<sup>275</sup> JAN works to encourage disability employment "by providing information on job accommodations, entrepreneurship, and related subjects."<sup>276</sup> And EARN, operated by the ODEP, is a telephone service that links employers to qualified applicants with disabilities.<sup>277</sup>

Given all of these efforts, little progress has been seen.<sup>278</sup> To start, all of these efforts, with the exception of the 2000 task force, have been targeted at disabled applicants as a whole, not just those with severe disabilities.<sup>279</sup> This seems to encourage employer "cream-skimming,"

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ended with education. One favors educating the public through an amendment to the ADA. *See, e.g.,* Porter, *supra* note 181, at 358.

269. *See* Weber, *supra* note 267, at 133 ("[D]iscrimination . . . stems . . . from ignorance, fear, or a misplaced concern for the person's well-being," and this can be solved through education and interaction with people with severe disabilities.). *See also* DISABILITY EMPLOYMENT 101, *supra* note 203, at 3 (discussing the DOE's attempt to educate employers through "lessons").

270. *See supra* text accompanying notes 252-54.

271. *See supra* text accompanying notes 252-54. The pervasiveness of the problem is demonstrated by the high unemployment and poverty rates of those with severe disabilities, and the passiveness of the executive's efforts is shown by the fact that these rates remained high after implementation of these efforts. *See* HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8.

272. PEOPLE WITH DISABILITIES, *supra* note 50, at 4-5.

273. ROADMAPS FOR ENHANCING, *supra* note 167, at 5.

274. SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 3-4.

275. *Id.* at 22.

276. *Id.* at 23.

277. *Id.*

278. *See supra* note 271 and accompanying text.

279. *See, e.g.,* SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 1 (discussing how the results of the survey—collecting data on JAN, EARN, and One-Stop Career Centers—were to assist ODEP in developing policies for "increasing employment opportunities for people with disabilities," failing to differentiate between those with severe and non-severe disabilities).

which is when employers recognize the need to hire disabled applicants, but then only hire the least disabled who are perceived to have higher benefits and lower costs.<sup>280</sup> Further, and more importantly, these efforts have been underutilized.<sup>281</sup> This underutilization is clearly shown by survey results collected by the ODEP, finding that only 25% of employers were aware of One-Stop Career Centers, 7.4% of JAN, and 8% of EARN services.<sup>282</sup> Even more telling, out of the employers aware of these services, only 15.3% used One-Stop Career Centers, 27.7% used JAN, and 12.4% used EARN services.<sup>283</sup> Researchers failed to articulate a hypothesis for employer's failure to utilize these services.<sup>284</sup> However, a report by the Government Accountability Office discussing One-Stop Career Centers suggested that the service was underutilized because the government had not taken adequate steps to collect data on employers' use of the service, leading to a lack of "information necessary to identify areas where additional employer assistance may be needed or to design a strategy for effectively targeting limited workforce funds."<sup>285</sup>

And finally, the federal government has taken cursory efforts to gather data that differentiates between disabilities.<sup>286</sup> The data that has been collected deals with rates of employment, poverty, annual earnings, and educational attainment, among others.<sup>287</sup> The issue with this data is two-fold. First, the data fails to reflect accommodation costs associated with applicants with severe disabilities or any pertinent data on the successes these employees bring.<sup>288</sup> Second, the categorizations used fail to differentiate between severe and non-severe disabilities.<sup>289</sup> The data categorizes disabilities along the lines of visual, hearing, ambulatory, cognitive, self-care, and independent living disabilities.<sup>290</sup> However,

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280. See Stein, *supra* note 70, at 1680 (describing the "cream-skimming" concept).

281. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 22-23 (showing the low percentage of employers familiar with One-Stop Career Center, JAN, and EARN).

282. See *id.*

283. *Id.*

284. See *id.* (failing to suggest a reason why employers are not utilizing the services).

285. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-259, WORKFORCE INVESTMENT ACT: EMPLOYERS ARE AWARE OF, USING, AND SATISFIED WITH ONE-STOP SERVICES, BUT MORE DATA COULD HELP LABOR BETTER ADDRESS EMPLOYERS' NEEDS 10 (2005), available at <http://www.gao.gov/new.items/d05259.pdf>.

286. See, e.g., *Disabilities*, *supra* note 18 (providing general data about Americans with disabilities).

287. See, e.g., *Find Disability Statistics*, EMP'T & DISABILITY INST., CORNELL UNIV., <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=2> (last visited Apr. 20, 2012).

