# People with Intellectual Disabilities and Employment Discrimination Law: a US Case Study

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## Abstract

This article explores how anti-discrimination law has been applied in relation to employment discrimination faced by people with intellectual disabilities. Although disability discrimination laws are now found in many states, there has been relatively little litigation by those with intellectual disabilities as regards employment discrimination. This article examines experience in the USA in order to identify the potential of anti-discrimination law, as well as its limitations in practice. It considers litigation brought by individual plaintiffs, as well as enforcement actions by public bodies. This concerns employment in the open labour market, but also sheltered employment schemes. The article concludes by reflecting on what lessons may be derived from US experience.

## Keywords

Intellectual disability, discrimination, USA, sheltered employment, reasonable accommodation.

## Introduction

People with intellectual disabilities (ID) remain highly marginalised in the labour market. Their rate of employment is low, both in comparison to the general population and amongst people with varying types of disability.[1] Insofar as people with ID have opportunities to engage in work, it remains common for this to take place in a segregated environment. There are multiple forms of 'sheltered' employment, but its fundamental characteristic is that most of the workers are persons with disabilities. It is largely separate from the open labour market where job opportunities are competitive to obtain. The International Labour Organisation (ILO) found that typically the majority of those in sheltered employment are people with ID.[2] Many factors combine to explain why people with ID experience labour market disadvantage. These include education and vocational training systems that do not

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[1] World Health Organisation (WHO) and the World Bank, 'World Report on Disability' (WHO 2011) 237; N. Ditchman, K. Kosyluk, E.-J. Lee and N. Jones, 'How Stigma Affects the Lives of People with Intellectual Disabilities: an Overview' in K. Scior and S. Werner (eds), *Intellectual Disability and Stigma – Stepping Out from the Margins* (Palgrave Macmillan 2016) 31.

[2] International Labour Office, 'Decent Work for Persons with Disabilities: Promoting Rights in the Global Development Agenda' (ILO 2015) 73.

prepare people with ID for the open labour market;[3] lacking the skills frequently sought by employers;[4] a shortage of accessible transport;[5] social security benefit traps (ie the risk of being worse-off financially through entering employment);[6] and reservations on the part of family members.[7] While bearing in mind that each person with ID has a distinct set of skills and abilities, intellectual impairment can affect the range of tasks that can be performed insofar as it may manifest itself in 'slower than average learning of new tasks, impaired memory, slow and sometimes impaired motor performance, and reluctance to change roles and routines'.[8]

Discrimination is a further element in this broad canvas of barriers. This can take a variety of forms, including overt prejudice towards people with ID, irrespective of their abilities. Scior points out that ID can provoke responses of 'anxiety, avoidance, hostility, and even hatred and disgust'.[9] This is occasionally revealed in case-law narratives: in *Perkl,* there was a finding of discrimination under the ADA where a worker with ID was dismissed after a manager said that the organisation did not employ 'those kind of people'.[10] Prejudice is also manifested in harassment related to ID; this features significantly in discrimination complaints in the US.[11] Some employers may be reluctant to hire people with ID due to engrained stereotypes about their likely productivity or potential for learning.[12] Yet research has also indicated that the actual performance and capability of workers with ID may exceed initial expectations.[13] Discrimination can also arise from the organisation of the working environment in ways that render it inaccessible for people with ID. For example, including an unnecessary written test in a recruitment procedure could have the effect of excluding some people with ID, even though there are other methods through which they could demonstrate their ability to perform the job.[14]

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[3] R. Lysaght, H. Ouellette-Kuntz, and C. Lin, Untapped Potential: Perspectives on the Employment of People with Intellectual Disability, 41 Work 409, 419 (2012).
[4] L. Kumin and L. Schoenbrodt, Employment in Adults with Down Syndrome in the United States: Results from a National Survey, 29 Journal of Applied Research in Intellectual Disabilities 330, 338 (2016).
[5] A. Migliore, T. Grossi, D. Mank, and P. Rogan, Why do Adults with Intellectual Disabilities Work in Sheltered Workshops? 28 Journal of Vocational Rehabilitation 29, 34 (2008).
[6] A. Cohen Hall and J. Kramer, Social Capital Through Workplace Connections: Opportunities for Workers with Intellectual Disabilities, 8 Journal of Social Work in Disability & Rehabilitation 146, 159 (2009).
[7] Ibid 160. e.g. about personal safety, treatment by co-workers, and instability of employment: Migliore, *supra* n. 5 , at 30-31.
[8] Lysaght et al, *supra* n. 3, at 412.
[9] K. Scior, 'Toward Understanding Intellectual Disability Stigma: Introduction' in K. Scior and S. Werner (eds), *Intellectual Disability and Stigma – Stepping Out from the Margins* (Palgrave Macmillan 2016) 3.
[10] *Equal Employment Opportunity Commission (EEOC) and Perkl v CEC Entertainment, Inc. d/b/a Chuck E. Cheese's* 2000 U.S. Dist. LEXIS 13934 (W.D. Wis. 2000).
[11] D Unger, L Campbell and B McMahon 'Workplace Discrimination and Mental Retardation: the National EEOC ADA Research Project' 23 Journal of Vocational Rehabilitation 145, 150 (2005); EEOC 'Selected List of Pending and Resolved Cases Involving Intellectual Disabilities' available at https://www.eeoc.gov/eeoc/litigation/selected/intellectual_disabilities.cfm (accessed 11 Dec. 2018).
[12] Scior, *supra* n. 9.
[13] M Gormley, Workplace Stigma Towards Employees With Intellectual Disability: a Descriptive Study, 43 Journal of Vocational Rehabilitation 249, 253 (2015).
[14] e.g. EEOC, 'EEOC sues Adecco USA for Disability Discrimination': https://www.eeoc.gov/eeoc/newsroom/release/8-29-18b.cfm (accessed 11 Dec. 2018).

While acknowledging the multiple causes of labour market marginalisation, this article focuses upon discrimination and the role that law can play in tackling this barrier. This warrants exploration because existing literature and data (discussed further below) indicate that people with ID encounter various hurdles when seeking to rely upon employment discrimination legislation.[15] To this end, this article takes the Americans with Disabilities Act (ADA) of 1990[16] as a case study. This legislation had extensive influence on law in other jurisdictions because it created a 'new paradigm' that 'inspired disability activists across the globe to rethink disability as a civil rights issue'.[17] It represented a shift from a welfare/charity approach to disability towards one based upon non-discrimination.[18] Critically, it embedded the idea that denial of reasonable accommodation is a form of discrimination, a position that is today reflected in the UN Convention on the Rights of Persons with Disabilities (CRPD).[19] Yet its inspiring conceptual framework is tempered by the experience of its practical impact upon the labour market: 'nearly all empirical analyses conclude that the relative employment rates of disabled persons has not improved significantly since the statute's passage'.[20] In addition, the approach by courts to the interpretation of the employment provisions of the ADA has been widely criticised given the extremely low rates of success for plaintiffs.[21] In both its strengths and its limitations, the ADA remains a global point of reference in understanding disability discrimination legislation.

Section 1 provides a short introduction to the ADA and its application to people with ID. Section 2 examines in more detail the duty on employers to provide reasonable accommodation. Section 3 turns to the specific issue of sheltered employment and its relationship to the ADA. Finally, Section 4 concludes by reflecting on the anti-discrimination model and its impact upon people with ID.

