Congress enacted the 2008 Amendments to the Americans with Disabilities Act (ADA) on September 25, 2008 (2008 Amendments) amidst high hopes that the amended statute would be more plaintiff friendly. My work and the work of others have suggested that, prior to the 2008 Amendments, defendants were prevailing in more than 90% of ADA cases and that the rigorous definition of disability was often to blame for this pro-defendant outcome.

It is too early to know whether the 2008 Amendments have had the desired impact on cases filed under the ADA for conduct occurring after January 1, 2009. Nonetheless, I thought it would be useful to study judicial outcomes from January 1, 2006 to December 31, 2008 in order to have some baseline data to understand how the passage of the 2008 Amendments affected judicial outcomes.

One might argue that baseline data are not really necessary because researchers, such as myself, have conclusively demonstrated that the 1990 version of the ADA (1990 Act) consistently resulted in defendants prevailing in more than 90% of cases. So, if those figures changed, one would argue that the 2008 Amendments had an impact on litigation.

Unfortunately, I believe that such an assessment is simplistic for several reasons. First, the existing data suffer from significant flaws that may create an
inaccurate baseline. The existing data are based on cases available on one of the reporter services: Westlaw or Lexis. Those services only report cases with a written decision. Because trial court judges rarely write decisions when plaintiffs attain a jury award, jury awards are typically not included in the data. Second, much of the existing data (including my own) overemphasize appellate results. While appellate results may have a big impact on the legal rules that govern cases—and are therefore important—they are not reflective of all cases filed under a statute because few cases result in appeals. Third, the existing data largely ignore settlements. Settlement data are notoriously difficult to capture because most settlements are private. Nonetheless, if a substantial majority of filed cases result in settlement, then those cases must be included in any analysis of plaintiff-outcomes in litigated cases. Especially with so many courts insisting on mediation, settlement is a critical aspect of the litigation process.

By noting these limitations with previous research, I do not mean to criticize prior researchers as sloppy (especially since I was one of them). When much of the ADA data were collected, these flaws were impossible to avoid because the electronic databases—with their limited information—were the only available way to consider cases.

The development of electronic data collection for all filed cases through the Public Access to Court Electronic Records (PACER) makes it possible to engage in more rigorous data collection. PACER includes a code for disability discrimination cases and makes it possible to track a case from the date it is filed to the date of its resolution. Although records are inconsistent among courts and the categorization system is imperfect, PACER provides a more extensive set of records than has been previously examined on a nationwide basis.

Therefore, with the help of a team of research assistants, I decided to gather data about cases filed after January 1, 2006 and resolved prior to December 31, 2008. I did not want to merely record the results in these cases (plaintiff wins, defendant wins, or undisclosed settlement). I wanted to understand who the

7 The plaintiff or lawyer provides the code for the case, not the court. Hence, the code is not always used correctly. When a case was improperly coded, we did not include it in our database.
8 Dr. Kathryn Moss and her colleagues collected some data by traveling to various courts. Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney & Scott Burris, Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 303–04 (2005). Their settlement data are quite problematic. They classified voluntary dismissals without explicit mention of settlement as settlements if the dismissal was with prejudice and no events suggested the plaintiff had unilaterally dropped the suit. Id. at 304. By contrast, I distinguished between “definite settlement” and “likely settlement.”
plaintiffs were and some of the problems they experienced in bringing a lawsuit. I was particularly interested in understanding why people might file what we would consider to be hopeless lawsuits—lawsuits filed without assistance of counsel that have virtually no chance of success. Are there many of these cases, and is there any reason to believe that these cases would be more successful under the 2008 Amendments? Further, of the cases decided in 2008, how frequently was the definition of “disability” a significant barrier to a plaintiff’s success?

Admittedly, this inquiry can yield only minimal information about the fate of plaintiffs under the 2008 Amendments. Presumably, those who were represented by counsel only filed cases if they thought they had a significant chance of prevailing under the 1990 Act. It is quite possible that new categories of plaintiffs will emerge under the 2008 Amendments. Nonetheless, it is still useful to investigate the challenges faced by the plaintiffs who filed cases prior to the 2008 Amendments to find answers to questions like: What problems other than the disability category did they face before the 1990 Act was amended? Are the 2008 Amendments likely to alleviate those problems?

Although my data collection is incomplete, I provisionally report that plaintiffs rarely prevailed under the 1990 Act when judicial decisions were rendered, as has been previously reported, but that the definition of disability has not played a significant role in the favorable defendant outcomes. Thus, it is unlikely that the 2008 Amendments, which principally broaden the definition of disability, will have an impact on litigation outcomes. I also found that nearly half of all filed cases seem to have resulted in some kind of settlement. It is impossible to know if those settlements were meaningful or simply “nuisance” settlements, but the high rate suggests that some beneficial results may have occurred for many plaintiffs despite the high rate of defendant success in cases that resulted in a judicial decision.

Assuming one concludes that many potentially meritorious complaints are not resulting in pro-plaintiff outcomes, the larger question raised by this investigation is what kinds of changes to the ADA would be necessary for plaintiffs to gain a higher rate of success. My answer is that it would need to have a better mechanism for plaintiffs to obtain the assistance of free, competent counsel. The Buckhannon case has made it more difficult than ever for plaintiffs to find counsel who will take cases on a “prevailing party” basis. 9 Few cases lend themselves to

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9 In Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, the Supreme Court concluded that the “catalyst theory” (whereby a party is considered prevailing so long as he or she can prove that the pending litigation was a catalyst that brought about the policy change) is not a permissible basis for the award of attorney fees. 532 U.S. 598, 610 (2001). In dicta, the Court also offered guidance on what it means to be the “prevailing party” for the purpose of collecting attorney’s fees—a party must secure either a judgment on the merits or a court-ordered consent decree. Id. at 603–04. Since Buckhannon, a circuit split has developed regarding whether a private settlement without further judicial action constitutes an “alteration in the legal relationship of the parties” sufficient to make the plaintiff a “prevailing party.” Id. at 605. Compare Barrios v.
contingency fee awards and even fewer cases are brought by plaintiffs able to afford counsel at an hourly rate. In a considerable number of cases, I found that procedural difficulties, such as failing to file a charge with the Equal Employment Opportunity Commission (EEOC), precluded individuals from any consideration on the merits. If we ever expect the win-loss rate to approach a more balanced level, we have to find a way to provide individuals with disabilities competent counsel to handle their cases.

In this Article, part II considers why plaintiffs file cases under the ADA and examines existing literature on this question. Part III then reports the results from the data collected by my research assistants on the eve of the passage of the 2008 Amendments and analyze a few questions: What can we learn about ADA plaintiffs before the 2008 Amendments became effective? If the 2008 Amendments were applicable to these cases, would the outcomes likely have been any different? Part III discusses the results of my study in three areas: rate of pro-plaintiff outcomes, possible impact of ADA Amendments, and results for pro se plaintiffs. This Article concludes that, although the data available prior to the 2008 ADA Amendments make it hard to determine the effectiveness of the Amendments, the 2008 ADA Amendments will likely have little effect on overall judicial outcomes.

