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The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities

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TABLE OF CONTENTS

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I. INTRODUCTION

John has Asperger's Syndrome.[1] None of his coworkers were aware of it, even though a few may have suspected it; what others around him saw was a model employee, a highly competent, highly motivated worker who kept calm under the most trying of circumstances.[2] He sometimes seemed withdrawn and often found excuses to avoid office parties, but, by and large, his coworkers assumed that he was simply a workaholic.[3]

But in December 2012, everything changed for John. On December 14, a lone gunman named Adam Lanza killed twenty-six people at an elementary school in Connecticut before turning his gun on himself.[4] Within hours, as more information on Lanza was uncovered, several press reports focused on speculation that he might have Asperger's Syndrome.[5] A guest on CNN's *Piers*

1. Asperger's Syndrome is an autistic spectrum disorder characterized by "severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities . . . ." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 80 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR]. It differs from the diagnosis of autism primarily in that it does not feature a delay in early childhood development of language and cognitive skills. *Id.* Because the distinction between Asperger's Syndrome and autism is unclear and has no practical value to clinicians, the DSM-V will merge Asperger's Syndrome and autism into a single diagnosis called "autism spectrum disorder." Jon Hamilton, *Asperger's Officially Placed Inside Autism Spectrum*, NPR (Feb. 10, 2010), http://www.npr.org/templates/story/story.php?storyId=123527833 (on file with the *McGeorge Law Review*).

2. Although John is fictitious, this is a fairly common profile of people with psychiatric disabilities: many go to great lengths to keep peers from becoming aware of their diagnoses. *See* Susan G. Goldberg et al., *The Disclosure Conundrum: How People with Psychiatric Disabilities Navigate Employment*, 11 PSYCHOL. PUB. POL'Y & L. 463, 479 (2005) (describing challenges to which people with psychiatric disabilities are willing to face to avoid disclosing their disabilities). People with Asperger's Syndrome are often able to mask the effects of the disorder: "for example, the individual may learn to apply explicit verbal rules or routines in certain stressful situations. . . . [A]s adults, many individuals are capable of gainful employment and personal self-sufficiency." DSM-IV-TR, *supra* note 1, at 82.

3. This, too, is fairly common for people with psychiatric disabilities: one recent study of high-functioning people with schizophrenia found that working is a common coping mechanism. Elyn Saks, *Successful and Schizophrenic*, N.Y. TIMES (Jan. 25, 2013), http://www.nytimes.com/2013/01/27/opinion/sunday/schizophrenic-not-stupid.html (on file with the *McGeorge Law Review*). One respondent in a study "works on the weekends too because of 'the distraction factor.' In other words, by engaging in work, the crazy stuff often recedes to the sidelines." *Id.*

4. Tracy Connor & Pete Williams, *Newtown Gunman Forced His Way into School, Police Say*, NBC NEWS (Dec. 15, 2012), http://usnews.nbcnews.com/_news/2012/12/15/15926718-newtown-gunman-forced-his-way-into-school-police-say (on file with the *McGeorge Law Review*).

5. *E.g.*, David M. Halbfinger, *A Gunman, Recalled as Intelligent and Shy, Who Left Few Footprints in Life*, N.Y. TIMES (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/nyregion/adam-lanza-an-enigma-who-is-now-identified-as-a-mass-killer.html (reporting that several of Lanza's high-school classmates "had been

Morgan Tonight suggested that people with autism spectrum disorders[6] might be more prone to violence because they lacked a "capacity for empathy."[7] Even family members of people with autism spectrum disorders expressed fear that their children might become mass murderers.[8] Although mental health professionals and advocates for people with autism spectrum disorders quickly pushed back against negative media portrayals of Asperger's Syndrome,[9] the damage had been done where John was concerned. Later that week, one of John's coworkers, who had viewed *Piers Morgan Tonight* after the Connecticut mass shooting, began to suspect that John might have an autism spectrum disorder and told a supervisor that John might fit Adam Lanza's profile. John was fired the next day and was told that he was being removed from the workplace because he was a danger to himself and everyone around him.

John was well-informed enough to file a charge of disability discrimination with the Equal Employment Opportunities Commission (EEOC). The EEOC investigated his charge and found that there were indeed facts suggesting that he had been fired, at least in part, because of his mental illness. His employer refused to negotiate a settlement, however, and lacking the resources to file a lawsuit, the EEOC instead issued John a right-to-sue notice.

John retained an attorney shortly thereafter. The attorney advised him that, although he had a strong case for disability discrimination under the Americans with Disabilities Act (ADA),[10] his remedies would likely be limited to reinstatement and back pay.[11] Although it is true that intentional discrimination

told" that he had Asperger's Syndrome and that law enforcement officials "were closely examining whether Mr. Lanza had such a disorder") (on file with the *McGeorge Law Review*).

6. *See supra* note 1 (defining autism spectrum disorder).

7. Tommy Christopher, *Piers Morgan Quack Says People With Autism Lack Empathy: 'Something's Missing In The Brain'*, MEDIAITE (Dec. 14, 2012), http://www.mediaite.com/tv/piers-morgan-quack-says-people-with-autism-lack-empathy-somethings-missing-in-the-brain/ (on file with the *McGeorge Law Review*). This was not the first time in 2012 that autism spectrum disorders had been associated with violence by television commentators. MSNBC's Joe Scarborough had previously responded to a mass shooting in Aurora, Colorado by suggesting that mass shooters tended to be "somewhere, I believe, on the autism scale." Dylan Byers, *Scarborough: Holmes 'On Autism Scale'*, POLITICO (July 23, 2012), http://www.politico.com/blogs/media/2012/07/scarborough-holmes-on-autism-scale-129779.html (on file with the *McGeorge Law Review*).

8. *E.g.*, Liza Long, *Thinking the Unthinkable*, THE ANARCHIST SOCCER MOM (Dec. 14, 2012), http://anarchistsoccermom.blogspot.com/2012/12/thinking-unthinkable.html (on file with the *McGeorge Law Review*); Pamela Mirghani, *My Brother Is Not Adam Lanza, But He Could Be*, W. AUSTL. TODAY (Dec. 21, 2012), http://www.watoday.com.au/opinion/my-brother-is-not-adam-lanza-but-he-could-be-20121221-2bql1.html (on file with the *McGeorge Law Review*).

9. *E.g.*, Adam Martin, *Asperger's Is a Red Herring to Explain the Newtown Massacre*, N.Y. MAG. (Dec. 16, 2012), http://nymag.com/daily/intelligencer/2012/12/aspergers-is-a-red-herring-to-explain-newtown.html (on file with the *McGeorge Law Review*).

10. *See infra* Part II.B (discussing an employer's affirmative duties in evaluating a direct threat to the health or safety of the workplace). John's employer, by failing to evaluate whether his disability actually created significant danger in the workplace, clearly breached that duty. *Id.*

11. 42 U.S.C. § 2000e-5(g) (2006) (listing equitable remedies for employment discrimination); *see infra* Part III (discussing remedies actually received by prevailing disability discrimination plaintiffs with psychiatric disabilities).

on the basis of disability carries compensatory and possibly punitive damages,[12] proving intent would be difficult.[13] John's supervisor did not actually know that John had Asperger's Syndrome, but had simply acted hastily, and arguably negligently, on a report that John's behavior might have had parallels to Adam Lanza's behavior prior to December 14.[14]

At this point, John faced a serious dilemma. His employer refused to negotiate a settlement, and litigation seemed like a poor option even if he was almost certain to prevail. John knew that, should he file suit, his diagnosis would become public knowledge. Where his supervisor and a few coworkers may have been aware of his Asperger's Syndrome at the time he was fired, his entire workplace would be aware if he were to be reinstated. Unable to accept that possibility, John declined to file a civil complaint. Much like his namesake, the protagonist of Joseph Heller's *Catch-22*, John found himself in a situation where the act of seeking a remedy would defeat the remedy itself.[15]

People with psychiatric disabilities have reported experiencing worse discrimination in the workplace than in any other context.[16] Although John's story is fictitious, several commentators have discussed the scenario in which an employee with a psychiatric condition is fired on the grounds of allegedly endangering others in the workplace.[17] Studies have repeatedly found that large portions of the public greatly fear individuals with psychiatric conditions and believe that people with psychiatric conditions are likely to commit violent acts, regardless of the specific diagnosis.[18] Even as American society has generally become more accepting of differences, the stereotype of the dangerous psychiatric patient appears to have actually increased over recent decades.[19]

12. 42 U.S.C. § 1981a.

13. *See infra* Part III.B (discussing reasons why plaintiffs with psychiatric disabilities have difficulty proving discriminatory intent).

14. Particularly when a plaintiff's disability is psychiatric, courts are often reluctant to determine that discrimination is intentional for a variety of reasons. *See infra* Part III.B.

15. John Yossarian, the novel's protagonist, tries to escape World War II by asking his bomber squadron's doctor about the possibility of being grounded for insanity, only to discover that asking to be grounded would prevent him from being grounded:

> Orr [another pilot] was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

JOSEPH HELLER, CATCH-22, at 46 (Simon & Schuster, 1st paperback ed., 2004) (1961).

16. SUSAN STEFAN, HOLLOW PROMISES 4 (2001).

17. *E.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 609–12 (2003) (discussing the fear that a mentally ill person may become violent as a driving force behind workplace discrimination); Ann Hubbard, *The ADA, the Workplace, and the Myth of the 'Dangerous Mentally Ill'*, 34 U.C. DAVIS L. REV. 849 (2001).

18. Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 52 (2005).

19. *Id.*

Because proclivity for violence is the dominant stereotype, fear of violence is probably the most common cause of employment discrimination against people with psychiatric disabilities.[20]

Courts have recognized that federal disability discrimination statutes are intended to dispel myths about people with disabilities.[21] However, despite that stated goal, people with psychiatric disabilities continue to face a very real "justice disparity" as compared to people with other disabilities.[22] One study found those with psychiatric disabilities experience less favorable litigation outcomes, lower levels of satisfaction with the process of enforcement, and reduced access to settlement negotiations and alternative dispute resolution, none of which were entirely attributable to the relative merit of the cases brought.[23]

Most of the scholarship on the difficulties faced by plaintiffs with psychiatric disabilities has focused on the definition of disability.[24] This focus was historically well justified: psychiatric disability discrimination actions most commonly failed at summary judgment because the plaintiff failed to prove membership in the protected class under the ADA.[25] The case law greatly narrowed the definition of disability for both physical and mental disabilities

20. *See* Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 221, 228 (Richard J. Bonnie & John Monahan eds., 1997) (discussing employer attitudes toward psychiatric disabilities). Surveys of employers support the same conclusion. One study found that employers were more reluctant to hire applicants with a history of psychiatric illness than any of a list of other factors, including ethnic minority status, physical disability, and even having a criminal record. *Id.* at 228–29 (citing James N. Colbert et al., *Two Psychological Portals of Entry for Disadvantaged Groups*, 34 REHABILITATION LITERATURE 194 (1973)). Another found that the fear of violence was the highest-rated concern of employers in hiring people with psychiatric illnesses. *Id.* at 228; *see also* Edward Diksa & E. Sally Rogers, *Employer Concerns about Hiring Persons with Psychiatric Disability: Results of the Employer Attitude Questionnaire*, 40 REHABILITATION COUNSELING BULL. 31 (1996) (finding a similar result six years later).

21. *E.g.*, Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 284–85 (1987) (describing the "basic purpose" of the Rehabilitation Act as "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.").

22. Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94 (2006). Swanson and his co-authors used empirical data to test the hypothesis that the legal system might in some way treat people with psychiatric disabilities differently from those with other disabilities. *See id.* They observe that "a justice disparity for people with psychiatric disabilities would not be unique," citing the long, continuing struggle to combat "persistent perceptions of racial, ethnic, and gender bias in the administration of justice." *Id.* at 136.

23. *Id.* at 139.

24. *See, e.g.*, Michelle Parikh, Note, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act's Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721 (2004); Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321 (2003); Randal I. Goldstein, Note, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927 (2001).

25. *See* Center & Imparato, *supra* note 24, at 327 ("[H]ostile court rulings frequently turn on whether the individual is 'substantially limited.'"); Goldstein, *supra* note 24, at 950 (citing cases in which courts rejected psychiatric disability discrimination claims because "medications and counseling allow [the plaintiffs] to function without limitation.") (internal quotation marks omitted).

from Congress's intended definition,[26] requiring that a plaintiff have a condition that "prevents or severely restricts" an activity "of central importance to most people's daily lives"[27] and that the condition be considered in its mitigated state.[28]

The restricted definition of disability had a disproportionate effect on psychiatric disability plaintiffs because the ADA specifically protects "qualified" individuals with disabilities.[29] Because people with psychiatric illnesses are, by definition, impaired in cognitive function, their disability directly impacts their qualifications for many jobs. The United States Supreme Court's interpretation of the statute as requiring severe and pervasive limitation despite mitigation excluded individuals who had well-controlled mental illness.[30] Although appropriate mental healthcare might make a plaintiff able to perform job duties, any plaintiff who could prove that he or she was thus qualified for a job would then have difficulty proving the existence of a protected disability.[31]

In 2008, in response to the judicial narrowing of the definition of "disability," Congress passed the ADA Amendments Act (ADAAA), greatly expanding the scope of the term.[32] In its findings, Congress expressly repudiated court decisions that had narrowed the definition of "disability."[33]

With the passage of the ADAAA, many more ADA plaintiffs are now able to pass the threshold test of establishing membership in the protected class. Prior to the ADAAA, both the case law and the scholarship concerning the ADA focused overwhelmingly on that threshold test because few plaintiffs had the opportunity to litigate any other issue.[34] Today, however, as litigation of other aspects of the ADA becomes more frequent, they deserve further scrutiny.[35] As exemplified in John's predicament, the remedies available under the ADA are often insufficient to overcome the additional disincentives against enforcement faced by employees

26. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (2008) (expressly stating the intent to define "disability" broadly).

27. Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002).

28. *Sutton*, 527 U.S. at 487.

29. 42 U.S.C. § 12112(a) (Supp. II 2009).

30. Parikh, *supra* note 24, at 740–41 (citing *Sutton*, 527 U.S. at 488).

31. *Id.* at 741; *see also* Goldstein, *supra* note 24, at 944–45 (further discussing essential job functions that are impaired by an untreated mental illness, leading courts to declare that plaintiffs are "not otherwise qualified").

32. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

33. *Id.* § 2, 122 Stat. at 3553–54. The amended statute requires that disabilities be considered in their unmitigated state, that disabilities that are "episodic or in remission" should be considered in their active state, and that the ADA should generally be interpreted as having broad coverage. 42 U.S.C. § 12102(4) (Supp. II 2009).

34. *See* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 188 (2010) ("Although courts encountered these interpretive questions prior to the ADAAA, they have not yet fully resolved these issues due to the scarcity of ADA cases that proceeded past the initial question of the plaintiff's standing to sue.").

35. *Id.* at 188–89.

with invisible and highly stigmatized disabilities, such as mental illness.[36] These disincentives against litigation cause rational employers to refuse to settle disputes out of court, in turn leaving employees litigation as the sole avenue for obtaining relief.[37] This Comment argues that a consistently available compensatory damages remedy is necessary to provide meaningful protection for both the employment rights and privacy of employees with psychiatric disabilities, and proposes a solution in the use of common-law causes of action.

Part II of this Comment provides an overview of the ADA and its remedies for employment discrimination. Part III discusses the characteristics of psychiatric disabilities and how they affect ADA causes of action and remedies. Part IV considers the question of why alternative dispute resolution has been underutilized in psychiatric disability cases, focusing on the EEOC voluntary mediation program. It then argues that effective remedies are necessary to encourage employers to negotiate in good faith and agree to mediation or other forms of settlement. Part V is a multi-part proposal to provide disability discrimination plaintiffs who have psychiatric disabilities with meaningful remedies and to encourage defendants to negotiate settlements in good faith. It explores the use of the characteristics of psychiatric disabilities to sustain common-law claims as a means of creating the necessary incentives to enforce the ADA. It examines several specific tort claims that may be particularly viable for psychiatric disability discrimination: negligent infliction of emotional distress, intentional infliction of emotional distress, and wrongful discharge against public policy. It also examines the remedy of front pay as an option, and proposes policy changes to promote mediation.

