

# Monkey-Business: Connecticut's Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the *ADA* as Justification for the Elimination of Second Injury Funds

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## I. INTRODUCTION

In June of 1994, Connecticut lawmakers began to realize they had a six billion dollar public policy nightmare on their hands.<sup>1</sup> The nightmare was the projected unfunded liability of a little known state insurance fund. Administered by the Office of State Treasurer, Connecticut's Second Injury Fund (SIF) was created in 1945 to prevent physically impaired job applicants from being denied employment because of employer fear of potential workers' compensation costs.<sup>2</sup> While the SIF operated within its means for a time,<sup>3</sup> gradually claims against the SIF outpaced its revenue; by 1994 estimates on projected liabilities reached as high as six billion dollars.<sup>4</sup>

Euphemistically dubbed "Connecticut's \$6 Billion Gorilla" by the *Hartford Courant*,<sup>5</sup> the SIF was roundly criticized as an expensive

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<sup>1</sup> See Larry Williams, *High Cost of Covering Injury Claims Comes as a Shock*, HARTFORD COURANT, June 25, 1994, at C1.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> Peter S. Barth, *Workers' Compensation in Connecticut Administrative Inventory* 41 WORKERS' COMPENSATION RESEARCH INSTITUTE (1987). As late as 1982 Connecticut's SIF posted a yearly revenue surplus; \$30,000 for fiscal year 1982. *Id.*

<sup>4</sup> *E.g.*, Williams, *supra* note 1.

<sup>5</sup> Editorial, *Connecticut's \$6 Billion Gorilla*, HARTFORD COURANT, January 27, 1995, at A12. How the SIF got to this point is a story unto itself. One of the major factors was certainly the Connecticut Supreme Court's decision in *Jacques v. H.O. Penn Machinery Co.*, 349 A.2d 847 (Conn. 1974). Jacques, a machinist who injured his knee in the course of employment, died after complications from surgery on the knee. *Id.* at 848. It was later discovered that the complications arose from a heart disease of which neither he nor his doctors were aware. H.O. Penn Machinery Co. filed a claim with the SIF for reimbursement on the theory that the heart disease was a "pre-existing impairment" as defined under CONN. GEN. STAT. § 31-349 (1974). The Court agreed with H.O. Penn and concluded

anachronism.<sup>6</sup> Less than a year after an initial audit that revealed the massive \$6 billion short fall was issued, Connecticut's Treasurer, in a move that received bipartisan support from state lawmakers,<sup>7</sup> proposed closing the fund to new claims.<sup>8</sup> Soon thereafter the General Assembly did just that and passed *Public Act 95-277* unanimously,<sup>9</sup> closing the SIF to new claims made after July 1, 1995.<sup>10</sup>

Connecticut's experience is not unique. Existing in forty-nine states and Washington D.C. as late as 1991,<sup>11</sup> SIFs have been steadily eliminated over the last fifteen years.<sup>12</sup> Called superfluous by academics, business interests, and lawmakers,<sup>13</sup> the essential criticism is that the purpose of SIFs was rendered obsolete by enactment of the *Americans with Disabilities Act of 1990 (ADA)* and complementary state law anti-discrimination provisions.<sup>14</sup>

Connecticut's decision to close its SIF to new claims is emblematic of this trend. The wealthiest state, Connecticut has not only the highest per-capita income in the country, but the highest manufacturing sector pay as

that employer eligibility for SIF reimbursement did not depend on employer knowledge of impairment before hire. *Id.* at 852. In the wake of this holding SIF expenditures grew 725% between 1976 and 1986, as workers' compensation insurers discovered the SIF penetrability. Barth *supra* note 3, at 41. By 1993 over 19% of employer spending on workers' compensation was devoted to the SIF. CONN. GENERAL ASSEMB., LEGIS. PROGRAM REVIEW AND INVESTIGATIONS COMM., *SECOND INJURY FUND*, 19 March 1994.

<sup>6</sup> HARTFORD COURANT, *supra* note 5.

<sup>7</sup> See Andrew Julien, *Treasurer Suggests Ending Injured-Workers Fund*, HARTFORD COURANT, January 20, 1995, at B9. Co-chairmen of the Connecticut General Assembly's Labor Committee, Republican State Senator Anthony Guglielmo and Democratic State Representative James O'Rourke agreed with Treasurer Christopher Burnham's proposal to close the SIF to new claims. O'Rourke is quoted as saying, "There's no question that the fund is going to have to be closed to new claims. Everybody knows that this thing has gotten out of control the last four or five years. It's a dinosaur."

<sup>8</sup> *Id.*

<sup>9</sup> H.B. 6923, 1995 Leg., June Sess. (Conn. 1995) (House and Senate Roll Call Vote Tallies) available at <http://www.cga.ct.gov/ps95/vote/h/hv-0412.htm>.

<sup>10</sup> Act Concerning the Recommendations of the Blue Ribbon Commission on the Second Injury Fund, 1995 Conn. Acts 1297 (Reg. Sess.); Connecticut's SIF still exists in limited form. Employees of uninsured employers may be compensated by the fund, along with the many injured workers whose claims were transferred to the SIF before its closure in 1995. See CONN. GEN. STAT. §§ 31-349, 31-355 (2007).

<sup>11</sup> Catherine M. Doud, *Oklahoma's Special Indemnity Fund: A Fund Without Function?*, 30 TULSA L. J. 745, 745 (1994-1995).

<sup>12</sup> U.S. CHAMBER OF COMMERCE, STATISTICS AND RESEARCH CENTER, ANALYSIS OF WORKERS' COMPENSATION LAWS, at 105 Chart XIII (2005). Alabama, Kentucky, Maine, and New Mexico have eliminated their SIFs entirely. SIFs in Connecticut, Florida, Kansas, Minnesota, Nebraska, Oklahoma, Rhode Island, Utah, Vermont, and West Virginia have been closed for new claims. *Id.*

<sup>13</sup> See e.g. Doud, *supra* note 11, at 747; Conn. J. Standing Comm. Hearings, *Labor and Public Employees*, Pt. 1, 1995 Sess., pp. 1089-91 (comments of Bonnie Stewart, associate counsel of the Connecticut Business and Industry Association)[Hereinafter *Conn. J. Standing Comm.*]; 38 S. Proc., Pt. 15, 1995 Sess. at 5485 (comments of State Senator William Kissel) [Hereinafter *Senate Proceedings*].

<sup>14</sup> See *id.*

well.<sup>15</sup> A solidly “blue” state,<sup>16</sup> Connecticut is generous in terms of workers’ compensation benefits, ranking fourth highest among the states for maximum weekly benefit cap.<sup>17</sup> For these reasons, the elimination of Connecticut’s SIF was a curious public policy decision. A state with tremendous fiscal resources and a generous compensation system, Connecticut would seem an unlikely candidate to repeal a disabled workers’ benefit program.

With a particular focus on Connecticut, this article attempts to show that elimination of SIFs premised on the mere existence of the *ADA* is an insufficient policy justification. While the *ADA* represents both a more comprehensive approach to the problem of disabled employment, and includes strong punitive measures, the *ADA*, in and of itself, cannot eradicate hiring discrimination against the disabled. State elimination or closure of SIFs is a premature abandonment of a governmental mechanism that is well suited to supplement the *ADA* and similar state law.

By first detailing the differences between SIFs and the *ADA*, and then proceeding to show how the structural limitations of the *ADA* are supplemented by SIFs, this article demonstrates how hiring discrimination against the disabled is best combated when SIFs and the *ADA* act in concert.