Before commencing the substance of the article, it is appropriate to make some brief remarks about terminology. There is no international consensus on the definition of intellectual disability, but a commonly cited definition is the following:

> *Intellectual disability* is a disability characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many

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[15] S. Herr, 'The Potential of Disability Non-Discrimination Laws' in S. Herr, L. Gostin, and H. Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press 2003) 203, 204.

[16] Pub L No. 101-336, 104 Stat 327.

[17] K. Heyer, *Rights Enabled – the Disability Revolution, from the US, to Germany and Japan, to the United Nations* (University of Michigan Press 2015) 3; T. Degener, 'Disability Discrimination Law: a Global Comparative Approach' in A. Lawson and C. Gooding (eds), *Disability Rights in Europe – From Theory To Practice* (Hart Publishing 2005) 87, 89.

[18] Heyer, ibid 32.

[19] Art 2 CRPD.

[20] M.A. Stein, M.E. Waterstone and D.B. Wilkins, Cause Lawyering for People with Disabilities, 123 *Harvard Law Review* 1658 (2010). See also, S. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (Yale University Press 2009) 117; P. Blanck, S. Schwochau and C. Song, 'Is it Time to Declare the ADA a Failed Law?' in D. Stapleton and R. Burkhauser (eds), *The Decline in Employment of People with Disabilities – a Policy Puzzle* (W.E. Upjohn Institute for Employment Research 2003) 301; L. Schur, D. Kruse and P. Blanck, *People with Disabilities – Sidelined or Mainstreamed?* (Cambridge University Press 2013) 78.

[21] Stein et al, ibid 1659.

everyday social and practical skills. This disability originates **before the age of 18** (emphasis original).[22]

This definition captures the combined effect of impairments in cognition (frequently measured by intelligent quotient (IQ) tests) and adaptive abilities, such as 'the areas of social/interpersonal skills and responsibility, communication, self-care, home living …'.[23] Intellectual impairments, such as Down Syndrome, can thus be distinguished from other types of impairment, such as autism. While the latter may affect adaptive behaviour, such as social communication skills, autism does not, *per se*, imply a limitation in intellectual functioning. A distinction can also be made between intellectual disabilities and learning disabilities. The latter term is often associated with impairments that affect learning, such as dyslexia. An individual may require more time to process information, but her intellectual functioning is not, *per se*, limited. It must be acknowledged, however, that a multiplicity of terms are used in literature, activism and legal documents, and it may be unclear what meaning is being attached to the precise label in use. Older sources often use 'mental retardation', but this term has been largely abandoned by activists and academic commentary. In this article, some cases where judges have used the term 'learning disability' have been included because the description of the person's impairment is vague (e.g. 'cognitive deficits'[24]) and/or the circumstances of the case illustrate issues that would also affect those with an intellectual impairment.

## 1. The ADA and People with Intellectual Disabilities

### a. The ADA: Setting the Scene

The ADA was premised upon a change in thinking about the role for people with disabilities in the labour market. It challenged assumptions that such people were unable to work productively in the open labour market. Instead, it reflected 'the fundamental assumption that stigma and stereotypes are primary barriers keeping people with disabilities out of the workplace'.[25] In so doing, it drew an explicit analogy with other social movements seeking equality;[26] indeed, the Congressional findings at the outset of the ADA adopted language familiar to 'civil rights discourse' in other contexts.[27] By placing discrimination at the centre of its conceptual framework, the ADA reflected a departure from the 'individual' or 'medical' model of disability. This views the disadvantages experienced by people with disabilities as primarily caused

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[22] American Association on Intellectual and Developmental Disabilities (AAIDD), *Definition of Intellectual Disabilit*y, http://aaidd.org/intellectual-disability/definition#.WdZBnUy-LgE (accessed 11 Dec. 2018).
[23] J. Harris, *Intellectual Disability – Understanding Its Development, Causes, Classification, Evaluation, and Treatment* (Oxford University Press 2006) 65.
[24] *Galvan v City of Bryan, Texas*, 367 F. Supp. 2d 1081, 1090 (S.D. Tex. 2004).
[25] Heyer, *supra* n. 17, at 32.
[26] Ibid 66.
[27] M. Diller, 'Judicial Backlash, the ADA, and the Civil Rights Model of Disability' in L. Hamilton Krieger (ed), *Backlash Against the ADA* (University of Michigan Press 2003) 62, 72. Sec. 2(a)(7) ADA stated that 'individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society …'.

by individual impairment; disability is 'perceived as inherent to the individual as well as a tragedy or misfortune that a person has to overcome'.[28] In the context of ID, this implies that individual limitations in intellectual functioning and adaptive behaviour are the main explanation for why few people with ID have jobs in the open labour market; in other words, they lack the capabilities and/or productivity for competitive work. By placing a spotlight on discrimination, the ADA leans towards a 'social' model of disability. Disability studies is rich in literature that analyses what the social model entails.[29] Crucially, it distinguishes impairment and disability.[30] It anchors the concept of disability 'in the social environment, rather than impairment, and carries with it the implication of action to dismantle the social and physical barriers to the participation and inclusion of persons with disability'.[31] Consequently, the ADA addresses 'uneven playing fields that historically have been presumed unbiased, but operate from baselines that reflect cultural prejudice and result in workplace exclusion.'[32] A key concept in this endeavour is reasonable accommodation. Failure to provide reasonable accommodation is defined as a form of discrimination in the ADA, which therefore places employers under a duty to take steps to remedy what Stein calls 'avoidable exclusion'.[33] While there are some barriers created by impairment that cannot be removed via accommodation,[34] the ADA tackles 'artificial' reasons for exclusion.[35] For example, a worker with ID could be placed at a disadvantage by the introduction of a new IT system if it is not accompanied by appropriate training that is tailored to the needs of someone who experiences difficulty in learning.[36]

The ADA prohibits discrimination on the basis of disability in employment (Title I), public services (Title II), and public accommodations (Title III).[37] The litigation discussed in the first two sections of this article largely relates to Title I, but section 3 examines the relevance of Title II. This prohibits discrimination in the 'services, programs, or activities of a public entity'.[38] It has been applied to publicly-funded sheltered employment facilities, where many people with ID continue to work. Given the space available, it is not possible to consider every type of employment

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[28] D. Dorfman, Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process, 42 *Law & Social Inquiry* 195, 199 (2017).

[29] e.g. M. Oliver and C. Barnes, *The New Politics of Disablement* (2nd edn, Palgrave MacMillan 2012) 22; T. Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014) ch 2; S. Mitra, The Capability Approach and Disability 16 *Journal of Disability Policy Studies* 236 (2006).

[30] T. Degener, 'A Human Rights Model of Disability' in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 31, 33.

[31] R. Kayess and P. French, Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities? 8 *Human Rights Law Review* 1, 6 (2008).

[32] M.A. Stein, A. Silvers, B. Areheart and L. Pickering Francis, Accommodating Every Body, 81 *The University of Chicago Law Review* 689, 698 (2014).

[33] M.A. Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 *University of Pennsylvania Law Review* 579, 602 (2004).

[34] Even with accommodation, a person with ID might be unable to perform a job requiring a very high level of written communication skills, e.g. some roles in the legal profession.

[35] Stein, *supra* n. 33, at 602.

[36] e.g. *Vollmert v Wisconsin Department of Transportation* 197 F.3d 293 (7th. Cir. 1999).

[37] 'Public accommodations' includes the provision of goods and services by private entities, e.g. hotels, restaurants, shops, leisure facilities: 42 U.S.C. § 12181(7). For an overview of the ADA, see, inter alia, R. Colker, *The Law of Disability Discrimination* (6th ed., LexisNexis 2007); P. Susser and P. Petesch, *Disability Discrimination and the Workplace* (2nd ed., BNA Books 2011).