288. See *id.*

289. See *Glossary*, EMP'T & DISABILITY INST., CORNELL UNIV., <http://www.disabilitystatistics.org/glossary.cfm> (last visited Apr. 20, 2012).

290. *Id.*

within each of these categories individuals with severe and non-severe disabilities can be found.<sup>291</sup> Even the federal government itself has stated that the current research is inadequate, and that efforts need to be expanded.<sup>292</sup>

The executive, through the EEOC, has the potential to aggressively enforce Title I in regards to applicants with severe disabilities rather than the passive efforts taken thus far.<sup>293</sup> Aggressive enforcement of Title I will lead to “lessons learned” for the violator.<sup>294</sup> Other employers will also learn through what analysts have called the “wait-and-see” effect.<sup>295</sup> This effect, originally posed in the reasonable accommodation setting, holds that employers will “wait” until others have made successful accommodations rather than take immediate, potentially unsuccessful, and costly action.<sup>296</sup> Employers “wait-and-see” because if they act too quickly they risk overinvesting, thereby squandering assets, or may underinvest and risk litigation from Title I violations.<sup>297</sup> This “wait-and-see” effect explains employers’ reluctance to employ and promote individuals with severe disabilities.<sup>298</sup> Employers are fearful to invest time and money into hiring and training individuals with severe disabilities because they are unaware of the benefits these employees bring.<sup>299</sup> At the same time, employers fear taking too little action, thereby setting themselves up for litigation under Title I.<sup>300</sup>

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291. *See id.*

292. *See, e.g., ROADMAPS FOR ENHANCING, supra* note 167, at 25 (describing how more research is needed to help business hire, train, and assist employees with disabilities).

293. *See, e.g., ODEP-CVS Alliance, supra* note 218 (describing the alliance between the ODEP and CVS to develop programs for “recruiting, hiring, and advancing employees with disabilities”).

294. *See supra* note 16 and accompanying text. Increased enforcement will lead to a lesson learned for the violator because they will be forced to pay damages and possibly suffer from a negative public image. *See Hoffman, supra* note 16, at 335. Because businesses seek to “make as much money as possible,” if businesses are forced to pay for violations, their profits will be lowered. *See Milton Friedman, A Friedman Doctrine: The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 33 (discussing the responsibilities of business).

295. *See Bird & Knopf, supra* note 56, at 180-81.

296. *Id.*

297. *Id.*

298. *See Jolls, supra* note 54, at 277 (finding a decline in employment levels of those with disabilities following the ADA’s enactment).

299. *Cf. Bird & Knopf, supra* note 56, at 181 (describing employers’ fear of “overinvesting” in reasonable accommodations).

300. Bird & Knopf, *supra* note 56, at 181. The executive has implicitly adopted a “wait-and-see” approach in its own efforts to employ individuals with disabilities, seeing itself as a “model employer.” *See PEOPLE WITH DISABILITIES, supra* note 50, at 3.



### B. From Passive to Aggressive Education

To educate employers, the executive must act aggressively to enforce the current legislation. Applicants with severe disabilities are qualified under Title I for employment within numerous sectors and positions.<sup>301</sup> As shown, large retailers have, arguably, created an industry standard for hiring these applicants.<sup>302</sup> Similarly, other industries may have created such a standard, including the food preparation industry.<sup>303</sup> The EEOC needs to initially focus its efforts on the industries and positions where applicants with severe disabilities have been found qualified, through industry standard or otherwise.<sup>304</sup> Since individuals with severe disabilities have been found qualified, the EEOC's enforcement efforts will see greater success because of Title I's application solely to qualified applicants.<sup>305</sup>

By bringing claims forward, the EEOC can act to educate both violators and other employers through "lessons learned."<sup>306</sup> Broadly speaking, increasing litigation would raise the costs of noncompliance<sup>307</sup>—acting as a lesson learned for the violator and a "lesson of deterrence" for other employers.<sup>308</sup> But to truly make "lessons learned" effective, the EEOC must go further by fully prosecuting the claims while seeking the highest judgments available,<sup>309</sup> and publicizing the claims it brings.<sup>310</sup> Most importantly, the EEOC must demand that

301. See *supra* Part IV.A (discussing how applicants with severe disabilities are qualified, particularly in the retail industry).

