ENABLING THE MENTALLY DISABLED EMPLOYEE: BINDING ARBITRATION UNDER THE ADA

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INTRODUCTION ........................................................................930

I. THE TYPES OF PROTECTIONS OFFERED UNDER THE ADA AND THE PERSONS TO WHOM THESE PROTECTIONS ARE OFFERED ...931
   A. PROTECTIONS OFFERED .................................................932
   B. WHO IS COVERED ..........................................................933

II. PURPOSES OF THE ADA’S PASSAGE ......................934
   A. REPARATION FOR PAST HARMS .................................934
   B. ECONOMIC STABILITY AND SOCIAL WELL-BEING OF THE DISABLED ...............................................................935

III. FACTORS AFFECTING WHETHER THE MENTALLY DISABLED EMPLOYEE FILES SUIT........................................................................935
   A. FACTORS ENCOURAGING THE FILING OF ADA CLAIMS .................................................................935
   B. FACTORS DISCOURAGING THE FILING OF ADA CLAIMS .................................................................936

IV. POSSIBLE EMPLOYER REACTIONS TO PERCEIVED ADA ABUSE .............................................938
   A. WHY EMPLOYERS MIGHT FEEL THE NEED TO REACT ........................................................................938
      1. Positive Reactions and Adherence to ADA Mandates .................................................................939
         a. Answers to economic concerns ..................939

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b. Answers to productivity concerns ................. 940

2. Negative Reactions Fueled by the Possibility
   of Litigation and Economic or Monetary
   Damages .................................................... 941
   a. Possibility of litigation with
      uncertain results .................................... 941
   b. Economic and monetary damages .............. 942

B. HOW EMPLOYERS MIGHT ACTUALLY TRY TO
   CIRCUMVENT THE ADA .................................. 943
   1. Artful Interviewing Techniques ......... 943
   2. Psychological Testing ......................... 945

V. PROPOSAL TO KEEP EMPLOYERS FROM
   CIRCUMVENTING THE ADA .......................... 946
   A. WHY A BETTER SOLUTION IS NEEDED .......... 946
   B. BINDING ARBITRATION AS A BETTER SOLUTION .... 949
      1. How Binding Arbitration Could Be Implemented
         in the ADA Context ......................... 949
      2. Disadvantages of Using Binding Arbitration to
         Settle Mental Disability Claims ............. 953
      3. Advantages of Using Binding Arbitration to
         Settle Mental Disability Claims ............. 954
      4. Probable Responses to Binding Arbitration in the
         ADA Setting ........................................ 957

CONCLUSION ..................................................... 958

INTRODUCTION

The Americans with Disabilities Act (“ADA”) took effect in U.S.
workplaces in July 1992. The Act bars employers from discriminating
against persons with physical, mental, or learning disabilities.1 Businesses
employing fifteen or more persons must make “reasonable accommoda-
tions” for qualified disabled workers and applicants.2 The Equal Employ-
ment Opportunity Commission (“EEOC”) issued guidelines in March 1997
to clear up confusion regarding employers’ responsibilities under the
ADA. These guidelines require that reasonable accommodations be made
unless such measures would “impose an undue hardship” on the em-

The guidelines also prohibit employers from asking job applicants whether or not they suffer from physical or mental disorders.4

Unfortunately, this landmark legislation is not opening up doors for many mentally disabled persons. The confusion and stigma that surround mental disability, as well as the ease with which employers can sidestep the ADA and mold malleable language to their advantage, is getting in the way of enabling the disabled. As it stands now, litigation of disputes is clogging up court dockets and resulting in high-stakes shows of force in which the defendant usually prevails.5 A better solution is needed both to remain true to the ADA’s goal of employing a high percentage of mentally disabled persons and to inspire employer confidence in their ability to select and maintain a qualified and highly productive workforce.

After briefly outlining the ADA provisions meant to ensure equal treatment for mentally disabled individuals in Part I of this Note, Part II explores the purposes behind the ADA’s implementation. Part III weighs the pros and cons for a mentally disabled employee who is contemplating whether to file a suit under the ADA. Part IV explores how and why employers might react to perceived employee abuse of this legislation, including ways in which employers might actually try to circumvent the mandates of the ADA. The Note then addresses why a better method of handling the disposition of ADA claims is needed, and concludes that binding arbitration is the best solution to the problem. While binding arbitration is not without its disadvantages (as a solution, for instance, it could only be implemented in cases where the employee becomes mentally disabled after being hired), it nevertheless offers several important advantages over litigation of claims that are likely to win it support in both the courtrooms and the boardrooms.

I. THE TYPES OF PROTECTIONS OFFERED UNDER THE ADA AND THE PERSONS TO WHOM THESE PROTECTIONS ARE OFFERED

Congress took strong steps in 1990 to combat pervasive discrimination aimed at physically and mentally disabled individuals when it drafted the ADA.6 Though some protections against disability-based employment

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4. See id.
discrimination already existed under various state laws and the Rehabilitation Act of 1973.\(^7\) Congress passed the ADA to draw national attention to society’s tendency to segregate disabled individuals, which often precluded them from working or carrying on normal lives.\(^8\)

### A. PROTECTIONS OFFERED

The ADA forbids employment discrimination on the basis of disability, requires employers to make “reasonable accommodation” for employees‘ disabilities, and eliminates pre-offer, while limiting post-offer, medical examinations and disability inquiries.\(^9\) The statute states in pertinent part, “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\(^10\)

Employers subject to the ADA are all those engaged in interstate commerce with fifteen or more employees.\(^11\) These employers must provide reasonable accommodations for qualified disabled workers who request such accommodations in order to adequately perform their jobs, as long as such accommodations will not impose an “undue hardship” on the employer.\(^12\) The “reasonableness” of such accommodations is determined on a case-by-case basis.\(^13\) Sample accommodations include providing employees who cannot follow oral instructions with written comments, making scheduling changes to allow an employee to start work later in the day or to be provided extra unpaid time off, and setting up room dividers or other soundproofing mechanisms to aid workers who have difficulty maintaining concentration.\(^14\) ADA violations could result in jury-awarded compensatory and punitive damages of up to $200,000 in the aggregate.\(^15\)

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\(^8\) See Peter M. Panken, Disabilities in the Workforce: The Impact of the American with Disabilities Act, SB36 ALI-ABA 123, 129 (1997).
\(^9\) Id. at 130.
\(^12\) 42 U.S.C. § 12111(10) (1994).
\(^13\) See Silverstein, supra note 3.
\(^14\) See id.
\(^15\) See, e.g., Hogan v. Bangor and Aroostook R.R. Co., 61 F.3d 1034, 1037 (1st Cir. 1995) ($200,000 limitation on recovery provided in Civil Rights Act should also apply to actions under the ADA, for purposes of award of compensatory and punitive damages).
B. WHO IS COVERED

Persons suffering from physical and/or mental disabilities can seek redress under the ADA provisions.\(^{16}\) An individual with a hearing impairment could be covered under the ADA. Someone suffering from paranoid schizophrenia might be entitled to ADA protection. A person with terminal cancer experiencing clinical depression would also fall under the rubrics of the statute. This Note, however, focuses exclusively on those persons with mental disabilities, not because persons with physical disabilities cannot seek protection under the ADA, but because mentally disabled individuals have been largely ignored in both scholarship and the press.\(^{17}\) It is this group of individuals to whom I now turn my attention.