[38] 42 U.S.C. § 12132.

discrimination that has arisen under the ADA involving people with ID. Section 2 concentrates upon reasonable accommodation, but it should be acknowledged that there are examples of successful litigation or settlements relating to other forms of discrimination.[39]

Notwithstanding certain individual cases, the general picture under Title I has been great difficulty for plaintiffs to succeed before courts. There has been 'an almost insurmountable barrier to trial, with some 97 percent of federal Title I plaintiffs losing'.[40] Courts have been repeatedly criticised for the narrow interpretations applied to Title I of the ADA, which appeared to contradict the vision behind the legislation.[41] As discussed below, this included a very restrictive reading of the definition of disability.[42] The hurdles thus imposed by the judiciary have been summarised in the notion of 'backlash'.[43] Stein observed that 'post-ADA Supreme Court rulings likewise demonstrate that the Justices continue to subscribe to the notion that disability-based rights differ in kind from more traditional civil rights, are contingent on humanitarian concerns rather than equality, and are thus subject to the availability of competing resources'.[44]

The situation of people with ID sits within this broader narrative. The case-law discussed below indicates that people with ID have also experienced the judicial tendency to give a narrow interpretation to the protections found in Title I. This compounds clear evidence that people with ID are amongst the least likely to attempt to challenge employment discrimination.[45] In relation to a complaint ('charge') of employment discrimination under Title I of the ADA, individuals are first required to lodge this with the Equal Employment Opportunity Commission (EEOC); the EEOC has a mandate for enforcing federal anti-discrimination legislation, including the ADA. In 2017, the EEOC reported that 0.6% of charges lodged with it under the ADA were on the basis of an intellectual disability; this figure is consistent with data for the previous two decades.[46] Several large-scale studies of complaints investigated and resolved by the EEOC have also found that the number of cases relating to ID is low compared to other types of disability.[47]

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[39] e.g. EEOC, *supra* n. 11; *EEOC v Hill Country Farms* 899 F. Supp. 2d 827 (S.D. Iowa 2012) involving harassment, discriminatory working conditions, and unequal pay in respect of 32 intellectually disabled men.

[40] A.C. Geisinger and M.A. Stein, Expressive Law and the Americans with Disabilities Act, 114 *Michigan Law Review* 1061, 1073 (2016). See also, L. Hamilton Krieger, 'Introduction' in L. Hamilton Krieger (ed), *Backlash Against the ADA* (University of Michigan Press 2003) 7.

[41] Hamilton Krieger, ibid.

[42] K. Schriner and R. Scotch, 'The ADA and the Meaning of Disability' in L. Hamilton Krieger (ed), *Backlash Against the ADA* (University of Michigan Press 2003) 164, 172.

[43] L. Hamilton Krieger, 'Sociolegal Backlash' in L. Hamilton Krieger (ed), *Backlash Against the ADA* (University of Michigan Press 2003) 340.

[44] Stein, *supra* n. 33, at 631; Geisinger and Stein, *supra* n. 40, at 1078.

[45] L. Pickering Francis, Employment and Intellectual Disability, 8 *The Journal of Gender, Race and Justice* 299, 313 (2004).

[46] EEOC, *ADA Charge Data by Impairments/Bases – Receipts (Charges filed with EEOC),* https://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm (accessed 12 Dec. 2018). The EEOC records 'learning disabilities' separately and this constituted 1.4% of charges under the ADA in 2017.

[47] T. Van Wieren, A. Armstrong, B. McMahon, Autism Spectrum Disorders and Intellectual Disabilities: a Comparison of ADA Title I Workplace Discrimination Allegations, 36 *Journal of Vocational Rehabilitation* 159, 165 (2012); Unger et al, *supra* n. 11, at 151.

### b. Defining 'Disability' and the ADA

Litigation under the original ADA often focused upon the first step of whether the plaintiff met the statutory definition of disability.[48] The Act provides that:

> The term "disability" means, with respect to an individual-
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> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment …'[49]

It might be assumed that many people with ID would satisfy this definition given that intellectual impairment is often identified during childhood and it may have already led to additional supports in education or when seeking employment. Nevertheless, the restrictive interpretation of disability adopted by the courts meant that people with ID, like many other plaintiffs, sometimes fell outside the scope of the ADA.[50] For example, *Littleton v Wal-Mart, Inc.*[51] concerned a 29 year old man who had been diagnosed with 'mental retardation' as a child. An employment coordinator in an independent living center assisted him to get a job interview, which later gave rise to a claim of discrimination in recruitment. The court accepted that he had 'certain limitations' because of his impairment, but it concluded that he had not established that he was substantially limited in major life activities, as required under the ADA.[52] The evidence that he would be able to communicate with other workers without the assistance of a job coach was deemed to indicate that he was not substantially limited in the major life activity of communicating and social interaction.[53] The case illustrates a paradox within the ADA: the plaintiff needs to argue simultaneously that she is sufficiently qualified to be able to perform the job in question, yet also show evidence that she is substantially limited in major life activities in order to fall within the definition of disability.[54] This creates a tension between the plaintiff's description of her abilities and her limitations.

Concern about the restrictive interpretation of the definition of disability eventually led to the ADA Amendments Act of 2008 (ADAAA).[55] In this Act, Congress expressly sought to depart from the pre-existing case-law and to adopt a wider understanding of disability.[56] This goal was pursued by changes to the ADA, but also revision of the

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[48] C. Sullivan and M. Zimmer, *Cases and Materials on Employment Discrimination* (9th ed., Wolters Kluwer 2017) 442.
[49] 42 U.S.C. §12102(1).
[50] e.g. *Anderson v General Motors Corporation* 1997 U.S. Dist. LEXIS 7829 (D. Kan. 1997). See further, Pickering Francis, *supra* n. 45, at 314-315; P. Blanck, *The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation* (American Association on Mental Retardation 1998) 17.
[51] 231 Fed. Appx. 874 (11th. Cir. 2007).
[52] Ibid 878.
[53] Ibid 877.
[54] E. Emens, Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act, 60 *American Journal of Comparative Law* 205, 216 (2012); Stein et al, *supra* n. 32, at 713.
[55] Pub. L. 110–325, 122 Stat. 3553. See further, Emens, ibid.
[56] Sec. 2 on findings and purpose of the Act.

Federal Regulations that the ADA mandated the EEOC to adopt.[57] The amended Regulations clarified that some impairments will:

> virtually always be found to impose a substantial limitation on a major life activity. … For example … an intellectual disability (formerly termed mental retardation) substantially limits brain function …[58]

In guidance on intellectual disability, the EEOC has also expressed the view that 'as a result of the changes made by the ADAAA, individuals who have an intellectual disability should easily be found to have a disability within the meaning of the first part of the ADA's definition of disability because they are substantially limited in brain function and other major life activities (for example, learning, reading and thinking).'[59] Even if examples can still be found of plaintiffs failing to establish that their intellectual impairment reaches the threshold required by the ADA,[60] it would seem that plaintiffs with ID now face less obstacles in this regard.[61] Nevertheless, as explored in the next section, there are other requirements in the ADA that have also proven difficult for plaintiffs with ID to satisfy.