II. THE ADA'S EMPLOYMENT PROVISIONS: AN OVERVIEW

The American with Disabilities Act (ADA) is the main federal statute protecting persons with disabilities from discrimination.[38] This Par5t will provide background information on the ADA. It will discuss the general statutory framework,[39] the direct threat exception that frequently comes into play in psychiatric disability discrimination cases,[40] remedies available under the ADA,[41]

36. *See infra* Part III (discussing the insufficiency of the ADA's remedial structure for people with psychiatric disabilities).

37. *See infra* Part IV.B (discussing reasons for employer refusal to engage in alternative dispute resolution).

38. 42 U.S.C. §§12101-12213 (2006); John Parry, Civil Mental Disability Law, Evidence and Testimony 41 (2010).

39. *See infra* Part II.A.

40. *See infra* Part II.B.

41. *See infra* Part II.C.-D.

and recent legislation that may bring questions about ADA remedies to the forefront of litigation.[42]

A. The Statutory Framework

Title I of the ADA, the portion concerning employment discrimination, applies broadly to employers with fifteen or more employees, with the exception of the federal government, corporations wholly owned by the federal government, and Indian tribes.[43] Employers subject to the ADA are prohibited from discriminating "against a qualified individual on the basis of disability 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."[44] The protected class of employees includes persons with "a physical or mental impairment that substantially limits one or more major life activities," persons with "a record of" or "regarded as having" such an impairment,[45] and persons who have a known "relationship or association" with an individual with a disability.[46]

The ADA differs from other civil rights statutes in that it places an affirmative duty on employers to reasonably accommodate an employee's disability.[47] This requirement is closely related to the ADA's criterion of "qualified" in defining the protected class: a "qualified person" is one who can perform all essential job functions with accommodations that are reasonable in extent.[48] The employer has an affirmative duty to make a reasonable effort to determine such an accommodation through an "interactive process" with the employee with a disability.[49]

42. *See infra* Part II.E.

43. 42 U.S.C. § 12111(5) (2006). The Rehabilitation Act of 1973 prohibits employment discrimination by the federal government and by organizations receiving federal grants or contracts. 29 U.S.C. §§ 791, 793–794 (2006). The Rehabilitation Act defines "disability" somewhat differently from the ADA. 29 U.S.C. § 705(20). However, because the Rehabilitation Act has been amended to incorporate the ADA's standards of proof for employment discrimination, *id.* §§ 791(g), 793(e), 794(d), and both the ADA and the Rehabilitation Act incorporate by reference the remedies of the Civil Rights Act of 1964, this Comment's analysis of ADA remedies applies to Rehabilitation Act actions. 42 U.S.C. §§ 794a(a), 12117(a).

44. 42 U.S.C. § 12112(a).

45. *Id.* § 12102(1).

46. *Id.* § 12112(b)(4).

47. *Id.* § 12112(b)(5).

48. *Id.* § 12111(8).

49. 29 C.F.R. § 1630.2(o)(3) (2012). Although the regulation uses the words "may be necessary," rather than mandatory terms, courts have consistently held that the interactive process is mandatory. Kleiber v. Honda of America Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007) (citing numerous cases from other circuits).

B. The Direct Threat Exception

The ADA contains an exception that is particularly relevant in psychiatric disability cases: an individual who poses "a direct threat to the health or safety of other individuals in the workplace" is excluded from the protected class.[50]

The direct threat provision demands an individualized assessment of risk that considers both the specific circumstances and whether the risk can be mitigated by reasonable accommodations.[51] The assessment must be entirely objective[52] and "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[53] In *School Board of Nassau County v. Arline*, the United States Supreme Court, interpreting a similar direct threat provision in the Rehabilitation Act of 1973 as applied to a schoolteacher discharged on the basis of a diagnosis of tuberculosis, stated that "[t]he Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ."[54] When Congress enacted the ADA, numerous congressional committees expressed the intent that the *Arline* standard should be applied to the direct threat provision in the ADA;[55] the Supreme Court later applied that standard to ADA direct threat analysis in *Bragdon v. Abbott*.[56] In holding that a dentist's refusal to treat an HIV-positive patient in his office due to a perceived risk of transmission violated the ADA, the Court emphasized that a risk must be significant,[57] and not merely speculative,[58] to constitute a direct threat.

Because existence of a direct threat is an affirmative defense, the employer has the burden of proving that it found the employee to pose a direct threat through an objective, individualized inquiry complying with the *Arline*

50. 42 U.S.C. § 12113(b).

51. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273 (1987). Although this case was decided before the enactment of the ADA, the "direct threat" provision in the Rehabilitation Act that the Court interpreted was substantially similar to that found in the ADA. 29 U.S.C. § 705(20)(D) (2006) (excluding individuals who "would constitute a direct threat to the health or safety of other individuals"). The ADA also expressly defines "direct threat" as including only "significant risk" that "cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

52. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999) ("Such an analysis . . . disallows reliance on subjective evaluations . . . .").

53. 29 C.F.R. § 1630.2(r); *see also* Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1034 (9th Cir. 2003) (holding that the opinions of physicians outside the specialty associated with the employee's disability are insufficient to establish that an employer has made the required direct threat assessment).

54. 480 U.S. at 284–85.

55. Hubbard, *supra* note 17, at 862, 862 n.44.

56. 524 U.S. 624, 649 (1998).

57. *Id.* ("Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant.").

58. *Id.* at 653 (observing that the petitioner's assertion that dentists risked contracting HIV from patients was based only on "the absence of contrary evidence, not on positive data.").

standard.[59] In the specific context of psychiatric disabilities, the employer's individualized inquiry must identify specific behavior on the part of the employee that would create a direct threat.[60]

C. ADA Causes of Action and Remedies

As with other antidiscrimination statutes, plaintiffs may sue under a theory of disparate treatment or disparate impact.[61] In addition, a third cause of action exists for failure to accommodate a disability.[62]

Disparate treatment, as its plain-language meaning suggests, occurs when a plaintiff is treated differently from others similarly situated "because of, not merely in spite of," membership in an identifiable protected class.[63] The plaintiff must prove the defendant's subjective discriminatory intent; in most civil rights contexts, the terms "disparate treatment" and "intentional discrimination" are used interchangeably.[64]

Discrimination need not be intentional to be unlawful, however. Since 1971, the courts have recognized that antidiscrimination statutes prohibit "practices that are fair in form, but discriminatory in operation," a theory that has come to be known as disparate impact.[65] Although the disparate impact theory was created judicially in the general antidiscrimination paradigm, it is expressly codified in Title I of the ADA.[66] The ADA prohibits employment policies or practices that "have the effect of discrimination on the basis of disability,"[67] and also prohibits "qualification standards . . . that screen out or tend to screen out" individuals with disabilities unless the standard is "job-related for the position in question" and "consistent with business necessity."[68]

Failure to accommodate occurs when an employer denies the employee a reasonable accommodation or denies an employment opportunity to avoid the

59. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999). This interpretation is reflected in the EEOC's interpretive guidance. 29 C.F.R. 1630, App. § 1630.15(b)–(c) (2012) ("[A]n employer must demonstrate that the requirement, applied to the individual, satisfies the direct threat standard in § 1630.2(r) . . . ."). However, at least one other circuit has contested this interpretation. Hubbard, *supra* note 17, at 865, 865 n.52 (citing Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)).

60. Hubbard, *supra* note 17, at 864–65 (citing H.R. Rep. No. 101-485, pt. 2, at 57 (1990)).

61. Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

62. 42 U.S.C. § 12112(b)(5) (2006).

63. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

64. Statutory language implies the same, defining "intentional discrimination" as unlawful discrimination that is "not an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981a(a)(2).

65. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

66. 42 U.S.C. § 12112(b)(3), (6).

67. *Id.* § 12112(b)(3).

68. *Id.* § 12112(b)(6).

duty to provide an accommodation.[69] An employer is not liable when accommodating the employee's disability would cause "undue hardship."[70]

The ADA incorporates by reference the remedies listed in the Civil Rights Act of 1964.[71] This creates a three-tiered system of remedies in employment cases: equitable relief in all cases,[72] compensatory damages for intentional discrimination,[73] and punitive damages only when the defendant acted maliciously or with "reckless indifference" to the plaintiff's federally protected rights.[74] Compensatory damages are capped at a level determined by the employer's size.[75] Where the plaintiff's cause of action is failure to accommodate a disability, compensatory damages are awarded only where the employer acts in bad faith.[76]

Equitable relief typically consists of injunctive relief and any back pay the employer owes.[77] Pursuant to statute, back pay is considered an equitable remedy rather than an element of compensatory damages.[78] In addition, a prevailing plaintiff is entitled to attorney's fees.[79]

D. Administrative Procedure

Like other employment discrimination plaintiffs, ADA Title I plaintiffs must exhaust administrative remedies.[80] A person alleging disability discrimination must first file an administrative charge with the EEOC or one of its state or local counterparts.[81] The EEOC may bring a civil action or attempt to negotiate a

69. *Id.* § 12112(b)(5).

70. *Id.* § 12112(b)(5)(A). Whether an accommodation imposes an "undue hardship" is a question of fact, depending on factors including the nature and cost of the accommodation, the effect of accommodation on the employee's work site, the employer's financial resources, and the types of operations in which the employer is engaged. *Id.* § 12111(10).

71. *Id.* § 12117(a).

72. *Id.* § 2000e-5(g). The equitable relief to which plaintiffs are entitled "may include, but is not limited to, reinstatement or hiring of employees, with or without back pay" as well as an injunction against the unlawful employment practice alleged in the complaint. *Id.*

73. *Id.* § 1981a(a)(2).

74. *Id.* § 1981a(b)(1). An employer acts with reckless indifference when discriminating "in the face of a perceived risk that its actions will violate federal law . . . ." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 536 (1999).

75. 42 U.S.C. § 1981a(b)(3).

76. *Id.* § 1981a(a)(3).

77. *Id.* § 2000e-5(g).

78. *Id.* §§ 1981a(b)(2), 2000e-5(g)(1).

79. *Id.* § 2000e-5(k).

80. SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 42 (2005).

81. *Id.*

settlement on the claimant's behalf.[82] The person alleging discrimination may only file a private lawsuit if the EEOC issues a right-to-sue notice.[83]

Despite the existence of an administrative enforcement mechanism, private lawsuits remain a critical component of enforcing the ADA.[84] "Civil rights laws depend on the private bar for their enforcement. Government enforcers have limited resources in the best of times . . . . Public interest groups, moreover, have far too limited resources to fill in the gap . . . ."[85] Because the EEOC only has the resources to sue employers in a fraction of the potentially meritorious disability discrimination claims received each year, it tends to focus its attention on cases that appear strongest or have high precedential value.[86] In addition, critics have noted that the EEOC and other executive agencies often decline to litigate "legally sound but politically touchy enforcement actions."[87] Because of its limited resources, the EEOC issues right-to-sue letters in the vast majority of apparently meritorious cases, leaving enforcement to private litigants.[88]

E. The ADA Amendments Act: Changing the Face of ADA Litigation

For many years, a great majority of ADA Title I plaintiffs failed to establish a prima facie case specifically because they were unable to prove membership in

82. 29 C.F.R. §§1601.24, 1601.27 (2012).

83. *Id.* § 1601.28.

84. Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 35 (2006) [hereinafter Bagenstos, *Limited Remedies*]; *see also* MEZEY, *supra* note 80, at 172 (describing a general consensus among disability rights advocates that the threat of litigation has been the main driver of ADA compliance).

85. Bagenstos, *Limited Remedies*, *supra* note 84, at 35.

86. Claims that the EEOC fully investigates and litigates tend to "involve pattern or practice/systemic issues or other public policy concerns that call for public adjudication." Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 257 (2003) (quotation marks omitted). In addition, "the easiest cases resolve at the EEOC level." Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1314 (2012).

87. Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U.L. REV. 1459, 1461 (2007).

88. *See Enforcement and Litigation Statistics: Americans with Disabilities Act of 1990 (ADA) Charges*, EQUAL EMP. OPPORTUNITIES COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm (last visited Jan. 6, 2013) (listing numbers of ADA charges filed from 1997 through 2012 and breaking them down by type of resolution) (on file with the *McGeorge Law Review*). In 2010, the EEOC found 1,186 ADA claims to have reasonable cause at the conclusion of investigation; in 747 of these it was unable to reach a settlement with the employer. *Id.* In that year, it filed forty-one ADA suits, which represents just one-in-eighteen of the unresolved claims it found to have merit. *EEOC Litigation Statistics*, EQUAL EMP. OPPORTUNITIES COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (last visited Jan. 6, 2013) (on file with the *McGeorge Law Review*). Private litigation has been the primary means of enforcement of antidiscrimination statutes since they were first enacted; between 1972 and 1989 the EEOC filed less than four percent of employment discrimination lawsuits. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1000 n.66 (1991).

the protected class of qualified individuals with disabilities.[89] Courts tended to construe the definition of "disability" extremely narrowly on several different grounds. First, in *Sutton v. United Airlines*, the Supreme Court held that two pilots denied employment for having severe myopia were not disabled because they had normal or better eyesight with corrective lenses.[90] Its holding required courts to consider a disability in its mitigated state, which created particular difficulties for individuals with well-controlled psychiatric disabilities who might nevertheless face discrimination in the workplace.[91] Second, courts often found that a psychiatric illness did not constitute a disability under the ADA because it did not limit "a major life activity."[92] Third, some courts read the words "substantially limit" as requiring that the putative disability have a pervasive, long-term impact, which excludes many psychiatric illnesses that affect patients episodically.[93] Finally, the *Sutton* Court construed the "regarded as" prong of the disability definition so narrowly as to eliminate virtually all claims relying on that prong, by holding that people who were regarded as limited, but not regarded as "substantially limited," were not protected.[94]

In 2008, Congress overruled these judicial precedents by enacting the ADA Amendments Act.[95] The ADAAA expanded the definition of "disability" by inserting language expressly stating that disabilities are to be considered in their unmitigated state, stating that conditions that were "episodic or in remission" are to be considered in their active state, and codifying broad readings of "substantially limits" and "major life activity."[96] It clarified that an individual is "regarded as" disabled if he or she is regarded as having any impairment "whether or not the impairment limits or is perceived to limit a major life activity."[97] In its findings, Congress listed its disapproval of *Sutton* and other cases limiting the definition of "disability" among its reasons for amending the ADA.[98]

89. Center & Imparato, *supra* note 24, at 325–26.

90. 527 U.S. 471, 482–83, 487 (1999).

91. STEFAN, *supra* note 16, at 36. Numerous courts subsequently used exactly this reasoning to determine that psychiatric disabilities that were controlled by medication were not disabilities under the ADA. *Id.* at 37; Swanson et al., *supra* note 22, at 122–23.

92. STEFAN, *supra* note 16, at 74–75; Korn, *supra* note 17, at 641–42; *see, e.g.*, Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144 (2d Cir. 1998) (holding that the impairment of plaintiff's everyday mobility by panic disorder did not limit a major life activity because it did not prevent the plaintiff from commuting to work); Breiland v. Advance Circuits, Inc., 976 F. Supp. 858, 863 (D. Minn. 1997) (holding that "inability to get along with others" is not a "major life activity").

93. *See, e.g.*, Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003) (affirming summary judgment for defendant because plaintiff had not shown "that he had a continuing inability to handle stress at all times, rather than only episodically").

94. Center & Imparato, *supra* note 24, at 326 (citing *Sutton*, 527 U.S. at 490–91).

95. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

96. 42 U.S.C. § 12102(4) (Supp. II 2009).