II. WHY PLAINTIFFS FILE CASES UNDER ADA

A. Introduction

One perplexing question under the ADA is why plaintiffs file cases at all. The empirical literature suggests they have little likelihood of prevailing on the merits and it is reasonable to assume that many plaintiff lawyers are aware of the difficulty of bringing such litigation. During my informal conversations with lawyers, I am often told they avoid such cases because potential plaintiffs can rarely afford to pay lawyers on an hourly basis, and a contingency arrangement rarely makes sense because the potential liability is not sufficient to support a decent contingency award and they are unlikely to obtain fees as the “prevailing party.” The Buckhannon decision made the prevailing party calculus even more difficult because lawyers know that settlement is the most likely outcome and plaintiffs cannot seek attorney fees as the prevailing party if they obtain a private settlement.10 If plaintiffs cannot obtain lawyers, they can represent themselves—

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10 Although the circuits are split on this issue, see supra note 9, a majority of circuits have rejected the idea that a party can be the “prevailing party” merely as a result of a private settlement. See, e.g., Bill M. ex rel. William M. v. Neb. Dep’t of Health & Human Servs., 570 F.3d 1001, 1004 (8th Cir. 2009). In circuits where settlements can help parties attain “prevailing party” status, the court has to, at least, approve the settlement. See, e.g., Am. Disability Ass’n, Inc. v. Chmielarz, 289 F.3d 1315, 1320 (11th Cir. 2002) (“[E]ven absent the entry of a formal consent decree, if the district court either incorporates the
often referred to as “pro se” litigation—though this is also a hard-to-explain path. Filing fees in district courts are $350. If someone cannot afford a lawyer, the person is likely to find a $350 filing fee substantial. Many plaintiffs seek to have their fees waived, but their requests are sometimes denied. They then proceed to represent themselves without counsel and nearly always have their cases dismissed at an early stage because they cannot comply with the rules of the court system. Why, I wonder, would someone who has typically already lost a job and cannot find a lawyer, spend $350 to file a complaint in federal court?

The experience of plaintiffs who represent themselves is often ignored in discussions about cases brought under the ADA. We know that these plaintiffs are extremely unlikely to prevail or to even obtain a voluntary settlement. So, their experiences say little about the usefulness of the ADA.

But this is not entirely true. These experiences include people who tried, but failed, to find a lawyer to take their case. Are any of their cases seemingly valid? Do some of these cases actually settle? Might these plaintiffs have prevailed had they been able to find a lawyer? If pro se litigants comprise a significant portion of the people who currently file ADA claims in federal court, are there ways the ADA could be changed to assist them?

B. The Existing Literature

It has been observed that pro se litigation has increased in recent years and that federal courts in particular have seen a rise in pro se litigation in civil rights cases. This trend has been attributed to the difficulty of finding legal representation, especially for individuals with disabilities. The existing literature refers to pro se cases as those brought by plaintiffs who represent themselves without the assistance of a lawyer.

Lawyers can try to write into a retainer agreement under which the defendant pays some of the attorney fees as a condition of settlement, but those kind of agreements create ethical and other problems. They may simply reduce the settlement rate by increasing the cost of settlement without meaningfully making it more possible for lawyers to be able to afford to represent ADA plaintiffs.

Paula Hannaford-Agor and Nicole Mott have suggested that the term “self-represented” is respectful of those who proceed without representation by legal counsel rather than the Latin term “pro se” or the term “unrepresented.” As they point out, such people are represented, but by themselves. See Paula Hannaford-Agor & Nicole Mott, Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations, 24 JUST. SYS. J. 163, 163 n.1 (2003). Because the existing literature refers to “pro se litigation,” I will use that phrase in discussing the literature. In my discussion of these cases, though, I will consider such people to be representing themselves rather than being unrepresented.

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claims involving employment discrimination and fair housing issues. A study of nonprisoner, pro se cases that terminated in February 1996 in the United States District Court in San Francisco found that there was a strong correlation between pro se plaintiffs and civil rights claims. Nearly 30% of the cases in the study were civil rights cases. It is difficult to know why so many individuals file pro se in civil rights cases. The literature on pro se representation tends to lump together all types of cases including criminal and family law in which pro se representation is quite commonplace. One party in a divorce case usually appears pro se, but for a somewhat unique reason. Individuals in divorce cases often conclude that the matter is sufficiently simple that both parties do not need legal counsel. Civil rights cases, however, do not fit that model. Cases under the ADA can rarely be described as simple or straightforward.

A more likely explanation for pro se representation in ADA cases is the difficulty of affording and securing counsel. Studies suggest that the legal needs of the poor are rarely met. The American Bar Association reported in a 1995 study that 62% of low-income families that had legal needs took no legal action or attempted to resolve the problem on their own. A pro se litigant is typically perceived “as a nut who files rambling, illogical lawsuits to settle personal vendettas and advance his or her own social and political agenda.” It is thought that pro se litigants have great difficulty navigating the legal system. Hence, in my study of 2008 ADA decisions, I decided to pay close attention to the cases

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15 It is commonly stated that pro se litigation has increased in federal courts. I have not seen a statistic that clearly establishes this fact, although I have seen the following statement: “[N]onprisoner pro se litigants filed 21,615 cases between October 1, 2004 and September 30, 2005.” Nina Ingwer VanWormer, Note, Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon, 60 VAND. L. REV. 983, 988 (2007). That figure, however, is not very illuminating because it offers no evidence of change over time, or a statement of what percentage of the docket includes pro se litigation.


18 Id. at 832.

19 Swank, supra note 16, at 376.

20 In my own dissolution case, I proceeded pro se, seeing no need for us to hire two lawyers to achieve a straightforward dissolution.

21 Swank, supra note 16, at 381–82.


23 Swank, supra note 16, at 385.

24 Buxton, supra note 22, at 106 (noting that pro se litigants are more likely to lose “their case due to technicalities instead of a meaningful review of the merit of their claim”); VanWormer, supra note 15, at 993 (noting that pro se litigants “are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim” (quoting Buxton, supra note 22, at 114) (internal quotation marks omitted)).
involving pro se litigants to see if they do have trouble following the rules of the legal system and whether their cases ever result in successful outcomes.

Some scholars have tried to study the identities of pro se litigants to determine if the generalities about them are valid. Drew Swank suggests that it is not clear that the majority of pro se litigants cannot afford legal representation. He lumps together all pro se litigants in making this statement, failing to distinguish adults who proceed pro se in simple divorce matters from plaintiffs who proceed pro se in complicated civil rights cases. Similarly, Scott Barclay suggests that some litigants pursue pro se litigation “in an attempt to force the courts to deal with the issue that the litigants, rather than the legal system, identify as at the heart of their disputes,” not for financial reasons. To explore Barclay’s hypothesis, I looked for signals within each case file of whether the pro se litigant actively sought, but could not retain, counsel. If pro se litigants have clearly sought counsel then it is not accurate to describe their pro se status as intentional.