## II. THE SECOND INJURY FUND CONCEPT

Second injury funds, or subsequent injury funds, as they are sometimes called,<sup>18</sup> are special, dedicated state funds that operate in the shadow of state workers’ compensation statutes.<sup>19</sup> Their purpose is to promote the hiring and retention of handicapped workers by absolving employers of workers’ compensation liability for the lasting effects of injuries that occurred prior to an employee’s hire.<sup>20</sup> The basic premise is that SIFs alleviate employer fear of increased workers’ compensation exposure for disabled job applicants. They accomplish this goal by providing an independent revenue source for any potential compensation payout to

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<sup>15</sup> HAROLD A. HOVEY & KENDRA A. HOVEY, CQ, STATE FACT FINDER 2006: RANKINGS ACROSS AMERICA 350 (CQ Press 2007).

<sup>16</sup> ANDREW GELMAN, RICH STATE, POOR STATE, RED STATE, BLUE STATE: WHAT’S THE MATTER WITH CONNECTICUT? A DEMONSTRATION OF MULTILEVEL MODELING 16 (2006), available at <http://www.stat.columbia.edu/~gelman/research/presentations/soctalk.pdf>.

<sup>17</sup> HOVEY & HOVEY, *supra* note 15.

<sup>18</sup> See, e.g., MD. CODE ANN., LAB & EMPLOY. § 10-204 (2004).

<sup>19</sup> Harry M. Dahl, *The Iowa Second Injury Fund—Time For Change*, 39 DRAKE L. REV. 101, 102 (1989-1990); Doud, *supra* note 11, at 745.

<sup>20</sup> 5 ARTHUR LARSON & LEX LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 91.01[1] (2006).

qualifying disabled workers.<sup>21</sup> In this way, SIFs are like private insurance companies, acting to insure employers against the risk that an employee will experience a compensable workplace injury made more expensive because of a previous injury.<sup>22</sup>

In order to understand how SIFs work the uninitiated observer must first understand the so-called “second injury” problem unique to workers’ compensation. The easiest way to explain is through a real life example. The unfortunate circumstances of Jacob Schwab, as detailed by the Supreme Court, Appellate Division of New York in *Schwab v. Emperium Forestry*,<sup>23</sup> the original case on the subject,<sup>24</sup> illustrates the fundamental issue succinctly. In 1892, for some unknown reason Jacob Schwab had his left hand amputated.<sup>25</sup> Through either skill, determination, good luck, or some combination of the three, Mr. Schwab was able to secure a job with a logging company despite his disability. Unimaginably, twenty-six years after the loss of his left hand, Mr. Schwab lost his right hand in a logging accident.<sup>26</sup>

Jacob Schwab’s sad and bizarre experience posed a deceptively complex problem to New York’s infant workers’ compensation system.<sup>27</sup> Should Emperium Forestry, the company that employed Schwab at the time that he lost his right hand have been liable for only the loss of the right hand, or should the company have been liable for Mr. Schwab’s resulting circumstances, namely total disability with no realistic prospect of ever again securing gainful employment?

The Appellate Division was thus faced with a question of first impression. Relying on the fact that Emperium hired Schwab aware of his pre-existing disability, the Court determined that Schwab should be compensated for the total disability that the loss of the right hand had engendered.<sup>28</sup>

While presumably this was a just decision from Schwab’s perspective, the result hardly seems fair when viewed from the lense of an employer.

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<sup>21</sup> *E.g.*, Dahl, *supra* note 19, at 103.

<sup>22</sup> *See id.* at 102.

<sup>23</sup> 153 N.Y.S. 234 (1915).

<sup>24</sup> U.S. BUREAU OF LABOR STANDARDS, U.S. DEP’T OF LABOR, BLS BULL. NO. 190, SECOND INJURY FUNDS (1957) [hereinafter LABOR STANDARDS].

<sup>25</sup> *Schwab*, 153 N.Y.S. at 234.

<sup>26</sup> *Id.*

<sup>27</sup> New York’s workers’ compensation scheme, the first comprehensive system in the nation, was originally implemented in 1910. After first being declared unconstitutional by the New York Court of Appeals in *Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911), the legislature passed a state constitutional amendment that ensured the system’s continued validity. 1 LARSON & LARSON, *supra* note 20, at § 2.07.

<sup>28</sup> *Schwab*, 153 N.Y.S. at 234–35.

Why should Emperium Forestry be stuck paying for total disability when they had nothing to do with the amputation of Schwab's left hand in 1892? Moreover, in all probability the decision to hire Schwab, given his pre-existing disability, was probably an act of benevolence on the part of Emperium.

Essentially SIFs represent a compromise between these two alternatives of apportioning workers' compensation liability for the effects of subsequent disabilities, or "second injuries" made worse by a preexisting disability or injury.<sup>29</sup> The first alternative, embraced in early workers' compensation cases, like Schwab, decided before the adoption of SIFs, was to require the employer at the time of second injury to pay all compensation costs stemming from the second injury even though employment only caused a portion of the employees ultimate injury.<sup>30</sup> This approach, seemingly beneficial for previously injured workers by providing full compensation for the combined effects of the first and second injury, in reality often led to widespread discrimination against the disabled.<sup>31</sup> Some employers, fearful of the prospect of paying workers' compensation for previously injured workers, simply chose not to hire any more disabled employees and to lay-off the workers with pre-existing impairments that they already employed. For instance, in 1925, less than thirty days after the Oklahoma Supreme Court in *Nease v. Hughes Stone Co.*,<sup>32</sup> held an employer responsible for full disability payments after a worker lost the use of his second eye in a workplace accident, between seven and eight thousand "one-eyed, one-armed, one-handed men" working in Oklahoma were laid off.<sup>33</sup>

The second possible alternative for apportioning workers' compensation liability, the one favored by Emperium in *Schwab*, was to simply require employers only to pay for the effects of the second injury as if the first injury had never occurred.<sup>34</sup> For example, assume an employee was blind in his right eye before losing vision in his left in a workplace accident. Under this second method of apportionment the employer would only be required to pay benefits for the loss of the second eye rather than for total blindness, thus leaving the employee with less compensation than

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<sup>29</sup> 5 LARSON & LARSON, *supra* note 20, at § 91.01[1].

<sup>30</sup> *See, e.g., Schwab*, 153 N.Y.S. at 234-36.

<sup>31</sup> *See* LABOR STANDARDS, *supra* note 24, at 6; 5 LARSON & LARSON, *supra* note 20, at § 91.01[1].

<sup>32</sup> *Nease v. Hughes Stone Co.*, 224 P. 778 (Okla. 1925).

<sup>33</sup> U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BLS BULL. NO. 536 ASSOC. OF GOV'T OFFICIALS IN INDUSTRY OF THE U.S. AND CANADA 272 (1930) (Statement of Mr. I. K. Huber of Oklahoma) (hereinafter LABOR STATISTICS)

<sup>34</sup> 5 LARSON & LARSON, *supra* note 20.

he would have been entitled to had the blindness resulted from one accident.<sup>35</sup> The shortfall in compensation would be absorbed by the employee rather than the employer or SIF.

Both full second injury employer coverage and limited second injury employer coverage resulted in undesirable consequences. A system that made employers liable for the effects of first injury led employers to simply ignore the disabled when hiring and to terminate the disabled workers they already had.<sup>36</sup> A system that made employers only liable for the second injury left disabled workers with little money to survive. Some states recognized this dilemma only several years after first introduction of their workers' compensation schemes.<sup>37</sup> Their solution was the creation of SIFs.<sup>38</sup> By the end of World War II most jurisdictions had caught on.<sup>39</sup> By 1991 SIFs could be found in forty-nine states (Wyoming excluded) and Washington D.C.<sup>40</sup>

### III. STATE VARIATION ON THE SECOND INJURY FUND CONCEPT

The principal features of SIFs vary from state to state. All SIFs share the same basic goal of discouraging discrimination against the disabled

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<sup>35</sup> *Id.*

<sup>36</sup> See LABOR STANDARDS, *supra* note 24, at 6.