Although the ADA does offer protection to the mentally disabled, Congress intended to provide protection only to a narrowly defined subset of mentally disabled individuals. The statute states that only mental impairments that substantially limit one or more “major life activities” of an individual evidence a “psychiatric disability” covered by the ADA.\(^{18}\) Having a “record of” such impairment or being “regarded as” having such an impairment also qualifies as a “disability” under the Act.\(^{19}\)

The law covers such mental or psychological disorders as major depression and bipolar disorder, schizophrenia, and panic, obsessive compulsive or post-traumatic stress disorders.\(^{20}\) The ADA does not cover, however, everyday stress (unless proven to be tied to a specific mental impairment) or behavior stemming from illegal drug use.\(^{21}\)

Concern has been raised about the scope of individuals considered disabled and entitled to protection under the ADA, particularly in the context of mental disability. Some fear that those with less visible or less traditional manifestations of disability, despite being subject to the same stigmatization and discrimination experienced by disabled persons afforded protection under the ADA, may be slipping through the cracks.

\(^{17}\) I come to no conclusions in this Note as to the efficacy of using binding arbitration to settle disputes involving physical disabilities. This is not to say that binding arbitration might not prove useful in such cases. However, I wish to focus solely on mental disabilities and the impact that binding arbitration could have on settling the ADA claims of the mentally disabled because such issues have largely been ignored by both the academic world and the media.
\(^{20}\) See Silverstein, supra note 3.
\(^{21}\) See id. See also 42 U.S.C. § 12114(a) (1994).
There is no doubt that proving an individual has a disability covered by
the law requires complex analysis and an understanding and sensitivity
to disability issues. This is a new area for many judges and for our soci-
ety as a whole. Unfortunately, this has led to individuals being denied
civil rights protections simply because they have “nontraditional” dis-
abilities, the implications of which are misunderstood. Only those dis-
abilities that society has historically identified as disabilities, generally
the ones with obvious, severe manifestations, have been found to be
covered.22

Thus, the need to ensure that the interests and rights of all mentally
disabled individuals are met calls for an alternative to the simple litigation
of employment discrimination cases.

II. PURPOSES OF THE ADA’S PASSAGE

Congress enacted the Americans with Disabilities Act to achieve cer-
tain goals. Chief among these were to make reparation for past harms
against disabled individuals and to assure the economic stability and well-
being of such individuals.

A. REPARATION FOR PAST HARMs

Much as discrimination against other groups in society has been ad-
dressed and outlawed by national legislation, Congress intended the ADA
to end discrimination against disabled persons. As stated in the Congres-
sional hearings which led to passage of the ADA, “[O]ur Nation has re-
sponded to the needs of other segments of our population which have been
denied equal opportunity, and we must now address the needs of disabled
Americans who are currently denied the opportunity to be full participants
in our communities.”23

Society has historically isolated and segregated mentally disabled in-
dividuals, and while some improvements had been seen in that area, the
issue remained problematic enough to warrant specific legislation to ad-
dress the problem.24 The ADA was designed to set clear standards which
would eliminate such discrimination, and to allow for enforceable claims
against those who persisted in treating disabled individuals in a disparate
manner.25

22. Wendy Wilkinson, Judicially Crafted Barriers to Bringing Suit Under the Americans with
B. ECONOMIC STABILITY AND SOCIAL WELL-BEING OF THE DISABLED

The statute also states that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”26 In this regard, the ADA was designed to serve as a tool for strengthening the economy by enriching the workforce.27

In addition, providing the disabled with employment opportunities increases their self-esteem. This sense of self-worth is therapeutic because it contributes to stability, which, in turn, is usually a key step toward living independently.28 Thus, giving the mentally disabled a chance to work facilitates their ultimate rehabilitation.29 This is both an obvious benefit to disabled individuals nationwide, as well as a benefit to a society as a whole, which can draw on these individuals’ talents to increase productivity and decrease dependence and passivity.

III. FACTORS AFFECTING WHETHER THE MENTALLY DISABLED EMPLOYEE FILES SUIT

Despite the lofty goals for the ADA proposed by legislators and articulated in the ADA itself, it is obviously unclear whether these goals are being achieved some eight years after its enactment. For one thing, suspicion and stigma surrounding mental disability may discourage many disabled individuals from even filing suits lest they face future repercussions or be branded as “crazy” persons. For another, those individuals who do file suit and make it to trial often lose because judges have refused to find the existence of a mental disability, perhaps out of fear that loosely defining such a term will lead to a proliferation of employee abuse of the ADA.

A. FACTORS ENCOURAGING THE FILING OF ADA CLAIMS

There are several potential reasons why mentally disabled individuals might be encouraged to undergo the stress and expense of filing an ADA claim. Recently, an increasing number of abuse excuses have been raised

29. See id.
or proposed.\textsuperscript{30} Thus, as more and more outlandish "syndromes" and "diseases" are somewhat legitimated by seeing the light of day in court, those with lesser known mental disorders are encouraged to acknowledge and, even though this often does not translate into victory in court, validate their own disorders by bringing suit. Some commentators fear that "\[r\]easonable accommodation to end mindless discrimination has become mindless accommodation to irresponsible behavior. . . . [Congress should] spell out what is meant by 'reasonable' accommodation before society finds itself gone to hell in a handbasket of disabilities."\textsuperscript{31}

Furthermore, an increasing number of individuals with perceived or "hidden" disabilities (such as mental impairments not immediately obvious) are entering the workforce only to encounter lower wages or loss of equal job opportunity not in line with actual output or consumers' preferences.\textsuperscript{32} This may lead to either justifiable aggravation or desperation, and, in turn, compel those individuals to use the ADA as a tool to get out of dire economic straits.