By focusing on how many pro se plaintiffs seek to proceed in forma pauperis (IFP), Spencer Park draws a different conclusion than Drew Swank. Park observes that “the high number of pro se litigants who never apply for IFP status (plus those who are denied such status) implies that the possibility of pursuing a claim in federal court with the aid of counsel is financially out of reach for many people, including those who are not poor.” Nonetheless, Park makes quite a leap from the IFP data to that conclusion. If someone is proceeding pro se and not seeking IFP status, it is hard to know what that person could or could not afford with respect to legal representation. Those who apply for and are denied such status clearly reflect people who are struggling with the costs of litigation. However, there is no way to speculate about the financial status of those who never seek IFP status but proceed pro se. Conceivably, as Swank suggests, they may have nonfinancial reasons for proceeding pro se. Alternatively, they may have

26 See id. at 378–79.
28 Barclay’s study does not appear to involve any disability discrimination claims. The examples he cites, which include a disjuncture between the litigants’ wishes and the lawyers’ views, are from cases involving marriage dissolution, unemployment compensation, a contractual claim, and a personal injury action. Id. at 918–19.
29 The ability to proceed in forma pauperis in federal court was codified in 1948 under 28 U.S.C. § 1915, whereby a party files an affidavit indicating that he or she is unable to pay the required fees due to indigency.
30 Park, supra note 17, at 849.
31 There are studies supporting the argument that at least some portion of pro se litigants could afford legal representation but choose not to hire counsel. In a 1993 study of pro se parties in family court in Arizona, 20% said they could afford a lawyer but chose not to get one. See AYN H. CRAWLEY, MD. LEGAL ASSISTANCE NETWORK, HELPING PRO SE LITIGANTS TO HELP THEMSELVES 1 (citing AM. BAR. ASS’N, STUDY OF FAMILY LAW PRO SE, MARICOPA COUNTY., AZ (1993)), available at http://www.courtinfo.ca.gov/programs/cf/cf/ffiles/HelpThemselves.pdf.
been unaware of the option to file IFP; or they could be quite poor but above the income qualifications for IFP status.\textsuperscript{32}

I have tried to respond to these different views of pro se plaintiffs by tracking how frequently they seek IFP status, and what happens to those applications. A larger, more difficult question is whether prior studies on pro se litigants are relevant to ADA litigants. Studies reflect that individuals with work-related disabilities are typically quite impoverished. When the ADA was enacted in 1990, “studies showed that almost 30% of people with work disabilities lived below the poverty line and 45% of families headed by a person with a disability lived in poverty.”\textsuperscript{33} In 2000, national census data reflected that “18% of people with disabilities live below the poverty line, compared with 11% of people without disabilities.”\textsuperscript{34} The unemployment rate for individuals with disabilities was 22% in 1999 when the overall national rate of unemployment had fallen to 4.1%.\textsuperscript{35} Hence, whatever the reasons might be for most plaintiffs filing cases on a pro se basis, it appears unlikely that many ADA plaintiffs can afford a lawyer.

It also appears plausible that ADA plaintiffs increasingly have difficulty finding a lawyer. In a careful study, Rulli and Leckerman found that the number of ADA employment discrimination cases has declined.\textsuperscript{36} They examined ADA Title I filings in the Eastern District of Pennsylvania and found that the number of filings declined from ninety-eight in 2000 to sixty-three in 2003.\textsuperscript{37} Moreover, their review of the filed cases suggested that few of these cases were brought by the disabled poor.\textsuperscript{38} Oddly, they also found that only two IFP applications were filed during the study’s four-year time period.\textsuperscript{39} This trend led them to conclude “that poor people with disabilities are substantially under-represented in federal court litigation seeking to remedy employment discrimination.”\textsuperscript{40} They assumed that poor litigants are likely to seek IFP status, and therefore concluded that the limited number of applications suggests that few poor people are filing ADA lawsuits in that jurisdiction. An important question is whether their findings that 99.7% of all Title I complaints were paid filings\textsuperscript{41} is reflective of the national trend. In my study, I documented the number of IFP requests and the results of such requests.

\textsuperscript{32} Buxton, supra note 22, at 114 (reporting that courts often require plaintiffs to sell assets rather than proceed IFP: “[I]t is not unusual for courts to deny in forma pauperis status to a party who can raise the required funds by offloading valuable assets.”).
\textsuperscript{34} Id. at 627 (citation omitted).
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 633.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 632.
\textsuperscript{39} Id. at 633.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
A 1996 San Francisco study suggests that pro se plaintiffs do not fare badly. Settlement resulted in 15.4% of the cases surveyed. However, these were private settlements so there is no way to assess their quality. Also, the cases included in this study were heard in a relatively liberal jurisdiction. It is not clear that similar statistics would be found elsewhere. Nonetheless, these settlement statistics suggest more favorable results for some pro se plaintiffs than might be expected consistently with the “nuisance suit” perception of pro se plaintiffs. A National Center for State Courts’ research project found less favorable data for self-represented parties. Researchers concluded that less than 7% of cases resulted in settlement if both parties were self-represented in Cook County, Illinois. In Delaware, the researchers found that 30% of cases were dismissed if at least one party was self-represented. On the other hand, they found that settlement rates increased substantially if one party was represented by counsel. These various studies are difficult to interpret and compare because they reflect parties in many different kinds of cases—domestic relations, landlord/tenant, contracts, torts, and civil rights. It is not clear that one can generalize from parties’ experiences in domestic relations matters heard in state court to parties’ experiences in civil rights matters heard in federal court. In my study, I tracked how frequently cases brought by pro se litigants result in settlements to see if the data reflect the national experience under the ADA.

When researchers have studied the difficulties that pro se litigants face, they have attempted to arrive at some solutions. One approach is to suggest how pro se litigants can better help themselves through Internet-based sources and other kinds of resource centers. Some of these programs are very procedurally based and help pro se litigants get in the front door, but leave them baffled at the substantive standards they must meet. Other programs are more substantively focused but can be of little use to a litigant who has made a fatal procedural error. Nina Ingwer VanWormer has suggested that a court-endorsed Internet approach, which included both procedural and substantive material, would be an excellent solution to the challenges of pro se representation. She argues that such a system has many advantages including the possibility that “[p]ro se litigants will still be required to invest a great deal of time and energy in their self-representation; thus, this form of assistance will not encourage people who would otherwise retain counsel to pursue their claims pro se.”