## 2. Employment Discrimination and The Duty of Reasonable Accommodation

Title I of the ADA prohibits discrimination in employment 'against a qualified individual on the basis of disability'.[62] Discrimination includes 'limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee'.[63] While this echoes language found in other branches of US anti-discrimination legislation,[64] the ADA also provides that discrimination consists of:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity …[65]

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[57] 29 C.F.R. § 12116.
[58] 29 C.F.R. § 1630.2(3)(ii)-(iii): Regulations to Implement the Equal Employment Provisions of the the Americans with Disabilities Act.
[59] EEOC, *Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA),* https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm (accessed 11 Dec. 2018).
[60] e.g. evidence of a 'moderate cognitive impairment' was not, by itself, sufficient to establish disability under the ADA in *Barrett v Seneca Foods* 2018 U.S. Dist. LEXIS 184586 (W.D. Wis 2018).
[61] Sullivan and Zimmer, *supra* n. 48, at 449, argue that case-law since the ADAAA shows that it is, in general, easier for individuals to prove that they fall within the definition of disability than prior to the amendments. See also, Stein et al*, supra* n. 32, at 720.
[62] 42 U.S.C. § 12112(a). Disability discrimination in relation to federal employment, and federal programs and activities, is prohibited under the Rehabilitation Act of 1973; 42 U.S.C. §§ 791 and 794.
[63] 42 U.S.C. § 12112(b)(1).
[64] e.g. 42 U.S.C. § 2000e-2(a) on discrimination because of race, color, religion, sex, or national origin.
[65] 42 U.S.C. § 12112(b)(5)(A).

Typically, people with ID do not easily find employment through competition in the open labour market. Often inclusion in the open labour market stems from 'supported employment' programmes that seek to match the individual with a suitable job opportunity.[66] A key element of supported employment for people with ID is the role of 'job coaches' who provide 'intensive, individualized coaching' in order to assist the person to learn how to perform the job, both at the outset and often with ongoing support.[67] Supported employment is not, per se, a form of reasonable accommodation,[68] but accommodations within an identified job role may be critical to facilitating the successful integration of a person with ID.

The ADA defines reasonable accommodation in broad and non-exhaustive terms. It may include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[69]

The EEOC has published specific guidance on people with ID in the workplace. This identifies relevant accommodations that employers could provide, such as offering 'easy-to-read' versions of complex information, permitting more time for learning and performing tasks, and allowing support from third parties, including job coaches.[70] Given that intellectual impairment may affect communication skills, interaction with managers or other workers is an area where accommodation may be required.[71] For example, if a formal procedure is being conducted in the workplace (such as investigating an internal complaint), a worker with ID might need more time to answer questions, and the investigator might need to use simple sentences with language that could be easily understood.[72] An early example of the importance of accommodation in the style of management can be found in *Kent v Derwinski*.[73] This case concerned a woman with intellectual and psychosocial disabilities who was hired as part of an employment support programme. Initially, she performed effectively in this job with appropriate support, but a new line manager subjected her to criticism and inappropriate disciplinary measures. Ultimately, Ms. Kent resigned after two hospitalizations for breakdowns. The Court held that her employer failed to provide a reasonable accommodation in the form of 'good management techniques'

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[66] R. Lysaght, V. Cobigo and K. Hamilton, Inclusion as a Focus of Employment-Related Research in Intellectual Disability from 2000 to 2010: a Scoping Review, 34 *Disability & Rehabilitation* 1339,1340 (2012).
[67] E. Hoekstra, K. Sanders, W. van den Heuvel, D. Post, and J. Groothoff, Supported Employment in the Netherlands for People with an Intellectual Disability, a Psychiatric Disability and a Chronic Disease. A Comparative Study, 21 *Journal of Vocational Rehabilitation* 39, 42 (2004).
[68] EEOC Interpretative Guidance draws a distinction between supported employment and reasonable accommodation, which are 'non synonymous': 29 C.F.R. pt. 1630, app. §1630.9.
[69] 42 U.S.C. § 12111(9).
[70] EEOC, *supra* n. 59.
[71] Blanck, *supra* n. 50, at 45.
[72] Carr, Appeal No. 01A00212 (EEOC, 28 January 2000).
[73] 790 F. Supp. 1032, (E.D. Wash. 1991).

and this caused her constructive dismissal.[74] In a similar vein, the District Court rejected a motion for summary judgment in a case where the defendant employer claimed that the worker's dismissal was due to poor performance. The worker had learning disabilities and there was evidence that his line manager 'screamed at him continually when he failed to complete a task properly'.[75] The Court held that the worker's request for additional training from his line manager could have constituted a reasonable accommodation.[76]

The limited body of existing case-law indicates mixed fortunes for plaintiffs with ID when seeking to rely upon this aspect of the ADA. Two issues can be highlighted: demonstrating that the plaintiff is an 'otherwise qualified individual' and job coaches as a reasonable accommodation.

### a. Otherwise Qualified Individual With a Disability

In order to bring a claim that there has been a denial of reasonable accommodation, the plaintiff will first need to establish: (1) that she has a disability falling within the definition of the ADA;[77] and (2) that she is 'an otherwise qualified individual with a disability'.[78] As discussed in Section 1, the ADAAA made it easier for a person with ID to satisfy the definition of disability, but it did not make any change to the need to show that the plaintiff is 'an otherwise qualified individual'.[79] The ADA defines a 'qualified individual' as 'an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'[80] The EEOC Regulations specify that the term 'qualified', in relation to an individual with a disability, 'means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position'.[81] On one hand, there is no obligation on an employer to provide reasonable accommodation to a plaintiff who is not an otherwise qualified individual, so this is a precondition for the duty to arise. On the other hand, the assessment of whether the plaintiff can perform the essential functions of the job includes the possibility that these can be performed with accommodation, so substantive questions over what

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[74] Ibid Para II.B.
[75] *Metz v The Shell Oil Company and Equistaff, LLC* U.S. Dist. LEXIS 21614, 17 (N.D.Ill. 2006).
[76] Ibid 18.
[77] Note, however, that the ADAAA provides that there is no duty of reasonable accommodation in respect of claims brought under the third limb of the definition of disability ('being regarded as having such an impairment'): see further, Emens, *supra* n. 54, at 216.
[78] 42 U.S.C. § 12112(b)(5)(A).
[79] A. Kanter, The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities, 63 *Drake Law Review* 819, 839 (2015).
[80] 42 U.S.C. § 12111(8).
[81] 29 C.F.R. § 1630.2(m). The EEOC has also issued 'Interpretive Guidance' in the Appendix to the Regulations implementing the ADA. These state: 'The term "otherwise qualified" is intended to make clear that the obligation to make reasonable accommodation is owed only to an individual with a disability who is qualified within the meaning of §1630.2(m) in that he or she satisfies all the skill, experience, education and other job-related selection criteria. An individual with a disability is "otherwise qualified", in other words, if he or she is qualified for a job, except that, because of the disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions': 29 C.F.R. pt. 1630, app. §1630.9.

steps the employer could or should have taken are often intertwined with the determination of whether the individual is qualified.[82]

Case-law suggests that plaintiffs with ID may find the 'qualified individual' requirement to be a stumbling block for their claims. For example, in *Miller v Santa Clara County Library*,[83] the plaintiff had Down Syndrome and had been dismissed after several days of work in two different library branches. The dismissals were based on his need for supervision, but both libraries declined offers to attempt to put in place additional support for him. Notably, he subsequently took up placements elsewhere and he was able to perform these successfully. Nevertheless, a challenge to his dismissals under the ADA failed because he was not regarded as a 'qualified individual'. The Ninth Circuit Court of Appeals held that he lacked the 'basic, rudimentary knowledge required for library work' and that he could not 'perform without a job coach at his elbow'.[84] As will be seen in other cases, it appears that his need for a job coach was regarded as evidence that he could not perform the essential functions of the position, even though the ADA expressly permits reasonable accommodation to be taken into account when determining if the person can perform essential functions.