A final factor that might encourage mentally disabled persons facing discrimination to file suit under the ADA is that the legislation prohibits discrimination inflicted for a retaliatory or coercive purpose (such as after the mentally disabled have filed ADA claims).\textsuperscript{33} Thus, the mentally disabled plaintiff need not fear losing the progress that they have attained in their current job or having future difficulties obtaining employment as a result of their filing an ADA claim. Also, the potential for future retaliation is reduced by the statute’s requirement that all employers keep medical information confidential and separate from the employee’s personnel file.\textsuperscript{34}

\textbf{B. FACTORS DISCOURAGING THE FILING OF ADA CLAIMS}

Perhaps even more persuasive, however, are the arguments that have been formulated to explain why many mentally disabled individuals might choose not to file ADA claims. The language of the statute itself narrows


\textsuperscript{33} See 42 U.S.C. § 12203(a) (1994).

\textsuperscript{34} See Morgan D. Hodgson & Ronald S. Cooper, EEOC Guidance Document, OFCCP Compliance Reviews, and Legislative Initiatives, 22 EMPLOYMENT REL. TODAY 81 (1995).
the definition of “mental impairment” so as not to protect “current illegal drug users, alcoholics, transvestites, homosexuals, bisexuals, voyeurs, compulsive gamblers, kleptomaniacs, or pyromaniacs.”

Perhaps reflecting cynicism toward mental disabilities in general, and toward the protections offered individuals with such disabilities in particular, one commentator states that “[t]heir lobbies apparently were not strong enough to obtain ADA protection.” General grief and stress do not present an impairment covered by the ADA, and short-term mental conditions are also generally not subject to ADA protection.

In order to prevail on an ADA claim, the plaintiff must not only prove that she is disabled, but she must also prove that she is qualified for the position for which she has sought reasonable accommodations. Another factor that may stand in the way of mentally disabled persons filing claims is that disabled persons may be “unqualified” for a job when they pose a direct safety or health threat to themselves or others in the workplace, regardless of their ability to perform essential job functions. ADA regulations define a direct threat as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

But could one argue that it is substantially harmful merely to expose others to the uglier sides of any mental disability? Could an employer claim that they found the manic depressive’s excited state (even when diminished by medication) to be threatening or a safety hazard which necessitates declaring the employee unqualified for their former position? And wouldn’t this serve as a potentially fatal blow to a mentally disabled individual’s already fragile self-esteem—a blow that might not be worth the risk of pursuing an ADA claim? These are all difficult questions that await an answer.

Mentally disabled persons might also avoid filing suit because of their awareness that those with such impairments face a horrible history of mistreatment and discrimination. The daily lives of such persons are often

36. Panken, supra note 8, at 130.
38. See id. at 314-15.
39. See Blanck, supra note 32, at 888.
40. Id. at 890.
filled with harsh social, economic, and psychological burdens. This stigma is expressly recognized and painstakingly detailed in the actual legislation.

Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

Such exclusionary and discriminatory practices are seemingly encouraged, or, at the very least, overlooked under the current litigation system. If the prospect of litigation deters disabled employees from filing suits or leads them to file suits that will never be won, the goals of the ADA are not being realized. A new method of resolving ADA claims—one involving binding arbitration—is needed to ensure that these claims are both filed and adequately considered.

IV. POSSIBLE EMPLOYER REACTIONS TO PERCEIVED ADA ABUSE

The ADA, if adhered to by employers and utilized only by disabled employees able to perform the requisites of their employment, would produce wondrous results. But there are a lot of “if”s that must fall into place to ensure that the aforementioned purposes for enacting the ADA are fulfilled. If employees who are not actually disabled, or who are actually disabled but unable to perform their jobs, even with accommodations, file suit under the ADA, congested court dockets and increases in the expenses faced by employers and (potentially) employees alike will result. Similarly, if employers fearing abuse of the ADA by employees find ways to circumvent its mandates, economic inefficiencies will result, and the legislation will be prevented from achieving its ultimate goals.

A. WHY EMPLOYERS MIGHT FEEL THE NEED TO REACT

Positive or negative, there is bound to be some reaction to any major piece of legislation that affects a great number of individuals, and the ADA is no exception. Since the ADA took effect in 1992, “the second most
common type of job discrimination under the law has been bias tied to emotional or psychiatric impairments.” Of the 72,687 claims filed under the ADA from July 26, 1992, to September 30, 1996, 9216 claims (or 12.7%) were emotional and/or psychiatric in nature. Employers have responded to the potential onslaught of litigation in various, and nonetheless predictable ways.

1. Positive Reactions and Adherence to ADA Mandates

Congress long ago realized that for the ADA “to be effective at eliminating discrimination against the disabled, the active cooperation of business [would] be required.” Thus, quite a stir was caused when the traditional “make whole” remedies originally available to ADA plaintiffs were abandoned for punitive and compensatory damages that could potentially hit employers’ pocketbooks hard. Employers became nervous, and, as a result, some members of Congress responded. Employer concerns about economic waste and inefficiency and declines in productivity were met by measures designed to alleviate such concerns while simultaneously encouraging adherence to the mandates of the ADA.

a. Answers to economic concerns: Employers have approached adherence to the ADA in the mental disability context with much trepidation, perhaps for no reason. “Since the [March 1997 EEOC] guidelines were released, judges have sided with employers in the vast majority of cases where workers claimed discrimination based on mental disability.” Nevertheless, Congress, sensing employer fear of litigation and potentially huge expenses involved in the installation of accommodations for the disabled, has taken some steps to curtail the costs associated with adhering to the mandates of the ADA.

Small businesses providing reasonable accommodations under the ADA can take advantage of various tax credits which are available for such expenses. State and federal agencies will often fund the costs associated with expensive machinery needed to comply with some reasonable accommodations. Employers also do not have to make reasonable ac-

44. Silverstein, supra note 3.
45. See id.
47. Id. at *H2612.
48. See Blanck, supra note 32, at 888.
49. Higgins, supra note 5, at 24.
51. See Panken, supra note 8, at 161.
commodations that pose an “undue hardship” on their business operations.52 Moreover, employers “[are not] required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.”53

Courts have also enforced the ADA in a manner that should ease the economic worries of employers. Generally, employers must know about an employee’s disability in order to subject themselves to liability for failure to provide a reasonable accommodation.54 This somewhat reduces the chances that an employer will wind up in court facing the potential of having to pay compensatory and punitive damages. More importantly, courts have consistently maintained the stance that not every accommodation will be considered a reasonable accommodation.55 Recent decisions show that “the EEOC guidelines are cause for alarm only ‘if you read all the press and not the guidelines’ themselves.”56

b. Answers to productivity concerns: Employers are not just worried about the direct costs imposed by the ADA. They also have the related concern that, by having to keep mentally disabled workers in their employ, productivity will decrease, or they will ultimately have to perform reverse discrimination against qualified persons without disabilities.57 Neither of these concerns is justified.