302. See *supra* notes 152-61 and accompanying text.

303. See, e.g., PEOPLE WITH DISABILITIES, *supra* note 50, at 63 (describing a court's finding that an individual with mental retardation was qualified for a dishwashing position at Olive Garden).

304. See *supra* Part IV.A.

305. See ADA Amendments Act of 2008, 42 U.S.C. § 12112(a) (2006 & Supp. II 2009) (applying Title I to only "qualified" applicants with disabilities).

306. See *supra* note 297 and accompanying text.

307. See Amy L. Allbright, 2004 *Employment Decisions under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513 (2005) (finding that employers prevail in 97% of Title I claims); Harris, *supra* note 179, at 31-32 (arguing that hiring claims are difficult to prove and that applicants have little investment in them); Hoffman, *supra* note 16, at 335 (purporting that an obvious "soft" cost is negative media attention).

308. This Note uses the phrase "lesson of deterrence" to describe the scenario where an employer learns from the negative implications of a claim brought against a similarly situated employer. This, in many ways, is similar to the "wait-and-see" effect, except that instead of employers waiting for others to take action in compliance with the ADA, they see the effects of noncompliance by others, and soon thereafter take action themselves. See Bird & Knopf, *supra* note 56, at 180-81 (explaining the "wait-and-see" effect in relation to Title I accommodations).

309. The EEOC has the ability, depending on the size of the employer, to seek up to \$300,000 in compensatory and punitive damages. *Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employers/remedies.cfm> (last visited Apr. 20, 2012).

310. See *infra* text accompanying notes 321-33.

settlements and relief from the court include mandated ADA compliance training programs,<sup>311</sup> data collection,<sup>312</sup> and require alliances with the ODEP focusing on promoting their positive experiences with severely disabled applicants.<sup>313</sup>

First, studies show that the EEOC is failing to investigate a number of claims.<sup>314</sup> This provides the EEOC with the opportunity to further enforce Title I by prosecuting the claims brought before it, specifically claims involving applicants with severe disabilities.<sup>315</sup> While bringing these claims, the EEOC needs to seek the highest amount of recovery available. Under Title I, a plaintiff can recover up to \$300,000 in compensatory and punitive damages.<sup>316</sup> However, the average settlement for claims brought by the EEOC is a mere \$16,171—meaning the EEOC is settling for far less than the maximum amount allowed under the ADA.<sup>317</sup> The higher the financial burden, the more deterrent effect the claim will have because, logically, the more money lost from the Title I violation, the less likely employers will obtain their goal of profit generation.<sup>318</sup> In addition, plaintiffs can bring state claims which often have no maximum.<sup>319</sup> These state claims can add massive dollar amounts to awards, in one instance adding \$2.5 million to the \$300,000 allowed

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311. See, e.g., Press Release, U.S. Equal Emp't Opportunity Comm'n, Judge Slaps Wal-Mart with Major Sanctions for Violating Court Order in EEOC Disability Bias Case (June 14, 2001) [hereinafter Press Release, Judge Slaps Wal-Mart], available at <http://www.eeoc.gov/eeoc/newsroom/release/6-14-01.cfm> (ordering a mandatory training program as part of the Consent Decree).

312. See Blanck, *supra* note 176, at 896 (arguing that additional research, which differentiates between disabilities, is needed).

313. See, e.g., *ODEP-CVS Alliance*, *supra* note 218 (detailing the ODEP-CVS alliance).

314. Allbright, *supra* note 307, at 514.

315. A caveat to this proposal is that the EEOC's budget would likely need to be increased. In the 2009 federal budget, the EEOC was granted \$342 million dollars in funding. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2009, at 1159 (2009), available at <http://frwebgate1.access.gpo.gov/cgibin/PDFgate.cgi?WAISdocID=Jh5Fm1/0/2/0&WASAction=retrieve>. The EEOC not only covers claims brought under the ADA, but under numerous other pieces of legislation. *Id.* at 1159-60. In order to truly increase enforcement without overburdening the agency, the EEOC's budget will need to be increased.