In a similar vein, in *EEOC v Dollar General Corporation*[85] the defendant employer argued that the plaintiff was not a 'qualified individual' because she could not perform the essential functions of the 'clerk' position. Ms. Bost, described as 'moderately mentally retarded' by the court, was hired following assistance from a supported employment coach. She worked part-time performing cleaning duties and tidying merchandise. While she performed her duties satisfactorily, she was later dismissed.[86] The defendants argued that she was dismissed because she was unable to operate the cash register, which they contended was an essential function of the position.[87] Although the employer's manual included operating the cash register as a job function of clerks, she had been allocated other duties from the outset and she performed all the tasks assigned to her. In considering what were the essential functions of her position, the District Court concluded that 'the essence of the inquiry requires a logical, case-by-case examination involving a common sense consideration of various factors, such as what an employee actually does and what she was hired to do'.[88] As Ms. Bost was able to perform the functions that she was hired to do, she was a 'qualified individual'.

These examples illustrate that the definition of essential job functions is particularly sensitive in relation to people with ID who may be constrained in the range of tasks that they can perform. If the essential job functions are defined broadly, then this may exclude people with ID.[89] The ADA states that 'consideration shall be given to the employer's judgment as to what functions of a job are

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[82] Sullivan and Zimmer, *supra* n. 48, at 475.
[83] 24 Fed. Appx. 762 (9th. Cir. 2001).
[84] Ibid at 765.
[85] 252 F. Supp. 2d 277 (M.D.N.C. 2003).
[86] Ibid at 281.
[87] Ibid at 285.
[88] Ibid at 288.
[89] The definition of what constitutes 'essential job functions' has given rise to considerable case-law under the ADA: L. Postol, ADA Open Issues: Transfers to Vacant Positions, Leaves of Absence, Telecommuting, and Other Accommodation Issues, 8 *Elon Law Review* 61, 81 (2016).

essential',[90] indicating some deference towards business choices in this area.[91] Yet this is not unlimited, as indicated above in *EEOC v Dollar General Corporation*. Pickering Francis also highlights the risk that persons with ID may be vulnerable to the effects of restructuring within organisations.[92] Some people with ID will encounter barriers to learning how to perform new tasks or a broader variety of tasks. This poses the risk that employer-imposed changes to the essential job functions create a situation where the 'qualified individual' test is no longer satisfied.[93]

A good illustration of this scenario is found in *Galvan v City of Bryan, Texas.*[94] The plaintiff had been working for 11 years and had been performing the role of 'crew worker' on a waste collection truck. Following a reorganisation, crew workers were required to become 'equipment operators', which included an obligation to become a licenced commercial driver with permission to operate heavy equipment. The plaintiff, who had learning disabilities, was unable to pass the test for the licence and he was dismissed as a result. His claim under the ADA was rejected by the District Court because operating commercial vehicles was an essential function of the new position and, without a licence, there was no accommodation that could enable him to perform that function.[95]

### b. Job Coaches as a Reasonable Accommodation

If a plaintiff can establish that she would be able to perform the essential job functions, then not providing reasonable accommodation will, in principle, constitute discrimination on the basis of disability. At this point, the focus on the inquiry will shift to the question of what constitutes a reasonable accommodation and whether any such measures would give rise to undue hardship for the employer.[96] Although an array of legal issues can arise, in the context of this article, the specific issue of job coaches warrants analysis. As mentioned earlier, this is a key component in supported employment schemes that assist people with ID in finding work in the open labour market. Yet existing case-law places significant constraints on the extent to which a job coach constitutes a reasonable accommodation.

In *EEOC v Hertz Corporation*,[97] the defendant hired two persons with ID for part-time work as part of a supported employment programme. At no cost to the employer, the workers were accompanied by job coaches to train and assist them. The arrangement broke down, however, when two of the job coaches were observed engaging in intimate conduct. They were required to leave the premises and the two workers that they supported were dismissed as a result. In subsequent legal proceedings under the ADA, the District Court concluded that there was no denial of

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[90] 42 U.S.C. § 12111(8). The ADA also states that 'if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job': 42 U.S.C. § 12111(8). EEOC Regulations provide further explanation of the meaning of 'essential functions': 29 C.F.R. § 1630.2(n).

[91] See further, Postol, *supra* n. 89, at 74.

[92] Pickering Francis, *supra* n. 45, at 310 and 323.

[93] e.g. *Heiden v Littelfuse, Inc.* U.S. Dist. LEXIS 19957 (N.D.Ill. 2005); *Anderson v General Motors Corporation* U.S. Dist. LEXIS 7829 (D. Kan. 1997).

[94] 367 F. Supp. 2d 1081 (S.D. Tex. 2004).

[95] Ibid 25-26.

[96] 42 U.S.C. § 12112(b)(5)(A).

[97] 1998 U.S. Dist. LEXIS 58 (E.D. Mich. 1998).

reasonable accommodation because the two workers indefinitely required full-time job coaches. It accepted that 'a temporary job coach providing job training to a qualified individual' might be a reasonable accommodation, but it rejected the idea of a full-time coach of indefinite duration. This view was shared by the District Court in *EEOC v Dollar General Corporation*.[98] It went a step further by holding that it was also necessary that the role of the job coach was confined to training the worker to perform the essential job functions. It would not be a reasonable accommodation if the job coach was helping to perform the job, other than 'the bare minimum of "physical prompting" needed to demonstrate proper technique'.[99]

Given the limited body of case-law, caution is needed before attaching too much weight to the approach taken in these cases. As discussed earlier, they emerge from a period when courts seemed particularly hostile to the ADA, so there remains the possibility that judicial attitudes could shift. They do, perhaps, indicate doubt about extending the concept of reasonable accommodation to include the (long-term) presence in the workplace of a person other than the worker. Yet permanency is not a reason for rejecting an accommodation in other circumstances;[100] for example, a worker with a visual impairment may need permanent assistive technology.[101] In both of the above cases, the courts justified their decision with reference to the EEOC Interpretative Guidance:

> an employer, under certain circumstances, may be required to provide modified training materials or a temporary "job coach" to assist in the training of an individual with a disability as a reasonable accommodation.[102]

The reference to a job coach being 'temporary' was relied upon to reject the proposition that it could be a reasonable accommodation if the worker required support on a longer-term basis. More broadly, these decisions may be symptomatic of a judicial perception that accommodation would require employers to hire 'costly and unproductive' workers,[103] even though this is not sustained by the empirical evidence that most accommodation have only modest costs.[104]

### c. Summary

This section of the article has reviewed the limited body of case-law under Title I of the ADA involving plaintiffs with ID. There is, of course, a much wider range of legal issues that confront plaintiffs, many of which could also affect those with ID.[105] What the existing case-law indicates is that plaintiffs with ID may be particularly affected by the need to establish that they are qualified to perform the essential functions of the job, as well as restrictions in the interpretation of what kinds of support may be a

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98 252 F. Supp. 2d 277, 292 (M.D.N.C. 2003).
99 Ibid.
100 Pickering Francis, *supra* n. 45, at 319.
101 Acquisition of equipment is expressly included in the non-exhaustive list of reasonable accommodations found in the ADA: 42 U.S.C. § 12111(9).
102 29 C.F.R. pt. 1630, app. §1630.9.
103 Geisinger and Stein, *supra* n. 40, at 1078.
104 Schur et al, *supra* n. 20, at 76.
105 Kanter, *supra* n. 79, at 23. e.g. the employer's duty to provide reasonable accommodation arises in relation to 'known' impairments (42 U.S.C. § 12122(b)(5)(A)) and there may be dispute over whether the employer had sufficient knowledge of the plaintiff's need for accommodation (Sullivan and Zimmer, *supra* n. 48, at 494).

reasonable accommodation. This is a possible explanation for the lower rate of reasonable accommodation claims amongst cases relating to ID compared to other types of disability.[106] Following the ADAAA, it may be easier for plaintiffs to establish that they have a disability for the purposes of the legislation, but Stein et al highlight the risk that this gain is counter-balanced by courts placing greater emphasis upon whether the individual is qualified to perform the essential functions of the job: this may be 'a new way for courts to summarily dispense of cases before reaching the merits of alleged discrimination'.[107] Should this trend be sustained, this would make it even more difficult for people with ID to succeed in actions under Title I of the ADA.