<sup>37</sup> *Id.*

<sup>38</sup> See generally 5 LARSON & LARSON, *supra*, note 20, at § 2.07. New York, in 1910, was the first state to pass a workers' compensation law with coverage applicable to multiple industries. N.Y. LAB LAW § 674 (1910). This act was declared an unconstitutional taking without due process of law in violation of the New York constitution by the New York Court of Appeals in *Ives v. S. Buffalo Ry.*, 94 N.E. 431 (N.Y. 1911). Two years later New York passed a constitutional amendment that allowed for the enactment of a similar workers' compensation statute. 5 LARSON & LARSON, *supra* note 20, at § 2.07.

In 1916 New York also became the first state to enact a SIF to complement its workers' compensation scheme. LABOR STANDARDS, *supra* note 24, at 6. The impetus came from Schwab v. Emporium Forestry Co., 153 N.Y.S. 234, 234 (1915), a case in which a worker who had lost his left hand twenty-two years earlier lost his right in an industrial accident while employed by Emporium Forestry. The Court awarded Schwab total disability, reasoning that since "a man with one hand is presumably earning less wages than a man with two hands . . ." a total disability award based on a percentage of his total weekly wage complied with legislative intent. *Id.* at 235–36.

<sup>39</sup> LABOR STANDARDS, *supra* note 24, at 8–9. Thirty-four states had enacted SIF legislation before the end of World War II. The War itself was the driving force behind SIF adoption in most of these jurisdictions. Legislatures were fearful of the employment obstacles that would face the thousands of injured veterans coming home from Europe and the Pacific, and turned to SIFs as a means of fending off an impending crisis. *Id.*

<sup>40</sup> Doud, *supra* note 11, at 745; see also 5 LARSON & LARSON, *supra* note 20, at § 91.01. Sixteen states and the District of Columbia have either eliminated their SIF or closed their SIF to new claims. These states include: Connecticut; Florida; Kansas; Kentucky; Minnesota; Nebraska; New Mexico; Rhode Island; South Dakota; Vermont; and West Virginia. U.S. CHAMBER OF COMMERCE, *supra* note 12.

worker, but individual funds approach this goal differently.<sup>41</sup> In general funds differ in three respects: funding mechanisms, covered injuries, and apportionment of compensation liability between employer and SIF.

#### A. Funding Mechanisms

SIFs are funded either directly or indirectly by employers. Some states require employers to pay directly into SIFs through annual assessments, while others are indirectly funded by employers through workers' compensation insurance premium surcharges.<sup>42</sup>

The first SIFs were funded entirely by a special tax levied against insurance carriers (or self-insurers) whenever an employee died in a compensable work-place accident and left no dependents to collect death benefits.<sup>43</sup> This remains a popular revenue source, but has proven inadequate for most states.<sup>44</sup>

Either to supplement "death-without-dependent" funding, or to replace it entirely, a majority of jurisdictions have adopted a pro-rata assessment mechanism that takes account of a company's past record of workers' compensation paid losses to determine the amount to be assessed.<sup>45</sup> Nebraska, for instance, used a system that levied a 2% assessment on the benefits paid by the insurance carrier or self-insured employer in the previous year.<sup>46</sup> Thus, if an insurance company paid out \$100,000 in benefits in 2006 then they would have to pay \$2,000 in 2007 to the state's SIF. This method of funding has two advantages. First, it distributes the costs of SIF financing evenly among all employers.<sup>47</sup> A small firm with \$1,000 in paid losses in the previous year pays into the SIF at the same rate as the factory with millions of dollars in comp payments. Second, this

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<sup>41</sup> *E.g.*, Doud, *supra* note 11, at 748.

<sup>42</sup> *See generally* 5 LARSON & LARSON, *supra* note 20, at § 90.01[2]. Workers' compensation insurance is unlike other liability insurance because of the employers' statutory obligation to provide compensation to injured employees. Accordingly, all states require employers to insure themselves against potential compensation liability. Most states allow either private insurance carriers, or self-insurance to cover potential liability. A minority of states offer state insurance funds, with some requiring mandatory participation and others offering a choice between competitive state funds.

Insurance rates are dictated within the framework of rate-making policies typically governed by official rating bureaus established by the states. Rates are derived from a combination of factors including the nature and history of workplace injury within the targeted industry and individualized workplace inspection. Further consideration is then given to the liability experience of the individual firm. This process dictates the insurance premium an employer must pay to buy coverage for their employees.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See generally* U.S. CHAMBER OF COMMERCE, *supra* note 12.

<sup>46</sup> *Id.*

<sup>47</sup> 5 LARSON & LARSON, *supra* note 20, at § 91.01[2].

method of funding imposes a penalty on employers who pay more to their employees in workers' compensation, and therefore (at least presumably) have more dangerous workplaces.<sup>48</sup> This provides an added economic incentive to place greater emphasis on worker safety, especially in dangerous industries.

### *B. Covered Injuries*

SIFs differ most significantly in terms of employer coverage, or employer reimbursement, for second injuries. Some states only offer SIF reimbursement to employers who hire an employee who has lost, or lost the use of, a limb and then subsequently lose another limb.<sup>49</sup> More comprehensive funds provide second injury coverage for employers who hire any employee with a pre-existing disability (regardless of how the disability occurred) so long as the combined effects of the disability and second injury are worse than what would have been sustained from the second injury alone.<sup>50</sup> The scope of coverage offered by a SIF determines its size and funding requirements.<sup>51</sup>

### *C. Notice of Impairment Requirements*

A number of states have elected to limit employer access to SIFs through the use of notice of impairment requirements.<sup>52</sup> These requirements, which can take the form of affidavit, are used by fund administrators to certify that an employer had actual knowledge of an employee's impairment before he was hired.<sup>53</sup> In Georgia, for example, employers must submit a "notarized knowledge affidavit" to the SIF administrator soon after an impaired employee is hired.<sup>54</sup> In this way these provisions are designed to limit claims brought against a SIF while still furthering their overall purpose.

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<sup>48</sup> *See id.*

<sup>49</sup> *See generally* U.S. CHAMBER OF COMMERCE, *supra* note 12.

<sup>50</sup> *E.g.*, WASH. REV. CODE § 51.16.120 (Supp. 2007).

<sup>51</sup> U.S. CHAMBER OF COMMERCE, *supra* note 12.

<sup>52</sup> *See generally* Doud, *supra* note 11, at 748–53.

<sup>53</sup> *See* 5 LARSON & LARSON, *supra* note 20, at § 19.03[2].