42 Park, supra note 17, at 835.
43 His study surveyed the Northern District of California. Id. at 822.
44 Hannaford-Agor & Mott, supra note 11, at 171.
45 Id.
46 Id. The researchers’ data are a bit difficult to follow because the researchers do not appear to distinguish between cases in which both parties are represented by counsel and cases in which only one party is represented by counsel. They report that settlement increases to 26% if the defendant is represented by counsel. Id. But it is unclear if plaintiffs in all such cases are represented by counsel.
47 VanWormer, supra note 15, at 1013.
48 Id. at 1016.
VanWormer’s approach, however, may be based on a misunderstanding of pro se litigants. She begins her article by discussing Susan Hudock—an award-winning sales representative who decided to fire her attorney and proceed pro se in an ADA claim by using resources she found on the Internet. 49 Hudock appears not to be the typical pro se litigant because of her access to financial resources. She had already spent $18,000 in legal fees on her claim when she fired her attorneys, and she was likely well educated. It appears to me that we need a better picture of these pro se litigants before we decide whether it is realistic for them to proceed without counsel and prevail. Even Hudock lost; the jury found for her employer. 51 If the typical pro se litigant qualifies for IFP status, it is unlikely that he or she would have access to the kinds of Internet resources used by Hudock.

In a comparative study of how other countries respond to problems faced by pro se litigants, Tiffany Buxton found that the United States focuses on educating the self-represented party (similar to the approach recommended by VanWormer), whereas other countries focus on institutional or procedural reforms to make the process itself easier to navigate. 52 Based on this comparative study, Buxton recommends assignment of counsel through the IFP statute, court-drafted documents from oral pleadings, creation of courts for specialized claims, and specialized mediation of claims involving a pro se party. 53 Many of these recommendations, of course, come with a significant price tag and are based on the assumption that further educational efforts are not likely to be sufficient to help pro se litigants gain access to justice. In reading the cases that follow, I tried to consider whether any of these recommended reforms would have helped the parties. Some of them did request that the court appoint legal counsel but that request was rarely granted. Some of them wrote rambling complaints or letters that failed to meet legal standards and were not translated by the court into legal language. Possibly, they would have benefitted from a method of oral communication that could be written into proper pleadings. Many of them did access an alternative dispute resolution system and, occasionally, it appears that that system resulted in a settlement—although there is no way to know the value of the settlement. The hard question is whether the price tag accompanying Buxton’s suggestions would be worth the incremental improvement in access to justice. Would plaintiffs merely make it another step in the process but ultimately lose (like Hudock) or would a higher percentage of plaintiffs actually prevail? That is not an easy question to answer but I did try to assess the pro se cases (when facts were available) to see how many might have had potentially strong claims of discrimination. Unfortunately, even with the existence of electronic files on PACER, that was often a difficult matter for speculation.

49 Id. at 984–85.
50 Id. at 984.
51 Id. at 985.
53 Id. at 139–47.
III. 2008 RESULTS UNDER ADA IN DISTRICT COURTS

A. Prior Studies

In my study of the ADA, which follows, I tried to capture what is happening at the ground floor by reading court files for all ADA cases filed after January 1, 2006 and resolved prior to December 31, 2008. Although settlement data are often speculative, I tried to consider any available evidence of successful settlements for these cases. No other study has attempted to examine the ADA on a national scale, but several studies have examined ADA results within certain jurisdictions or within a subset of ADA cases.

Settlement data are very difficult to obtain because most settlements are private and confidential. EEOC settlements are an exception to this pattern because the EEOC makes settlement data available on its Web site. For fiscal year 2008, the EEOC reports that it received 19,453 charges and resolved 16,705 charges in that fiscal year. Table 1 reflects that EEOC reports that about 20% of the resolved charges resulted in some kind of successful relief for the charging party.

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55 Id.
56 Id.
Table 1: EEOC Charge Data for Fiscal Year 2008

<table>
<thead>
<tr>
<th>Type of Resolution</th>
<th>Number of Charges</th>
<th>Percent of Total Charges</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Resolutions</td>
<td>16,705</td>
<td></td>
<td>Administrative closures, no reasonable cause, merit resolutions</td>
</tr>
<tr>
<td>Settlements</td>
<td>2,079</td>
<td>12.45%</td>
<td>Benefit from EEOC process</td>
</tr>
<tr>
<td>Withdrawals with Benefits</td>
<td>1,058</td>
<td>6.33%</td>
<td>Benefit from EEOC process</td>
</tr>
<tr>
<td>Administrative Closures</td>
<td>2,889</td>
<td>17.29%</td>
<td>No benefit from EEOC process</td>
</tr>
<tr>
<td>No Reasonable Cause</td>
<td>9,760</td>
<td>58.43%</td>
<td>No benefit from EEOC process</td>
</tr>
<tr>
<td>Successful Reasonable Cause Resolution</td>
<td>362</td>
<td>2.17%</td>
<td>Benefit from EEOC process</td>
</tr>
<tr>
<td>Unsuccessful Reasonable Cause Resolution</td>
<td>557</td>
<td>3.33%</td>
<td>No benefit from EEOC process</td>
</tr>
<tr>
<td>Some Benefit</td>
<td>3,499</td>
<td>20.95%</td>
<td>Settlements, withdrawal with benefits, successful reasonable cause conciliations</td>
</tr>
</tbody>
</table>

Interpretation of the EEOC charge data in table 1 requires some careful reflection. All individuals who desire to file an ADA employment discrimination charge in court must first file with the EEOC. Individuals can request a right to sue letter and avoid the EEOC’s investigatory process, but it is not clear how the EEOC records those who seek a right to sue letter. Unlike a private lawyer, the EEOC is required to investigate and seek resolution of all charges. Nonetheless, the EEOC concluded that in nearly 60% of cases there was no reasonable cause to

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57 See id.; Definitions of Terms, U.S. EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm?renderforprint=1 (last visited Sept. 12, 2010). I used the definitions to figure out what data were subsets of other data. The last category—some benefit—is a value that I created for the fields noted in the last column. EEOC does not report data in that way.


60 I sought guidance from the EEOC on this question, but received an unhelpful response.
believe that discrimination took place. The EEOC closed 17% of cases for various reasons, like the fact that it could no longer locate the charging party. Of the 16,705 cases that were closed in fiscal year 2008, only 919 (5.5%) resulted in conciliation following a “reasonable cause” determination. Of those cases in which the EEOC concluded there was reasonable cause to believe that discrimination occurred, successful resolution occurred in 362 of 919 (39.4%) cases.