97. *Id.* § 12102(3)(A).

98. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (2008).

Prior to the ADAAA, very little of the extant ADA case law and scholarship concerned issues other than the definition of disability because few cases proceeded beyond the threshold question of the plaintiff's membership in the protected class.[99] By expanding the definition of disability, the ADAAA increased the likelihood that a disability discrimination case could proceed beyond that initial stage of analysis.[100] It is for this reason that this Comment focuses on remedies.

III. ADA ENFORCEMENT AND PSYCHIATRIC DISABILITIES

Empirically, enforcing the ADA has been particularly difficult for plaintiffs with psychiatric disabilities.[101] Why is this the case?

This Part first discusses the characteristics that differentiate psychiatric disabilities from other disabilities,[102] then explores three ways in which these differences affect ADA enforcement: (1) plaintiffs with psychiatric disabilities face greater difficulty proving discriminatory intent;[103] (2) the equitable relief that is available without proof of intentional discrimination is particularly ineffective for employees with psychiatric disabilities;[104] (3) and concerns about privacy, along with other aspects of psychiatric illnesses, deter victims of psychiatric disability discrimination from seeking relief.[105]

A. What Makes Psychiatric Disabilities Different?

The stereotypes surrounding psychiatric disabilities differ from those relating to other forms of disability.[106] Whereas attitudes about other disabilities tend toward either paternalism or doubt about an individual's productivity, people with psychiatric disabilities are more often viewed with fear and seen as a danger to those around them.[107] Media portrayals of people with psychiatric disabilities as prone to violence feed this stereotype.[108] Where employers might view a

99. *See* Cox, *supra* note 34, at 188 ("Although courts encountered these interpretive questions prior to the ADAAA, they have not yet fully resolved these issues due to the scarcity of ADA cases that proceeded past the initial question of the plaintiff's standing to sue.").

100. *Id.* at 188–89.

101. Swanson et al., *supra* note 22.

102. *See infra* Part III.A.

103. *See infra* Part III.B.

104. *See infra* Part III.C.

105. *See infra* Part III.D.

106. Hubbard, *supra* note 17, at 850.

107. *Id.*

108. Korn, *supra* note 17, at 608 (observing that news articles about violent crimes often cite the alleged criminal's history of mental illness and that most film and television characters with mental illness are portrayed as violent).

person with a "physical" disability as incurring an acceptable economic burden,[109] they might view a person with a psychiatric disability as posing a non-quantifiable, unacceptable risk.[110]

Psychiatric disabilities are manifested primarily in behavior.[111] For this reason, they are particularly susceptible to facially neutral workplace rules or policies that have a disproportionate impact on—and may even be devised to remove—people with psychiatric disabilities.[112] Particularly common are violence-prevention measures that involve behavioral profiling.[113] At other times, workplace policies may err far on the side of removing perceived safety risks, even when the degree of risk is remote or nonexistent.[114] Some people who have disclosed psychiatric disabilities to their employers report that they are held to higher behavioral standards than non-disabled coworkers; emotional reactions that would otherwise pass without remark are seen as signs that the person is losing control.[115]

On the other hand, psychiatric disabilities are also often invisible unless disclosed.[116] Symptoms may not be readily apparent in the workplace because they are well-managed or the person with the disability "self-accommodates" to

109. *See generally* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 59–60, 67–68 (2009) [hereinafter BAGENSTOS, LAW AND CONTRADICTIONS] (discussing the prohibition on statistically-based "rational discrimination" and characterizing the ADA's accommodation mandate as imposing acceptable costs on employers).

110. *See* Hensel & Jones, *supra* note 18, at 71 (citing OTTO F. WAHL, TELLING IS RISKY BUSINESS: MENTAL HEALTH CONSUMERS CONFRONT STIGMA 84–85 (1999)) ("60% of personnel directors 'would never choose an individual with mental illness for an executive job,' compared with just 3% who would not hire a person with diabetes."); *see also* Campbell & Kaufmann, *supra* note 20, at 228–29 (citing Colbert et al., *supra* note 20) (finding that employers viewed "mental instability" more negatively than a variety of other characteristics, including physical disability and even time spent in prison).

111. STEFAN, *supra* note 16, at 154.

112. *See id.* at 155 ("These seemingly neutral rules may be devised precisely to ensure the removal of employees . . . who are not in the least threatening, but whose disability-related behavior nevertheless makes fellow employees uncomfortable."). The courts have recognized that the strict application of such rules may constitute disparate impact discrimination. *See* Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1087 (10th Cir. 1997) (observing that some accommodation for disability-caused conduct is necessary because not doing so would render the ADA meaningless for disabilities that manifest themselves behaviorally).

113. Korn, *supra* note 17, at 614–15. The degree to which behavioral profiling is socially accepted might best be demonstrated by one advertisement for a 1995 seminar that promised to teach employers how to "avoid hiring lemons, nuts and flakes." Hubbard, *supra* note 17, at 903 n.218.

114. In employment discrimination cases, behavior cited by the employer as "misconduct" has ranged from actual threats or sexual harassment to mere eccentric behavior. STEFAN, *supra* note 16, at 153–54. Some institutions have implemented policies broadly prohibiting conduct that merely creates a perception of danger. *See, e.g.*, CECIL CNTY. GOV'T, PERSONNEL POLICIES AND PROCEDURES 62 (rev. 2011), *available at* www.ccgov.org/uploads/HR/P_PManual2011.pdf (on file with the *McGeorge Law Review*) (prohibiting "behavior that creates a fear of injury to another person"). Employers, courts, and regulators alike often share a "zero-risk mentality that leads people to demand an elimination of all risk." Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1494–95, 1506 (2001).

115. Campbell & Kaufmann, *supra* note 20, at 232.

116. *Id.* at 229.

perform the functions of the job.[117] Employers typically see the symptoms only in the form of "common personality traits" such as "the inability to tolerate stress, difficulties with interpersonal and social relationships, and periodic difficulties in focusing and concentration."[118] Even where the disability manifests itself as unusual conduct, it is often not readily apparent that such conduct is the result of a psychiatric disability.[119]

Because psychiatric disabilities tend to be invisible, the stigma surrounding them has been particularly difficult to dispel.[120] Civil rights laws have been more effective in destigmatizing other marginalized groups through contact in workplaces and other public venues.[121] But the contact theory may not work similarly for psychiatric and other invisible disabilities; coworkers are not exposed to people with disabilities as long as the disability remains undisclosed, and disclosure itself has been known to stigmatize individuals.[122] Although advocacy groups have made significant progress in increasing the public's understanding of psychiatric disabilities, these efforts tend to operate at a conscious level and have not necessarily altered unconscious stereotypes.[123] As a result, the public continues to view psychiatric disabilities as somehow more worthy of fear and less deserving of accommodation than other disabilities.[124]

B. Problems with Discriminatory Intent

Empirically, prevailing plaintiffs with psychiatric disabilities are less likely to be awarded monetary damages than prevailing plaintiffs with other types of

117. *Id.* at 230. Campbell and Kaufmann quote several employees with disabilities who make this observation. *Id*. "I'm accommodating all the time, but they don't know or realize it," one said. *Id.* Another experienced psychotic symptoms that others in the workplace noticed only in the form of the resulting fatigue. *Id.*

118. STEFAN, *supra* note 16, at 63.

119. *See id.* at 153–54 (describing examples of alleged employee "misconduct" seen in disability discrimination cases, most of which would not automatically create the impression of a psychiatric disability); Campbell & Kaufmann, *supra* note 20, at 223 (observing that psychiatric disabilities "manifest themselves through behavior that may appear to be voluntary").

120. Goldberg et al., *supra* note 2, at 494.

121. Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1366 (2008). *But see* BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 109, at 2 (noting the "inherent limitations of antidiscrimination laws" in combating social stigma).

122. Goldberg et al., *supra* note 2, at 494; *see also* Nancy Hall, *Mental Illness + Workplace Violence*, 13 VISIONS: BC'S MENTAL HEALTH J. 7 (Fall/Winter 2001) (citing a Canadian study that found that eight in ten workers report discrimination following disclosure of a psychiatric disability).

123. *See* Sadie F. Dingfelder, *Stigma: Alive and Well*, 40 MONITOR ON PSYCHOL. 56 (2006), *available at* http://www.apa.org/monitor/2009/06/stigma.aspx (on file with the *McGeorge Law Review*) (observing that most anti-stigma campaigns "convey the message that mental illness is a disease like any other" and "focus on the prevalence and symptoms of mental illness").

124. This is even true of behavioral manifestations of disabilities. *See* Korn, *supra* note 17, at 607–08 (observing that the public tends to be more understanding with, and that employers are more likely to accommodate, behavioral changes that are associated with "physical" disabilities).

disabilities.[125] Because an award of compensatory damages requires discriminatory intent,[126] the higher frequency at which plaintiffs with psychiatric disabilities receive purely equitable remedies suggests that courts are less likely to find intent even when they find that some form of unlawful discrimination occurred.

The prima facie case for proof of intentional discrimination, articulated in *McDonnell Douglas v. Green*,[127] applies to disparate treatment claims under the ADA.[128] Historically, disability discrimination plaintiffs most often failed to make a prima facie case because they could not prove the necessary element of membership in the ADA's protected class.[129] With the passage of the ADAAA, which greatly explanded the protected class by defining disability more broadly, more plaintiffs are able to survive summary judgment.[130] Still, after both sides have met their burdens of production, the plaintiff retains the burden of proving discriminatory intent.[131] This is true whether the plaintiff chooses to attack the defendant's proffered reason as pretext or to attempt to prove mixed motive.[132]

In practice, "intentional discrimination" has been narrowly defined, with lower courts sometimes incorrectly requiring some evidence of active dislike or ill-will toward the plaintiff's class.[133] This misunderstanding of intent may particularly disadvantage plaintiffs with disabilities, as society greatly underestimates the prevalence of animus toward persons with disabilities.[134] The

125. Swanson et al., *supra* note 22, at 108.

126. 42 U.S.C. § 1981a(a)(2), (b)(1) (2006).

127. 411 U.S. 792, 802 (1973).

128. *E.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (applying *McDonnell Douglas* analysis to determine burdens of production in an ADA claim).

129. Center & Imparato, *supra* note 24, at 325–26.

130. Cox, *supra* note 34, at 188–89.

131. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–56 (1981) (holding that the defendant's production of a legitimate, nondiscriminatory reason rebuts the plaintiff's prima facie case, and the plaintiff's burden to demonstrate that the proffered reason is a pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.").

132. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003) (explaining that the plaintiff must "meet the burdens of production and persuasion" in demonstrating "that an employer used a forbidden consideration," regardless of whether it is a pretext or mixed-motive case).

133. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 776–80 (2006) (arguing that the existence of the disparate impact theory "led to judicial neglect of the disparate treatment theory, and also created the false impression that disparate treatment equaled animus"). Intentional discrimination means consciously making decisions on the basis of the protected characteristic, as described in the classic "because of, not merely in spite of" formulation. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted). The actor need not bear any hostility toward the adversely affected class; animus is merely evidence of intent. Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 501–02 (2001) (discussing Supreme Court jurisprudence regarding animus).

134. *See generally* MARK SHERRY, DISABILITY HATE CRIMES: DOES ANYONE *REALLY* HATE DISABLED PEOPLE? (2010) (arguing that animus against persons with disabilities is greatly underestimated). Professor Sherry found disbelief in the existence of animus against persons with disabilities among audiences at his own speeches, *id.* at xiv, in mainstream newspapers, *id.* at 29, and even in at least one British government report, *id.*

myth that disability-based animus does not exist may have an even greater impact on plaintiffs with psychiatric disabilities, as animus toward persons with psychiatric disabilities is especially prevalent.[135]

But even the fact that intentional discrimination does not require animus is of little comfort. Although the Supreme Court unambiguously stated in *Price Waterhouse v. Hopkins* that acting on a stereotype is a form of intentional discrimination,[136] that holding is useful in proving intent only where the stereotype has been expressed in some way.[137] Misjudgments and rash decisions alone do not sufficiently support an inference of discriminatory intent; the plaintiff must still somehow prove that the employer was acting on a stereotype.[138] In fact, the problem of stereotyping without clear expression has led some legal realists to characterize the disparate impact theory, which does not require proof of intent, as an "evidentiary dragnet" used to ferret out hidden discriminatory intent.[139] Perhaps more worrisome for plaintiffs with psychiatric disabilities, the assertion that an employer is acting on a stereotype may even be dismissed out of hand by a court that happens to accept the stereotype as truth.[140]

In addition, employers' stereotypes frequently play out unconsciously, where they might be inferred only from a long-term pattern of behavior.[141] "These stereotypes are not conscious in the sense that the actors express a belief . . . and if one were asked, they would almost certainly deny any such belief. But their

at 52–53. The same myth may exist in the legal system as well. *See id.* at 82–83 (suggesting that American prosecutors are reluctant to prosecute crimes against persons with disabilities as hate crimes because they do not consider animus to be a likely motive).

135. *See id.* at 41–42 (describing "an informal disability hierarchy underpinning antidisability websites" in which "people with cognitive impairments and psychiatric impairments are located at the bottom of humanity.").

136. 490 U.S. 228, 250 (1989) ("[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

137. *See* Stacy E. Seicshnaydre*, Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1164–66 (2007) (citing several commentators who assert that the disparate impact theory is necessary to uncover hidden intent). In *Price Waterhouse*, the stereotypes were expressly stated; no inference was necessary. 490 U.S. at 235.

138. *See* Selmi, *supra* note 133, at 706 (noting the difficulty of proving intent where "evidence of overt bias or animus is lacking").

139. Seicshnaydre, *supra* note 137, at 1164–66.

140. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272–73 (2000) (describing several cases). Particularly where the direct threat exception is involved, some court opinions have been so conclusory about the plaintiff's condition as to imply that the court accepts the stereotype as true. *See, e.g.*, Wilson v. Chrysler Corp., 172 F.3d 500, 513 (1999) (Easterbrook, J., concurring) ("Paranoid schizophrenia often entails the sort of violent outbursts . . . that an employer need not accommodate."); Hubbard, *supra* note 17, at 921–22 (discussing Palmer v. Cir. Ct. of Cook Cnty, 905 F. Supp. 499 (N.D. Ill. 1995) and criticizing the court's evidence-free assumption about the plaintiff's "inability to control her behavior.").

141. *See* Selmi, *supra* note 133, at 778–79 ("Because subtle discrimination is not fueled by a conscious motive or any express animus, there has been a struggle . . . to determine whether existing proof structures can accommodate the changed nature of discrimination . . . .").

actions indicate otherwise . . . ."[142] Policies and procedures that allow subjective criteria, and thus unconscious stereotypes, to play an excessive role in employment decisions may constitute disparate impact discrimination.[143] Whether unconscious stereotyping rise to the level of intentional discrimination remains a subject of heated debate in academic circles,[144] but in practice courts have generally limited intentional discrimination to conscious intent.[145] This limitation particularly disadvantages psychiatric disability discrimination plaintiffs because psychiatric disability discrimination so frequently takes the form of risk assessments colored by commonly accepted stereotypes.[146]

The ADA analysis is further complicated in that its accommodation requirement, its exceptions, and the diversity of disabilities all blur the lines between disparate treatment and disparate impact.[147] The direct threat exception, properly seen as an exception to the protected class due to its description as a permitted qualification standard, allows an employer to consider the employee's disability; and the accommodation requirement requires an employer to act because of an employee's disability.[148] Both present ways for an employer to consciously act because of a disability without overt discriminatory intent, and even invite some degree of unconscious stereotyping.[149]

142. *Id.* at 779.

143. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988) (holding that promotion criteria depending on an "undisciplined system of subjective decisionmaking" could constitute disparate impact discrimination).

144. TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 514–15 (2d. ed. 2011).

145. White & Krieger, *supra* note 133, at 506. At least one federal court, while using this approach, has expressed reservations about it. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) ("Such subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor.").

146. Hubbard, *supra* note 17, at 921 (explaining how stereotypes of mental illness may affect the objectivity of a direct threat assessment).

147. *See* James Leonard, *The Equity Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 28–29 (2005) (observing that disparate impact claims under Title I of the ADA often involve individual discrimination that closely resembles disparate treatment or failure to accommodate); *see also* Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 71 (2008) (noting significant uncertainty and debate in the relationship between accommodation and nondiscrimination in the ADA).

148. *See* Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden-Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98 (1997) (arguing that the traditional framework of proof for intentional discrimination breaks down in ADA cases where the disability is part of the employer's proffered justification); *see also* Elliott v. City of Athens, 960 F.2d 975, 987 (11th Cir. 1992) (Kravitch, J., dissenting) ("Because handicapped people are entitled by law to preferential treatment . . . necessary to afford them equal access to housing, a disparate impact analysis is useless in this context and in fact negates the entire intent of including handicapped people within the FHAA.")

149. *See* Basas, *supra* note 147, at 102, 109–10 (arguing that the ADA, by allowing employers to engage in cost analysis, invites employers to "[indulge] in some slippery rounds of the worst case scenario game" and

The lines are particularly blurry for psychiatric disabilities that manifest through behavior; the types of discrimination to which psychiatric disabilities are most susceptible defy easy characterization within any of the three recognized causes of action, and may arguably be any of the three.[150] When an employer removes a person with a psychiatric disability for "endangering conduct," for example, then all three theories are in play. The employee's diagnosis may be a conscious motivating factor, which would constitute intentional discrimination.[151] On the other hand, the removal could be the result of a policy that fails to make an adequate assessment of dangerousness and allows completely unconscious bias to play too much of a role in the process, which would constitute disparate impact discrimination.[152] Finally, psychiatric disabilities that manifest themselves as behavior may require accommodation in the form of modification of workplace rules or policies,[153] and employers must consider whether a reasonable accommodation can mitigate a direct threat.[154] The affirmative duty to engage directly with the employee to determine an appropriate accommodation arguably does not disappear when the employer suspects a direct threat to workplace safety.[155] An omission in any of these affirmative duties constitutes failure to

allows "reasonable" to become a proxy for unconscious bias).

150. *See* STEFAN, *supra* note 16, at 155 (noting that psychiatric disabilities are particularly susceptible to discriminatory application of workplace conduct rules and related policies).

151. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (establishing the mixed motives standard).

152. Because the direct threat exception requires an objective, individualized, and medically sound assessment, a policy that fails to make such an assessment is clearly unlawful. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 284–85, 287 (1987). However, such a policy does not necessarily reflect any discriminatory motive. Even where unconscious bias is involved in the decision-making process, whether it constitutes discriminatory intent is uncertain. GLYNN ET AL., *supra* note 144, at 514–15; *see also* Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) (describing subjective decision-making processes as "particularly susceptible to being influenced" by unconscious bias without discriminatory intent).

153. *See* Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 (10th Cir. 1997) (observing that some accommodation for disability-caused conduct is necessary because not doing so would render the ADA meaningless for disabilities that manifest themselves behaviorally).

154. 42 U.S.C. § 12111(3) (2006) (defining "direct threat" as "a significant risk . . . that cannot be eliminated by reasonable accommodation"). The employer always carries the burden to prove inability to reasonably accommodate a disability. Prewitt v. U.S. Postal Serv., 662 F.2d 292, 310 (Former 5th Cir. Nov. 1981). Arguably, a failure to consider accommodations could be probative of the alleged direct threat being a pretext for intentional discrimination, but that argument does not appear to have been brought in litigation to date. *See* Kera Croteau, Comment, *Lack of Unity in ADA Decisions Leaves Bipolar Sufferers Unprotected and Employers Confused*, 37 U. TOL. L. REV. 1059, 1084 (2006) (stating the inverse, that efforts to accommodate a disability are probative of the credibility of a proffered legitimate reason).

155. Tory L. Lucas, *So What If I'm Gonna Hurt Myself: The ADA's Direct Threat Defense*, NEB. LAW., Sept. 2003, at 7, 15. No court has considered the question on whether the interactive process is still mandatory when an employee may pose a direct threat to health or safety. *See* Echazabal v. Chevron U.S.A., Inc., 336 F.3d 1023, 1035 (9th Cir. 2003). However, on a number of occasions, courts have accepted without argument that the interactive process is mandatory regardless of circumstances. *E.g.*, Reinhardt v. Burlington Northern Santa Fe R.R., 846 F. Supp. 2d 1108, 1114 & n.4 (D. Mont. 2012); EEOC v. Hibbing Taconite Co., 720 F. Supp. 2d 1073, 1083 (D. Minn. 2010); French v. Providence Everett Medical Center, No. C07-0217RSL, 2008 WL 4186538, at *4 (W.D. Wash. Sept. 8, 2008).

accommodate.[156] Plaintiffs often plead all three of the claims available under the ADA.[157]

Inevitably, the blurring between the various ADA causes of action leaves situations in which plaintiffs may reasonably plead discriminatory intent but expect to prevail only on other theories.[158] These situations arise disproportionately often in psychiatric disability discrimination cases.[159] Often, an employer does not act with intent to discriminate, but instead fails to act on an affirmative duty (arising from the ADA's reasonable accommodation mandate and direct threat exception) to avoid unnecessary discrimination.[160] Between society's reluctance to find disability-based animus and the particular likelihood that psychiatric disability discrimination falls into the gray areas between disparate treatment and disparate impact causes of action, plaintiffs with psychiatric disabilities may receive only equitable relief. This is likely even when defendants' conduct is more culpable than that typically associated with disparate impact discrimination.

C. Equitable Relief and its Limitations

Equitable relief is generally limited to reinstatement, injunctive relief as needed, and back pay.[161]

Courts have some discretion to award "front pay" for a reasonable period of time, if the plaintiff has been discharged and reinstatement is not feasible due to "continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination."[162] However, front pay is rarely awarded;[163] a court must

156. 42 U.S.C. § 12112(b)(5).

157. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (holding that disparate treatment and disparate impact discrimination are separate claims that must be pled separately in a complaint).

158. *See* STEFAN, *supra* note 16, at 153–55 (noting that psychiatric disabilites are particularly susceptible to being penalized as "misconduct," leaving open the question of whether the employer acted because of the disability or pursuant to a facially-neutral policy).

159. *See id.* at 155 (noting that psychiatric disabilities are particularly susceptible to discriminatory application of workplace conduct rules and related policies); Swanson et al., *supra* note 22, at 108 (finding that prevailing ADA plaintiffs with psychiatric disabilities are less likely to receive monetary awards than plaintiffs with other disabilities).

160. BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 109, at 68; *see also* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 943–44 (1993) (arguing that the affirmative duty to reasonably accommodate disabilities essentially prohibits negligent discrimination).

161. *See generally supra* Part II.C (discussing ADA remedies).

162. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). Front pay, which is money awarded to replace lost post-judgment compensation, is considered an equitable remedy rather than compensatory damages. *Id.* at 846, 852.

163. *See* EEOC v. Century Broad. Corp., 957 F.2d 1446, 1462 (7th Cir. 1992) (noting that if "hostility common to litigation" justified a front pay award, "reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff.").

"carefully articulate its reasons for awarding front pay," and there must be unusual circumstances such as hostility in excess of that normally attendant to litigation.[164]

For psychiatric disabilities, the typical remedy of back pay and reinstatement creates new problems for the prevailing plaintiff: the plaintiff's disability becomes known to many more people in the workplace than would have otherwise been aware of it, creating stigma or hostility in addition to that normally resulting from litigation.[165] Many courts have been reluctant to allow plaintiffs with psychiatric disabilities to sue under fictitious names.[166] And even in the best-case scenario, when a plaintiff is actually able to seal his or her real name and litigate under a fictitious name, the plaintiff's coworkers may still become aware of the lawsuit and the parties' factual allegations. Although efforts have been made to destigmatize psychiatric disabilities, and not all coworkers who learn about an individual's psychiatric disability react badly, the enduring stigma makes disclosure risky.[167] For some individuals, disclosure of a psychiatric disability is itself traumatic and may lead to exacerbation of the disability.[168] The decision to disclose a psychiatric disability is not made lightly.[169]

For people whose disabilities are not immediately apparent, most of the situations in which an ADA claim may arise do not involve widespread disclosure of a disability prior to litigation.[170] Adverse employment actions may be taken by just one person. Although an individual must obviously disclose a disability to request accommodations, the process of requesting and obtaining

164. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1339 (11th Cir. 1999). In *Farley*, the Eleventh Circuit upheld an award of front pay, finding reinstatement not feasible because the plaintiff's supervisors and coworkers had subjected him to persistent verbal abuse and anonymous hate mail related to his mental illness for four years prior to his termination. *Id.* The court contrasted Farley's case from *Walther v. Lone Star Gas Co.*, in which the Fifth Circuit vacated a front pay award that had been based solely on "protracted and necessarily vexing" litigation. *Id.* at 1339–40 (citing *Walther*, 952 F.2d 119, 127 (5th Cir. 1992)). The hostility justifying a front pay award need not be as extreme in severity or duration as in *Farley*; in one age discrimination case, a record showing an officer of the defendant corporation referring to one plaintiff as a "cancer" and making "numerous attacks during the trial on plaintiffs' abilities" supported the finding that "plaintiffs and [defendant] could no longer co-exist in a business relationship . . . ." Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir. 1982) (internal quotation marks omitted).

165. *See supra* Part III.A (discussing the stigma surrounding psychiatric disabilities and the frequent invisibility of psychiatric disabilities in the workplace).

166. Sarah Orme, Note, *Justice or Mental Health . . . Should Litigants Have to Choose? Mental Health as a Reason to Proceed Anonymously*, 44 IND. L. REV. 605, 616–17 (2011).

167. *See generally* Campbell & Kaufmann, *supra* note 20, at 229–33. One study found that, whereas job candidates with visible "physical" disabilities faced relatively little stigma compared to other historically disadvantaged groups, employers viewed those with psychiatric disabilities even more negatively than candidates who had spent time in prison. *Id.* at 228–29 (citing Colbert et al., *supra* note 20).

168. Orme, *supra* note 166, at 613.

169. *See* STEFAN, *supra* note 16, at 18 (noting that many individuals with psychiatric disabilites decline to disclose their disabilities even though it means forfeiting legal rights).

170. *See generally* Campbell & Kaufmann, *supra* note 20, at 229–33 (noting that people with psychiatric disabilities generally attempt to minimize disclosure in the workplace).

accommodations does not compel disclosure to more than a few people.[171] Even after disability discrimination has occurred, the EEOC charge process generally does not lead to widespread disclosure; an EEOC investigation of an employer typically involves contact with only a few people,[172] and information that the EEOC obtains in the course of its investigation is confidential.[173] Thus, at the time a person with a psychiatric disability might consider litigation, the majority of the person's coworkers might well be completely unaware of the disability. Conversely, it may become public knowledge after litigation, opening the plaintiff to stigma from many more directions than before.[174]

Even when the disclosure of a psychiatric disability does not cause overt hostility in the workplace, it subtly alters the way others view a person's behavior, as what would otherwise be considered normal emotional responses may be read as manifestations of mental illness.[175] Paradoxically, people with known psychiatric disabilities must often maintain even greater composure than their colleagues in order to avoid scrutiny of their mental status, and in turn, their competence or the risk they may pose to workplace safety.[176]

Ultimately, litigation means disclosure of a psychiatric disability, at least within the workplace.[177] As a result, most employment discrimination plaintiffs with psychiatric disabilities face the prospect of returning to workplaces in which their psychiatric disabilities have become widely known.[178]

D. Psychiatric Disabilities as Barriers to Relief

Because private litigation is such a critical component of ADA enforcement, people with psychiatric disabilities must choose between enforcing their statutory

171. *See* PARRY, *supra* note 38, at 220–23 (describing various accommodations found reasonable for psychiatric disabilities).

172. *See the Charge Handling Process*, EQUAL EMP. OPPORTUNITIES COMM'N, http://www.eeoc.gov/employers/process.cfm (last visited Mar. 1, 2012) (on file with the *McGeorge Law Review*) (listing ways in which investigators obtain information); John Costello, *EEOC Investigation: What Happens After the Request for Information?*, HR INFO CTR. (May 20, 2009), http://rapidlearninginstitute.com/ hric/eeoc-investigation-what-happens-after-the-request-for-information/ (on file with the *McGeorge Law Review*) (noting that on-site investigations, the most intrusive of investigatory methods, are "not used that frequently").

173. 42 U.S.C. 42 § 2000e-5(b) (2006).

174. *See supra* Part III.A (discussing the stigma associated with psychiatric disabilities); *see also* Sara Noel, Comment, *Parity in Mental Health Coverage: The Goal of Equal Access to Mental Health Treatment Under the Mental Health Parity Act of 1996 and the Mental Health Equitable Treatment Act of 2001*, 26 HAMLINE L. REV. 377, 405–06 (2003) (arguing that private enforcement of insurance parity laws is flawed because privacy concerns deter litigation).

175. Campbell & Kaufmann, *supra* note 20, at 232.

176. *Id.*

177. *See supra* notes 165–168 and accompanying text (discussing how litigation exposes a previously invisible disability).

178. *Id.*

rights and keeping their privacy.[179] Although it is true that the exposure of unsavory facts is part of the cost of litigation, disclosure of a psychiatric disability has a particularly chilling effect on plaintiffs because it directly undermines what is often the only available remedy. Essentially, the act of seeking a remedy renders injunctive relief meaningless by creating widespread exposure of a psychiatric disability and potentially creating hostility in the workplace.[180] Whereas an injunction for reinstatement or accommodations improves the position of a plaintiff with visible disabilities, the same remedy, for plaintiffs with psychiatric disabilities, may leave the plaintiff facing worse discrimination than before, even in the complete absence of any retaliatory motive on the employer's part.[181]

Psychiatric disabilities also create their own obstacles for potential plaintiffs. Litigation is inherently extremely stressful, and plaintiffs with psychiatric disabilities are especially likely to lack the ability to independently litigate a claim.[182] The likely exposure of a psychiatric condition that accompanies litigation can be particularly traumatic in itself.[183] Even when the plaintiffs have the ability and willingness to litigate, "[m]any lawyers share the prejudices of the population at large,"[184] restricting access to the legal system by stereotyping potential clients with psychiatric disabilities as lacking capacity or being otherwise "difficult."[185]

179. *See* STEFAN, *supra* note 16, at 18 (noting that many individuals with psychiatric disabilities decline to disclose their disabilities even though it means forfeiting legal rights); *see also* Noel, *supra* note 174, at 405–06 (suggesting that the possibility of being forced to litigate an insurance parity claim and expose one's medical history may deter individuals with mental illness from seeking necessary treatment); *cf.* Brief of Amicus Curiae Anti-Defamation League Supporting Plaintiffs-Appellees, Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Oct. 25, 2010), 2010 WL 4622566 (arguing that separating "domestic partnerships" from marriage unconstitutionally conditions receipt of ostensibly equal benefits on disclosure of sexual orientation and resulting exposure to stigma; much like a psychiatric disability, sexual orientation is not readily apparent and its nondisclosure is a constitutionally protected privacy interest).

180. A hostile work environment will not always arise following reinstatement, of course, but the prevalence of negative stereotypes of psychiatric disabilities makes it reasonable for a potential litigant to anticipate some stigmatization. Stigma arising from disclosure of a hidden disability may be entirely separate from hostility arising from litigation. Even those who fully understand the justification for a lawsuit and bear no ill-will as a result of the litigation itself may begin to act unconsciously on perceptions of the prevailing plaintiff's diagnosis. Campbell & Kaufmann, *supra* note 20, at 232.