First, the ADA does not require employers to hire or retain persons with covered disabilities who are not qualified for the position sought.58 Neither do employers have to hire or retain persons with covered disabilities over equally or more qualified individuals who do not have disabilities.59 Thus, the ADA in no way discourages employers from seeking out the most qualified individuals regardless of disability.60

53. Panken, supra note 8, at 153.
54. See, e.g., Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996).
55. See, e.g., Carrozza v. Howard County, 847 F. Supp. 365, 368 (D. Md. 1994) (eliminating stress from job not a reasonable accommodation), aff’d, 45 F.3d 425 (4th Cir. 1995); Kennedy v. Applause, Inc., 90 F.3d 1477, 1480 (9th Cir. 1996) (“work-when-able” schedules are not reasonable accommodations).
56. Higgins, supra note 5 (quoting Ann Reesman, General Counsel for the Equal Employment Advisory Counsel, a group of approximately 300 large employers).
57. See Blanck, supra note 32, at 888.
59. See Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1196 (7th Cir. 1997) (“To require [employers] to retain the least able because of disability would handicap the able-bodied, and that is not required by the Act.”).
60. See Blanck, supra note 32, at 888.
Second, the ADA, which draws from an employee pool largely untapped in the past, has the potential to increase productivity by enriching the workforce.

Studies of accommodations suggest that companies that are effectively implementing the ADA demonstrate the ability . . . to look beyond minimal compliance of the law in ways that enhance economic value. The low direct costs of accommodations for employees with disabilities has been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers’ compensation costs, and workplace effectiveness and efficiency.61

The ADA could thus serve as a boon, not a bane, to employers. Getting employers to realize this, however, is another issue entirely.

2. Negative Reactions Fueled by the Possibility of Litigation and Economic or Monetary Damages

For the large part, employers have looked upon the ADA’s provisions with distaste. Employers commonly fear long, intense courtroom battles coupled with unpredictable results. Also troublesome to employers is the possibility of costly damage awards for any digressions from the provisions of the statute.

a. Possibility of litigation with uncertain results: Employer apprehension of litigation of discrimination disputes is perhaps not an unfounded fear. It has been reported that “the new [EEOC] guidelines continue to present employers with a linguistic minefield where the mere turn of a phrase could result in liability under the ADA.”62 Furthermore, it appears that Congress intentionally left central provisions of the statute ambiguous.63 “Since its inception, the ADA has been lauded for its lofty goals, yet criticized for its rambling, often ambiguous terms and definitions that Congress left in the statute for others—notably the Equal Employment Opportunity Commission . . . and the courts—to figure out.”64

Perhaps if there was some noticeable trend in what factors proved prominent in deciding the cases brought under the ADA that did make it to

61. Id. at 901.
62. Hodgson & Cooper, supra note 34.
63. See Peter T. Kilborn, Major Shift Likely as Law Bans Bias Toward Disabled, N.Y. TIMES, July 19, 1992, at A1 (definitions of “reasonable accommodation” and “undue hardship” are dependent on the value of an individual company’s resources).
Court, employers would be less concerned about litigating such claims. But a definite lack of predictability can be seen in ADA litigation. Circuit courts have given different answers to issues arising in the litigation of lawsuits claiming discrimination based on disability—issues such as (1) whether “reasonable accommodation” has some meaning apart from the absence of “undue hardship;” and (2) the nature of the plaintiff’s burden with respect to “reasonable accommodation.” Why should employers rest easily when they have no idea how courts are going to interpret the statute?

Also, ADA cases involving disabled plaintiffs pose their own particular challenges to corporate defendants. An obvious risk is that judges and juries will let sympathy for the disabled influence the verdict. Rulings have suggested that a heavy burden will not be placed on the disabled plaintiff; for instance, the employee’s burden of proposing a reasonable accommodation to keep their current position will be satisfied if they suggest anything that involves job modification or implies the need for reasonable assistance. Recently, some courts have even gone against the grain and found that an employee’s silence in requesting an accommodation is not a complete defense for employers failing to provide any accommodation. This means that employers could be liable, despite the fact that they had no knowledge that the employee suffered from a disability or needed an accommodation for adequate job performance.

b. Economic and monetary damages:

Employers also worry that compliance with the ADA could result in economic and monetary damages. The concern is that disabled persons have comprised an inactive segment of the workforce not because of discrimination, but instead because they are unqualified to meet the demands of many job positions. “Some critics of the law contend that [the ADA’s]
implementation has resulted in economic waste and inefficiency, declines in productivity, and reverse discrimination toward qualified individuals without disabilities.70

Any losses in productivity are almost certain to be coupled with actual monetary expenses, both for fighting ADA claims and for paying any damages that are awarded to the claimants. In private lawsuits, courts may award compensatory and punitive damages (within certain limits depending on the employer's size) for intentional discrimination.71 Juries may award ADA plaintiffs up to $200,000 in the aggregate as compensatory and punitive damages.72

This was not originally the case; in fact, the necessary cooperation of business both in passing the ADA and complying with its mandates was predicated on employers being subject only to lesser remedies than are currently available.73 Cooperation is a vital component of the ADA, largely because the vagueness of the statute leaves room for those looking for loopholes to exploit them. Unfortunately, such negative reactions to implementation of the ADA have, in some cases, been both attempted and successful.

B. HOW EMPLOYERS MIGHT ACTUALLY TRY TO CIRCUMVENT THE ADA

Employers attempting to circumvent the ADA have several avenues at their disposal. In particular, employers could use “creative” interviewing techniques to weed out disabled applicants. They could also give employees psychological tests in order to determine which individuals likely suffer from a mental disability that would make them possible ADA litigants, with the intention of looking for ways to lawfully discharge such employees.