## 3. Sheltered Employment and Anti-Discrimination Legislation

Sections 1 and 2 of this article have examined examples of litigation that pertain to the treatment of people with ID in the open labour market; in other words, these were jobs performed in companies that normally rely upon competitive recruitment processes for the allocation of jobs and where there are also workers without disabilities. Yet many people with ID continue to perform work in segregated environments, where most workers have disabilities. In the USA, research suggests that the majority of people with ID continue to work in such settings.[108] Sheltered employment has certain benefits; it is potentially more stable and predictable than a job in the open labour market, while some workers derive benefits from the social interaction that it entails.[109] Some people experience isolation when working in the open labour market and, at times, there can be strong attachment to existing sheltered facilities.[110] In addition, most workshops offer multiple services, such as transport to and from work, and medical and housing support.[111]

There is, however, a strong consensus in the academic literature and contemporary public policy that inclusion in the open labour market is normally preferable. Evidence consistently shows that sheltered employment is largely ineffective in providing a pathway into other forms of employment.[112] The open labour market is typically better equipped to enhance the skills and autonomy of people with ID.[113] Research also indicates that many people with ID who find jobs in

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[106] Unger et al analysed cases resolved by the EEOC between 1992 and 2003. Reasonable accommodation was an issue in 11% of mental retardation cases, compared to 20% for all other disability cases: *supra* n. 47, at 150.
[107] Stein et al, *supra* n. 32, at 723.
[108] Cohen Hall and Kramer, *supra* n. 6, at 148; Migliore et al, *supra* n. 5, at 30. In 2001, a survey of sheltered workshops employing around 400,000 workers recorded that 74% had 'mental retardation or other developmental disability': United States General Accounting Office (GAO), 'Special Minimum Wage Program: Centers Offer Employment and Support Services to Workers with Disabilities, but Labor Should Improve Oversight' GAO-01-886 (GAO 2001) 24.
[109] Cohen Hall and Kramer, ibid, 153 and 162.
[110] National Council on Disability, 'Subminimum Wage and Supported Employment' (National Council on Disability 2012): https://ncd.gov/publications/2012/August232012 (accessed 5 Dec. 2018) 28 and 39.
[111] Z. Brennan-Krohn, Employment for People with Disabilities: a Role for Anti-Subordination, 51 *Harvard Civil Rights - Civil Liberties Law Review* 239, 240 (2016).
[112] GAO, *supra* n. 108, at 28; ILO, *supra* n. 2, at 73.
[113] Lysaght et al, *supra* n. 3, at 413; J. Cramm, H. Finkenflügel, R. Kuijsten and N. van Exel, How Employment Support and Social Integration Programmes are Viewed by the Intellectually Disabled, 53 *Journal of Intellectual Disability Research* 512, 516 (2009).

the open labour market value the opportunity to expand their social network[114] and that this is associated with benefits to mental well-being.[115]

A key issue is pay because wages are lower in sheltered employment than in the open labour market.[116] Sheltered employment in the US is underpinned by a minimum wage exemption scheme. Section 14(c) of the Fair Labor Standards Act permits employers certified by the US Department of Labor to pay less than the federal minimum wage to individuals 'whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury'.[117] Although this scheme is not exclusive to sheltered employment, it is predominantly used by such facilities and, to some extent, supports the financial viability of these workshops.[118] The possibility to pay workers with disabilities less than the minimum wage applicable to other workers is evidently in tension with the prohibition of discrimination found in the ADA. In 2012, the National Council on Disability (a federal agency) reported that while 'many disability advocates' wanted section 14(c) to be abolished, there was not a consensus because others feared the loss of opportunities for those who could not otherwise obtain work in the open labour market.[119] It recommended that section 14(c) be phased-out, with an initial focus on ensuring school leavers enter the open labour market, followed by more recent entrants into sheltered employment.[120]

Section 14(c) remains in force,[121] but this section explains how the ADA has been used to require public authorities to take measures to divert resources away from the sustenance of sheltered employment and into supported employment schemes that aim to provide jobs in the open labour market. This stems from litigation under Title II of the ADA, which prohibits discrimination in public services. Critically, in 1999, the US Supreme Court held that this could be applied to situations where people with disabilities were segregated from others in the provision of public services.

### a. Olmstead

In *Olmstead v L.C.*,[122] the US Supreme Court was confronted with the situation of two women with ID who had received treatment for mental health problems in a psychiatric institution. When their health improved, they could have been discharged

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[114] Cohen Hall and Kramer, *supra* n. 6, at 147.
[115] R. Kober and I. Eggleton, The Effect of Different Types of Employment on Quality of Life, 49 *Journal of Intellectual Disability Research* 756, 759 (2005).
[116] R Evert Cimera, The Percentage of Supported Employees with Significant Disabilities Who Would Earn More in Sheltered Workshops, 42 *Research and Practice for Persons with Severe Disabilities* 108, 117 (2017).
[117] 29 U.S.C. § 241(c)(1).
[118] Brennan-Krohn, *supra* n. 111, at 247.
[119] National Council on Disability, *supra* n. 110, at 1.
[120] Ibid 18.
[121] Legislative changes in 2014 ended the use of minimum wage exemptions for federal employees: Brennan-Krohn, *supra* n. 111, at 245. Moreover, employers may have to comply with state legislation if this does not permit exemptions from the state minimum wage: US Department of Labor, 'Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act' (2016): https://www.dol.gov/whd/opinion/AdminIntrprtn/FLSA/2016/FLSAAI2016_2.pdf (accessed 6 Dec. 2018).
[122] 527 U.S. 581 (1999).

to live in the community, but a shortage of resources meant that no community residence could be located and they had to remain for an extended period in the psychiatric institution. They brought actions against the State authorities in Georgia arguing that the failure to place them in a community-based programme was in breach of the prohibition of discrimination in Title II of the ADA.[123]

In a seminal judgment, the Supreme Court held that 'unjustified institutional isolation of persons with disabilities is a form of discrimination'.[124] The Court justified this conclusion with two core arguments. First, unnecessary institutionalisation 'perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life'.[125] Secondly, 'confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment'.[126] This reading of the concept of discrimination was buttressed by Federal Regulations adopted under Title II of the ADA. These stated that 'a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'[127] The Supreme Court held that the obligation to provide community-based treatment was not absolute. It existed if: the responsible medical professional determined that this was appropriate; it was not opposed by the affected person; and if community placement could be reasonably accommodated, 'taking into account the resources available to the State and the needs of others with mental disabilities'.[128] *Olmstead* did not, therefore, imply that it was necessary to close all institutional settings;[129] these could continue for 'persons unable to handle or benefit from community settings'.[130]