316. *Remedies for Employment Discrimination*, *supra* note 309. For employers with 15 to 100 employees the maximum is \$50,000, with 101 to 200 it is \$100,000, with 201 to 500 it is \$200,000, and with over 500 employees the maximum is \$300,000. *Id.*

317. See Hoffman, *supra* note 172, at 10.

318. See Friedman, *supra* note 294, at 33 (arguing that a business's goal is to "make as much money as possible").

319. See, e.g., *Brady v. Wal-Mart Stores, Inc.*, No. CV 03-3843(JO), 2005 WL 1521407, at \*1, \*3, \*5 (E.D.N.Y. June 21, 2005) (holding that Wal-Mart was liable for \$300,000 on the plaintiff's federal claim and an additional \$2.5 million for the plaintiff's state claim).

under the ADA.<sup>320</sup> The EEOC should actively encourage plaintiffs to pursue such state remedies.

Second, the EEOC must publicize the claims it brings.<sup>321</sup> When claims are brought against an employer, the employer not only loses money through litigation expenses, settlements, and verdicts, but also through negative publicity.<sup>322</sup> While the EEOC collected over \$54 million in monetary benefits from the 3364 ADA claims it brought in 2007, this has a small deterrent effect given that each claim averaged only \$16,171.<sup>323</sup> Further, evidentiary factors make it difficult to prevail on a Title I claim.<sup>324</sup> With low success rates and low monetary damages in the successful cases, the main deterrent from violating Title I seems to be the negative publicity it generates.<sup>325</sup> The EEOC must work to intensify this negative publicity.<sup>326</sup> The EEOC can publicize litigation, thereby exacerbating negative exposure, by prominently posting claims on its website,<sup>327</sup> disseminating the information to major news media through press releases,<sup>328</sup> and passing the information onto local government and advocacy groups.<sup>329</sup> The EEOC has already developed a newsletter that it distributes to regional offices, keeping them abreast of

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320. *Id.* at \*5.

321. The EEOC can do this by issuing press releases. *See, e.g.*, Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Three South Carolina Companies for National Origin Discrimination (Feb. 3, 2011) [hereinafter Press Release, EEOC Sues Three South Carolina Companies], available at <http://www.eeoc.gov/eeoc/newsroom/release/2-3-11b.cfm>.

322. *See* Hoffman, *supra* note 16, at 335 (discussing the negative media attention generated from Title I violations); Acemoglu & Angrist, *supra* note 54, at 4 (finding that employers paid over \$174 million dollars in settlements from July 1992 to July 1998).

323. *See* Hoffman, *supra* note 172, at 10.

324. Harris, *supra* note 179, at 31-32. Between 2002 and 2004, employers prevailed in 97% of the cases brought before the courts. Allbright, *supra* note 307, at 513.

325. *See* Hoffman, *supra* note 16, at 329 (purporting that concern over "workplace morale problems and adverse media attention might further induce employers to resolve [Title I] claims early").

326. This can be done through issuing press releases. *See, e.g.*, Press Release, EEOC Sues Three South Carolina Companies, *supra* note 321.

327. Currently, the EEOC's website has a small text box on its home page titled "Newsroom," which lists only five stories. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/> (last visited Apr. 20, 2012). Clicking on the "Newsroom" icon brings you to the "Newsroom" page. *Newsroom*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/newsroom/index.cfm> (last visited Apr. 20, 2012). The EEOC could easily make this text box more prominent and have the "Newsroom" page contain more detailed information in a more organized fashion.

328. *See* Press Release, EEOC Sues Three South Carolina Companies, *supra* note 321, for an example of a press release issued by the EEOC.

329. The EEOC could pass the information onto the same local agencies that the DOE has encouraged employers to seek out in their efforts to find and accommodate workers with disabilities. *See* DISABILITY EMPLOYMENT 101, *supra* note 203, at 13-15 (encouraging employers to go to schools and universities, as well as to seek resources at the U.S. Chamber of Commerce's Center for Workplace Preparation, U.S. Business Leadership Network, and the Society for Human Resource Management).

