

DEPUTY DIRECTOR
Denise A. Cardman
(202) 662-1761
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL
R. Larson Frisby
(202) 662-1098
frisbyr@staff.abanet.org

Lillian B. Gaskin
(202) 662-1768
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL
Kristi Gaines
(202) 662-1763
gainesk@staff.abanet.org

Kenneth J. Goldsmith
(202) 662-1789
goldsmithk@staff.abanet.org

Kerry M. Lawrence
(202) 662-1766
lawrenck@staff.abanet.org

Ellen McBarnette
(202) 662-1767
mcbarnee@staff.abanet.org

E. Bruce Nicholson
(202) 662-1769
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS
OPERATIONS/LEGISLATIVE COUNSEL
Julie M. Strandlie
(202) 662-1764
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY
LAW CONSULTANT
Hayden Gregory
(202) 662-1772
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL
Rita C. Aguilar
(202) 662-1780
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT
Julie Pasatiempo
(202) 662-1776
jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR
INFORMATION SERVICES
Sharon Greene
(202) 662-1014
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER
Rhonda J. McMillion
(202) 662-1017

January 29, 2008

The Honorable George Miller, Chair
Committee on Education and Labor
United States House of Representatives
Washington, DC 20015

Regarding: Oversight of the Americans with Disabilities Act of 1990

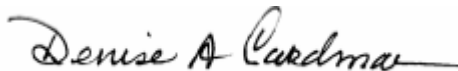
Dear Chairman Miller:

In support of your consideration of possible inadequacies in the access to fair redress under the Americans With Disabilities Act of 1990 (ADA), I call your attention to a 2007 American Bar Association survey relevant to the matter.

For the past 10 years our Commission on Mental and Physical Disability Law has annually surveyed employment cases brought in federal court under ADA Title I, 42 U.S.C. §§1211-117. Our most recent survey update, 2006 Employment Decisions under the ADA Title I—Survey Update, *Mental & Physical Disability Law Reporter, Vol. 31, No. 3, May June 2007*, has shown that in 2006, employers won 97.2% of the cases brought. In eight of the federal circuits no employee won a single ADA Title I case in all of 2006. In fact, in all the surveyed court decisions published between 1992 and 2006 involving employment under ADA Title I, plaintiffs have prevailed less than 5% of the time, while employers have prevailed more than 95% of the time.

While the ABA has taken no formal position on HR 3195, the results of our survey suggest that there is cause for concern that the ADA may not be serving the purpose for which it was originally enacted. Attached is a copy of the article cited above which summarizes our survey results and contains additional information describing the methodology used in the study.

Sincerely,



Denise A. Cardman
Acting Director

cc: Member of the House Committee on Education and Labor

Special Feature

2006 Employment Decisions Under the ADA Title I— Survey Update

Amy L. Albright, *Managing Editor*

Special thanks to legal intern Samantha A. Crane for compiling the data.

This is the tenth annual survey of employment cases brought in federal court under the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111–117. As in the previous survey, we included those employment cases involving retaliation claims, even though those cases fall under Title V of the ADA, 42 U.S.C. §12203. The first survey examined Title I cases decided from 1992 to 1997; the second, 1998 decisions; the third, 1999 decisions; the fourth, 2000 decisions; the fifth, 2001 decisions; the sixth, 2002 decisions; the seventh, 2003 decisions; the eighth, 2004 decisions; and last year's survey, 2005 decisions.

Methodology

We followed the same methodology employed in the original survey, dividing court decisions into three categories: (1) employer victories; (2) employee victories; and (3) no final resolution at the stage in which the case was reviewed for the survey. Employers “win” if the employee’s case is dismissed for whatever reason (e.g., employer’s motion to dismiss or for summary judgment granted), or the employer wins on the merits. Employees “win” only if they prevail on the merits. No final resolution occurs when a preliminary matter is resolved, but the merits are yet to be decided, such as with summary judgments in which the employee prevails, or pretrial litigation in which either party prevails. The case decision information is then subdivided into the federal circuits, based on the location of the deciding federal court. In addition, we surveyed the number of employer wins, employee wins, and no resolution in cases where the alleged disability is substance abuse and mental illness (e.g., depression, claustrophobia, psychosis, anxiety, stress, bipolar disorder, and post-traumatic stress disorder).