181. *See supra* Part III.C (discussing reasons reinstatement may not be feasible in psychiatric disability discrimination cases).

182. *See* Noel, *supra* note 174, at 406 (noting that private enforcement of health insurance parity is difficult because people with mental illness are often unable to endure the stress inherent to litigation). The argument applies with even greater force to discrimination claims than to health insurance parity claims, because long-lasting exacerbation of the underlying disability may impair the plaintiff's ability to litigate until after the relevant statute of limitations has run. STEFAN, *supra* note 16, at 15–16 (quoting people for whom discrimination exacerbated a psychiatric disability for "years").

183. Orme, *supra* note 166, at 613.

184. STEFAN, *supra* note 16, at 26–27.

185. Twitchy Woman, *Ableist Attorneys*, WEIRDLAW (Feb. 8, 2012, 5:23 PM), http://whoselaw.wordpress.com/2012/02/08/ableist-attorneys/ (on file with the *McGeorge Law Review*) (describing and

Even in plaintiffs without psychiatric disabilities, "[e]motional distress is a predictable, and thus foreseeable, consequence" and even "a probable result" of discrimination itself.[186] But discrimination causes particularly severe emotional distress in persons with psychiatric disabilities.[187] "The impact of discrimination and stigma on a person's job performance . . . may be more deleterious than the effects of the illness itself."[188] For many people with serious psychiatric illnesses, work is a highly effective coping mechanism, and loss of employment deprives a person of that mechanism.[189] Perceived discrimination or rejection has a "startling and disturbing" detrimental influence on depressive symptoms[190] and may lead to social withdrawal.[191] This observation also has a theoretical basis in psychology: discrimination exacerbates psychiatric disabilities by confirming negative self-image,[192] acting directly counter to the principles of cognitive-behavioral therapy.[193] One study also suggests that, in addition to directly impacting a psychiatric disability's symptoms, perceived stigma negatively affects adherence to medication regimens, indirectly increasing the disability's severity.[194]

The lack of an effective remedy in many psychiatric disability discrimination cases may further contribute to emotional distress.[195] One survey of disability discrimination plaintiffs found that, for many litigants with psychiatric

criticizing the frequency with which legal aid organizations refuse to represent clients due to the client's mental illness).

186. Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) (internal quotation marks omitted).

187. STEFAN, *supra* note 16, at 15–16 (quoting survey responses). In making this observation, one must be careful not to equate it with an all-encompassing mental weakness. Discrimination affects specific vulnerabilities in ways that normal stressors do not. *See infra* notes 188–94 and accompanying text.

188. John S. Strauss & Larry Davidson, *Mental Disorders, Work, and Choice*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW, *supra* note 20, at 105, 126.

189. Saks, *supra* note 3 ("One of the most frequent mentioned techniques that help our research participants manage their symptoms was work.").

190. Bruce G. Link et al., *The Consequences of Stigma for the Self-Esteem of People with Mental Illness*, 52 PSYCHIATRIC SERVS. 1621, 1625 (2001).

191. *Id.* at 1621–22.

192. *Id.* at 1622.

193. *See Cognitive-Behavioral Therapy*, NAT'L ALLIANCE ON MENTAL ILLNESS (July 2012), http://www.nami.org/Template.cfm?Section=About_Treatments_and_Supports&template=/ContentManagement/ContentDisplay.cfm&ContentID=7952 (on file with the *McGeorge Law Review*) (describing general principles of cognitive-behavioral therapy). Cognitive-behavioral therapy (CBT), in which the patient aims to actively challenge negative thoughts, is highly effective in the treatment of a wide range of psychiatric illnesses. Andrew C. Butler et al., *The Empirical Status of Cognitive-Behavioral Therapy: A Review of Meta-Analyses*, 26 CLINICAL PSYCHOL. REV. 17 (2006).

194. Jo Anne Sirey et al., *Perceived Stigma and Patient-Rated Severity of Illness as Predictors of Antidepressant Drug Adherence*, 52 PSYCHIATRIC SERVS. 1615 (2001).

195. *See* Swanson et al., *supra* note 22, at 119 (discussing causes of dissatisfaction in litigants with psychiatric disabilities); Ian Freckelton, *Therapeutic Appellate Decision-Making in the Context of Disabled Litigants*, 24 SEATTLE U. L. REV. 313, 314 (2000) ("If they depart from their cases feeling demoralized by or disenfranchised from the process, this can be profoundly counter-therapeutic.").

disabilities, "the perception of procedural unfairness adds insult to injury."[196] A potential plaintiff, forewarned of the available remedies after seeking legal advice, could reasonably perceive a certain unfairness in the legal framework.[197] This sense of unfairness might easily add to a perception of stigma, exacerbating psychiatric symptoms just as the original act of discrimination did before, and further impairing the potential plaintiff's ability to litigate an employment discrimination claim.[198]

IV. SHORTCOMINGS OF EXISTING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

One answer to the privacy concerns inherent in litigation is to use alternative dispute resolution, which has the advantages of confidentiality and reduced stress for employees, and may provide negligent employers with a "less guilt-oriented medium to resolve disputes."[199] Because the EEOC has routinely referred charges to a voluntary mediation program for over a decade,[200] employers are generally aware of the option of mediation, and parties that were not previously aware of the option typically know of it by the time they are seriously considering litigation. Why, then, is alternative dispute resolution not the preferred means of settling psychiatric disability discrimination claims? This Part examines the EEOC's highly effective yet underused voluntary mediation program, and explores the ways in which employers and the EEOC respectively contribute to the underuse of the mediation program for psychiatric disability discrimination charges.

A. The EEOC and Alternative Dispute Resolution

As its caseload has increased over the last two decades, the EEOC has made increasing use of mediation to resolve disputes, with pilot programs beginning as early as 1991 and a formal, nationwide voluntary mediation program existing since 1999.[201]

196. Swanson et al., *supra* note 22, at 119.

197. *See supra* notes 158–60, 179–81, and accompanying text (noting that the direct threat exception actually allows an employer to act because of a disability, and that litigation generally means disclosure of a disability). A plaintiff with a psychiatric disability may view both of these aspects of litigation as disfavoring litigants with psychiatric disabilities in comparison with other disabilities.

198. *See supra* notes 186–94 and accompanying text (discussing the disclosure inherent in litigation and the stigma that accompanies disclosure).

199. Butcher, *supra* note 86, at 226.

200. *See* Kathryn Moss et al., *Mediation of Employment Discrimination Disputes Involving Persons with Psychiatric Disabilities*, 53 PSYCHIATRIC SERVS. 988, 988–89 (2002) (discussing the history of the EEOC's mediation program).

201. *Id.*

The EEOC uses a priority system to streamline its handling of charges.[202] Upon receipt of a charge, the EEOC assigns the charge to a priority category on the basis of an initial review.[203] The EEOC places in "category A" and fully investigates charges for which the initial review suggests a high probability that discrimination occurred.[204] "Category B" charges are those for which the EEOC needs additional evidence to evaluate the merits; the EEOC routinely asks the employer for its side of the story but conducts further investigation "only as resources permit."[205] Finally, the system places in "category C" charges that appear to lack merit, and typically, the EEOC quickly dismisses them.[206]

The EEOC's mediation process focuses on "category B" charges, which may appear to have some merit on initial review but are extremely unlikely to be selected for litigation.[207] The EEOC refers more than seventy percent of "category B" charges to its voluntary mediation program, along with a significant minority of "category A" charges and even some "category C" charges.[208] When the EEOC refers a charge for mediation, it asks both complainants and employers whether they are willing to participate in mediation.[209] Mediation occurs only if both parties agree to participate.[210]

B. The Employer Perspective on Mediation

The EEOC mediation program has been highly successful in reaching amicable settlements and both employers and employees have reported being highly satisfied.[211] However, it has been of little value to complainants with psychiatric disabilities because, despite the willingness of most complainants, few employers agree to participate in mediation.[212] Empirically, while the vast majority of disability discrimination complainants referred to the EEOC mediation program agree to participate in mediation, only a minority of employers do so.[213] Employers have been even less willing to enter mediation with psychiatric disability cases than with other types of disabilities.[214] Jeffrey

202. Michael D. Ullman et al., *The EEOC Charge Priority Policy and Claimants with Psychiatric Disabilities*, 52 PSYCHIATRIC SERVS. 644, 644 (2001).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Moss et al., *supra* note 200, at 990.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 989.

212. *Id.* at 990–91.

213. *Id.* at 990. Complainants with psychiatric disabilities are approximately as likely to agree to participate as complainants with other disabilities. *Id.*

214. *Id.*

Swanson and co-authors have advanced two potential explanations for employers' refusal to enter settlement negotiations: employers "might have stronger negative attitudes . . . and simply be more averse to employing" people with psychiatric disabilities, or they "might calculate that they are more likely to win in court against . . . a stigmatized mentally ill employee than a physically disabled employee . . . ."[215]

Surveys conducted by the EEOC indicate that employers most frequently decline to participate in mediation because they believe the charges lack merit.[216] These surveys did not address psychiatric disability or even disability discrimination, or disparities in employer participation in mediation across different types of employment discrimination charges, but were aimed at determining what could be done to increase the use of mediation generally.[217] Nevertheless, the surveys suggest that an employer's primary consideration in deciding whether to agree to mediation is, quite rationally, how much it stands to lose in litigation.

Employers might not necessarily perceive the merits of psychiatric disability discrimination charges differently from other disability discrimination charges. The EEOC has already categorized charges by apparent merit on initial review,[218] and of the cases that go to mediation, the likelihood of reaching a settlement is similar for psychiatric and non-psychiatric disabilities.[219] Instead, the disparity in employer willingness to participate may reflect, not only the perceived likelihood of winning or losing once litigation commences, but the perceived likelihood of litigation occurring at all. Often an employer that refuses to mediate will subsequently agree to mediation after the aggrieved employee has retained an attorney.[220] Indeed, it would seem that employers tend to objectively evaluate the merits of aggrieved employees' claims only after receiving some indication that the employee is seriously considering a private lawsuit.[221] The unspoken subtext in the EEOC's findings is that employers first consider the likelihood that the employee will litigate a claim in the first place.[222] Regardless of the merits of the

215. Swanson et al., *supra* note 22, at 129.

216. E. Patrick McDermott et al., *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Dec. 10, 2003), http://www.eeoc.gov/eeoc/mediation/report/study3/index.html (on file with the *McGeorge Law Review*).

217. *Id.*

218. *See* Ullman et al., *supra* note 202, at 644 (describing the charge priority system); Moss et al., *supra* note 200, at 990 (noting the EEOC mediation program's focus on medium-priority charges).

219. Moss et al., *supra* note 200, at 990.

220. *Transcript of Meeting of December 2, 2003: EEOC Mediation Program and the Workplace Benefits of Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Dec. 2, 2003), http://www.eeoc.gov/eeoc/meetings/archive/12-2-03/transcript.html (Panel One, remarks of Dr. Patrick McDermott) (on file with the *McGeorge Law Review*).

221. *Id.* The majority of employers refusing mediation have not yet consulted an attorney at the time, and many appear to consult an attorney only when the threat of a lawsuit is more imminent. *Id.*

222. Such a conclusion does not imply any dishonesty on the part of employers responding to the EEOC survey. The perceived strength of a claim tends to reflect the perceived likelihood that the employee will

employee's claim, there is no financial benefit to mediating if the employee shows no intent to sue.[223] Where the employee has a hidden disability and exposure may deter litigation, the employer would have reason to conclude that litigation is less likely. Such a conclusion could in turn lead employers to rationally refuse to participate in mediation, perhaps explaining why mediation has so often been unavailable to EEOC complainants with psychiatric disabilities.

C. Possible Bias at the EEOC?

Regardless of the charge priority level, the decision to refer charges to mediation is largely at the discretion of EEOC field offices.[224] Some evidence supports the possibility that the EEOC is less likely to refer charges involving psychiatric disabilities for mediation than charges involving other disabilities.[225] Some EEOC staff reported that they declined to refer complainants with psychiatric disabilities for mediation because "they become too emotional," suggesting an assumption that people with psychiatric disabilities lacked the ability to negotiate rationally.[226]

But as damning as the anecdotal evidence may seem, the difference between psychiatric disabilities and other disabilities is quite small, if statistically significant; psychiatric disabilities are only four percent less likely to be referred to mediation.[227] It is possible that certain diagnoses are subject to greater degrees of bias than others; individuals with schizophrenia, specifically, are less likely to be referred to mediation than those with other psychiatric disabilities.[228]

ultimately decide to litigate. Making decisions based on the likelihood of litigation rather than the likelihood of liability is a rational approach, as the filing of a lawsuit immediately results in some expense and inconvenience regardless of its merits.

223. Donohue & Siegelman, *supra* note 88, at 1023.

224. *See* Moss et al., *supra* note 200, at 989 (examining the actual process of referral for mediation at EEOC field offices); *Questions and Answers About Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/mediation/qanda.cfm (last visited June 4, 2013) (on file with the *McGeorge Law Review*) (describing numerous factors that the EEOC uses to determine whether a charge is appropriate for mediation).

225. Moss et al., *supra* note 200, at 989, 992.

226. *Id.* at 989. That stereotype has proven to be untrue: complainants with psychiatric disabilities are no less likely to successfully negotiate a settlement than those with other disabilities. *Id.* at 992.

227. *Id.* at 992. A statistically significant disparity is one that exceeds the study's margin of error; it strongly supports the inference that the disparity actually exists in the population as a whole and is not a product of normal variation between random samples. Here, the reasonable inference is that there is an actual disparity in EEOC treatment of psychiatric and non-psychiatric disabilities, but only a slight one.

228. *Id.*

V. PROTECTING EMPLOYEES' STATUTORY RIGHTS USING TORT LAW AND OTHER MECHANISMS

As a result of limited remedies and strong disincentives against litigation, existing enforcement mechanisms are failing to protect the statutorily guaranteed rights of employees with psychiatric disabilities. This Part argues that a compensatory damages remedy would provide the appropriate incentives for meaningful enforcement of ADA Title I,[229] and suggests several common-law approaches that a plaintiff might use to obtain a damages remedy[230] as well as a modification to EEOC policy to increase access to the EEOC's voluntary mediation program.[231]

A. The Need for Compensatory Damages

The single most significant obstacle to alternative dispute resolution and other forms of negotiated settlements is employer unwillingness to enter negotiations, and the most common reason for an employer's refusal to negotiate is knowledge that the employee is unlikely to litigate.[232] A more consistently available compensatory damages remedy would create the credible threat of litigation necessary to bring employers to the negotiating table;[233] although a compensatory damages remedy would not always overcome the significant disadvantages of litigation, it would make litigation a meaningful option. The greater likelihood of damages liability, moreover, would incentivize settlement.

A meaningful remedy could even make litigation empowering rather than debilitating for some plaintiffs; instead of merely prohibiting discrimination against people with psychiatric disabilities in principle, the law would provide a way to hold employers accountable in practice.[234] The availability of compensatory damages would communicate to potential plaintiffs that the legal system takes their grievances seriously,[235] and a judgment awarding

229. *See infra* Part V.A.

230. *See infra* Part V.C.

231. *See infra* Part V.E.

232. *See supra* Part IV.B (discussing the barriers to litigation that people with psychiatric disability face).

233. *See supra* notes 218–22 and accompanying text (discussing reasons for employer refusal to participate in alternative dispute resolution).

234. *See* Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 74 (2010) (observing that litigation may give plaintiffs the "empowering or cathartic" opportunity to tell their stories). Litigation's ability to empower a plaintiff depends in large part on its availability as a meaningful option that can adequately redress the wrong suffered. *See* Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 64 (2011) ("The purpose of the adversary system is to provide a forum for a fair fight between the plaintiff and the defendant, and it is in the very process of this struggle that the plaintiff's honor is vindicated.").