1. Artful Interviewing Techniques

Employers trying to sidestep ADA provisions could use artful methods of conducting interviews to determine which applicants have, or are susceptible to having, mental disabilities. By hiring only nondisabled workers, businesses could keep to a minimum the likelihood that they would have to provide accommodations later. This cost-cutting measure

70. Blanck, supra note 32, at 887.
would defeat one of the primary purposes behind the enactment of the ADA—increasing the number of disabled individuals in the workforce.74

What sort of artful interviewing techniques might employers utilize? The general rule is that employers cannot require medical exams or ask employees either if they have a disability or about the nature of a disability that they know the employee has, unless it is “shown to be job-related and consistent with business necessity.”75 However, once an employee voluntarily talks about his disability or states that he might need a reasonable accommodation, the employer may ask questions which he otherwise could not ask.76

It is well recognized that “there is a fine line between the types of inquiries which are legal and those that are illegal.”77 While courts have disallowed questions such as, “Have you ever been terminated by or granted a leave of absence . . . for reasons that related to any physical or psychiatric illness or condition,” they have allowed licensing boards to ask questions about behavior in which individuals might have engaged (even though this behavior may have been caused by substance abuse or mental illness).78

In the end, it may all come down to the inflection in the interviewer’s voice when asking certain questions. For instance, employers can describe the essential functions of a job, and then ask whether the employee could perform these functions with or without reasonable accommodation.79 This is not the same thing as asking if an employee would in fact require a reasonable accommodation, which is an impermissible question.80 As one can imagine, disabled applicants not savvy to the specifics of the ADA might unwittingly shoot themselves in the foot by hearing “with or without accommodation” as an either/or question. Then, once they “volunteer” their need for accommodation, the door is open for the employer to inquire about the extent of the applicant’s disability, and to surreptitiously take this into account when making hiring decisions.

76 See Panken & Morrison, supra note 41, at 302.
77 Keith Alan Byers, No One is Above the Law When it Comes to the ADA and the Rehabilitation Act—Not Even Federal, State, or Local Law Enforcement Agencies. 30 Loy. L.A. L. Rev. 977, 1036 (1997).
79 See Byers, supra note 77, at 1036.
80 See id.
2. Psychological Testing

Another way in which employers could attempt to circumvent ADA provisions is to use psychological testing either before or after hiring applicants in an attempt to discern mental instability. By hiring only mentally healthy individuals, employers would lessen their chances of finding themselves as defendants in an employment discrimination suit based on disability.

Generally, psychological tests can be used in the application process as long as they are used to measure personality traits, and not to identify mental disorders.81 Furthermore, an employer can give all employees the same medical exam once hired and screen out those with disabilities as long as the relevant test or criteria is “job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation.”82

A single test could be allowed in one instance (if seen as non-medical in nature) and disallowed in another (when determined to be an unlawful medical exam),83 since case-by-case analyses are used to determine whether particular psychological tests are medical or non-medical in nature.84 But making such determinations is difficult, and use of the term “medical” exam may confuse the issue even further because it might not strike juries as including inquiries into mental states. Nevertheless, some resolution of the issue is needed because employers are frequently using psychological tests to assess integrity, honesty, personality, mental health, and emotional well-being.85

Currently, employers seem to have relatively free reign in what types of testing they can conduct. A recent case determined that tests revealing “behavior problems” and “emotional instability” will not be considered unlawful medical exams because these are not in and of themselves disabilities or characteristics that can lead to determining whether an employee has a mental impairment.86 Employers can test for mental or personality characteristics which may be “disfavored” as long as they are not

81. See, e.g., Hodgson & Cooper, supra note 34.
82. 29 C.F.R. § 1630.14(b)(3) (1997). See also Byers, supra note 77, at 1044 (remarking that employers are free to conduct post-offer psychological tests aimed at detecting disabilities that would affect job performance).
84. See Byers, supra note 77, at 1042.
85. See id. at 1041.
designed to elicit information about impairment. As this discussion suggests, courts seem unwilling to recognize ties between some unpopular mental characteristics (say, for instance, emotional instability) and an increased likelihood of suffering from a mental disorder.

Finally, employers would have less reason to engage in behavior that undermines the goals of the ADA if their expenses were curtailed. The precipitous path of the current litigation system offers employers no guarantees that the expense or prevalence of mental disability discrimination claims can be determined, much less justified by the benefits of adhering to the ADA. A new proposal is needed to offer employers more reasons and better abilities to adhere to the mandates of the ADA.

V. PROPOSAL TO KEEP EMPLOYERS FROM CIRCUMVENTING THE ADA

As has been shown above, employers looking for loopholes in the ADA probably will find them. Does this mean that tinkering with the wording of the statute would eliminate this problem? Probably not. No matter how well-crafted the statute, no matter how well-intentioned the purposes, some employers will always search for a way out. So how best to achieve the ultimate goals of the ADA? Perhaps striking a compromise between the needs of businesses and the needs of mentally disabled employees is the best solution. Then employers, even if they could avoid the mandates of the ADA, would not feel the need or temptation to sidestep the legislation.

A. WHY A BETTER SOLUTION IS NEEDED

Currently, lawsuits involving employment discrimination under the ADA are resolved via the litigation of claims. As this Note has detailed, neither employees nor employers are well-served by this method of resolving disputes. The shortcomings of the litigation process are most evident in a situation where mentally disabled and perhaps misunderstood plaintiffs are battling sophisticated corporate defendants in pursuit of continuing a prosperous employment relationship.

Lest one think that such occurrences are rare, that it is highly unlikely that one will ever have to deal with the issues of mental disability and em-

87. Id. at *7.
ployment, it is helpful to keep some statistics in mind. Approximately 2.8 million Americans suffer from severe mental disabilities. Up to seventy percent of these persons are unemployed for sustained periods of time. Those mentally disabled persons who find employment often face harsh working environments. Over twelve percent of all complaints filed with the EEOC under the ADA involve emotional and psychiatric conditions.

The first obstacle mentally disabled employees must face in filing a discrimination suit is finding good legal representation. Mentally disabled individuals often have trouble obtaining counsel who truly understand their unique cares and concerns. Moreover, lawyers are not the only persons who do not fully understand how disabilities affect the lives of those who are afflicted. Judicial decisions in civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. Language used by judges sometimes demonstrates bias against mentally disabled persons. Even mental health professionals, who often serve as valuable expert witnesses to plaintiffs in these cases, are not immune from judges’ and prosecutors’ contempt.

The mentally disabled are particularly vulnerable in the litigation process because the stresses of going to trial, filing an appeal, waiting for the verdict, and the extensive financial costs involved can potentially relapse mental illness. Furthermore, mentally disabled employees, who frequently face high medical expenses and are often underrepresented in upper-level positions, present a profile that has proven to be poorly served by the litigation process.