The *Reporter* contains summaries of Title I and V court decisions, both reported and unreported, that staff identify through online searches, particularly WESTLAW, and various media outlets. For all of the surveys, staff also examined Equal Employment Opportunity Commission (EEOC) statistics on Title I administrative complaints for 2006 (*see* <http://www.eeoc.gov/stats/ada-charges.html>). According to the EEOC’s definition of terms, employers prevail if: (1) the case is closed administratively because the plaintiff no longer has a valid claim or has not followed proper procedures, or (2) the EEOC determines there is no reasonable cause to believe that discrimination had occurred. Employees prevail either on the merits—negotiated settlement, the employer granted the plaintiff benefits, and conciliation—or if the EEOC determined that reasonable cause existed to believe that discrimination had occurred

and, in most cases, had begun conciliation efforts.

Results

This survey covers 272 case decisions from the year 2006 that have appeared in the *Reporter* through this issue. Of the 272 cases, 212 resulted in employer wins; 6 in employee wins; and 54 in decisions in which the merits of the claim were not resolved. Of the 218 decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins. Of these 272 decisions, 59 involved some type of mental illness as one of several primary disabilities, with 53 employer wins, no employee wins, and 6 no resolution of the merits. For the 7 cases involving substance abuse (drug and/or alcohol abuse), 7 resulted in employer wins. The Tenth Circuit had the highest percentage of employee wins at 12.5, followed by the Third Circuit at 7.7, the Second Circuit at 5.3, and the Ninth Circuit at 3.8. There were no employee wins in the remaining 8 circuits. Finally, with respect to the EEOC complaints, employees prevailed in 23.4 percent of the 2006 cases, a slight increase from 22.1 percent in 2005.

Discussion

The percentage of employee wins for this survey—2.8—was significantly lower than last year’s percentage—6.2—yet comparable to the percentages in 2004 (3 percent) and 2003 (2 percent). Similarly, the highest percentage of employee wins among the circuits fell sharply from 36.4 (First Circuit) in 2005 to 12.5 (Tenth Circuit) in 2006, and was close to 11.1 in 2004 (Ninth Circuit). When broken down into cases involving mental illness and substance abuse, there were no employee wins, compared to 1 employee win for mental illness and 1 for substance abuse in 2005. Despite the declines in employee wins from 2005, however, the results for 2006 show a continuing pattern of employers prevailing and employees losing in both final court outcomes and administrative decisions.

Similarly, the results show a continuation of employer wins on motions for summary judgment or to dismiss due to the plaintiff employee’s failure to meet the requirements of a *prima facie* case of discrimination—that he or she has a protected disability, is qualified to perform his or her essential job functions with or without reasonable accommodations and does not pose a direct threat, and suffered an adverse employment action because of his or her disability—or of retaliation—that he or she engaged in a protected activity and suffered an adverse employment action, and that a causal connection exists between the protected activity and adverse action. Accordingly, the elements of a *prima facie* case continue to create obstacles for plaintiffs. Other obstacles include sovereign immunity, arbitration clauses, judicial estoppel, exhaustion of administrative remedies, statutes of limitations, and the definition of covered employees and employers under the ADA.

As in previous surveys, the percentage of employee wins among

the circuits varies from year to year, with no apparent reason why, other than chance since the sample is small. However, compared to last year's survey, that percentage dropped for all but the Third and Tenth Circuits. In the Third Circuit, the percentage of employee wins jumped significantly from 2.9 to 7.7, while in the Tenth Circuit that percentage jumped slightly from 11.1 to 12.5. The sharpest decline occurred in the First Circuit (36.4 percent to no wins), with significant declines in the Fifth (7.7 to no wins), Sixth (5.7 to no wins), and Ninth (8.3 to 3.8) Circuits. However, there were some similarities among the survey results for 2005 and 2006, as there were no employee wins in the Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits.

Interestingly, the number of mental health cases in both 2005 and 2006 was 59. For both years, the percentage of employer wins was high (46 in 2005 to 53 in 2006), while the number of employee wins was 1 in 2005 and none in 2006. Also, there was a 50 percent drop in the number of no resolution cases, from 12 in 2005 to 6 in 2006, but again the sample is small. Moreover, the number of substance abuse cases for both years was low, 10 and 7, as was the number of employee wins, 1 and none, respectively. Finally, with respect to the EEOC data, the percentage of employee wins has been slightly increasing for 2004–06—20.9, 22.1, and 23.4, respectively—and employees continue to have a better chance of prevailing at the administrative level than they do in court.