It is hard to figure out what we can learn from the EEOC statistics. The EEOC must accept all charges that are filed. The EEOC helped resolve about 20% of the charges with the charging party attaining some benefit. Those cases do not ever enter the judicial process. The settlement rate is a seemingly high figure given that the EEOC must accept all charges and that the EEOC itself concluded that there was no reasonable cause to believe that discrimination took place in 58.4% of cases. The cases that do potentially enter the judicial process are (1) those with a no reasonable cause finding, and (2) those with a reasonable cause finding but unsuccessful conciliation. Only 5.4% (557/10,317) of those cases are ones in which the EEOC found there was reasonable cause to believe discrimination occurred. Hence, one might expect success in litigation to parallel this conclusion—only 5.4% of cases would result in successful resolution through the judicial system. When authors talk about the litigation win/loss rate, they often ignore that the EEOC arguably skimmed the best cases out of the system in advance of litigation. On the other hand, we have no way of knowing which of the 10,317 cases that made it through the EEOC process without conciliation resulted in the filing of a complaint in federal court. One would expect that it is easiest for parties to attain counsel to represent them if the EEOC found that there was reasonable cause to believe that discrimination took place. According to data collected by the federal government, there were 1,153 cases filed in federal court in 2008 that were characterized as “ADA-employment” on the docket entry sheet. My team of coders found that possibly as many as 20% of cases were inaccurately described as fitting the “445” code (the PACER designation for an ADA employment case). Even assuming some inaccurate categorization of cases under the 445 code occurred, no more than half of the cases filed in federal court were ones in which the EEOC had concluded that reasonable cause existed. On the other hand, it would appear that there is a very significant siphoning process that occurs. More than 10,000 charges were filed with the EEOC that were not resolved at the administrative level, and only 1,153 cases (about 11.5%) were filed in federal court that could be ADA employment discrimination cases. Of the

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62 Because plaintiffs can also file in state court, and those cases are not included on the federal tracking system, the numbers may even be lower.

63 My estimate of the siphoning process is consistent with results reported by Professor Sharona Hoffman. Hoffman reports that from 1993 to 2001, 27,724 lawsuits were filed out of 201,371 eligible administrative charges (13.7%). Sharona Hoffman, Settling the Matter: Does Title I of the ADA Work?, 59 ALA. L. REV. 305, 312–13 (2008)
cases filed in court, the EEOC had already determined that many of them did not appear to involve valid claims of discrimination through a no reasonable cause finding. However, there is no way to know how many of those cases were ones in which attorneys requested a right to sue letter and prematurely ended the EEOC investigative process. In any event, a lot of siphoning takes place from the time a charge is filed with the EEOC until a case is filed in court. About 20% of the cases in which an individual filed a charge of discrimination do not go forward because the EEOC helped attain some benefit for the claimant; only a small portion of the remaining 80% resulted in cases filed in court.

I also mention the EEOC data with some care to highlight a question posed by the results of my study: What is the value of the EEOC process to litigants? Even though the EEOC has access to all ADA claims, it only attains a successful resolution in about 20% of them. As we will see below, an equivalent (or higher) number of claimants appears to attain some benefit by filing suit under the ADA even though they were not claimants for whom the EEOC was able to obtain successful resolution. Does the EEOC process make sense financially if claimants who are not in the category of having what the EEOC considered to be the strongest cases are equally successful without the assistance of the EEOC? Put differently, could the resources currently used for the EEOC process be better used to support ADA claimants? As we will see below, a high percentage of individuals who file suit in federal court do so without assistance of counsel and, nearly always, attain no benefits. Moreover, their cases are often dismissed because they cannot comply with the rules of the court system. At dismissal, these claimants have often paid a $350 filing fee that resulted in no benefit to them whatsoever. The EEOC resources might be more valuable if used to help individuals who file pro se, rather than to administer a cumbersome administrative process that seems to provide little benefit.

In addition to the EEOC data, Professor Sharona Hoffman explored the available ADA settlement data in an article published in 2008. Rather than speculate about the percentage of cases that result in favorable settlements, she explored the literature about the size of settlements. Using one set of data, she concluded that the median settlement figure was $50,000; using another set of data, she concluded it was $75,000. She was careful to note the limitation of such figures because they relied on voluntary reports by lawyers and others. A third set of data, involving settlements attained by magistrates, resulted in a median

(citing Kathryn Moss et al., Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 304–305 (2005)). My figure is somewhat lower—about 11.5%, but I excluded incorrectly categorized cases from my database. If those cases were included, I would have included about 20% more cases, causing my figure to be about 13%.

64 Hoffman, supra note 63, at 314–16.
65 Id. at 316–19.
66 Id. at 317–19.
67 Id.
dollar recovery of $35,000. The third set of data is likely more complete, so it is not surprising that the dollar figure is a bit lower.

A median recovery of $35,000—while not insignificant—is not likely to be very enticing to the practicing bar. On a contingency fee basis, those awards would typically amount to about $12,000 in legal fees. At a reasonable rate of $200 per hour, that would only support sixty hours of legal work before settlement. A contingency fee contract must also take into account the risk of collecting no settlement at all. As we will see below, I found that the settlement rate was no better than 50%, using a very liberal estimate of whether cases settled. If a lawyer must devote time to two cases in order to attain one successful settlement, then the $12,000 in legal fees looks even less promising. The question posed by the findings below is: How can we help plaintiffs obtain more competent legal representation so that they have the possibility of attaining even the median settlement of $35,000?

B. Methodology

To compile the database for this study, a team of research assistants downloaded cases from PACER that were recorded as being ADA-employment cases. The research assistants were instructed to read cases that were filed after January 1, 2006, and were closed by December 31, 2008. Many cases were misclassified as ADA-employment cases and were therefore excluded from the database. The research assistants filled out a coding sheet and wrote a memo for each case. They recorded fields such as plaintiff’s disability, theory of discrimination, defendant’s position in case, whether plaintiff proceeded pro se, whether plaintiff sought IFP status, and what outcome likely occurred in the case. We had to speculate whether cases were settled, although the court sometimes had a notation about settlement in the record. I spot-checked the research assistants’ coding by using the docket file on Westlaw. I particularly focused on the pro se cases to determine if there was any reason to believe that the case may have settled. We recorded whether the settlement conclusion was known or based on speculation. We also recorded jury results if a case went to trial, but only a handful of cases went to trial, so these results were not very illuminating (except for their infrequency).

Initially, I planned to have my research assistants code the entire database, but after they coded 200 cases, I decided that was a sufficient sample to generate some useful results. For the fields I found the most interesting, the results were so stark that there was no way that coding the entire database would change the outcome.

To develop a database, I took the coding sheets and memos and transferred them to a database using Statistical Package for the Social Sciences (SPSS). I used the following fields: docket number, whether the plaintiff proceeded pro se, whether the overall outcome was pro-plaintiff, whether the case involved a contested disability issue, whether the case involved a request for reasonable

68 Id. at 318–19.
accommodation, whether one can infer a favorable settlement for the plaintiff, whether the record clearly indicates a favorable settlement for plaintiff, whether the plaintiff filed an IFP motion, whether the IFP motion was granted, whether the plaintiff paid the filing fee, whether the plaintiff experienced litigation difficulties, whether the defendant filed a dispositive motion, whether the defendant’s motion was granted, whether a trial occurred (and if so, what was the outcome), and what award the plaintiff attained after settlement or trial.