<sup>54</sup> GA. COMP. R. & REGS. 622-1-.05 (2007). The regulation requires that the affidavit follow the below format:

On (Date of first knowledge), I (Name), the (Title) for (Employer), learned that (Employee) SSN (SSN) had (Type of prior impairment). I received this information in the following manner: (Describe). In addition, I considered the impairment likely to be a hindrance to employment because: (Describe)



#### D. Available Benefits Under Second Injury Funds

It is important to make clear that the benefits available to an injured worker under a state's workers' compensation scheme exist independently of whether or not the state has a SIF.<sup>55</sup> Therefore, the manner in which the costs of second injuries are apportioned between employer and SIF have no direct effect on the compensation an injured worker is entitled to receive.<sup>56</sup>

The general aim of apportionment is to equitably allocate the costs of second injury between the employer and SIF.<sup>57</sup> To this end, apportionment provisions seek to hold employers financially responsible only for roughly their share.<sup>58</sup> Some states apportion costs simply by requiring the employer to pay for the disability caused by the second injury with the SIF covering the added cost stemming from the prior impairment.<sup>59</sup> Other states require employers to pay for a set period, often two years, with the SIF assuming claim administration afterwards.<sup>60</sup> In principle, this arrangement acts as a deductible; establishing a threshold before which all expenses relating to a claim must be paid by the employer.

### III. THE ADA

The ADA was signed into law by the first President Bush on July 26, 1990.<sup>61</sup> Its expressed purpose was to "provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities."<sup>62</sup> To effectuate this goal, Title I of the ADA prohibits discrimination in employment against qualified individuals with a disability.<sup>63</sup> Furthermore, Title I imposes an affirmative duty on employers to provide reasonable accommodation to qualified disabled employees

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<sup>55</sup> See Dahl *supra* note 19, at 102, 108.

<sup>56</sup> *Id.* at 102. It is important to note however, that several state SIF apportionment models require individual employees to collect SIF payments on their own accord. *E.g.* TEX. LAB. CODE ANN. § 408.162 (2006).

<sup>57</sup> Dahl, *supra* note 19, at 108.

<sup>58</sup> *Id.* at 102, 108.

<sup>59</sup> This standard is perhaps most consistent with the true intent of SIF legislation, but is quite difficult to apply. Even medical experts can have difficulty determining the causal relationship of one injury to another, and the contribution each had to the employee's ultimate impairment.

<sup>60</sup> See, *e.g.*, ALASKA STAT. § 23.30.041 (2007).

<sup>61</sup> President George H.W. Bush, Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990).

<sup>62</sup> Americans with Disabilities Act of 1990 § 101, 42 U.S.C. § 12101 (2000) [hereinafter ADA].

<sup>63</sup> *Id.* § 12112.

unless such an accommodation would impose an undue hardship on the employer.<sup>64</sup>

Because the *ADA* protects people with limited physical abilities, the *ADA*, unlike landmark civil rights acts of the past, requires more of society in general, and employers in particular, than the reconstruction of social beliefs.<sup>65</sup> Instead, the *ADA* requires business to take the affirmative step of not just considering the person confined to a wheelchair for a job but also building the ramp so that the person has access to the workplace.<sup>66</sup> This comes at a significant economic cost and one that is directly paid by individual businesses.<sup>67</sup> This does not mean, however, that the *ADA*'s provisions trump the financial concerns of an employer in any and all circumstances. In some situations no amount of accommodation will allow a disabled person to work.<sup>68</sup> Similarly, there are also scenarios in which it is conceivable that sufficient accommodations could be made, but the cost of implementing such accommodations puts them beyond realistic reach.<sup>69</sup> To this end, the *ADA* includes an undue hardship provision to protect the legitimate financial concerns of employers.<sup>70</sup> If an accommodation would require a business to incur "significant difficulty or expense" within the context of its operations, such an accommodation is unreasonable because it would impose an undue hardship.<sup>71</sup>

Predictably, there is no magic formula that establishes when an employer will prevail with an undue hardship defense. The definition of

<sup>64</sup> *Id.* § 12111. The term "reasonable accommodation" is not unique to the Americans with Disabilities Act (ADA). In fact, the term was taken from Equal Employment Opportunity Commission (EEOC) regulations issued pursuant to the Rehabilitation Act of 1973 and is also applied in cases of religious discrimination brought under Title VII of the Civil Rights Act of 1964. *Van Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

<sup>65</sup> S. REP. NO. 101-116, at 98 (1989) (S. Comm. on Labor and Human Res.). Senator Orrin Hatch of Utah observed of the proposed ADA:

In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits. To provide equal opportunity for a person with a disability will . . . require additional actions and costs than those required to provide access to a person without a disability.

*Id.*

<sup>66</sup> See ADA § 12112(b)(5)(A).

<sup>67</sup> *Id.*

<sup>68</sup> Eric Wade Richardson, *Who is a Qualified Individual with a Disability Under the Americans with Disabilities Act*, 64 U. Cin. L. Rev. 189, 192 (1995-96).

<sup>69</sup> See S. REP. NO. 101-116, *supra* note 65, at 98.

<sup>70</sup> ADA § 12111(10).

<sup>71</sup> *Id.* § 12111(10)(A). Part B of section 10 instructs the finder of fact to consider; "the nature and cost of the accommodation," "the overall financial resources of the facility . . . (including consideration for) . . . the number of persons employed . . . (and) . . . the effect on expenses and resources." *Id.* § 12111(10)(B).

“undue hardship” in Title I § 101<sup>72</sup> leaves judges with broad interpretive discretion.<sup>73</sup> Some courts have adopted a “hard” cost/ benefit efficiency test. In *Van Zande v. Wisconsin Department of Administration*, Seventh Circuit Judge Richard Posner argued that undue hardship should be considered not only in light of an employer’s financial capability to provide an accommodation but also in terms of the “benefits of the accommodation.”<sup>74</sup> By contrast, interpreting parallel undue hardship language in § 504 of the *Rehabilitation Act of 1973*,<sup>75</sup> Judge Guido Calabresi of the Second Circuit emphasized the greater objectives of disability access legislation. “. . . Section 504 does not require that the employer receive a benefit commensurate with the cost of the accommodation.”<sup>76</sup> It is important to note that “cost” can be measured in ways that go beyond the price tag of a wheelchair ramp or the salary of a teacher’s aide. Cost can also be measured in terms of business practice. For example in *U.S. Airways, Inc. v. Barnett*,<sup>77</sup> the United States Supreme

<sup>72</sup> *Id.* § 12111(10).

<sup>73</sup> See S. Rep. No. 101-116, *supra* note 65, at 98.

<sup>74</sup> 44 F.3d 538, 543 (7th Cir. 1995). Van Zande, a paraplegic, worked for the State of Wisconsin as a housing division official. In addition, to modifications to her work schedule, and a special allowance to work from home on occasion, Van Zande claimed that Wisconsin failed to provide reasonable accommodation by refusing to lower the height of sinks in the general work area (the bathroom already had a handicapped accessible sink). *Id.* at 544–46. Lowering the height of the sink on her floor would have cost the state \$150, a sum obviously within the state’s means. *Id.* at 545.

Van Zande argued that lowering the sinks would not only provide her access to an office facility, but would also free her from the stigma and label of inferiority of having to use the bathroom sink to perform common activities such as washing out her coffee cup. *Id.* at 546. Posner rejected this claim and all of her others and upheld the district court’s grant of summary judgment, saying an “employer does (not) have a duty to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and non-disabled workers.” *Id.*

<sup>75</sup> 29 U.S.C. § 792 (2000).

<sup>76</sup> *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 n.3 (2d Cir. 1995). The reasonable accommodation provision of the Rehabilitation Act of 1973, 29 U.S.C. §§ 705, 791, 793-94a, (2000), which deals with government employment of people with disabilities and vocational training programs, is to be interpreted consistently with the reasonable accommodation provision of the ADA. 29 U.S.C. § 794(d) (2000).