235. *See* Freckelton, *supra* note 195, at 321 (observing, in the context of New Zealand's involuntary commitment hearing process, that "[i]f the patient emerges from the hearing disappointed, but feels that he has been treated fairly and with dignity, given an opportunity to air grievances, and listened to . . . it can make a

compensatory damages would serve as an unambiguous "message from the courts that certain conduct is unacceptable."[236] These messages might reduce the perception of unfairness that currently plagues plaintiffs in psychiatric disability discrimination suits.[237]

In addition to creating an incentive to negotiate in good faith, compensatory damages liability can serve as a deterrent against "negligent" discrimination.[238] As noted previously, many of the disability discrimination cases that fall into the "disparate impact" category involve forms of conduct by the defendant that can be deterred by damages liability, whether that conduct is intentional conduct not driven by a discriminatory motive or strict application of a qualification standard without regard for a person's disability.[239] These forms of discrimination are arguably "negligent" in that they involve failure to act on an affirmative duty.[240] The direct threat exception imposes an affirmative duty to make individualized assessments, and the requirement of reasonable accommodation parallels, to some degree, the duty of reasonable care in tort law.[241] The precise nature of these affirmative duties has been made clear by statute and case law.[242] The likely rationale for barring compensatory damages, that disparate impact discrimination cannot be deterred by damages liability due to lack of moral culpability,[243] does

significant difference to the patient's mental state.").

236. *Id.* at 313.

237. *See* Swanson et al., *supra* note 22, at 118–19 (noting that ADA plaintiffs with psychiatric disabilities were particularly dissatisfied with a "perception of procedural unfairness"). "People with psychiatric disabilities were significantly less likely than people with other disabilities to feel that they had a chance to tell their stories, that they were treated with dignity, or that decisionmakers were fair." *Id.*

238. *See supra* notes 158–60 and accompanying text (noting that employers may be liable solely for disparate impact discrimination even though their culpability exceeds that typically associated with the disparate impact cause of action). Law and economics generally characterizes damages liability for negligence as an incentive to increase safety precautions to the point where an actor's conduct is no longer negligent. *See generally* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

239. *See supra* Part III.B (discussing the blurring of causes of action in disability discrimination cases).

240. *See* Oppenheimer, *supra* note 160 (drawing parallels between standards of culpability in antidiscrimination law and tort law, and arguing that "negligent" discrimination should be a separate cause of action). Professor Oppenheimer observes that the disparate treatment and disparate impact causes of action respectively resemble intentional and strict liability torts. *Id.* at 918–20. He also presents the ADA 's reasonable accommodation mandate as an example of a prohibition on what he terms "negligent" discrimination. *Id.* at 943–44. Surprisingly, in the twenty years since Professor Oppenheimer's article, courts have almost entirely eschewed reference to negligence as a theory of liability in ADA and other antidiscrimination cases. Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 99–100 (2011) (discussing the courts' surprising failure to consider the idea of negligent discrimination). Nevertheless, one appellate court has expressly drawn a parallel between "reasonable accommodation" in the ADA and "reasonable care" in tort law. Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

241. BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 109, at 68.

242. *See* Kleiber v. Honda of America Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007) (citing numerous cases holding that the interactive process for determining reasonable accommodations is mandatory); *supra* Part II.B. (describing the requirements for a sufficient assessment of a putative direct threat).

243. The legislative history of the Civil Rights Act of 1991, which established the present remedial scheme for employment discrimination, never expressly stated a rationale for excluding compensatory damages for disparate impact discrimination. However, providing "a necessary deterrent" was one of the primary

not apply where a clearly defined affirmative duty exists.[244] Instead, damages liability may encourage employers to proactively review and change their policies regarding mental health in a way that the present remedial scheme does not.[245]

Finally, compensatory damages are consistent with the general principle of corrective justice.[246] The fact that disability discrimination often takes the form of an omission, rather than an animus-based act, should not preclude compensatory damages.[247] Tort law calls for compensation for negligent acts or omissions; likewise, in the disability discrimination context, failure to act on a statutory obligation should give rise to liability for injury suffered as a result.[248]

The primary objection to increasing the available remedies is that it would encourage excessive litigation.[249] The ADA, in particular, is already "often accused of being a font of abusive and frivolous litigation"[250] and "portrayed . . .

motivations for applying compensatory and punitive damages to intentional discrimination. H.R. REP. NO. 102-40, pt. 1, at 69 (1991). Courts and commentators have, to some extent, assumed that this rationale holds true and applied it to other titles of the ADA. *See, e.g.*, Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (suggesting that compensatory damages under Title II of the ADA, which concerns government programs, would be unfair without notice of alleged discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1244 (1995) (arguing that subjecting unconscious discrimination to a damages remedy would be counterproductive because such discrimination is unintentional); Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian* Approach, 25 YALE L. & POL'Y REV. 95, 132 n.268 (2006) (conceding that the author's proposal of merging the disparate treatment and disparate impact theories "would disadvantage employers by providing additional relief to employees even where the employer has not enacted an intentionally discriminatory policy"). *But see* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 948 (1993) (arguing that "there is no principled basis" to distinguish between the models of discrimination in determining remedies).

244. *See* Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1156 (2000) ("When there is no threat of liability, individuals could be induced to use too little care.").

245. *See* Bagenstos, *Limited Remedies*, *supra* note 84, at 12 (noting that "the absence of a damages remedy "in Title III, the ADA's public accommodations title, "gives businesses little reason not to take [a] 'wait and see' approach" of making facilities accessible "only in response to litigation"). Although fee-shifting arguably incentivizes compliance with nondiscrimination laws, it depends on plaintiffs' willingness to litigate; the strong disincentives against litigation that people with psychiatric disabilities face may require something more to overcome. *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1854 (2005) (arguing that lack of monetary incentive to litigate claims has resulted in widespread noncompliance with Title II and Title III of the ADA, which address government programs and public accommodations respectively); *supra* Part III.D.

246. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 6 cmt. d (2010) (discussing rationales for imposing liability for negligence).

247. *See* Oppenheimer, *supra* note 160, at 970–73 (1993) (arguing that negligent discrimination should be actionable in order to focus on the fact of discrimination rather than the defendant's moral reprehensibility).

248. *See id.* (arguing that negligent discrimination should be actionable in order to focus on the fact of discrimination rather than the defendant's moral reprehensibility).

249. *See* Bagenstos, *Limited Remedies*, *supra* note 84, at 2 ("[B]usiness groups and their political allies have often criticized broad civil rights remedies–particularly the availability of monetary damages–as encouraging abusive and extortionate litigation practices.")

250. BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 109, at 123.

as a windfall statute for plaintiffs,"[251] and critics are likely to see any increased remedy as inviting nuisance suits.[252] These perceptions may be concerning because psychiatric disabilities are among the types of disabilities that critics paint as "convenient excuses for special treatment."[253]

Criticism of Title I based on "abusive and frivolous litigation" is, to a large extent, misplaced: much of the "abusive" ADA litigation arises from Title III, the public accommodations title, rather than Title I.[254] Interestingly, even those critical of the volume of ADA litigation concede that the suits they decry as abusive generally have merit.[255]

Existing checks on litigation already prevent the addition of a compensatory damages remedy from creating a flood of frivolous litigation. Lawyers already have a financial incentive to serve as "agents of quality control for the court system" and screen out most frivolous claims;[256] this will not change if compensatory damages are available. Even if the psychiatric disability complaints filed with the EEOC tended to be weaker than those for other disabilities, it would not imply that the same is true of lawsuits reaching the court system.[257] In addition, empirical evidence suggests that few potential plaintiffs actually insist on litigation; EEOC statistics demonstrate that the overwhelming majority of disability discrimination complainants, including those with psychiatric disabilities, are willing to accept mediation as an alternative to litigation.[258]

Even if the number of ADA Title I lawsuits would increase, the fear of clogging the courts with frivolous suits does not justify denying an entire class of plaintiffs the effective protection of a duly passed statute.[259] Effective

251. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 (1999).

252. Bagenstos, *Limited Remedies*, *supra* note 84, at 2–3.

253. Pamela M. Prah, *Federal Enforcement of ADA Falls Short, Civil Rights Commission Says in Report*, 67 U.S.L.W. 2199 (Oct. 13, 1998).

254. *See* Bagenstos, *Limited Remedies*, supra note 84, at 3–5 (discussing the controversy over "serial ADA public accommodations litigation"). Members of Congress have focused largely on Title III in repeated attempts to limit ADA litigation. *Id.* at 5.

255. Bagenstos, *Limited Remedies*, *supra* note 84, at 22.

256. Swanson et al., *supra* note 22, at 125.

257. *Id.*

258. Moss et al., *supra* note 200, at 990.

259. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1640 (2004) ("The ultimate danger from court action that denies meaningful relief is that rights will be effectively nullified."). The United States Supreme Court has suggested in a variety of contexts that the Due Process Clause of the Fourteenth Amendment requires a meaningful remedy for prevailing plaintiffs, *id.* at 1640–41, and it is a fundamental principle of the common law that rights must have remedies. *Id.* at 1636–37 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) and Ashby v. White, 92 Eng. Rep. 126 (K.B. 1703)).

enforcement of the ADA for plaintiffs with psychiatric disabilities requires a remedy that makes litigation a meaningful option.[260]

It may also seem paradoxical to create incentives to litigate a claim given the privacy and health implications of litigation for people with psychiatric disabilities.[261] But there is a vast difference between litigation being an option with significant disadvantages and litigation being essentially a non-option because the remedy is illusory. The former allows aggrieved employees to reserve the option of litigation; the latter does not, which may lead employers to refuse to negotiate a settlement.[262] Not every potential plaintiff needs to litigate; as long as some choose to do so, the threat of litigation is credible.

B. Can Statutory Solutions Work?

Amending the ADA to specifically address psychiatric disabilities is unsatisfactory because it could entrench the difference between psychiatric and other disabilities.[263] Already, much of this difference lies in the way society views the disabilities.[264] The social distinction between "physical" and "mental" disabilities "serves no legitimate rationale and perpetuates the stigmatization of mental illness."[265] In addition, disability rights advocates are extremely wary of their movement's potential for fragmentation.[266] For these reasons, disability rights activists, concerned about differential treatment in the legal system, have called for eliminating the separation of "physical" and "mental" disabilities in the statute.[267] Enacting statutory language that provides for additional remedies for psychiatric disabilities comes dangerously close to establishing psychiatric disability as a privileged class within the disability rights structure and risks

260. *See supra* Part III.C–D (discussing barriers to litigation that potential plaintiffs with psychiatric disabilities face); Joan Steinman, *Backing Off* Bivens *and the Ramifications of This Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 283–84 (1984) (arguing that due process requires not only a substantive remedy but meaningful access to that remedy).

261. *See supra* Part III.D (discussing the privacy and mental health concerns that litigation implicates).

262. *See supra* notes 218–22 and accompanying text (noting reasons for employer refusal to participate in alternative dispute resolution).

263. *See* Korn, *supra* note 17, at 647 (arguing that the mere reference to "mental and physical" disabilities in the ADA contributes to an "artificial dividing line" between the two).

264. *Id.* at 649.

265. *Id.* at 647.

266. *See, e.g.*, Clarice Hausch, *From the Executive Director*, ADVOCARE 2, 3 (2007), *available at* http://wvadvocates.org/assets/docs/pubs/advocare/wvaadvocare30thanniversary.pdf (on file with the *McGeorge Law Review*) ("Success will be difficult to achieve if we allow ourselves to be divided into disability silos competing against each other for funding with a my disability first, win-lose mentality that in the end is never enough to solve the challenges."). This concern stems from the larger disability rights movement's origins in a number of disability-specific, often competing movements. *See generally* BAGENSTOS, LAW AND CONTRADICTIONS, *supra* note 109, at 12–18 (discussing the history of the disability rights movement).

267. *E.g.*, Korn, *supra* note 17, at 647–48 (proposing elimination of references to "mental and physical" disabilities in the ADA with the purpose of eliminating the distinction between the two).

backlash from a society that has shown much resistance to accommodating psychiatric disabilities.[268]

Amending the Civil Rights Act to provide compensatory damages for negligent discrimination appears more promising. In fact, courts already use a quasi-negligence analysis in their treatment of reasonable accommodation under the ADA and harassment by coworkers under all the federal civil rights statutes.[269] Such a move could provide an effective remedy for victims of overly subjective direct-threat assessments, but two decades of inaction since Professor Oppenheimer first proposed a negligence theory of employment discrimination raises doubts about its political feasibility.[270] In addition, even if negligence is sufficient culpability to impose damages liability, the negligence standard creates a certain temptation to weigh cost against likely harm in determining whether an employer was negligent, even when the employer uses workplace policies that violate established law under the ADA.[271]

C. Harnessing Characteristics of Psychiatric Disabilities in Tort and Other Remedies

Regardless of the merits of amending the ADA or other civil rights statutes, plaintiffs with psychiatric disabilities may be able to assert their rights by another avenue: the common law. Mark Weber has recently observed that disability discrimination plaintiffs may often have a variety of viable common-law causes of action available to them in addition to statutory claims.[272] While "race and sex discrimination plaintiffs have regularly filed claims asserting violations of common law duties," common-law claims have appeared far less often in disability discrimination litigation and scholarship.[273] These claims may merit more attention from plaintiffs' attorneys than they currently receive, both for disability discrimination plaintiffs generally and for plaintiffs with psychiatric

268. *See id.* at 607–09 (noting the common tendency to blame individuals for their psychiatric disabilities).

269. *See* Oppenheimer, *supra* note 160, at 943–44, 946–47 (describing the reasonable accommodation mandate in the ADA and harassment jurisprudence under the Civil Rights Act as imposing affirmative duties on employers).

270. *See id.* Professor Oppenheimer's article, published in 1993, has had substantial impact in academic circles, with 147 citing references listed on Westlaw as of March 25, 2012. However, only one of these references is a primary source, and that citation merely acknowledges the existence of a debate on whether unconscious discrimination could constitute disparate treatment. Glass v. Philadelphia Elec. Co., 34 F.3d 188, 200 n.8 (3d Cir. 1994) (Alito, J., dissenting).

271. *See* Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (analogizing reasonable accommodation under the ADA to the Hand formula in tort law); Basas, *supra* note 147, at 110 n.260 (criticizing courts' use of pure cost-benefit analysis in determining the reasonableness of accommodations).

272. Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 UTAH L. REV. 429, 430 (2012).

273. *Id.* at 430, 433–34.

disabilities in particular.[274] Without necessarily considering psychiatric disabilities as a separate class from other disabilities, courts should weigh the characteristics of a psychiatric disability as factors in sustaining certain causes of action or remedies. The nature and effects of psychiatric disabilities may make certain tort actions especially viable in disability discrimination cases.[275]

The United States Supreme Court has already signaled a willingness to distinguish mental illness from other disabilities on the basis of its unique privacy concerns.[276] In *Heller v. Doe*, the Court upheld a state law establishing a higher burden of proof in civil commitment of people with "mental illness" than of people with "mental retardation."[277] The Court justified its ruling not by the classification of the disabilities per se, but by the increased probability of diagnostic error for "mental illness" and the heightened privacy concerns of people with "mental illness" compared to "mental retardation."[278] Here, the distinction between considering relevant characteristics of a disability and considering a diagnosis or label per se is critical, because the differences between psychiatric and other disabilities may then be considered without splitting off psychiatric disabilities as a separate class.[279]

Several common-law claims may be particularly appropriate for plaintiffs with psychiatric disabilities. This Part explores three specific tort causes of action: (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, and (3) wrongful discharge against public policy. It then considers the equitable remedy of front pay that is already possible under existing antidiscrimination laws.

1. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress, also known as the "tort of outrage,"[280] occurs when an actor "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . ."[281]

274. *See generally id.* at 430–34 (discussing the potential value of common-law claims to disability discrimination plaintiffs).