For many of these fields, the records did not provide clear answers. If the file did not have adequate information to assess whether there was a contested disability or reasonable accommodation issue, I coded the file as “no.” Hence, those fields merely indicate whether those issues are known to exist. The favorable settlement category was the most difficult to code. Prior researchers have made different settlement assumptions—assuming that cases voluntarily dismissed after six months had settled. If I found nothing in these records to support that coding scheme. When there were indications in the files about settlement, those records were as likely to exist for cases filed before or after six months. Hence, I decided to assume that all cases voluntarily dismissed without the filing of a dispositive motion by defendant were settled. Clearly, that provides an overly generous record of settlement, but I could find no basis for any other assumption. Further, I created a category for “definite settlement” when no speculation was necessary to categorize the case as settled. That category reflects the minimum number of settled cases; the other figure reflects the maximum number of settled cases.

The purpose of the litigation difficulties field was to see how often plaintiffs struggled to follow the rules of the courts. Cases fell into that category when it appeared that dismissals occurred for nonmerit-based reasons—if plaintiffs’ cases were dismissed because they failed to file with the EEOC, failed to prosecute, did not pay the filing fee and did not have a successful IFP petition, or had their cases dismissed on other legal technicalities. Because the EEOC process is supposed to facilitate settlement, I was particularly interested in how often it was a barrier to, rather than a facilitator of, settlement.

Few cases provided any indication of the size of the settlement so those data are not very useful. One of the most important pieces of data is how frequently a defendant explicitly raised a disability issue. As we will see below, I found that the reasonable accommodation issue was by far the most frequent issue raised by defendants. Many cases raising that issue also appeared to settle.

A primary purpose of this coding was to see whether the 2008 Amendments are likely to make a significant difference in the outcome of ADA cases, assuming that the same kinds of cases continue to be filed. The cases that could be in that category would be ones in which I indicated that the disability category was a key

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69 Kathryn Moss disclosed her use of this assumption in her work to me during our work on a collaborative project.

70 It is also impossible to know the size of settlements in nearly all these cases. Plaintiffs may have attained little benefit when they voluntarily dismissed cases as part of a settlement.
litigation issue. Because I rarely found that that issue was important, I ended up using the database to consider other issues, such as the difficulties faced by pro se plaintiffs, the outcomes in cases raising reasonable accommodation issues, and the likelihood of settlement. Because very few cases went to trial, it is clear that a trial focus provides a very misrepresentative sense of ADA cases. This data set of all cases filed in federal court, irrespective of whether a trial ever occurs, is the backbone of ADA litigation; yet the electronic records are so sparse, it is hard to draw many conclusions from these data. As electronic record keeping increases in the future, it may be possible to learn more from PACER or comparable databases and better understand the nature and outcomes of suits filed under the ADA.

Admittedly, my sample is not a random sample. I selected cases based on whether my coders happened to get to them by proceeding through cases on PACER alphabetically by state. I did find considerable differences in the availability of information based on the district court. Some courts had almost all records on PACER whereas others had few records available on PACER. These differences among courts made it impossible to have a genuine study of the entire population of cases. So, even if I had completed the coding task, data from certain states would have received greater weight. Ultimately, I concluded that whatever value was contained in these data was contained in a nonrandom sample as effectively as in the entire population. When fuller records become available, I hope other researchers will use the model I have created to collect more complete records so that we can properly assess the effectiveness of the 2008 Amendments.

C. Results

The following tables reflect my findings based on 200 cases (alphabetically, they reflect cases from Alabama to Florida). These tables suggest that the 2008 Amendments will have little effect on overall judicial outcome. I will explain that conclusion as I go through each table.
1. Rate of Pro-Plaintiff Outcomes

The first question that I explored with my data was how frequently plaintiffs appear to attain a positive outcome. Table 2 discusses these outcomes. I defined a pro-plaintiff outcome as one in which the plaintiff prevailed at trial (an exceptionally rare outcome) or one in which the plaintiff appears to have agreed to a settlement. The settlement rate was the result of much speculation on my part. If a case was voluntarily dismissed, I assumed that some settlement had been reached. As discussed below, I did code separately for cases in which it was clear that a settlement had been attained.

Using that liberal settlement assumption, I found that 64% of cases resulted in a pro-plaintiff outcome. That result probably overstates the actual settlement rate and is higher than those reported by other researchers. If federal courts would note when settlement occurs as a part of a voluntary dismissal, such data could be much more accurate in the future. Some courts do keep such records; a more universal practice would be useful.

Table 2: Pro Plaintiff Frequencies

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>72</td>
<td>36.0%</td>
</tr>
<tr>
<td>Yes (or likely yes)</td>
<td>128</td>
<td>64.0%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Table 3 reflects a more conservative assessment of whether cases resulted in settlements. These cases were coded “definitely settled” only if the court indicated that the case had been settled as part of the dismissal. Using this rule, about 35% of cases definitely resulted in a settlement. This figure is also a fairly high figure compared to those found by other researchers. Interestingly, it is also a higher figure than the 20% settlement rate reported by the EEOC.71 The EEOC even has the advantage of being able to pursue cases in which it found “reasonable cause” to believe that discrimination occurred. Of course, lawyers can bypass the EEOC process by seeking a right to sue letter but, nonetheless, it is interesting to see private lawyers attain a higher settlement rate than the EEOC. As I will discuss below, this development suggests that the EEOC may have outlived its usefulness. The funds devoted to the EEOC process might be better spent helping pro se litigants attain legal representation.

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71 See supra text accompanying notes 54–56.
Table 3: Definitely Settled

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (or don’t know)</td>
<td>130</td>
<td>65.0%</td>
</tr>
<tr>
<td>Yes</td>
<td>70</td>
<td>35.0%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

2. Possible Impact of ADA Amendments

The 2008 Amendments were supposed to particularly help plaintiffs who could not meet the statutory definition of disability.72 I tried to code what cases might be affected by the amendments in light of the facts pleaded in the complaints. Nonetheless, what I found was that few cases seemed to involve a disability status issue. Admittedly, many cases did not include sufficient facts to understand the issue in controversy, but I could conclude that disability status was a major issue in about 9% of the cases. There were also a few cases in which it was clear that the amended disability definition would make a difference, but I was surprised by how few cases were affected by the disability status issue. Table 4 reflects those findings.

Table 4: Disability Status as an Issue

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (or don’t know)</td>
<td>181</td>
<td>90.5%</td>
</tr>
<tr>
<td>Yes</td>
<td>19</td>
<td>9.5%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

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One response to these results is to suggest that lawyers have learned not to file cases on behalf of individuals with a questionable disability status because those cases are likely to be decided in favor of the defendant. If there is a surge in filings under the 2008 Amendments then we will have reason to believe that a new class of plaintiffs has filed suit under the 2008 Amendments. Nonetheless, to the extent that scholars had hypothesized that the low plaintiff success rate was due to the narrow interpretation of the definition of disability, that factor does not seem to have had much of an impact on the cases resolved in 2006–2008. If it is true that plaintiffs had a low success rate, other factors may better explain it.