Title I litigation.<sup>330</sup> This newsletter, or a similar publication, could easily be forwarded to major news outlets, local governments, and advocacy groups. Overall, the publicity produced by enforcement actions has the potential to decrease the employer's public image, goodwill in the community, and even lead to boycotts.<sup>331</sup> These implications, along with the financial burdens of litigation, will act as a strong deterrent from future violations.<sup>332</sup> While Title I claims are difficult to win, the EEOC will satisfy a major barrier to relief under Title I by focusing its efforts on industries and positions where applicants with severe disabilities have been found qualified.<sup>333</sup>

Third, the EEOC must demand in settlement negotiations and court orders that violators have ADA compliance trainings, collect data on severely disabled applicants, and initiate ODEP alliances with the goal of promoting positive employment experiences. To start, the federal government has found mandatory training programs essential in having civil service employees and military personnel understand, recognize, prevent, and report certain types of discrimination.<sup>334</sup> The private sector has also seen the benefits of training programs, such as Wal-Mart's successful educational events featuring a manager who is severely disabled.<sup>335</sup> Even more, the EEOC itself has stated that training programs "help employers understand, prevent and correct discrimination in the workplace."<sup>336</sup> In fact, the EEOC has initiated the EEOC Training Institute (the "Institute").<sup>337</sup> This Institute sponsors conferences, holds seminars, conducts webinars, and performs on-site training.<sup>338</sup> This pre-

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330. PEOPLE WITH DISABILITIES, *supra* note 50, at 62.

331. See Hoffman, *supra* note 16, at 335 (arguing that litigation generates negative attention; therefore, compliance outweighs noncompliance).

332. The deterrent effect comes from litigation and negative publicity, which lowers profits. See Friedman, *supra* note 294, at 33 (arguing that businesses seek to maximize profits); Hoffman, *supra* note 16, at 335.

333. See ADA Amendments Act of 2008, 42 U.S.C. § 12112(a) (2006 & Supp. II 2009) (applying Title I to only "qualified" applicants with disabilities). Also note that even though retail corporations have been hiring applicants with severe disabilities, many have continued to violate Title I, which has resulted in litigation. See, e.g., Press Release, Wal-Mart Sued, *supra* note 241. This means that there are still opportunities for the EEOC to enforce Title I claims against even large retail employers. See *id.*

334. See, e.g., John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 532, 120 Stat. 2083, 2200 (2006) (codified as amended at 10 U.S.C. § 4361 (2006)) (instituting a mandatory policy to educate cadets and Military Academy personnel about sexual abuse and harassment).

335. See, e.g., DIVERSITY AND INCLUSION, *supra* note 130, at 13.

336. U.S. EQUAL EMP'T OPPORTUNITY COMM'N TRAINING INST., <http://www.eeotraining.eeoc.gov/viewpage.aspx?ID=030b9cb8-8e56-433c-a410-cc94ccb64b3a> (last visited Apr. 20, 2012).

337. *Id.*

338. *Id.*; Webinars, U.S. EQUAL EMP'T OPPORTUNITY COMM'N TRAINING INST., <http://www.eeotraining.eeoc.gov/viewpage.aspx?ID=9e227508-eb1d-4b91-bc5e-e31e509d04df> (last visited Apr.

established Institute can accommodate the training programs that would be required by settlements and court orders. This would allow violators to have experienced government officials, with expertise in the ADA and Title I compliance, perform trainings on-site.<sup>339</sup> Trainings would be aimed toward the workforce as a whole, but in particular toward management and human resources personnel.<sup>340</sup> In certain cases, courts have already ordered mandatory trainings.<sup>341</sup> The EEOC needs to continue to pursue such orders and expand these efforts by requiring trainings within negotiations and settlement agreements.<sup>342</sup>

Next, the EEOC must mandate in settlements and court orders that violators collect data on the accommodation costs for and benefits received from hiring applicants with severe disabilities. Research differentiating between those with severe and non-severe disabilities is essential. With accurate information, stronger arguments can be made as to the benefits these applicants bring while increasing employers' confidence in the hiring decisions they make.<sup>343</sup> This data will likely quash misperceptions by showing that, although accommodations may be more costly, these costs are far outweighed by the publicity, goodwill, and work ethic that applicants with severe disabilities bring to the employer.<sup>344</sup> Employers want "usable" information.<sup>345</sup> Usable information from employers who have seen the true costs and benefits of employing applicants with severe disabilities will encourage other employers who are "waiting" to "see" the benefits and to begin to

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20, 2012). The Institute only charges \$149 for a live webinar event. *Id.*

339. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N TRAINING INST., *supra* note 336.