275. *See infra* Part V.C (discussing specific tort causes of action). Although this Comment focuses on psychiatric disabilities, similar arguments may apply with equal force to other disabilities, particularly those that tend to be invisible unless disclosed.

276. *See* Heller v. Doe, 509 U.S. 312, 322–25 (1993) (holding that higher risk of diagnostic error and more invasive treatments for "mental illness" than "mental retardation" justified a higher standard of proof for civil commitment).

277. *Id.*

278. *Id.* "The mentally ill are subjected to . . . treatment which may involve intrusive inquiries into the patient's innermost thoughts. By contrast, the mentally retarded in general are not subjected to these medical treatments." *Id.* at 324–25 (internal citations omitted).

279. *See id.* at 326–28 (observing the historical distinction between "mentally retarded" and "mentally ill" in English law, but also making clear that the Court's holding was based on the characteristics of the two conditions rather than on common-law tradition).

280. 74 AM. JUR. 2D *Torts* § 37 (2012).

The fact patterns in psychiatric disability discrimination cases may well support a finding of recklessness. Recklessness requires that the actor "[know] or [have] reason to know of facts which would lead a reasonable man to realize" that his conduct creates a substantial risk of harm.[282] Even if the employer does not subjectively expect to create this risk, actual knowledge of a psychiatric disability means actual knowledge of a fact that implies an elevated risk of emotional distress.[283]

Abuse of a position of power, or actual knowledge that the victim is "peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity," may contribute to a finding that conduct is "extreme and outrageous."[284] Because both of these factors are arguably present with disability discrimination in employment, Professor Weber suggests that the tort of intentional infliction of emotional distress is well suited to employment discrimination, particularly where the plaintiff is harassed because of a disability.[285] Courts have held that employment relationships inherently create a power disparity with the possibility of abuse,[286] and an employee's disability increases that power disparity.[287] "Power disparities," such as those "between a worker with a disabling condition and a supervisor or coworkers acting with the acquiescence of the supervisor," strongly support a finding of outrageousness.[288] Several courts have actually sustained intentional infliction of emotional distress claims based primarily on alleged disability discrimination.[289]

In light of the Second Restatement's express mention of "mental condition or peculiarity" as a factor in the outrageousness of conduct,[290] the tort of intentional infliction of emotional distress may be especially appropriate where the disability in question is psychiatric. Abundant evidence demonstrates that individuals with

281. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The most recent draft of the Third Restatement uses virtually identical language, merely changing the word "distress" to "harm." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 (2012).

282. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

283. *See supra* notes 186–94 and accompanying text (discussing the high likelihood of emotional distress resulting from employment discrimination).

284. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e, f (1965).

285. Weber, *supra* note 272, at 461–62.

286. *See, e.g.*, White v. Monsanto Co., 585 So. 2d 1205, 1210 (La. 1991) ("[M]any of the cases have involved circumstances arising in the workplace. A plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger.") (internal citations omitted).

287. Weber, *supra* note 272, at 462.

288. *Id.*

289. *See, e.g.*, Smith v. Dovenmuehle Mortg., Inc., 859 F. Supp. 1138, 1139, 1143–44 (N.D. Ill. 1994) (denying summary judgment on IIED claim where plaintiff's supervisor became "distant and hostile" to him and subsequently terminated his employment after plaintiff disclosed his AIDS diagnosis); Weber, *supra* note 272, at 462–64 (citing other cases in employment, education, and public accommdations settings). *But see id.* at 464–65 (citing disability discrimination cases in which courts found the alleged conduct insufficient to raise a jury question on outrageousness).

290. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965).

psychiatric disabilities are particularly susceptible to severe emotional distress caused by perceived discrimination.[291] Courts have noted this phenomenon,[292] and the Second Restatement even uses a prank played on a victim with a psychiatric disability to illustrate what may constitute knowledge that a person is "peculiarly susceptible" to some form of emotional distress.[293] But even the illustration in the Second Restatement understates the impact of perceived discrimination on people with psychiatric disabilities: it discusses only the susceptibility to emotional distress caused by the underlying disability.[294] The Second Restatement does not mention the effect of stigma—a significant omission because stigma contributes greatly to the resulting emotional distress.[295] Courts should weigh stigmatization of a psychiatric disability in favor of a finding that the psychiatric disability makes a plaintiff "peculiarly susceptible" to emotional distress, and in turn a finding that knowledge of the psychiatric disability is knowledge of the plaintiff's susceptibility.[296]

2. Negligent Infliction of Emotional Distress

Historically, because of concerns about liability to excessive numbers of plaintiffs, courts have generally been reluctant to find that a duty of care exists when a plaintiff alleges negligent infliction of emotional distress without suffering physical injury or property damage.[297] One of the few exceptions in which courts recognize a duty of care is the preexisting duty rule, where duty derives from a preexisting relationship between the plaintiff and the defendant.[298]

291. *See supra* notes 186–94 and accompanying text (discussing the high likelihood of emotional distress resulting from employment discrimination).

292. *See, e.g.*, Williams v. Tri-Counties Metropolitan Transp. Dist., 958 P.2d 202, 205 (Or. Ct. App. 1998) (observing that "bias-motivated conduct . . . inflicts distinct emotional harms" and and is more likely to be outrageous than "other forms of antagonistic behavior.") (internal quotation marks omitted).

293. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f, ill. 9 (1965) (asserting that a defendant may be liable for IIED for burying "a pot with other contents" to publicly humiliate a person who "has the delusion that a pot of gold is buried in her back yard, and is always digging for it. . . .").

294. *Id.*

295. *See supra* notes 190–94 and accompanying text (explaining the link between perceived stigma and emotional distress).

296. In many cases, plaintiffs will likely need to actually make this argument. The inference that discrimination is particularly harmful for people with stigmatized disabilities is, in spite of empirical evidence, not universally acepted. *See* Link et al., *supra* note 190, at 1622 (noting that "[s]ome reports downplay the importance of stigma" and that "strong skepticism" still exists about the effects of stigma on people with mental illness).

297. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 153–54 (4th ed. 2010). A small minority of states have extended a duty to all foreseeable plaintiffs. *Id.* at 147 (citing Camper v. Minor, 915 S.W.2d 437, 443, 446 (Tenn. 1996), in which the Tennessee Supreme Court held that negligent infliction of emotional distress should be treated as any other negligence case).

298. *E.g.*, Burgess v. Super. Ct., 831 P.2d 1197, 1204 (Cal. 1992) (holding that physician-patient relationship created an independent duty of care).

Courts have not considered an employment relationship alone to be sufficient to give rise to a preexisting independent duty. Most jurisdictions that have considered the tort of negligent infliction of emotional distress in the employment context have analyzed duty using the "zone of danger" and "bystander" rules, both of which rarely, if ever, apply to disability discrimination because they require conduct creating a risk of physical injury.[299]

However, courts in several jurisdictions have held that claims for negligent infliction of emotional distress are cognizable in the employment setting if serious emotional distress is sufficiently foreseeable—essentially an "employment plus particular foreseeability" formulation of preexisting duty.[300] *Kelley v. Schlumberger Technology Corp.* illustrates this principle.[301] The plaintiff alleged that the defendant employee's drug screening program caused him emotional distress by having a representative directly observe him urinating.[302] The First Circuit, applying Louisiana law, held that the defendant employer had a duty to take reasonable precautions against causing severe emotional distress in the administration of its drug screening program where severe emotional distress was foreseeable.[303]

Other courts have, without necessarily articulating a specific test for duty, left open the possibility of allowing negligent infliction of emotional distress claims in the employment setting.[304] At least one court has sustained a claim for negligent infliction of emotional distress where the plaintiff alleged harassment and termination on the basis of disability.[305]

299. Perodeau v. Hartford, 792 A.2d 752, 770 n.26, 771–72 (Conn. 2002) (listing cases from other jurisdictions analyzing duty in the context of an employment relationship).

300. *E.g.*, Kelley v. Schlumberger Technology Corp., 849 F.2d 41, 43–44 (1st Cir. 1988) (applying Louisiana law, holding that employer had a "duty to use reasonable care in implementing and administering its drug program so as not to cause serious emotional distress" where emotional injuries exceeding "minimal worry and inconvenience" were foreseeable); Faulkner v. Tyco Elecs. Corp., 552 F. Supp. 2d 546, 559 (M.D.N.C. 2008) (holding that an employer may be liable for negligent infliction of emotional distress if it "should have realized that its conduct involved an unreasonable risk of causing emotional distress"); Dirksen v. Springfield, 842 F. Supp. 1117, 1127 (C.D. Ill. 1994) (holding that an allegation of retaliation for EEOC charge is sufficient to state a claim for negligent infliction of emotional distress); Strong v. Terrell, 195 P.3d 977, 982–83 (Wash. Ct. App. 2008) (holding that negligent infliction of emotional distress is a cognizable claim in the employment setting and that duty is determined by foreseeability of harm).

301. 849 F.2d 41.

302. *Id.* at 43.

303. *Id.* at 43–44.

304. *E.g.*, Photias v. Graham, 14 F. Supp. 2d 126, 131–32 (D. Me. 1998) (declining to categorically hold that defendant coworker had no duty, stating that further development of facts would be necessary); Wasson v. Sonoma Cnty. Jr. College Dist., 4 F. Supp. 2d 893, 909 (N.D. Cal. 1997) (holding that workers' compensation laws did not bar a negligent infliction of emotional distress claim where the employer's conduct violated public policy and implying that such a claim may also be sustainable where an employer's conduct "exceeds the risks inherent in the employment relationship.").

305. Tomick v. United Parcel Servs., Inc., No. CV06408944, 2010 WL 2196576 at *3 (Conn. Super. Ct. Apr. 23, 2010). The court found that the defendant's conduct did not rise to the level of outrageousness required for intentional infliction of emotional distress, *id.* at *4, but also found that a triable question of fact existed on whether the defendant's conduct created "an unreasonable risk of causing emotional distress." *Id.* at *3.

The Third Restatement of Torts calls for extending duty to "specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm."[306] This approach somewhat resembles that of the courts that have found a preexisting duty under an "employment plus particular foreseeability" formula.[307]

Even under the Third Restatement's approach, the way that plaintiffs frame psychiatric disability discrimination is critical. Because employment is generally at-will, and employers are entitled to arbitrarily fire employees so long as they do not do so for specifically unlawful reasons,[308] courts are likely to accept the premise that discharge or suspension of employees is a normal and expected part of employment.[309] However, a plaintiff might also frame the employer's activity as something more specific: direct threat evaluation for psychiatric disabilities. The activity of evaluating a purported direct threat is highly analogous to the activity of employee drug screening in *Kelley*[310] and the fact that express legal standards exist for evaluation of direct threats[311] suggests that the activity is not so plaintiff-specific as to reduce duty analysis to foreseeability alone. A court should be able to conclude as a matter of law that evaluating the alleged dangerousness of a person with a psychiatric disability is an activity that creates a special likelihood of serious emotional distress; this would establish a duty using the approach endorsed by the Third Restatement and several states.[312]

If duty exists, then a plaintiff might establish breach of duty through the negligence per se doctrine.[313] The employer's obligations to participate in the interactive process to accommodate disability and to objectively assess the existence of a direct threat are well established,[314] and the foreseeable harms

306. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 (2012). Although the foreseeability of harm to the specific plaintiff does not factor into this formulation of preexisting duty, the Third Restatement nonetheless calls for an inquiry into whether the relationship between the parties and the general category of activity in which the defendant is engaging give rise to a particularly high likelihood of serious emotional distress. *Id.* at cmt. f, cmt. i.

307. *See supra* note 300 and accompanying text (discussing the "employment plus particular foreseeability" formulation).

308. RESTATEMENT (THIRD) OF EMP'T § 2.01 (Tentative Draft No. 2, Rev. 2009).

309. *E.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991) ("We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees.").

310. *See supra* notes 301–03 and accompanying text (discussing *Kelley*, 849 F.2d 41).

311. *See supra* Part II.B (discussing employers' affirmative duties in evaluating direct threats).

312. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. f (2012) (discussing courts' approaches to determining what activities are of such a nature that negligence is "especially likely" to cause serious emotional harm).

313. Under the negligence per se doctrine, a court may "adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation . . . ." RESTATEMENT (SECOND) OF TORTS § 286 (1965). A statute or regulation may be adopted as the standard of care if the statute is intended to protect a class of persons including the plaintiff, to prevent the type of harm that actually occurred, and to prevent the specific danger that actually caused the harm. *Id.*

314. *See supra* Part II.B.

associated with discrimination undoubtedly include severe emotional distress.[315] A violation of either of these standards could arguably constitute negligence per se.[316] Although it is true that the negligence per se doctrine applies most commonly to criminal statutes, the use of a well-established civil statute to establish a standard of care is "an intriguing possibility."[317] Justice Brennan, dissenting in *Merrell-Dow Pharmaceuticals, Inc. v. Thompson*, at least contemplated the possibility.[318] He argued that federal jurisdiction was appropriate for a negligence per se claim based on violation of a federal statute, because the question of negligence would depend on whether the petitioner had violated the federal statute, and, in turn, on interpretation of the statute.[319] In making this argument, Justice Brennan must necessarily have assumed that conduct violating a statute, but not subject to criminal penalties, could constitute negligence per se.[320]

At least one commentator has specifically advocated the use of a well-established civil statute as a standard of care. Laura Rothstein argued that courts should find negligence per se based on violations of the Education for All Handicapped Children Act of 1975 because, ten years after the passage of the statute, reasonable education professionals should be well aware of its requirements.[321] Professor Rothstein's argument applies especially well to direct threat assessment under the ADA because the employer's obligations have been settled law for well over a decade. The Supreme Court's interpretation of the direct threat exception as requiring an objective, individualized assessment based on "reasoned and medically sound judgments"[322] has not changed in a quarter-century.[323]

315. *See* Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1199 (11th Cir. 2007) (noting that emotional distress is "a predictable, and thus foreseeable, consequence" or even "a probable result" of disability discrimination).

316. *See* DIAMOND ET AL., *supra* note 297, at 86–87 (describing factors used to determine whether a statute becomes the standard of care).

317. Weber, *supra* note 272, at 457 n.165 (suggesting negligence per se as a possible means of obtaining relief in ADA claims lacking an adequate statutory remedy).

318. 478 U.S. 804, 823 (1986) (Brennan, J., dissenting).

319. *Id.*

320. *See* 21 U.S.C. § 333 (2006) (listing penalties for violations of the Food, Drug, and Cosmetic Act, with many types of violations subject only to a civil penalty); *Merrell-Dow*, 478 U.S. at 830–31 (Brennan, J., dissenting) (describing a statutory enforcement scheme that relies heavily on injunctions and civil seizure of products).

321. Laura F. Rothstein, *Accountability for Professional Misconduct in Providing Education to Handicapped Children*, 14 J.L. & EDUC. 349, 373–74 (1985).

322. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 284–85 (1987).

323. *See* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (holding that *Arline* controls interpretation of the ADA's direct threat exception).

3. Wrongful Discharge Against Public Policy

Most U.S. jurisdictions now recognize the tort of wrongful discharge in violation of public policy,[324] which imposes liability on employers for discharges that violate some clearly expressed public policy.[325] Two considerations affect whether disability discrimination can give rise to a cause of action for wrongful discharge.