Although *Olmstead* concerned residential facilities, the concept of discrimination adopted by the majority on the Court had a broader significance for the interpretation of the ADA. Rosenthal and Kanter noted that it was the first decision in which the US Supreme Court 'or likely any high court of any country' had recognised that 'undue institutionalization may constitute unlawful discrimination'.[131] From a contemporary perspective, this interpretation of discrimination is consistent of that advocated by the UN Committee on the Rights of Persons with Disabilities (CmRPD), which also views institutionalization as a form of 'disability-specific discrimination'.[132]

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[123] Title II ADA, 42 U.S.C. § 12132: 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'
[124] 527 U.S. 581, 600 (1999).
[125] Ibid.
[126] Ibid 601.
[127] 28 C.F.R. § 35.130(d).
[128] 527 U.S. 581, 607 (1999).
[129] J. Karger, "Don't Tread on the ADA": *Olmstead v. L.C.* ex rel. *Zimring* and the Future of Community Integration for Individuals with Mental Disabilities, 40 *Boston College Law Review* 1221, 1256 (1999).
[130] 527 U.S. 581, 601 (1999).
[131] E. Rosenthal and A. Kanter, 'The Right to Community Integration for People with Disabilities under United States and International Law' in M.L. Breslin and S. Yees (eds), *Disability Rights Law and Policy* (Transnational Publishers Inc 2002) 309, 322.
[132] Para. 73(c), CmRPD, General Comment No. 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6, 26 April 2018. The USA has signed, but not ratified, the UN Convention on the Rights of Persons with Disabilities.

### b. Olmstead Enforcement by the Department of Justice (and Individual Litigants)

Unlike Title I of the ADA, which is enforced by the EEOC, the jurisdiction for enforcement of Title II lies with the US Department of Justice (DOJ).[133] In conjunction with other agencies, it processes complaints alleging a breach of Title II and it enjoys powers to litigate to enforce its provisions.[134] The Supreme Court decision in *Olmstead* was in 1999, but a decade later, and following criticism from disability advocates,[135] the DOJ launched a concerted effort to ensure its enforcement.[136] This involved investigations into whether States were complying with *Olmstead* by ensuring that individuals able to live in the community were not being unnecessarily kept in segregated institutions. Although *Olmstead* concerned residential institutions, the underlying principle has been applied to State-sponsored sheltered employment schemes. As described above, the Supreme Court held that 'unjustified isolation' is a form of discrimination. In essence, it has been argued that state practices that unnecessarily isolate people with disabilities in sheltered employment constitute discrimination.

The first reported litigation that applied Title II of the ADA to sheltered employment arose from a combination of individual complaints and DOJ investigation. In Oregon, eight people with intellectual or developmental disabilities (IDD) initiated legal proceedings against the state authorities arguing that they were unnecessarily segregated into sheltered workshops when they were able and would prefer to work in an integrated setting.[137] The District Court rejected a motion to dismiss the action; it held that there was 'no statutory or regulatory basis for concluding that the integration mandate to provide services in the most integrated setting appropriate applies only where the plaintiff faces a risk of institutionalization in a residential setting'.[138] Prior to this decision, the DOJ had opened an investigation into whether Oregon's reliance on sheltered workshops was in breach of Title II of the ADA. This entailed on-site visits and interviews with a range of relevant parties, including people with ID. It found that 'thousands of individuals still spend the majority of their day-time hours receiving employment services in segregated sheltered workshops, even though they are capable of, and want to receive employment services in the community.'[139] Those in sheltered workshops earned an average of $3.72 per hour, while the 'overwhelming majority' of those in supported employment earned the State minimum wage of $8.80 per hour or above.[140] The State of Oregon later entered into a Settlement Agreement that included, *inter alia*, detailed commitments on the expansion of supported employment schemes and an

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[133] National Council on Disability, *Promises to Keep: a Decade of Federal Enforcement of the Americans with Disabilities Act* (National Council on Disability 2000) 27.
[134] Ibid 27 and 48.
[135] Ibid 128.
[136] See further, DOJ, *Olmstead: Community Integration for Everyone,* https://www.ada.gov/olmstead/index.htm (accessed 11 Dec. 2018).
[137] *Lane and others v Kitzhaber and others*, 3:12-cv-00138-ST (D. Or. 2012).
[138] Ibid 12.
[139] *Lane v Brown*, *DOJ Findings Letter to Oregon*, 2 https://www.ada.gov/olmstead/olmstead_cases_list2.htm#lane (accessed 11 Dec. 2018).
[140] Ibid 12.

end to sheltered workshop placements for those aged between 14 and 24, as well as other people with IDD who were not already working in a sheltered workshop.[141]

In a similar vein, *USA v State of Rhode Island* entailed a DOJ investigation into employment, vocational, and day services for persons with IDD.[142] It made comparable findings to the Oregon investigation, including a significant disparity in average wages between those in sheltered employment and those in integrated settings.[143] It concluded that the over-reliance of the state on sheltered workshops meant that individuals had 'virtually no choice other than segregated programs'.[144] The case against Rhode Island was settled via a Consent Decree,[145] where the State committed to a detailed plan of annual increases in the number of places available in supported employment schemes. These placements will be paid at least the State minimum wage.[146] The State also undertook to establish a 'Conversion Institute' to assist sheltered workshops to convert to the provision of supported employment services.[147] The Consent Decree included the appointment of a Monitor to investigate and report periodically on the State's compliance with its undertakings.[148]

While most DOJ enforcement activity under *Olmstead* has been directed towards residential institutions, the examples from Oregon and Rhode Island illustrate that the prohibition of discrimination can be used to challenge established practices in relation to employment support for people with ID. In keeping with *Olmstead*, the DOJ has accepted that sheltered workshops may be permissible for those 'who make an informed choice to rely on them'.[149] It has, though, rejected the argument that maintenance of the status quo could be justified on grounds of cost (which is a permitted consideration in *Olmstead*). The DOJ maintains that providing services in 'integrated settings is not only practicable but has been shown to lower costs over the longer term, and does not fundamentally alter state service systems'.[150]

There is insufficient evidence to assess whether these initial DOJ actions have had any ripple effect in terms of prompting other states to review the nature of employment supports for people with ID. There was already a trend amongst states to shift policy towards prioritising supported employment in the open labour market for people with IDD.[151] Yet the National Council for Disability reported that data for the period between 2001 and 2009 indicated a decline in the proportion of people with IDD who were employed in an integrated setting.[152] Brennan-Krohn suggests that the *Olmstead* enforcement litigation has been a factor in prompting states to

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[141] *Lane et al v Brown et al*, *Settlement Agreement*, 3:12-cv-00138-ST https://www.ada.gov/olmstead/olmstead_cases_list2.htm#lane (accessed 11 Dec. 2018).
[142] *United States v Rhode Island, DOJ Letter of Findings,* https://www.ada.gov/olmstead/olmstead_cases_list2.htm#ri-state (accessed 11 Dec. 2018).
[143] Ibid.
[144] Ibid 9.
[145] These are binding on the parties and supervised by the federal court in which they are entered: National Council on Disability, *supra* n. 133, at 84.
[146] *United States of America v State of Rhode Island*, Case No. CA14-175, 9 April 2014 (D. R.I. 2014).
[147] Ibid 21.
[148] Ibid 25-27.
[149] *United States v Rhode Island, DOJ Letter of Findings*, *supra* n. 142, at 4.
[150] Ibid.
[151] National Council on Disability, *supra* n. 110, at 16.
[152] Ibid.

take more steps to promote a transition away from sheltered employment.[153] Initiatives that entail closing existing facilities may, however, encounter resistance from some of the existing workers, their trade unions, and their carers.[154] Objections are often linked to the legitimate concern that the workers will forfeit the security of their existing jobs and/or that they will encounter a more hostile working environment in the open labour market.[155]

## 4. The Anti-Discrimination Model and People with Intellectual Disabilities

This article has taken the USA as an example of the role that law can play in tackling employment discrimination experienced by people with ID. Undoubtedly, anti-discrimination law holds the potential to tackle some of the barriers that people with ID can encounter. This includes being treated less favourably because of stereotypes or the failure to provide reasonable accommodation. Beyond individual situations, there is also the embedded practice of segregating people with ID into sheltered forms of employment with low levels of pay.