340. See ROADMAPS FOR ENHANCING, *supra* note 167, at 11. "Leadership at the highest level of business is critical to secure 'buy-in' and establish and sustain a corporate-wide culture (not limited to human resources) that increases awareness, creates expectations, and enhances commitment to the hiring, retention, and advancement of persons with disabilities through accessible technology." *Id.*

341. See, e.g., Press Release, Judge Slaps Wal-Mart, *supra* note 311. A federal court ordered Wal-Mart to, among other things, provide ADA training after it violated Title I by refusing to hire two deaf applicants and subsequently violated a consent decree. *Id.*

342. The EEOC has required "training of . . . staff in the requirements of the ADA" in consent decrees before, such as when an Arizona Wal-Mart violated Title I by discriminating against hearing-impaired employees. *Id.* While, as noted, the Wal-Mart store failed to comply, a judge found that the store violated the consent decree and ordered trainings, sanctions, and that Wal-Mart produce a television advertisement admitting to the violations. *Id.*

343. See *id.* at 17. Employers want "usable" information from official sources so that they can make hiring decisions. *Id.* Many have said that employers need usable information in regards to accommodation costs. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 5 (describing the importance of education about accommodating people with disabilities).

344. See Ruh, *supra* note 129 (describing the positive benefits for companies that employ and accommodate disabled employees).

345. ROADMAPS FOR ENHANCING, *supra* note 167, at 17.

employ applicants with severe disabilities.<sup>346</sup> Once others begin to employ applicants with severe disabilities, possible industry standards will form, leading to applicants being “qualified” under Title I and allowing even more aggressive enforcement by the EEOC in a broader range of industries.<sup>347</sup> Similarly, the data collected by violators will be informative to policy makers.<sup>348</sup> By collecting data with regards to applicants with severe disabilities, the data can be presented to policy makers who, in turn, will be able to make informed policy decisions backed by empirical evidence.<sup>349</sup>

And finally, the EEOC must mandate in settlements and court orders that violators enter into alliances with the ODEP with a focus on promoting their experiences with applicants with severe disabilities. The ODEP has already initiated alliances, although on a voluntary basis, as seen with the ODEP-CVS alliance.<sup>350</sup> There, the ODEP “provide[d] CVS with information, guidance, and access to resources” in order to assist CVS in developing “model programs for recruiting, hiring, and advancing employees with disabilities.”<sup>351</sup> CVS was then asked to demonstrate its commitment to the disability community, collect data as to the benefits these employees provided, and find solutions to the issues of hiring and promoting those with disabilities.<sup>352</sup> While this alliance stands as a prime example of the kind and nature of one that court orders and settlement negotiations must require, these alliances have been underutilized.<sup>353</sup> So far, CVS is the only for-profit business that ODEP has aligned with.<sup>354</sup> Forcing violators to align with ODEP will further this tool’s use and reach.

Importantly, these alliances must require that the violator promote their experiences with employing severely disabled applicants, including disseminating this information. The ODEP-CVS alliance required CVS to engage in a “national dialogue” with the goals of raising awareness, publicizing the results of case studies, and developing “forums, round

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346. See Bird & Knopf, *supra* note 56, at 180-81 (explaining the “wait-and-see” effect in relation to Title I accommodations).

347. See Harris, *supra* note 123, at 144-46 (arguing that industry standards create the presumption of qualification under Title I).

348. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 91, at 6 (suggesting that employer data can help the ODEP create policies for increasing disability employment).

349. See *id.*

350. See, e.g., ODEP-CVS Alliance, *supra* note 218.

351. *Id.*

352. *Id.*

353. See *Alliances*, U.S. DEP’T OF LABOR, OFFICE OF DISABILITY EMP’T POLICY, <http://www.dol.gov/odep/alliances> (last visited Apr. 20, 2012) (showing that only ten alliances have been created thus far).

354. See *id.*

table discussions, or stakeholder meetings.”<sup>355</sup> These efforts are essential because businesses want to learn from other businesses.<sup>356</sup> Businesses also want to learn about the job performance and productivity of applicants with disabilities, plus the benefits hiring such applicants will bring to their bottom line.<sup>357</sup> Essentially, in concurrence with the “wait-and-see” theory, violators would be demonstrating, by example and experience, the benefits of employing applicants with severe disabilities.<sup>358</sup> Other employers would then learn from the violator’s experiences.<sup>359</sup>

While best if the actual violator disseminates the information, executive agencies should simultaneously be issuing press releases and publications regarding the data collected and experiences of these employers.<sup>360</sup> To avoid any potential confidentiality issues, the alliance agreement would explicitly state that executive agencies would use the data in such a way.<sup>361</sup> Press releases should be sent directly to major news outlets, business associations, large employers, and nonprofit organizations. Additionally, executive agencies can create publications that can be easily distributed.<sup>362</sup> These publications should be targeted at state and local agencies that deal with disability employment. These agencies have strong connections to employers—providing a more effective means to spread information and successful practices to local businesses.<sup>363</sup>

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355. *ODEP-CVS Alliance*, *supra* note 218.