First, courts recognizing the cause of action have focused on protection of an employee's activities furthering public policy.[326] Courts may resist extending the tort of wrongful discharge to cover acts that are not retaliatory in nature.[327] However, "[s]ome courts have a more expansive idea of the public policy tort than merely a claim for retaliation, and the Restatement allows for such an interpretation."[328] Professor Weber discusses *Ward v. Sorrento Lactalis, Inc.*, in which a federal court in Idaho denied summary judgment on a wrongful discharge claim based purely on disability discrimination.[329] In *Ward*, the defendant-employer asked the plaintiff whether he was still on medication following a surgical procedure, and terminated the plaintiff's employment when the plaintiff responded affirmatively.[330] Although it was unclear whether Idaho law allowed a wrongful discharge claim to proceed where statute provided a remedy, the *Ward* court found it persuasive that the Idaho Supreme Court had implied the viability of such a claim.[331] When it first recognized the tort of wrongful discharge against public policy, the Idaho Supreme Court had cited, among other out-of-state cases, *Monge v. Beebe Rubber Co.*,[332] a wrongful discharge case that arose from sexual harassment.[333] Although *Monge* arguably involved retaliation rather than purely discriminatory discharge,[334] the *Ward* court

324. *See generally* Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending the Public Policy Exception Beyond the Wrongful Discharge Context*, 13 LAB. LAW. 371, 371–72 (1997) (giving an overview of the trend toward recognizing and expanding the scope of the wrongful discharge tort).

325. RESTATEMENT (THIRD) OF EMP'T § 4.01 cmt. a (Tentative Draft No. 2, rev. 2009).

326. *See id.* § 4.01(a) (stating that an employer is liable for taking action against an employee "because the employee has engaged or will engage in protected activity"); Weber, *supra* note 272, at 457 (observing that the tort of wrongful discharge in violation of public policy is primarily directed at retaliatory conduct).

327. *See* Weber, *supra* note 272, at 458 (noting that "some courts" have expanded the tort of wrongful discharge beyond retaliation but implying that these courts are in the minority).

328. *Id.* It is unclear how Professor Weber reaches his conclusion about the Restatement because the language he cites refers to the employee's "other activity directly furthering a substantial public policy." *Id.* at 458 n.171.

329. *Id.* at 458, 458 n.174 (citing Ward v. Sorrento Lactalis, Inc., 392 F. Supp. 2d 1187, 1194–95 (D. Idaho 2005)).

330. *Ward*, 392 F. Supp. 2d at 1193.

331. *Id.* at 1194 (citing Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 58 (Idaho 1977)).

332. 316 A.2d 549 (N.H. 1974).

333. *Jackson*, 563 P.2d at 58 (citing *Monge*, 316 A.2d 549).

334. 316 A.2d at 550–51 (describing facts that suggest the plaintiff was fired for rebuffing a foreman's sexual advances).

pointed out that the facts of *Monge* also "presumably could have led to a statutory sex discrimination claim."[335]

Second, courts are divided on whether the existence of statutory remedies always preempts a tort claim for wrongful discharge.[336] Courts have generally treated the tort of wrongful discharge against public policy primarily as a gap filler to enforce statutes that provide no private remedies,[337] and have been especially reluctant to extend the tort to antidiscrimination statutes.[338] However, some jurisdictions evaluate whether the legislature intended for statutory remedies to be exclusive;[339] a few courts have sustained the tort cause of action in employment discrimination cases using this analysis.[340] Alternately, courts inquire into the adequacy of the statutory remedies. These courts either evaluate only adequacy as a deterrent against violation of the statute[341] or the adequacy of the statutory remedies both as a deterrent and as compensation for the victim.[342] Finally, in *Ward v. Sorrento Lactalis, Inc.*, the court sustained the plaintiff's wrongful discharge tort claim without evaluating the adequacy of statutory remedies for disability discrimination.[343]

Any of the minority approaches might allow for the tort claim to avoid preemption in psychiatric disability discrimination cases. The ADA expressly states that it "shall not be construed to invalidate or limit the remedies, rights, and

335. *Ward*, 392 F. Supp. 2d at 1194.

336. *See infra* notes 337–43 and accompanying text (discussing cases).

337. *See, e.g.*, Van Kruiningen v. Plan B, LLC, 485 F. Supp. 2d 92, 96 (D. Conn. 2007) (stating that "the Connecticut Supreme Court intended merely to provide a modicum of judicial protection for those who did not already have a means of challenging their dismissals . . . .") (internal quotation marks omitted); McGarvey v. Key Property Mgmt. LLC, 211 P.3d 503, 507 (Wyo. 2009) (stating that "[t]his public policy exception is narrow in scope" and requring that the plaintiff show that "there is no other remedy available to protect the interests of the discharged employee or society.").

338. Kimberly C. Simmons, Annotation, *Pre-emption of Wrongful Discharge Cause of Action by Civil Rights Laws*, 21 A.L.R.5th 1, 22–23 (1994); *see also, e.g.*, Brudnicki v. General Electric Co., 535 F. Supp. 84, 89 (N.D. Ill. 1982) ("In light of these statutory remedies, the Court will not imply an independent cause of action in this context.").

339. The Restatement of Employment Law endorses this approach, but observes that courts often decline to extend it to public policies articulated by civil rights statutes. RESTATEMENT (THIRD) OF EMP'T § 4.01 cmt. d (Tentative Draft No. 2, rev. 2009).

340. *E.g.*, Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1229–30 (Okla. 1992) (holding that state antidiscrimination statute did not evidence intent to abrogate common-law rights and stating that "[t]he growth of the common law in the area of master/servant relationship will not be stunned by legislative silence.").

341. Wiles v. Medina Auto Parts, 773 N.E.2d 526, 534 (Ohio 2002) ("The mere absence of recovery for emotional distress is not enough to convince us that the remedies . . . are somehow insufficient to vindicate the policy . . . ."); Martin v. Clinical Pathology Laboratories, Inc., 343 S.W.3d 885 (Tex. Ct. App. 2011) (rejecting a tort claim for wrongful discharge because state criminal penalties were an adequate deterrent).

342. Hysten v. Burlington N. Santa Fe Ry. Co., 108 P.3d 437, 445 (Kan. 2004) (holding that the statutory remedy was inadequate on the basis of "differences in process, differences in claimant control, and differences in the damages available" as compared to tort action); Reddy v. Cascade Gen., Inc., 206 P.3d 1070 (Or. Ct. App. 2009) (holding that a statutory remedy is adequate only if the statute provides for such remedies "as are needed to make the plaintiff whole," including compensation for emotional distress).

343. 392 F. Supp. 2d 1187, 1194–95 (D. Idaho 2005).

procedures" of any other law "that provides greater or equal protection for the rights of individuals with disabilities . . . ."[344] This language appears to expressly indicate the intent not to foreclose any common-law claims.[345] Even if the tort claim of wrongful discharge against public policy is based on violation of the ADA itself, the tort claim is a state law claim that provides greater remedies for the same wrongful conduct, falling squarely within the type of law contemplated by the non-preemption clause.[346]

Because the privacy implications of litigating a disability discrimination claim render purely equitable relief inadequate to compensate plaintiffs with psychiatric and other "hidden" disabilities,[347] the ADA should not preempt the tort of wrongful discharge for these plaintiffs in a jurisdiction that considers adequacy for compensation. Unless knowledge of a psychiatric disability was already widespread in the plaintiff's workplace before the discriminatory act, the plaintiff cannot be restored to the *status quo ante* by equitable remedies alone.[348] A court that considers only the adequacy of remedies for deterrence should also sustain the tort claim by analyzing more than the remedies' direct effects on the defendant. Where the act of litigating a claim undermines the remedy, and the threat of litigation is not credible, the remedy's deterrent value against workplace discrimination is largely illusory.[349]

Jurisdictions that have not adopted the approach of inquiring into the adequacy of statutory remedies should do so for the sake of enforcing not only the ADA but other statutes as well. They should examine adequacy on a case-by-case basis, and determine whether the remedies can sufficiently compensate the plaintiff or whether the remedies could have deterred the defendant's conduct. For many plaintiffs with psychiatric disabilities, this inquiry would weigh in favor of sustaining the tort claim of wrongful discharge.

344. 42 U.S.C. § 12201(b) (2006).

345. Weber, *supra* note 272, at 435–36. The U.S. Supreme Court has viewed federal preemption of common-law remedies identically to federal preemption of state statutes. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (holding that the federal National Traffic and Motor Vehicle Safety Act did not preempt tort remedies).

346. *See* 42 U.S.C. § 12201(b) (referring to any law "that provides greater or equal protection for the rights of individuals with disabilities"); Weber, *supra* note 272, at 436 (describing the ADA as "a one-way antidiscrimination ratchet").

347. *See supra* notes 165–81 and accompanying text (discussing the inadequacy of purely equitable relief).

348. *Id.*

349. *See* Waterstone, *supra* note 245, at 1854 (arguing that lack of monetary incentive to litigate claims has resulted in widespread noncompliance with Title II and Title III of the ADA, which address government programs and public accommodations respectively).

4. Front Pay as a Remedy

The unique situation of plaintiffs with psychiatric and other hidden disabilities may justify the award of front pay as an equitable remedy.[350] The circumstances that justify front pay include "continuing hostility between the plaintiff and the employer or its workers, or . . . psychological injuries suffered by the plaintiff as a result of the discrimination."[351] To justify front pay, hostility must exceed that normally expected from litigation.[352]

Litigation related to a psychiatric disability, unlike that for more readily visible disabilities, makes the disability known to people who may not have previously been aware of it and exposes the plaintiff to stigma.[353] This stigma may create hostility based on the disability itself, and entirely apart from the litigation.[354] In addition, the especially strong likelihood that a person with a psychiatric disability will suffer psychological injuries as a result of an employer's wrongful conduct weighs in favor of awarding front pay because debilitating psychological harm can make reinstatement to a job impracticable.[355]

Courts should also take into account the stigma surrounding psychiatric disabilities in determining a reasonable period for which to award front pay. In determining the amount of front pay to award, courts may consider "a discharged employee's duty to mitigate, the availability of employment opportunities, the period within which one by reasonable efforts may be re-employed, the employee's work and life expectancy, the discount tables to determine the present value of future damages and other factors that are pertinent on prospective damage awards."[356]

A psychiatric disability can easily make re-employment more difficult: the disability is especially likely to have been exacerbated by discrimination,[357] and a person who has litigated a psychiatric disability discrimination suit exposes the

350. *See supra* note 164(describing front pay and its uses).

351. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001).

352. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1339 (11th Cir. 1999) (noting that front pay was appropriate, rather than reinstatement, because the "antagonism between [the parties] rendered reinstatement 'not feasible'.").

353. *See supra* notes 179–181 and accompanying text (discussing the disclosure of a disability that accompanies litigation).

354. *See supra* Part III.A (discussing the stigma associated with psychiatric disabilities).

355. *See Farley*, 197 F.3d at 1339 (affirming award of front pay in part because the plaintiff's psychiatric "symptoms were heavily influenced by" a hostile work environment).

356. EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1173 (10th Cir. 1985) (internal quotation marks omitted). Courts have fairly broad discretion in determining the length of time for which to award front pay, so long as the award does not "require unreasonable speculation." Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 87–88 (3d Cir. 2009) (finding no abuse of discretion in an award of 10 years' front pay).

357. *See supra* notes 186–194 and accompanying text (discussing the exacerbation of psychiatric disabilities by discrimination).

disability to all potential future employers.[358] As long as employers tend to view job candidates with psychiatric disabilities particularly negatively,[359] it is reasonable to believe that the plaintiff will take more time to find new employment than one with a more visible disability. This inference justifies awarding front pay for an extended period.

D. Toward the Goal of Encouraging Mediation

Even with monetary damages, litigation would not become the preferred option for most individuals who suffer psychiatric disability discrimination, nor should it be. Litigation may negatively impact the health of a plaintiff who already has a psychiatric disability, even if the plaintiff prevails.[360] Where mediation is actually available, the advantage of confidentiality makes it preferable to litigation for many people with psychiatric disabilities.[361] However, the potential of monetary recovery makes litigation a meaningful option that some aggrieved employees will choose, which, in turn, gives employers a real incentive to enter mediation or make good-faith attempts to reach a settlement.[362]

The EEOC has a role to play in encouraging parties to opt for alternative dispute resolution as well. Even if the difference in rate of referral between psychiatric and other disabilities is relatively small, it is statistically significant;[363] the EEOC should work to ensure that stereotypes about psychiatric disabilities do not affect its decision-making processes.[364] Possible changes might take the form of instructions to field offices that the complainant's perceived ability to negotiate should not affect whether the agency refers a case to mediation.[365]

VI. CONCLUSION

In passing Title I of the Americans with Disabilities Act, Congress aimed to protect people with a broad range of disabilities from employment discrimination.[366] However, people with psychiatric disabilities have struggled to

358. Orme, *supra* note 166, at 616–17 (discussing courts' reluctance to allow plaintiffs to sue under fictitious names).

359. *See supra* note 110 (citing studies of employer attitudes toward psychiatric disabilities).

360. STEFAN, *supra* note 16, at 15–16; *see also* Noel, *supra* note 174, at 406 (making the same argument about private enforcement of health insurance parity).

361. *See supra* notes 179–181 and accompanying text (discussing how the likelihood of disclosure discourages litigation).

362. *See supra* Part IV.B (discussing reasons for employer refusal to participate in alternative dispute resolution).

363. Moss et al., *supra* note 200, at 992.

364. *See supra* Part IV.C (discussing bias at EEOC field offices against referring complainants with psychiatric disabilities to mediation).

365. *Id.*

366. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (2008)

protect their statutorily guaranteed rights, in part due to an enforcement framework that limits remedies for the forms of discrimination that they most frequently face.[367] The ADA, like other civil rights statutes, allows for compensatory damages only for intentional discrimination.[368]

Because the lines between disparate treatment and disparate impact are blurry, and because courts have been reluctant to find intentional discrimination, plaintiffs with psychiatric disabilities are often limited to equitable remedies.[369] As a result, for people who suffer discrimination on the basis of psychiatric disabilities, the act of seeking a remedy often undermines the remedy itself by revealing the plaintiff's previously hidden disability.[370] This strongly discourages litigation[371] and, in turn, allows potential defendants to refuse to enter settlement negotiations or alternative dispute resolution.[372] The strikingly high rate at which employers refuse to participate in the EEOC's mediation program, especially when the complainant has a psychiatric disability, suggests that employers currently have insufficient incentive to negotiate.[373]

Common-law causes of action, which the plaintiff's bar has strangely neglected in disability discrimination cases,[374] could provide plaintiffs with a compensatory damages remedy to adequately compensate them for harm suffered as well as to incentivize good-faith settlement negotiations by defendants.[375] This Comment has examined specific tort actions that seem particularly appropriate for psychiatric disabilities and outlined ways in which the characteristics of psychiatric disabilities may realistically justify sustaining these tort actions.[376]

Returning to the fictional narrative that began this Comment, John might not have been completely denied a remedy had his lawyer considered the possibility of pleading tort claims. Because none of the common-law causes of action outlined in this Comment require disability-based motives, a court might have allowed them to proceed to trial without necessarily finding intentional discrimination. Even prior to any litigation, the possibility of tort liability could

(expressly overturning case law that narrowed the definition of "disability").

367. *See supra* Part III.B–C (discussing the blurring of causes of action in disability discrimination and the inadequacy of purely equitable remedies for plaintiffs with psychiatric disabilities).

368. *See supra* notes 71–76 and accompanying text (describing the ADA's remedial scheme).

369. *See supra* Part III.B (describing the difficulty that plaintiffs with psychiatric disabilities face in proving discriminatory intent).

370. *See supra* Part III.C (discussing how equitable remedies are undermined by disclosure of a psychiatric disability).

371. *See supra* Part III.D (discussing the deterrent effects against litigation that potential psychiatric disability discrimination plaintiffs face).

372. *See supra* Part IV.B (discussing reasons for employer refusal to participate in alternative dispute resolution).

373. *Id.*

374. Weber, *supra* note 272, at 430, 433–34.

375. *See supra* Part V.A (discussing the need for a consistently available compensatory damages remedy in psychiatric disability discrimination cases).

376. *See supra* Part V.C (describing various common-law causes of action).

have encouraged John's employer to accept EEOC mediation or otherwise enter into settlement negotiations. Thus, in the absence of statutory changes, the common law could offer people with psychiatric disabilities an effective solution to the Catch-22 that has kept them from enforcing their rights under the ADA.