91. See id. at 355.

92. See Silverstein, supra note 3.

93. See Dorfman, supra note 28, at 111-12.

94. See Perlin, supra note 42, at 977.


97. See Dorfman, supra note 28, at 117.
Employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries. Finally, the litigation model of dispute resolution seems to be dominated by ‘ex-employee’ complainants, indicating that the litigation system is less useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs.98

Employers also do not fare well in the litigation of ADA claims. The possible damage to business reputation and worker morale, as well as the cost of bringing parties and witnesses to court, can produce an incredible financial and emotional strain on defendants.99 Beginning around five years ago, employers began to realize the potential impact of litigation on the going concern of a business, which may have provided the impetus for some employers to make their employees agree to binding arbitration, thus avoiding expensive lawsuits.100

Some commentators feel that the move toward imposing alternative dispute resolution mechanisms for resolution of employee disputes is justified because, “[n]ow that most discrimination claims are jury trials, employers are rightly concerned that runaway jurors might not understand business needs and impose their own standards where they disagree with the employers’ judgments.”101 The inconsistent results already achieved in various circuits can only serve to strengthen this argument.102 It is a sad state of affairs indeed when concerns over litigation of discrimination disputes lead employer guidelines to urge saying “as little as possible. Every word employers utter can be used against them.”103

102. See Panken, supra note 8, at 145-54.
103. Id. at 170.
Congress did not expect resolution of claims via big, expensive lawsuits when it drafted the ADA.\(^{104}\) In fact, one Representative challenged business and civil rights communities to find ways “to exercise the new rights granted under the ADA, so that people’s precious time and money is spent on reasonable accommodation instead of litigation. . . . [W]e ought to try to avoid litigation under this bill, if possible, and . . . encouraging dispute resolution between the parties is a positive idea.”\(^{105}\) Judges and legal commentators have also recognized that the economy and speed of arbitration, which stands in stark contrast to the expense and delay of jury trial, would be more helpful to all parties involved.\(^{106}\)

B. BINDING ARBITRATION AS A BETTER SOLUTION

Alternative dispute resolution in general, and binding arbitration in particular, could serve as a superior solution to resolving claims under the ADA. Dispute resolution has proven to be a faster and cheaper method of settling claims, when compared to litigation, in other contexts of the law.\(^{107}\) Whereas mediation has limitations that call into question its effectiveness in ADA situations involving mentally disabled employees,\(^{108}\) binding arbitration is free of such concerns, and remains a powerful potential tool for the appropriate resolution of ADA claims.

1. How Binding Arbitration Could Be Implemented in the ADA Context

Binding arbitration is an alternative method of dispute resolution whereby the law forces parties in dispute to submit their claims to one or more neutral third parties chosen by, or agreed to by, the disputing parties, where the arbitrator’s decision is binding.\(^{109}\) Some statutory claims are

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\(^{104}\) See, e.g., 136 CONG. REC. H2599-01, *H2613 (daily ed. May 22, 1990) (statement of Rep. Sensenbrenner) (“I believe it is sound policy . . . to have the money that businesses spend to comply with the ADA used to make facilities accessible and provide additional employment opportunities for the disabled rather than to provide a windfall to ambulance chasing attorneys.”).


\(^{107}\) See Kristof, supra note 106.

\(^{108}\) Mediation is generally not useful in situations involving disputes where one party is mentally incapacitated or severely intimidated. See id. Also, mediation may not be a strong enough measure to lead to resolution of disputes when refusing to resolve the dispute and settle differences can lead to commencement of a civil suit and compensatory damages. See 136 CONG. REC. H2599-01, *H2617 (daily ed. May 22, 1990) (statement of Rep. Bartlett).

\(^{109}\) See BLACK’S LAW DICTIONARY 40 (pocket ed. 1996) (defining binding or “compulsory” arbitration).
now fully subject to this method of alternative dispute resolution. Binding arbitration as a condition of employment has generally been upheld in court “so long as the procedure is fair, the outcome can be the same as a jury trial, and the employee knew they were agreeing to final and binding arbitration.”

In order to abide by these requirements in the ADA context, it is first necessary to ensure that employees know that any future employment discrimination claims will be subject to binding arbitration. Courts have refused to enforce arbitration agreements when individuals seeking jury trials signed these agreements without knowledge of their terms. Commentators have drafted easily understandable model language that can be inserted into employment contracts to indicate that binding arbitration is to be used to settle all employment discrimination claims.

In order to ensure the “fairness” of the procedure, there should also be an identifiable method for choosing who will arbitrate the ADA claims. Concerns have been raised that the employer, unlike the employee, might be a repeat player in cases involving individual statutory claims, and thus may have superior knowledge that could be used to their advantage in choosing an arbitrator. However, this potential difficulty should be eliminated by requiring that neutral arbitrators appointed through the American Arbitration Association (“AAA”) conduct the proceeding in accordance with AAA rules. The AAA chooses arbitrators culled from a list of the best arbitrators in any particular area, as determined by lawyers representing both labor and management, human resource consultants, arbitrators, and EEOC officials.

An additional member on the arbitration team should be an independent rehabilitation worker who is an expert in mental health issues, or at least has experience in dealing with such issues. Inclusion of such an individual on the team would allow for easier determination of what accommodations were reasonable or available in any given situation. Further-

110. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that an individual employee claim outside the collective bargaining context can be fully subject to binding arbitration).
111. See Panken & Williams, supra note 101.
112. See Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that plaintiff did not have to arbitrate claims of sexual harassment and discrimination when she did not knowingly enter into arbitration agreement).
115. See Sixel, supra note 100.
more, decisions regarding the adequacy of job performance after the provision of a reasonable accommodation would be made more accurate and reliable. Although arbitrators working alone “will give more consideration to law that is clearly defined as opposed to unsettled law based upon controversial views as to what the public policy should be,”¹¹⁶ the aforementioned arbitration team would be adequately equipped to confront the unsettled arena of ADA disputes and its even more controversial overlap with mental disability law.