**Table 1:
Employer - Employee Wins 2006**

Circuit	# Cases	Er Wins	Ee Wins	No Resolution	% Er Wins	% Ee Wins
1	12	9	0	3	100	0
2	25	18	1	6	94.7	5.3
3	33	24	2	7	92.3	7.7
4	17	16	0	1	100	0
5	21	19	0	2	100	0
6	37	28	0	9	100	0
7	38	27	0	11	100	0
8	25	21	0	4	100	0
9	32	25	1	6	96.2	3.8
10	19	14	2	3	87.5	12.5
11	11	10	0	1	100	0
DC	2	1	0	1	100	0
TOTAL	272	212	6	54	97.2	2.8

**Table 2:
Percentage of Employer - Employee Wins 1992-2006**

Circuit	2006	2005	2004	2003	2002	2001	2000	1999	1998	1992-97	2006	2005	2004	2003	2002	2001	2000	1999	1998	1992-97
	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Ee Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins	% Er Wins
First	0	36.4	0	0	7.7	4	11.1	16.7	5.9	6.9	100	63.6	100	100	92.3	96	88.9	83.3	94.1	93.1
Second	5.3	7	3.7	2.6	3.8	2.2	2	4.4	7	8.2	94.7	93	96.3	97.4	96.2	97.8	98	95.6	93	91.8
Third	7.7	2.9	0	0	4.2	5.3	2.9	0	0	7	92.3	97.1	100	100	95.8	94.7	97.1	100	100	93
Fourth	0	0	0	0	0	4.5	5.6	0	16.7	2	100	100	100	100	100	95.5	94.4	100	83.3	98
Fifth	0	7.7	0	6.2	15.4	7.7	9.4	5.1	3.4	1.9	100	92.3	100	93.8	84.6	92.3	90.6	94.9	96.6	98.1
Sixth	0	5.7	0	6.7	2.9	11.1	0	0	3.7	11.7	100	94.3	100	93.3	97.1	88.9	100	100	96.3	88.3
Seventh	0	0	2.5	0	1.7	1.7	3.6	3.5	7.7	6.6	100	100	97.5	100	98.3	96.4	96.5	92.3	92.3	93.4
Eighth	0	0	0	8.6	14.6	5	8.7	5	0	3.7	100	100	100	91.4	85.4	95	91.3	95	100	96.3
Ninth	3.8	8.3	11.1	0	6.2	6.2	0	12.5	6.2	16.7	96.2	91.7	88.9	100	93.8	93.8	100	87.5	93.8	83.3
Tenth	12.5	11.1	6.7	0	9.5	3.1	2.4	5.1	10.7	16	87.5	88.9	93.3	100	90.5	96.9	97.6	94.9	89.3	84
Eleventh	0	0	8.3	0	0	0	0	0	0	7.2	100	100	91.7	100	100	100	100	100	100	92.8
D.C. & Fed.	0	0	50	0	0	0	0	0	0	12.5	100	100	50	100	100	100	100	100	0	87.5
U.S. Sup. Ct.	*N	0	*N	0	0	0	*N	0	0	100	*N	0	*N	0	100	100	*N	100	0	0
Total	2.8	6.2	3	2	5.5	4.3	3.6	4.3	5.7	7.9	97.2	93.8	97	98	94.5	95.7	96.4	95.7	94.3	92.1

*N = No Cases

Table 3:
Employer - Employee Wins 2006 in Mental Cases

Circuit	# Cases	Er Wins	Ee Wins	No Resolution	% Er Wins	% Ee Wins
1	3	3	0	0	100	0
2	4	4	0	0	100	0
3	6	4	0	2	100	0
4	3	3	0	0	100	0
5	6	6	0	0	100	0
6	12	11	0	1	100	0
7	5	4	0	1	100	0
8	5	5	0	0	100	0
9	12	10	0	2	100	0
10	2	2	0	0	100	0
11	1	1	0	0	100	0
TOTAL	59	53	0	6	100	0

Table 4:
Employer - Employee Wins 2006 in Substance Abuse Cases

Circuit	# Cases	Er Wins	Ee Wins	No Resolution	% Er Wins	% Ee Wins
2	2	2	0	0	100	0
3	1	1	0	0	100	0
5	2	2	0	0	100	0
8	2	2	0	0	100	0
TOTAL	7	7	0	0	100	0