In the course of coding the disability status issue, I noticed that many cases follow a pattern—the plaintiff complained that he or she was discharged after seeking an accommodation. Failure to accommodate seemed to be the most frequent kind of discrimination issue raised in these cases. As table 5 reflects, I found that about 36% of cases involved a reasonable accommodation issue, although that figure is quite conservative because many cases had insufficient facts to determine if they raised an accommodation issue.

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (or don’t know)</td>
<td>127</td>
<td>63.5%</td>
</tr>
<tr>
<td>Yes</td>
<td>73</td>
<td>36.5%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

As table 6 reflects, many cases raised reasonable accommodation issues and these cases were somewhat more likely to settle than other cases but the difference was not statistically significant. This is one area where my nonrandom sample selection may have been a problem. When I had only coded 135 cases, this difference was significant (with cases raising a reasonable accommodation issue as more statistically more likely to settle) but this difference became statistically insignificant as I included all of Florida in my database. This issue deserves further investigation. The typical fact pattern in these cases was a request to accommodate

73 It is true that the number of charges filed with the EEOC declined following the Supreme Court’s decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). See U.S. EEOC, *supra* note 54. The number of charges declined from 17,007 in 1999 to 15,864 in 2000. *Id.* They reached their lowest point of 14,893 in 2005. Since 2006, however, they have been increasing. *Id.* In fiscal year 2009, they increased from 19,453 to 21,451. *Id.* If those cases involved conduct occurring prior to January 1, 2009, then they would be resolved under the 1990 Act. See *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EEOC, [http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm](http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm) (last visited Sept. 15, 2010) (noting that the effective date for the 2008 Amendments is January 1, 2009). It is not clear why the numbers have been steadily increasing since 2006, but it will be interesting to see if a dramatic increase occurs in fiscal year 2010 when nearly all charges will be covered by the 2008 Amendments.
through an adjusted work schedule or particular equipment in order to allow the plaintiff to continue to work. Of course, these cases got this far in the process because an employer was not willing to settle before the plaintiff filed with the EEOC and then incurred the $350 expense to file a case in district court—to say nothing of potential legal fees. As the 2008 Amendments do not change the law with regard to reasonable accommodations, these data suggest that we should consider how the legal regime might better facilitate settlement in these cases.

Table 6: Reasonable Accommodation Issue by Definitely Settled

<table>
<thead>
<tr>
<th>Reasonable Accommodation Issue</th>
<th>Definitely Settled</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No (or don’t know)</td>
<td>Yes</td>
</tr>
<tr>
<td>% within Reasonable accommodation issue</td>
<td>66.1%</td>
<td>33.9%</td>
</tr>
<tr>
<td>Count</td>
<td>84</td>
<td>43</td>
</tr>
<tr>
<td>% within Reasonable accommodation issue</td>
<td>63.0%</td>
<td>37.0%</td>
</tr>
<tr>
<td>Count</td>
<td>46</td>
<td>27</td>
</tr>
<tr>
<td>% within Reasonable accommodation issue</td>
<td>65.0%</td>
<td>35.0%</td>
</tr>
<tr>
<td>Count</td>
<td>130</td>
<td>70</td>
</tr>
</tbody>
</table>

3. Results for Pro Se Plaintiffs

The final issue I sought to explore is the experience of pro se plaintiffs. The literature that I reviewed suggested that pro se plaintiffs sometimes appear without legal representation by choice. Further, some of the literature suggests that it is reasonable to expect some people to represent themselves with appropriate support. One could argue that the EEOC process acts as such a support by engaging in some free discovery and moving a case towards settlement. In addition to the experience of pro se plaintiffs, I was also interested in the quality of representation for many ADA plaintiffs. As discussed above, many individuals with disabilities make very low wages and their cases are not worth much on a contingency fee basis. The low rate of success in litigation may make ADA cases undesirable for many lawyers. Hence, I was interested in whether it is clear in some instances that the quality of legal representation was poor. Although that evaluation was subjective, I tried to rely on indicators like missing deadlines and dismissal for failure to prosecute.

Using these criteria for determining litigation difficulties, I found that 26% of the cases in my database reflected significant problems with accessing the legal system. Table 7 shows these findings.
Table 7: Litigation Difficulties Frequencies

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (or don't know)</td>
<td>148</td>
<td>74.0%</td>
</tr>
<tr>
<td>Yes</td>
<td>52</td>
<td>26.0%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Of the fifty-two cases in my database in which the plaintiff experienced litigation difficulties, twenty of them were cases in which the plaintiff had secured a lawyer. Having a lawyer clearly made a plaintiff less likely to experience litigation difficulties. Of plaintiffs without a lawyer, 78% experienced litigation difficulties, whereas only 12.6% of plaintiffs with a lawyer experienced such difficulties. Nonetheless, I would suggest that 12.6% is a high figure for those that have secured a lawyer. One of the most common fact patterns involved the plaintiff’s case being dismissed because he or she could not attain proper service of process after paying the $350 filing fee. It seems unfortunate that people who have likely been terminated from a job spent $350 on a completely fruitless legal experience. Table 8 displays these findings.

Table 8: Pro Se Status by Litigation Difficulties

<table>
<thead>
<tr>
<th>Litigation Difficulties</th>
<th>No (or don't know)</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro Se</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>Count</td>
<td>139</td>
</tr>
<tr>
<td></td>
<td>% within Pro Se</td>
<td>87.4%</td>
</tr>
<tr>
<td>Yes</td>
<td>Count</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>% within Pro Se</td>
<td>22.0%</td>
</tr>
<tr>
<td>Total</td>
<td>Count</td>
<td>148</td>
</tr>
<tr>
<td></td>
<td>% within Pro Se</td>
<td>74.0%</td>
</tr>
</tbody>
</table>

These data suggest that plaintiffs—both with and without legal counsel—could benefit from some assistance learning how to properly access the legal system. In several of these cases, the challenge faced by the plaintiff was an inability to navigate the EEOC process correctly. Some people tried to file in federal court without having first exhausted the EEOC process or missed the deadline after receiving a right to sue letter. Several cases also involved plaintiffs trying to undo settlements that had been attained through the EEOC process. Rather than assisting plaintiffs, the EEOC process itself appears to have been a hindrance to some litigants.

The conclusion that 12.6% of plaintiffs who retained legal counsel still had significant legal difficulties suggests that the plaintiff’s bar does not necessarily suggest that their lawyers did a poor job. It is possible that these plaintiffs had very weak cases and were turned down by numerous lawyers before selecting the
lawyer who had trouble navigating the legal system properly. Nonetheless, the rate of seemingly incompetent legal representation should have been lower.

Another issue that I explored relevant to the status of pro se litigants is whether they successfully navigated the IFP process so that they would not have to pay filing fees. Table 9 reflects that only 46.3% of individuals who appeared pro se filed IFP motions. It is hard to believe that the 53.7% of plaintiffs who did not file for IFP status could not have met the income requirements. It is possible that courts need to do a better job of publicizing the availability of IFP status.