In *Borkowski*, a school-teacher was denied tenure in part because administrators felt she was unable to control her classroom. The teacher had suffered neurological damage as a result of a car accident and had to sit-down while teaching. *Id.* at 134. After resigning, she brought suit under the Rehabilitation Act, claiming that if she was provided a teachers aide she would be able to perform the essential functions of the position.. The district court granted summary judgment to the school district based on their argument that Borkowski’s performance was unsatisfactory and that her disability did not figure into the tenure decision. *Id.* at 143. The Second Circuit reversed because the district had an affirmative obligation to attempt a reasonable accommodation once they knew of her disability. *Id.* This stands in contrast to *Van Zande*, where in the burden of demonstrating that a reasonable accommodation could be provided fell to the plaintiff. *Van Zande*, *supra* note 64, at 543.

<sup>77</sup> 535 U.S. 391 (2002). In *Barnett*, a cargo-handler with back problems, invoked his seniority rights to transfer to a position in the airline’s mailroom. Several years later employees with more seniority sought to “bump” him from his job with the mail-room to another position.. Barnett asked U.S. Airways to make an exception to the seniority bumping rules, because of his disability. U.S. Airways refused and after losing his job Barnett sued, arguing that a variance from the seniority rules

Court declared a proffered reasonable accommodation that would take precedence over a U.S. Airways' seniority system to be an undue hardship.<sup>78</sup>

#### A. *The Compatibility of the ADA and Second Injury Funds*

Critics of SIFs in Connecticut and elsewhere have argued that the ADA's prohibition on medical examination and questioning effectively eliminates the need for SIFs.<sup>79</sup> Their argument is that if it is illegal for an employer to ask about a job applicant's disability status there is no need to provide added incentive for employers not to discriminate.<sup>80</sup> Opponents of the continued utilization of SIFs insist that the ADA's prohibitions either frustrate or supersede the purpose and design of SIFs.<sup>81</sup> This argument is shortsighted for several reasons. First, in a very technical sense, while the ADA is federal law which would normally pre-empt state law, specific consideration has been given in EEOC regulations to state workers' compensation law.<sup>82</sup> Thus any argument for federal pre-emption is weak at best.

Second, while the ADA does prohibit employers from asking a job applicant if they have a disability,<sup>83</sup> and similarly prohibits employers from subjecting applicants to pre-employment medical examinations performed in order to determine if the applicant has a disability,<sup>84</sup> employers may circumvent the ADA's safeguards and still find out if an applicant has a

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was mandated by the reasonable accommodation mandate of the ADA. *Id.* at 394–95. The Court, in an opinion authored by Justice Breyer, rejected Barnett's claim. While allowing Barnett to stay in the mailroom position would be an "effective accommodation" it would not necessarily be a reasonable one because of its prospective effect on fellow employees. In essence the Court found the seniority system at U.S. Airways was such an integral part of business operations, that to modify it or make an exemption in Barnett's case could produce ripple effects among the airline's workforce that would outweigh the benefit of the accommodation. *Id.* at 400–01.

<sup>78</sup> *Id.*

<sup>79</sup> See *Senate Proceeding*, *supra* note 13, at 5485; see also Doud, *supra* note 11, at 764–65, 769–70.

<sup>80</sup> See *Senate Proceedings*, *supra* note 13, at 5484–86.

<sup>81</sup> See *id.*

<sup>82</sup> Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.14(b) (2007). The Interpretive Guidance provides the following:

State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

*Id.*

<sup>83</sup> ADA § 12112(d)(2)(A).

<sup>84</sup> *Id.* § 12112.

physical impairment.<sup>85</sup> Under the *ADA*, the employer may ask how the applicant would perform the job if hired.<sup>86</sup> This frees employers from the prospect of hiring a candidate physically incapable of performing the work required, but unfortunately also leaves room for the unscrupulous employer to determine the disability status of an applicant through pointed questioning.<sup>87</sup>

The *ADA* permits medical examinations if the employer has given the applicant a “conditional” offer of employment.<sup>88</sup> Such medical examinations must be given to all new employees and the results of any exam may only be disclosed to a limited class of people who would need to know such information in order to perform their jobs effectively.<sup>89</sup>

An employer cannot give a conditional offer of employment, subject the prospective employee to an exam, and then revoke the offer if the exam results show the prospective employee has a condition, which may cause the employer to incur costs related to the disability.<sup>90</sup> However, a medical exam can be the basis for revocation of the conditional employment offer if the employer is unable to insure the safety of the prospective employee or his potential co-workers, or is unable to provide a reasonable accommodation without undue hardship.<sup>91</sup>

The vast majority of states do not impose a notice of impairment requirement on employers in order to qualify for SIF coverage or contribution.<sup>92</sup> As was the case in Connecticut, in these states it makes no difference whether the employer actually or constructively knew that the employee had a preexisting injury or disability at the time of hire.<sup>93</sup>

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<sup>85</sup> *Id.* § 12112(d)(2)(B); see also S. REP. NO. 101-16, *supra* note 65, at 39 (1989). According to the Committee a prohibition on medical exams is necessary “to assure that misconceptions do not bias the employment selection process.” *Id.*

<sup>86</sup> ADA § 12112(d)(2)(B); see also EQUAL EMPLOYMENT OPPORTUNITY COMM’N, FINAL ENFORCEMENT GUIDANCE ON PRE-EMPLOYMENT DISABILITY RELATED QUESTIONS AND MEDICAL EXAMINATIONS, No. 915.002, at 8 (1995). (Hereinafter EEOC).

<sup>87</sup> All questions, however, must relate to a job function. *Supra* note 65.

<sup>88</sup> ADA § 12112(d)(3).

<sup>89</sup> *Id.*; see also 29 C.F.R. § 1630.14 (2006). This group includes supervisors and safety personnel. Government officials investigating ADA compliance may also have access to information obtained during the medical exam.

<sup>90</sup> See *Garrison v. Baker Hughes Oilfield Operations*, 287 F.3d 955 (10th Cir. 2002). The Tenth Circuit affirmed a jury award in favor of an assembly line applicant who was awarded a conditional offer of employment, which was later revoked. The jury found that Baker Hughes improperly based their revocation on a survey of the plaintiff’s extensive workers’ compensation history with prior employers. The company’s argument that the rejection was consistent with medical necessity was denied. *Id.* at 958.

<sup>91</sup> 29 C.F.R. § 1630.14(b).

<sup>92</sup> U.S. CHAMBER OF COMMERCE, *supra* note 12.

<sup>93</sup> See generally, CONN. GEN. STAT. §31- 349 (2007).

Accordingly, an employer may fully comply with the hiring restrictions of the *ADA* and still receive SIF funds if a second injury occurs.<sup>94</sup>

For states that do impose a knowledge or notice of impairment requirement, *ADA* medical inquiry restrictions are also benign.<sup>95</sup> An employer may establish their knowledge of a pre-existing condition through appropriate utilization of the two-step hiring process provided for in the text of the *ADA*.<sup>96</sup> After tendering a conditional offer of employment, a medical examination or inquiry can be mandated. This would provide the employer with knowledge of a pre-existing disability if the information had not been volunteered.<sup>97</sup> EEOC guidelines clearly allow for such information to be used for SIF coverage purposes.<sup>98</sup>

#### IV. STRUCTURAL LIMITATIONS OF THE *ADA*

SIFs provide a broader measure of protection for people with physical impairments than does the *ADA*. While civil liability imposed by the *ADA* offers a strong disincentive against hiring discrimination, the breadth of this disincentive is restricted. The *ADA* and complementary state anti-disability measures only apply to a limited subsection of people with physical or mental impairments.<sup>99</sup> This limitation is both explicit and implicit. By its terms the anti-discrimination provisions of the *ADA* only apply to employers with fifteen or more employees.<sup>100</sup> While state statutes frequently provide a lower floor,<sup>101</sup> employers who employ less than the minimum number of employees to trigger either the *ADA* or similar state provision are essentially free to discriminate.<sup>102</sup> Also, the definition of “disabled”<sup>103</sup> utilized by the *ADA* works to exclude some people with physical impairments from *ADA* protection.<sup>104</sup> In concert, these provisions

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<sup>94</sup> See generally, 5 LARSONS & LARSONS, *supra* note 20, at § 91.03[7].