To prevent expense from barring an employee’s pursuit of statutory rights, employers should be required to pay for the arbitration team. Courts have not seen employer payments to arbitrators as a cause for concern because arbitrators are only concerned about the bill being paid, not about who is paying the bill.¹¹⁷ Furthermore, corrupt arbitrators will not be able to survive under this system, since employees will be allowed access to the employment histories of chosen arbitrators, and will be granted an investigation of arbitrators if desired.¹¹⁸ Plaintiffs’ representatives or the AAA will catch arbitrator misconduct, and employers attempting to gain the arbitrators’ favor will simply be asking for increased judicial review of any arbitrators’ judgments handed down.¹¹⁹

Publishing the opinions that explain arbitrators’ decisions will also ensure that arbitrators are not governed by their own sense of justice. In fact, this may be even better than what occurs in the civil adjudication context, where juries, and to a lesser extent judges, cannot be required to write down their reasons for making decisions.¹²⁰ Arbitration awards should be in writing, contain the names of the parties involved, summarize the issues in controversy, and describe the type and amount of award issued.¹²¹ Such opinions should also be made available to the public. Finally, “a written opinion of the arbitrator . . . may be advisable since it will facilitate judicial review and moot objections about alleged lack of public awareness of the dispute resolution process.”¹²²

¹¹⁷. See Cole, 105 F.3d at 1485.
¹¹⁸. See generally James A. King, Jr., Glen D. Nager, Ronald K. Noble, & Joan E. Young, Agreeing to Disagree on EEO Disputes, 9 LAB. LAW. 97, 122 (1993) (suggesting a process for selecting neutral, unbiased arbitrators).
¹¹⁹. See Cole, 105 F.3d at 1485.
¹²⁰. See King et al., supra note 118, at 103.
¹²². King et al., supra note 118, at 124.
And how will the arbitrators go about determining if any ADA violations have occurred? Under this proposal, employers and employees during the hiring process must sign a document detailing the essential job functions to be performed by the employee in the course of their employment. Essential job functions are generally the fundamental job duties of the position that the disabled employee holds or desires—marginal functions of the position need not be included.123

Any written job descriptions prepared before advertising for or interviewing job applicants are “considered evidence of the essential functions of the job.”124 Employers should be given great latitude to determine legitimate essential job functions and production requirements.

[The statute] only requires that the applicant’s or employee’s skills are to be considered independent of the purported disability, in other words, independent of unfounded attitudes about the relation of a disability to current job qualifications or of views about the efficacy or cost of an accommodation for a qualified individual with a disability.125

In addition, the employer has no duty to provide every accommodation that the disabled employee requests; the employer only has to provide reasonable accommodation to make it possible for the employee to perform the essential functions of the job.126 Thus, prior creation of a detailed document describing the essential job functions streamlines the arbitration process, allowing the arbitrators to determine what accommodations must be provided as well as whether or not the disabled employee with the accommodation is adequately performing the job in question.

In order to allow the arbitrators to reach the best possible decision as to the disabled employee’s ability to adequately perform the essential job functions, the team should first determine what reasonable accommodations are warranted, and then provide for a trial period during which the employee attempts to perform their job duties with these reasonable accommodations in place. The trial period should run for a certain period of time (say six months) that is long enough to allow the employee to adapt to their new working environment, yet short enough not to economically cripple the employer if the demands of the position are not being met.

123. See Mishkind et al., supra note 37, at 350. See also Panken & Morrison, supra note 41, at 301-02 (evaluating the requisites making job functions “essential”).


125. Blanck, supra note 32, at 888.

126. See Gaines v. Runyon, 107 F.3d 1171, 1178 (6th Cir. 1997); Gile v. United Airlines, Inc., 95 F.3d 492, 497-99 (7th Cir. 1996); Hankins v. Gap, Inc., 84 F.3d 797, 800-01 (6th Cir. 1996); Schmidt v. Methodist Hosp. of Ind., Inc., 89 F.3d 342, 344-45 (7th Cir. 1996).
At the end of this trial period, the arbitration team should decide if the disabled employee is qualified and can remain in her position. If the answer is yes, then the employer must either keep the worker in her employ or face paying damages under the ADA for employment discrimination and improper termination. If the answer is no, then the employer should be able to terminate their employment relationship with the disabled individual with the promise that they will not be subject to future lawsuits for such action.

“[L]itigation of statutory discrimination claims will be precluded only if the arbitral process provided to individuals meets certain minimal procedural standards. . . . [A]n arbitration award based on fraud or bias will not be enforced.” Thus, while judicial scrutiny of arbitration awards necessarily is limited, such review must and will be sufficient to ensure that the arbitrators have complied with the requirements of the statute at issue. Under this proposal, the bases for the arbitrators’ decisions will be published and available for scrutiny. Therefore, judicial review should not adversely affect the arbitration process or diminish any streamlining that might be accomplished through the use of binding arbitration.

2. Disadvantages of Using Binding Arbitration to Settle Mental Disability Claims

Use of binding arbitration to settle ADA employment discrimination claims involving mental disability is not completely devoid of drawbacks. For one thing, employees might feel that binding arbitration detracts from their individual rights and reduces the award they would normally recover for an employer’s discriminatory acts. Use of alternative dispute resolution might be anti-therapeutic because its informal nature could convey a message to employers, mental health consumers, and society that these cases are not worthy of litigation. The mentally disabled might feel that their claims are not worthy or that they therefore have diminished value as people.

The response, of course, is that the binding arbitration proposal as outlined above is fairly formal and replete with a bevy of procedural protections. Furthermore, including persons familiar with mental disability on

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127. King et al., supra note 118, at 120.
130. See Jacob, supra note 116, at 1116.
132. See id.
the arbitration team should ensure a level of respect toward claimants which might not be achieved in the ordinary litigation process. The proposal appears “employee-friendly,” since the arbitrators’ expenses are to be paid by employers. And employees can receive the same remedies in the arbitration process as could be received in the courtroom; allowing arbitration provisions to limit remedies would be unconscionable.\textsuperscript{133}

A possible disadvantage of binding arbitration for employers is that some frivolous claims could be filed that might have been discouraged under a litigation scheme.\textsuperscript{134} Mentally disabled employees might be encouraged to pursue claims that they have no realistic chance of winning, knowing that they can hang on to their paychecks for just a little bit longer (during the accommodation trial period). However, the comfort to be gained in the security that no further litigation will develop down the line should more than compensate for any employers’ expenses that accrue during the trial period. And employers might reap the ultimate benefit from binding arbitration—the realization that many mentally disabled persons when adequately accommodated can give a stellar job performance.

A lingering disadvantage to the binding arbitration proposal as presented is that it can be applied only to those employees who are discovered to be mentally disabled while on the job. Without previously being hired, employees will not have been required to sign a binding arbitration agreement that enables them to share in the benefits of the proposal.

This plan does little to combat discrimination faced by mentally disabled individuals in obtaining employment; the only hope that it offers mentally disabled and unemployed individuals is the chance that it will change minds as to what a mentally disabled person can accomplish. While such a possibility is by no means remote or insignificant, this is a real limitation of the proposal that cannot be overlooked. More work needs to be done to determine how best to help qualified mentally disabled individuals obtain employment.