356. *See* ROADMAPS FOR ENHANCING, *supra* note 167, at 17.

357. *SURVEY OF EMPLOYER PERSPECTIVES*, *supra* note 91, at 24-25.

358. *See* Bird & Knopf, *supra* note 56, at 180-81 (explaining the “wait-and-see” effect in relation to Title I accommodations).

359. As other employers who were “waiting” to hire applicants with severe disabilities “see” the results violators are promoting, they will learn the benefits from the very sources they want to learn from—other businesses. *See* ROADMAPS FOR ENHANCING, *supra* note 167, at 17; Bird & Knopf, *supra* note 56 at 180-81.

360. *See, e.g.*, Press Release, EEOC Sues Three South Carolina Companies, *supra* note 321.

361. In fact, as part of the ODEP-CVS alliance, ODEP was able to “disseminate information through print and electronic media” and “through ODEP’s and CVS’ Web Sites,” per the terms of the alliance. *ODEP-CVS Alliance*, *supra* note 218.

362. *See, e.g.*, DISABILITY EMPLOYMENT 101, *supra* note 203.

363. *See id.* at 16. The federal government encourages employers to:

Connect with [their] local chamber [of commerce] for information and resources about: job skill requirements and industry trends; quality of training and job placement services provided by [their] local Vocational Rehabilitation program and other service providers; local economic development indicators; and links to other members that have partners with local disability organizations.

*Id.*

Through this multilevel approach of aggressive Title I enforcement, educating American employers can be accomplished. This education will make the realities of hiring those with severe disabilities apparent and ease the violator and other employers' misperceptions.<sup>364</sup> With these realities known, employers will be open to hiring—and possibly begin to actively seek—applicants with severe disabilities.

## VI. CONCLUSION

Congress's intent in enacting the ADA was to bring individuals with disabilities "into the economic and social mainstream of American life."<sup>365</sup> So far, in the realm of employment, the legislation has neglected those with severe disabilities.<sup>366</sup> In turn, research on accommodation costs has focused on the disability community as a whole;<sup>367</sup> however, the disability community as a whole fails to accurately reflect the position of Americans with severe disabilities.<sup>368</sup>

While it appears that many employers see applicants with severe disabilities as "inauthentic workers," the reality is quite the opposite.<sup>369</sup> In the realm of large retail employment, many applicants with severe disabilities are qualified for positions under Title I.<sup>370</sup> Beyond their qualification, these applicants bring benefits such as increased morale and productivity, tax incentives, decreased litigation costs, and positive publicity to the employer.<sup>371</sup> Many employers within the retail world have seen these benefits first hand.<sup>372</sup>

To increase the employment of applicants with severe disabilities and decrease the prevailing biases, employers need to be educated.<sup>373</sup> The executive, through the agencies beneath it, has the potential to educate American employers through aggressive enforcement of Title I by increasing enforcement, publicizing the claims brought, and

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364. See Bird & Knopf, *supra* note 56, at 180-81.

365. H.R. REP. NO. 101-485(II) (1990) at 22, *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

366. See HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8 (showing that Americans with severe disabilities have higher unemployment and poverty rates as compared to those with non-severe disabilities).

367. See, e.g., Blanck, *supra* note 52, at 278 (describing the Sears study's focus on then current Sears employees); Hendricks et al., *supra* note 52 (describing the JAN study which focused on "accommodations for workers with disabilities" without differentiating between disabilities).

368. See HOUSEHOLD ECONOMIC STUDIES, *supra* note 82, at 8 (describing the high unemployment and poverty rates of Americans with severe disabilities).

369. Waterstone & Stein, *supra* note 1, at 1361-62.

370. See *supra* Part IV.A.

371. See *supra* Part IV.B.

372. See *supra* text accompanying notes 216-30.

373. See *supra* Part V.



mandating in settlements and court orders that employers have ADA compliance training, collect data on applicants with severe disabilities, and enter into alliances with the ODEP to promote their experiences.<sup>374</sup>

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374. *See supra* Part V.B.

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