<sup>95</sup> See *id.*

<sup>96</sup> ADA § 12112(d)(3).

<sup>97</sup> *Id.*

<sup>98</sup> 29 C.F.R. § 1630, *supra* note 82.

<sup>99</sup> See e.g., CONN. GEN. STAT. § 46a-51 (2006). Through so-called “work-sharing agreements” the EEOC’s enforcement objectives incorporate state level agencies charged with enforcing civil rights laws. Connecticut’s relevant agency is the Commission on Human Rights and Opportunities.

<sup>100</sup> ADA § 12111(5)(A).

<sup>101</sup> See, e.g., CONN. GEN. STAT. § 46a-51(10). For purposes of Title 46a Connecticut defines employer as a “person or employer with three or more employees in such a person’s or employer’s employ.”

<sup>102</sup> See, e.g., *id.*

<sup>103</sup> ADA § 12102(2).

<sup>104</sup> See *infra* Part IV.B.

limit the effectiveness of the *ADA* in preventing hiring discrimination against people with physical impairments.

#### A. *Minimum Employee Threshold*

Congress, acutely concerned with the interests of small business, defined an “employer” under the *ADA* as “a person affecting, or engaged in an, industry affecting commerce who has fifteen or more employee . . . .”<sup>105</sup> This definition exempts employers with less than fifteen employees from the anti-discrimination mandates of Title I of the *ADA*.<sup>106</sup>

State anti-disability discrimination statutes often impose lower thresholds. The anti-disability discrimination provisions of Title 46a in Connecticut, for instance, apply to all private employers with three or more employees.<sup>107</sup> Anti-disability laws in fourteen states apply to all private employers regardless of size,<sup>108</sup> but in the remaining states employers with fewer employees than the statutory threshold escape the requirements of either the *ADA* or the comparable state statutory schemes.<sup>109</sup> The number of firms and the number of jobs exempted from the provisions of the *ADA* and presumably Connecticut’s Title 46a is quite large.<sup>110</sup>

The justification for minimum employee exemptions makes sense. A small operation is unlikely to have the resources to provide the accommodations a disabled worker may need to work successfully. In light of this economic reality SIFs remain an excellent method for inducing employers to hire the disabled. Where the deterrent of tort liability made available by the *ADA* and state law is unwieldy, the incentive offered by SIFs can help fill the void by eliminating increased potential workers’ compensation liability for employees with pre-existing impairments. Since

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<sup>105</sup> ADA § 12111(5)(A). The rest of the text gives instructions on how a part time employee can fit into the fifteen employee definition by reference to the number of weeks an employee works in a year.

<sup>106</sup> *But see* ADA §§ 12181–89. Title III of the ADA, however, applies to places of public accommodation (affecting interstate commerce), and may require the physical alteration of buildings or other structures owned by a private business with less than fifteen employees in order to allow access for people with disabilities. Such businesses, by specific statutory reference, include “places of public accommodation” like restaurants, bars, hardware stores, movie theaters, and others. *Id.* § 12181(7).

<sup>107</sup> CONN. GEN. STAT. § 46a–51(10).

<sup>108</sup> JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS, §10 (2006). These states include: Alaska; Colorado; Hawaii; Illinois; Maine; Michigan; Minnesota; Montana; New Jersey; South Dakota; Vermont; Virginia; and Wisconsin. *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, EMPLOYER FIRMS, ESTABLISHMENTS, EMPLOYMENT, AND ANNUAL PAYROLL BY FIRM SIZE, AND STATE, 2004, available at [http://www.sba.gov/advo/research/st\\_04.pdf](http://www.sba.gov/advo/research/st_04.pdf).

employers in all but twelve states, must provide workers' compensation,<sup>111</sup> regardless of firm size most small employers still face the dilemma that presented itself to all employers before the advent of SIFs.<sup>112</sup> In the absence of the deterrent effect of *ADA* liability, small employers act contrary to their economic interests if they hire an employee with a pre-existing impairment. When the cost of a workers' compensation claim can easily be as high as several hundred thousand dollars,<sup>113</sup> from a purely economic perspective, small employers are certainly justified in refusing to hire a job applicant with greater potential workers' compensation costs. SIFs address this problem but the *ADA* cannot.

### B. Limited Definition

Another structural limitation of the *ADA* stems from its definition of disability. Under the *ADA* individuals qualify as disabled if they have either; "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) (are) regarded as having such an impairment."<sup>114</sup> Although more flexible than a set list of qualifying handicaps,<sup>115</sup> this definition is limited in application. Determining whether or not an individual claiming to be disabled is in fact "substantially limited" in a "major life activity" has proven difficult. For the U.S. Supreme Court, the term "substantially limited" covers a range of capability that is less stringent than "utter inability," but more pronounced than a minor difficulty or inconvenience.<sup>116</sup> These parameters change, however, when

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<sup>111</sup> See generally, 5 LARSON & LARSON, *supra* note 20, at § 2.08.

<sup>112</sup> See *supra* Part II.

<sup>113</sup> Permanent partial ("PP") disability awards can be astronomically expensive for employers. In Connecticut, for instance, a PP award would include a scheduled payment based on the body part affected, medical expenses, indemnity benefits, and 75% of the employee's after tax average weekly wage (capped at \$931 a week) until they obtained gainful employment. CONN. GEN. STAT. § 31-275 (2006). To illustrate, for a person with an average after-tax weekly wage of \$500, who loses the use of their arm, benefits may include: 208 weeks of average weekly wage for loss of the arm (\$104,000); medical expenses; indemnity benefits; and the reduction in earnings attributable to the injury (if the person was unable to find gainful employment after 10 years the additional benefit would be \$260,000). *Id.*

<sup>114</sup> ADA § 12102(2).

<sup>115</sup> Cf. 29 C.F.R. § 1630.2(h) (2006). EEOC regulations do set forth a list of impairments that would be likely to trigger ADA protection. However, the impairments specifically identified are neither automatically covered by the ADA or exclusive. *Id.*

<sup>116</sup> See *Bragdon v. Abbott*, 524 U.S. 622 (1998). A case involving a woman who was denied dental treatment because she was HIV positive, the Court, in *Bragdon* held that Abbott, the plaintiff, was disabled as provided by the ADA, because she was substantially limited in the major life activity of reproduction. While physically capable of reproducing, the HIV virus was substantially limiting within the individual context of her life since she decided not to have children because of her HIV status. In this way, while she was technically able to bear children (or have sex) the consequences of having a child with HIV led her to celibacy. *Id.*



an individual is able to somehow mitigate the effects of disability through corrective measures.<sup>117</sup>

The EEOC has issued regulations listing typical examples of major life activities that may be considered for *ADA* purposes.<sup>118</sup> Listed activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, breathing, and working.<sup>119</sup>

The major life activity of “working”<sup>120</sup> merits particular attention when considering the interplay between SIFs and the *ADA*. Working is a unique criterion, because, according to EEOC regulations,<sup>121</sup> it should only be considered if an individual is not limited in any other major life activity.<sup>122</sup> These regulations,<sup>123</sup> and decisions that have implemented them,<sup>124</sup> look to the employability of the *ADA* plaintiff. Specifically considered are the geographic area in which the individual has access to employment and the “number and types of other jobs not utilizing similar training, knowledge, skills or abilities within the geographic area, from which the individual is also disqualified.”<sup>125</sup> Consequently, courts look to subjective qualities of the individual and the objective character of the relevant labor market.<sup>126</sup> The plaintiff bears the burden of producing information sufficient to convince the court that he is substantially limited in his ability to work.<sup>127</sup>

Circuit courts have held the bar high for plaintiffs claiming substantial limitation in working. The inability to perform a specific job function, such as cutting widths of foam board because of tendonitis,<sup>128</sup> has not risen to

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<sup>117</sup> See generally *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Corrective measures like glasses or medications that allow a person to function without substantial limitation may preclude an impaired individual from being designated as disabled under the *ADA*. *Id.*

<sup>118</sup> 29 C.F.R. § 1630.2(h)(2)(i) (2006).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* § 1630.2(j)

<sup>121</sup> *Id.* § 1630.2 (j)(3).