3. Advantages of Using Binding Arbitration to Settle Mental Disability Claims

Despite the aforementioned potential disadvantages of using binding arbitration to settle mental disability claims under the ADA, the gains to be had by arbitration of claims more than make up for any weaknesses in the proposal. “[A]rbitration avoids the formalities, delays, and expenses of


\textsuperscript{134} See Jacob, supra note 116, at 1116.
traditional litigation, while maintaining the trial like adversarial forum.”

Binding arbitration has the obvious benefit of alleviating congested court dockets. Intensified use of binding arbitration should also curtail the impact of ADA claims on governmental institutions such as the EEOC.

Binding arbitration is particularly appropriate in the ADA setting because the statute already requires a case-by-case analysis of the individual disabled’s job-related needs. The inquiries to be made by the arbitration team are no more elaborate than those that would need to be made under extensive time pressures in crowded courtrooms. And “so long as the prospective litigant effectively may vindicate [their] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

Binding arbitration answers many of the concerns that employers frequently voice in the ADA arena. The process detailed in this Note incorporates bases for making determinations on both what the essential job functions are (as determined by the job description) and whether or not they are being adequately performed (as determined by performance during the trial period). Employers, then, avoid the uncertainty in the bases for determining the mentally disabled employee’s fate that is currently experienced with the litigation of claims. Furthermore, the arbitration team is provided concrete evidence on the employee’s job performance that discourages the introduction of other factors, such as sympathy for the employee, into the mix.

Employers’ economic and monetary concerns are alleviated in the binding arbitration process. The expense of providing reasonable accommodations will often be slight in comparison to the benefits received in those cases where employees are able to continue performing their jobs adequately; employers need not screen other applicants for the position or undertake job restructuring so as to eliminate the position altogether. Speed and economy in the arbitral process should reduce costs typically experienced with protracted litigation. Binding arbitration does not require

\[135\] Id. at 1100.

\[136\] See King et al., supra note 118, at 98.


\[140\] For a discussion of employer concerns in the ADA context, see supra Part IV.A.2.

\[141\] See supra notes 62-66 and accompanying text.

\[142\] For a discussion of employers’ economic and monetary concerns, see supra Part IV.A.2.b.
parties to wait years for their cases to come up on court dockets; the arbitration process can begin as soon as an arbitrator is chosen. Finally, the binding nature of arbitration also means that the lengthy appeals process is avoided.

Binding arbitration as outlined in this Note also offers the mentally disabled employee several important advantages over litigation. First, the arbitration team as conceived will bring a level of expertise in mental disability issues to the table unmatched in the current litigation of claims. Second, the privacy of the arbitration proceedings might encourage employees to give frank and honest assessments of the severity of their disabilities, without fear of public humiliation or stigmatization. It is hard for a mentally disabled individual to come forward and admit that they need help in performing their job duties; it is even harder to make such admissions in a crowded courtroom.

The less formal arbitral forum should detract from the stress usually faced by litigants—stress that, if extreme, could increase the chances that a mentally disabled employee might relapse. And unlike what occurs in the current litigation process, with binding arbitration it is not necessary for the employee to face the daunting task of finding adequate legal representation. While some of the more acrimonious cases may still warrant involving attorneys in the arbitral process, it is conceivable that employees could find adequate representation in trusted friends, rehabilitation workers, or the like.

The arbitration solution also promotes the goal that employers not be deterred from hiring mentally disabled persons initially by giving them no justification to fear extended litigation costs if they later fire the employee for legitimate reasons. In this way, both employees currently laboring with a mental disability, and those mentally disabled persons who might decide to seek employment in the future, stand to benefit from the solution.

Perhaps most important, by giving the mentally disabled employee a chance, binding arbitration should prove to employers that compliance with the ADA is beneficial—that their preconceived notions of added inconvenience and lost productivity are without merit. And isn’t the strongest solution to the circumvention of the ADA best effectuated by

143. For a discussion on choosing an arbitration team, see infra Part V.B.1.
144. See Dorfman, supra note 28, at 117-21.
145. See id. at 111-12.
147. See Blanck, supra note 32.
changing employers’ attitudes toward the disabled? This too would have a positive effect on all mentally disabled individuals.

4. **Probable Responses to Binding Arbitration in the ADA Setting**

Binding arbitration under the ADA is likely to receive mixed reviews from the public. District courts have time and again emphasized that binding arbitration will be *binding* and welcomed by the courts.148 Most appellate courts have upheld the enforceability of binding arbitration agreements in workplace discrimination cases.149

Congress has put its support behind arbitration as a superior process to litigation in some contexts.150 The ADA itself encourages use of alternative dispute resolution “[w]here appropriate and to the extent authorized by law . . . .”151 Employers have also started jumping on the bandwagon. Binding arbitration as a condition of employment has been used by employers trying to avoid large and expensive ADA battles in the courts.152

But such support is not unqualified. Some employers have attempted to adopt “stiff, self-serving arbitration rules that . . . prohibit punitive damages or put severe limits on evidence-gathering by employees.”153 It remains to be seen how they would react to a binding arbitration policy that is not one-sided.

The EEOC has repeatedly objected to using binding arbitration to streamline the process of adjudicating discrimination claims.154 Advocates for employees tend to think that binding arbitration only removes the statutory rights that were granted by the ADA.155 A well-drafted and closely monitored binding arbitration policy, though, would seemingly ensure not only the *presence* of these statutory rights, but also *enforcement* of the same.


150. See 136 CONG. REC. H2421-02, *H2431 (daily ed. May 17, 1990) (statement of Rep. Glickman) (“This provision should serve as a reminder that rights and litigation are not one in the same. There are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation.”).


152. See Sixel, *supra* note 100.

153. Id.


155. See Sixel, *supra* note 100. But see *supra* note 150 and accompanying text.
CONCLUSION

Current methods of enforcing the ADA leave the needs of both employers and employees wanting. Employers fearing extensive litigation down the road may choose not to hire, or find reasons to fire, mentally disabled employees entitled to ADA protection. Employees trying to pursue claims of employment discrimination based on mental disability face stressful trials in unfriendly courts.

In order for this statute to achieve its ultimate purposes, something more in the way of enforcement is needed. The binding arbitration proposal outlined in this Note may be the answer. Employers and employees need to work together to find common ground; neither side is benefitted by the litigation of ADA claims. Binding arbitration under the ADA, correctly implemented and rigorously applied, could serve to open doors and change minds about the skills and capabilities of mentally disabled individuals everywhere.