**Table 9: Pro Se by IFP Motion Filed**

<table>
<thead>
<tr>
<th>IFP motion filed</th>
<th>No</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pro Se</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>157</td>
<td>2</td>
</tr>
<tr>
<td>% within Pro Se</td>
<td>98.7%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Yes</td>
<td>22</td>
<td>19</td>
</tr>
<tr>
<td>% within Pro Se</td>
<td>53.7%</td>
<td>46.3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>179</td>
<td>21</td>
</tr>
<tr>
<td>% within Pro Se</td>
<td>89.5%</td>
<td>10.5%</td>
</tr>
</tbody>
</table>

It is possible that more plaintiffs do not seek IFP status because the requirements are so stringent. As indicated in table 9, twenty-one litigants filed for IFP status, and courts granted those motions in nineteen cases, but two of those litigants had assistance of counsel. This means that seventeen of nineteen pro se litigants (89.5%) were successful in their IFP requests, but overall, only seventeen of the forty-one pro se litigants (41.5%) attained IFP status. The overwhelming majority of pro se litigants (twenty-four of forty-one, or 58.5%) paid a $350 filing fee to bring their case in federal court even though they had very little chance of attaining a beneficial settlement.
Paying the filing fee, however, was not a good investment for plaintiffs. As table 11 suggests, very few pro se plaintiffs attained a positive outcome. Only 4.9% of pro se plaintiffs attained a definite settlement compared with 42.8% of represented plaintiffs. Those results were statistically significant using a Chi-Square analysis under the .05 level of significance.

Finally, the last issue I explored is the role of dispositive motions filed by defendants in cases involving pro se litigants. Table 12 and 13 reflect how frequently defendants filed dispositive motions, and how frequently those motions were successful. Pro-defendant motions were filed in sixty-three of two hundred (31.5%) of cases. Those motions were successful in fifty-four of sixty-three cases (85.7%). Pro se plaintiffs never successfully defeated a dispositive motion filed by a defendant.
Table 12: Pro Plaintiff by Defendant Filed Dispositive Motion

<table>
<thead>
<tr>
<th>Pro-Plaintiff Motion</th>
<th>No</th>
<th>Count</th>
<th>% within Pro Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>18</td>
<td>25.0%</td>
</tr>
<tr>
<td>Yes (or likely yes)</td>
<td></td>
<td>54</td>
<td>75.0%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>137</td>
<td>68.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>63</td>
<td>31.5%</td>
</tr>
</tbody>
</table>

Table 13: Pro Plaintiff by Result of Defendant Motion

<table>
<thead>
<tr>
<th>Pro-Defendant Motion Granted</th>
<th>No</th>
<th>Count</th>
<th>% within Pro Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>20</td>
<td>27.8%</td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>52</td>
<td>72.2%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>148</td>
<td>74.0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>52</td>
<td>26.0%</td>
</tr>
</tbody>
</table>

The results of the pro-defendant motions suggest that it is extremely important for a plaintiff to be able to survive (or be perceived as being able to survive) such a motion for a successful settlement to occur. Given the low success rate for any plaintiff with such motions, it seems extremely unrealistic for pro se plaintiffs to survive such motions and portray a reasonable basis for settlement.

IV. CONCLUSION

Given the data collection challenges with using the PACER data, the results of this study are not conclusive. A failure to include complete online records, such as the complaint, and a failure to indicate clearly the reason for a voluntary dismissal makes it difficult at this time to gather a snapshot of the litigation experiences of ADA plaintiffs in employment discrimination cases. As electronic

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74 A “no” includes situations where the court did not rule on the defendant’s motion. Settlements or voluntary dismissals frequently occurred after motions were filed and before the court ruled. Hence, the actual pro-defendant rate of success on these motions might have been greater if the courts had actually ruled on the motions.
recordkeeping becomes more commonplace, we may be able to collect better records in the future. It is a shame that such records are not available at this time because the absence of such records makes it difficult for empirical researchers to gather accurate baseline data to assess the effectiveness of the 2008 Amendments.

Despite these limitations, I have tried to gather some sense of the experience of plaintiffs on the eve of the effective date of the 2008 Amendments so that we can have some basis to assess the effectiveness of these amendments. It appears that few defendants raised issues relating to the disability status of plaintiffs at that time. Possibly, plaintiffs had adjusted to the narrow definition of disability so we may see an upsurge in the number of cases filed following the 2008 Amendments. To the extent plaintiffs had a low success rate before enactment of the 2008 Amendments though, it does not seem appropriate to blame the narrow definition of disability for that poor success rate.

These data demonstrate that conflicts about reasonable accommodations seem to be the most common reason why plaintiffs filed an ADA claim. Many of these lawsuits settled, but there is no way to know how favorable these settlements were. It is somewhat odd that the EEOC process could not have resulted in successful resolution of more cases. The 2008 Amendments did not change the law of reasonable accommodation in any meaningful way, so there is no reason to suggest these results will change.

The most important finding from these data is the experience of pro se plaintiffs. Very few pro se plaintiffs appear to attain positive settlements. Moreover, many of them (as well as some plaintiffs with lawyers) have enormous trouble navigating the litigation process. A failure to file with the EEOC and meet basic court deadlines impeded the lawsuits of many pro se plaintiffs. Again, the 2008 Amendments do nothing to remedy this problem.

Two quite different suggestions could help the difficulties faced by pro se plaintiffs. The resources devoted to the EEOC could be expanded so that its legal staff could do a better job of assisting pro se plaintiffs. Alternatively, we could dismantle the EEOC process and use those resources to produce better avenues for free legal assistance for pro se plaintiffs. A question raised by this research is how much assistance the EEOC is truly providing as part of the litigation process. Although the EEOC seeks to resolve the strongest cases, its success rate seems to be no higher than that of the private bar after it skims off the seemingly best cases. That is a difficult conclusion to draw with certainty because the EEOC does not record how frequently plaintiffs seek right to sue letters and skip most of the EEOC process. If the private bar is skimming off the best cases, then the EEOC may be doing a respectable job with its caseload.

The bottom line in this investigation is that we need better recordkeeping to help determine how the ADA can be modified in the future for the benefit of plaintiffs. The PACER records need to be more complete, and the EEOC needs to maintain better records about the effectiveness of its assistance. Only then can we truly determine what changes are needed to the ADA to create the possibility of better outcomes for plaintiffs. We can hope that the 2008 Amendments will prove
effective, but the limited availability of baseline data will make that conclusion difficult to draw.

And, of course, data about litigation results tell us little about the experience of most people with disabilities in the workplace. One must assume that many employers voluntarily comply with the ADA and will provide further protection to individuals given the expansion of the ADA through the 2008 Amendments. My own personal experience working with school districts suggests that the expansion of the definition of disability has not yet entirely reached that community. The business community, though, may be more sophisticated than the K-12 educational community. I look forward to reading studies in the future of how the workplace responds to the 2008 Amendments. Only then will we have a somewhat complete picture of the effectiveness of the 2008 Amendments.