<sup>122</sup> *Id.* § 1630.2(j). EEOC regulations do not have the force of law since the agency is not delegated rulemaking authority under the *ADA*. “Nevertheless, courts will accord ‘great deference’ to the EEOC’s construction absent ‘compelling indications’ that the EEOC’s interpretation is wrong.” AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS, § 8.01, n.4 (2006) (Bender Co.)

<sup>123</sup> *Id.* § 1630.2(j)(3).

<sup>124</sup> See generally *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 508 (7th Cir. 1998).

<sup>125</sup> 29 C.F.R. § 1630.2(j)(3)(ii)(C).

<sup>126</sup> *Id.*

<sup>127</sup> See *Soileau v. Guilford of Maine*, 928 F. Supp. 37, 52 (D. Me. 1996).

<sup>128</sup> *Chanda v. Engelhard/ICC*, 234 F.3d 1219 (11th Cir. 2000). In *Chanda*, an engineer complained to his company’s health and safety coordinator that he was experiencing pain in his hands as a result of having to repetitively cut foam boards. He was sent to his personal physician who diagnosed the ailment as mysotisis, and issued a twenty pound lifting restriction. After the restriction was lifted some weeks later, Chanda returned to his former position, but experienced increased pain.

the level of substantial limitation.<sup>129</sup> Similarly, diagnosed carpal tunnel syndrome and severe lifting restrictions due to back and neck injuries have also fallen short of the *ADA* standard for disability.<sup>130</sup> Federal courts have consistently rejected substantial limitation claims if some evidence, either based on the individual's past work or education or from the relevant labor market, suggested that the plaintiff can find work.<sup>131</sup>

The *ADA*'s threshold requirements for disability leave too many potential workers beyond its reach. People with legitimate physical impairments often do not qualify as disabled. Many medical conditions are severe enough to impact a person's chances of getting a job, but not so severe as to bar the person from obtaining a job within a "broad range of jobs."<sup>132</sup> For these people who fall outside of *ADA* protection, SIFs are needed to induce employers to disregard potential workers' compensation costs when making hiring decisions.

## V. A DUBIOUS HISTORY

Since the *ADA* took effect in 1992, employment of people with disabilities in America has decreased.<sup>133</sup> This shocking, counterintuitive fact is well documented. Government-compiled statistics from the Centers

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Englehard terminated Chanda, who later sued under the *ADA*. *Id.* at 1220–21.

In affirming a grant of summary judgment for Englehard, the court rejected Chanda's claim of a substantial limitation of the major life activity of working, because although unable to cut the foam boards, he remained able to drive, use a computer, dress, etc. The court reasoned that, while restricted in certain physical activities, Chanda had failed to show he was restricted in a "range of manual tasks" sufficient to make a prima facie case of a substantial limitation in working. *Id.* at 1223–24.

<sup>129</sup> See generally *Kellogg v. Union Pac. R.R.*, 233 F.3d 1083 (8th Cir. 2000); *Amos v. Wheelabrator Coal Serv., Inc.*, 47 F. Supp. 2d 798 (N.D. Tex. 1998). Both cases deal with an employee's inability to work a particular shift or hours because of physical impairment.

<sup>130</sup> See *McKay v. Toyota Motor Mfg., U.S.A.*, 110 F.3d 369, 369–70 (6th Cir. 1997). McKay had diagnosed carpal tunnel syndrome which prohibited her from performing assembly line work and was fired by Toyota. The Sixth Circuit affirmed summary judgment for Toyota on the grounds that she remained capable of performing a broad class of jobs within the local labor market. *Id.* at 373; but see *Smith v. Kitterman, Inc.*, 897 F. Supp. 423 (W.D. Mo. 1995). A plaintiff with carpal tunnel syndrome survived a motion for summary judgment because evidence of her limited education and work experience could have shown that she was effectively prohibited from working within a broad range of jobs. *Id.* at 426–27.

<sup>131</sup> See *McKay*, 110 F.3d at 373; *Smith*, 897 F. Supp. at 427; *Duncan v. Washington Metro Area Transit Auth.*, 240 F.3d 1110, 1115 (D.C. Cir. 2001). The D.C. Circuit vacated a jury verdict in favor of a custodian who lost his job after a back injury resulted in a lifting restriction of twenty pounds. The court ruled that insufficient evidence had been presented for a reasonable jury to conclude that the plaintiff was excluded from a broad class of jobs. *Id.*

<sup>132</sup> 29 C.F.R. § 1630.2(j) (1991).

<sup>133</sup> *E.g.*, Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 915 (2001).

for Disease Control's National Health Interview Study,<sup>134</sup> the Census Bureau and Bureau of Labor Statistics' Current Population Survey,<sup>135</sup> and the Survey on Income and Program Participation<sup>136</sup> all show a measurable drop in disabled employment since 1992.<sup>137</sup> The Current Population Survey, for example, charts a nearly 5% national employment rate decline, from 1994 (24%) to 2004 (19.3%) for people who suffer from a self-described "work limitation."<sup>138</sup>

Academics offer varying explanations for this peculiar result. Some point to factors like increased participation in Social Security Disability Insurance,<sup>139</sup> while others blame an incongruity between the *ADA*'s definition of disability and the definition used in statistical research.<sup>140</sup> Still others blame the *ADA* itself,<sup>141</sup> with some going so far as to call for the Act's repeal.<sup>142</sup> Such critics argue that the *ADA* has resulted in a net disincentive for employers to hire the disabled.<sup>143</sup> Their argument is that the cost of reasonable accommodation mandates and defense of termination suits are economic disincentives to hiring the disabled that outweigh the costs of discriminating under the *ADA*.<sup>144</sup>

The elimination of SIFs provides an additional disincentive for employer hiring of the disabled that comports with incentive based explanations of the *ADA*'s failure to improve employment rates among the disabled. A number of academics, most notably Christine Jolls,<sup>145</sup> Thomas

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<sup>134</sup> Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKLEY J. EMP. & LAB. L. 527, 531 (2004).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> ANDREW J. HOUTENVILLE, *DISABILITY STATISTICS IN THE UNITED STATES*, CORNELL UNIVERSITY REHABILITATION RESEARCH AND TRAINING CENTER ON DISABILITY DEMOGRAPHICS AND STATISTICS, available at <http://www.disabilitystatistics.org>.

<sup>139</sup> Bagenstos, *supra* note 134, at 550–51. Detailing the recession in the early nineties that led to increased participation in SSDI.