The evidence considered in this article indicates that law can assist, but its potential is often unfulfilled. This was particularly true for individual discrimination claims brought under Title I of the ADA. As indicated at the outset of the article, there is a general picture of very low success rates in litigation for individual plaintiffs and a pattern of judicial interpretation that has been highly restrictive. People with ID rarely bring complaints under the ADA, but the limited body of case-law indicates that when such cases do reach the courts, then they often encounter the same kinds of difficulties as other ADA plaintiffs. Bagenstos observed that ADA employment litigation 'overwhelmingly focuses on the discharge of employees with disabilities rather than the failure to hire them'.[156] Given that most people with ID are not currently participating in the open labour market, they are less likely to find themselves in the type of situation that commonly arises in ADA litigation.

More generally, the low number of complaints may also reflect wider barriers to access to justice for people with ID. Mor identifies a range of obstacles that people with disabilities experience throughout the legal system.[157] In particular, people with ID have often faced restrictions when seeking to exercise their capacity to engage in legal proceedings.[158] The 'generally inaccessible and alienating nature of legal language'[159] means that people with ID are likely to need social and institutional

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[153] Brennan-Krohn, *supra* n. 111, at 254.
[154] J Lerner and D Pollack, Where Have All The Developmental Centers Gone? The Federal Push for Community-Based Services for People with Intellectual and Developmental Disabilities, 43 *Capital University Law Review* 751, 764 (2015).
[155] Migliore et al, *supra* n. 5, at 30.
[156] Bagenstos, *supra* n. 20, at 127. Stein et al point out it is particularly hard to establish discrimination in 'failure-to-hire' cases: *supra* n. 20, at 1701.
[157] S. Mor, With Access and Justice for All, 39 *Cardozo Law Review* 611, 614 (2017).
[158] J. Fiala-Butora and M.A. Stein, 'The Law as a Source of Stigma or Empowerment: Legal Capacity and Persons with Intellectual Disabilities' in K. Scior and S. Werner (eds), *Intellectual Disability and Stigma – Stepping Out from the Margins* (Palgrave Macmillan 2016) 195.
[159] Ibid 633.

support to understand their rights and the ways in which these may be enforced.[160] Some people with ID may need accommodations within the judicial process; giving evidence could be a challenging experience[161] and problems can arise where courts question the credibility of evidence from people with ID.[162]

Economic factors are also a significant factor. People with ID are typically reliant on disability benefits and/or earn low wages, so the financial costs of litigation may be prohibitive. Third parties may also play a role in influencing whether people with ID bring complaints of discrimination. Unger et al observe that 'employment support providers may be hesitant to outwardly acknowledge discriminatory practices or file charges for fear that they might jeopardize their relationship with the employer and make future job placements for their agency more difficult'.[163]

In summary, the case study of the ADA supports the view that, notwithstanding occasional successes, individual litigation is not a mechanism that easily assists people with ID who experience employment discrimination. This implies that other strategies, in law and in policy, might be more effective in practice.[164] Nevertheless, the possibility of individual enforcement of rights is a cornerstone of anti-discrimination legislation, so it remains necessary to consider ways in which access to justice for people with ID can be improved. This might, for example, entail putting in place advocacy support mechanisms to assist people with ID in legal proceedings.[165] The US case study illustrated the role for public bodies with enforcement powers, such as the EEOC or the DOJ. The involvement in third parties in litigation needs to ensure, however, that the voice of people with ID remains heard. Heyer reminds us that disability activism is rooted in 'independence, autonomy, self-determination, and a rejection of state paternalism'.[166]

## Beyond Equal Treatment

Even if better enforcement of anti-discrimination legislation was achieved, it seems evident that this would not be sufficient to address the marginal position that people with ID occupy in the open labour market. Kanter describes the ADA as 'a civil rights law that views equality for people with disabilities through a limited antidiscrimination lens'.[167] Through the prohibition of discrimination, including the obligation to provide reasonable accommodation, it seeks to ensure that persons with disabilities compete on the same basis as others for employment opportunities.[168] This promise of a level

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[160] D. Tarulli, D. Griffiths, and F. Owen, 'Human Rights and Persons with Intellectual and Developmental Disabilities: an Elusive But Emerging Paradigm' in J. Gordon, J. Poder, and H. Burckhart (eds), *Human Rights and Disability: Interdisciplinary Perspectives* (Routledge 2017) 50, 63.
[161] Mor, *supra* n. 157, at 640.
[162] A. Lawson, 'Disabled People and Access to Justice: From Disablement to Enablement?' in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 88, 93.
[163] Unger et al, *supra* n. 47, at 151.
[164] Stein, *supra* n. 33, at 659.
[165] Article 12(3) CRPD requires states 'to provide access by persons with disabilities to the support they may require in exercising their legal capacity.' See further, Fiala-Butora and M.A. Stein, *supra* n. 158.
[166] Heyer, *supra* n. 17, at 37.
[167] Kanter, *supra* n. 79, at 824.
[168] Pickering Francis, *supra* n. 45, at 310.

playing field, if truly realised, would assist many people with ID. Yet consideration needs to be given to the situation of those who remain less competitive in the labour market,[169] in particular, those with 'a combination of intellectual, behavioural, and psychiatric impairments'.[170]

In conclusion, employment discrimination law has a role to play in addressing the barriers faced by people with ID, but it needs to be accompanied by a wider range of legal and policy instruments. While many countries drew original inspiration from the model offered by the ADA, the experience with its implementation has illuminated both its strengths and its limitations. As Heyer observes, 'the ADA stops short of the kind of distributive justice that critics say is necessary to ensure true equality for people with disabilities'.[171] In searching for a model that improves upon the civil rights model of the ADA, the CRPD has become the global point of reference. Arguably, it incorporates some of the founding insights of the ADA, in particular, conceptualising denial of reasonable accommodation as a form of discrimination. The CRPD goes further;[172] it offers a 'human rights model', which addresses the situation of people with ID in a more comprehensive manner. Degener summarises this approach as follows:

> Anti-discrimination law can only be seen as a partial solution to the problem. Even in a society without barriers and other forms of discrimination, people need social, economic and cultural rights … because impairment often leads to needs for assistance, it is especially true that disabled persons need more than civil and political rights.[173]

[169] Herr, *supra* n. 15, at 205.
[170] Brennan-Krohn, *supra* n. 111, at 267.
[171] Heyer, *supra* n. 17, at 46.
[172] Kantor, *supra* n. 79, at 882.
[173] Degener, *supra* n. 30, at 36.