<sup>140</sup> *Id.* at 539–50. Disability statistics, particularly in reference to ADA effectiveness, are difficult to interpret. As previously discussed the ADA definition of disability is very specific. By contrast, the self-reporting nature of studies such as the Current Population Survey can suggest either over or under inclusiveness. *Id.* The consistency of an employment rate decline in all government surveys, however, certainly supports the general proposition that unemployment among the disabled has increased since enactment of the ADA.

<sup>141</sup> Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION 21, 24 (2000).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Bagenstos, *supra* note 134, at 536.

<sup>145</sup> See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

Deleire,<sup>146</sup> Daron Acemoglu,<sup>147</sup> and Joshua D. Angrist,<sup>148</sup> have argued that the decline in employment among the disabled after passage of the *ADA* can be explained in terms of the economic perspective of individual employers. These writers advance what has been dubbed the “perverse-results” critique of the *ADA*.<sup>149</sup>

Perverse-results proponents incorporate the work of John J. Donohue III,<sup>150</sup> Peter Siegelman,<sup>151</sup> and others<sup>152</sup> to establish their claim that the *ADA* engenders a disincentive for hiring the disabled.<sup>153</sup> In *The Changing Nature of Employment Discrimination*, Donohue and Siegelman used economic analysis to demonstrate that, all things being equal, employers with a taste for discrimination are financially better off by illegally discriminating at the time of hire, rather than later discriminating in termination.<sup>154</sup> In studying a marked increase in Title VII of the *Civil Rights Act of 1964* litigation during the 1980’s, Donohue and Siegelman noticed an enormous and growing gap between seldom litigated allegations of hiring discrimination, and frequently litigated allegations of discriminatory termination.<sup>155</sup> Within the context of the private enforcement model of the *ADA*, and similar civil rights statutes, these findings are troublesome. An employer who properly internalizes the hiring/termination litigation disparity will be more likely to discriminate against people trying to come in the door, rather than those already employed.<sup>156</sup> Because terminated employees are more likely to sue than denied applicants,<sup>157</sup> employers who anticipate difficulty discharging an employee once hired, are acting rationally by discriminating at the hiring stage where the likelihood of suit is much lower.<sup>158</sup>

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<sup>146</sup> DeLeire, *supra* note 141.

<sup>147</sup> Acemoglu & Angrist, *supra* note 133.

<sup>148</sup> *Id.*

<sup>149</sup> Bagenstos, *supra* note 134, at 536.

<sup>150</sup> John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1026–27.

<sup>151</sup> *Id.*

<sup>152</sup> See Bagenstos, *supra* note 134, at n.55; Christine Jolls, *Identifying the Effects of the Americans with Disabilities Act Using State Law Variation: Preliminary Evidence on Educational Participation Effects*, AM. ECON. REV., 447, 447 (2004).

<sup>153</sup> Bagenstos *supra* note 134, at 536–37.

<sup>154</sup> Donohue & Siegelman, *supra* note 150, at 1026–27.

<sup>155</sup> *Id.* at 1016. They postulated that this phenomenon was attributable to a number of factors, among others, a decline in class certifications by groups of private parties alleging hiring discrimination. *Id.* at 1019–20.

<sup>156</sup> See generally *id.* at 1023.

<sup>157</sup> See *id.* at 1023–24.

<sup>158</sup> *Id.*

The *ADA*'s reasonable accommodation mandate imposes a particular disincentive in hiring not present under other employment discrimination laws. Title I of the *ADA* not only prohibits employers from discriminating against qualified disabled applicants,<sup>159</sup> it also requires employers to make reasonable accommodations that will allow the applicant to work unless an accommodation would impose an undue hardship on the employer.<sup>160</sup> The costs of reasonable accommodation are borne by the employer.<sup>161</sup> There is no specific data on how much reasonable accommodation costs employers in the aggregate or on an average individual basis, but proponents of the perverse-results theory point to the typical expense of the installation of ramps and the like as some measure of cost.<sup>162</sup>

Perverse-results proponents argue that the disincentive effects of higher firing and reasonable accommodation costs on employers outweigh the cost of potential hiring discrimination litigation.<sup>163</sup> Available information on *ADA* litigation buttresses that claim. From 1993 to 2005, 219,890 complaints brought under the *ADA* were filed with the EEOC, translating into an average of just under 17,000 complaints a year.<sup>164</sup> Among those claims, employers were successful as defendants in over 90% of the cases that went to trial.<sup>165</sup>

Second injury workers' compensation liability should be conceptualized in the same way as the cost of reasonable accommodation. Since SIF's insulate employers from larger potential compensation liability than would be experienced by hiring a worker without a pre-existing condition,<sup>166</sup> the elimination of SIFs is a further disincentive for employers.<sup>167</sup> Where the weekly cost of a workers' compensation claim for a permanent disability can be well over \$1,000,<sup>168</sup> the elimination of SIFs presents a cost to employers that could easily trump the one time cost for

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<sup>159</sup> See *supra* Part IV.B.

<sup>160</sup> ADA § 12112(b)(5).

<sup>161</sup> *Id.*

<sup>162</sup> But see Bagenstos, *supra* note 134, at 556 (noting that many ADA reasonable accommodations are one time expenses).

<sup>163</sup> *Id.* at 536–37.

<sup>164</sup> Equal Employment Opportunity Commission, Americans with Disabilities Act Charges Statistics, available at <http://www.eeoc.gov/stats/ada-charges-a.html>.

<sup>165</sup> A.B.A., *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability L. Rep. 403, 403; Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108–09 (1999).

<sup>166</sup> See *supra* Part II.

<sup>167</sup> *Id.*

<sup>168</sup> See generally U.S. CHAMBER OF COMMERCE, *supra* note 12, at 51 Chart VI. Maximum average weekly wage payments are not inclusive of medical benefits.

the installation of a ramp or an accessible restroom.<sup>169</sup> As Table 1 demonstrates, elimination of SIFs during the past decade may also explain, to a limited degree, the decline in disabled employment over the past decade. Accordingly, the elimination of SIFs gives added credence to the perverse-results critique of the *ADA*.

**Table 1**

**Number of Employed Workers with a Work Limitation Aged 18-64<sup>170</sup>**

	<u>1994</u>	<u>2004</u>	<u>PERCENTAGE DECLINE</u>
States with SIF	2,307,000	2,162,000	9%
States that have Eliminated SIF as of 2004	743,000	584,000	23%

## VI. CONCLUSION

This paper should not be read as a criticism of the *ADA*. On the whole, the *ADA* has certainly reaped benefits for disabled Americans in terms of access to accommodations and public attitudes towards disability. Also, in particular circumstances, the provisions of Title I have been successful in both deterring illegal discrimination and remedying past wrongs.<sup>171</sup> That being said, in terms of combating hiring discrimination, Title I of the *ADA* leaves much to be desired, both in terms of its structural provisions and record of achievement.<sup>172</sup>

Policy makers, therefore, should be wary of the oft repeated argument that SIFs are no longer needed because of the *ADA*. Connecticut's experience shows that, in the midst of projected shortfalls, state governments can be too quick to abandon a conceptually sound policy, in favor of a federal regulatory scheme. In order to best address the problem

<sup>169</sup> For instance, a four foot modular wheelchair ramp can cost under \$500 to purchase and install. See, e.g., <http://www.disbailitysystems.com/ramps/modulars.html>. (last visited Nov. 5, 2007)

<sup>170</sup> See *supra* note 147. The aggregate totals for this table were compiled by the author.

<sup>171</sup> See generally Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 VA. L. REV. 1151, 1154 (2004).

<sup>172</sup> See *supra* Parts IV-V.

of hiring discrimination against the disabled, the *ADA* should be complemented by SIF's.