

# TOWARD INCREASED NOTICE OF FMLA AND ADA PROTECTIONS

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*The current notice regimes under the Americans with Disabilities Act and the Family and Medical Leave Act provide insufficient notice to two groups of employees who might avail themselves of the Acts' protections: those who are ignorant or misinformed about their rights under the Acts and those who remain "in the closet" about their disability, consciously choosing to hide their need for accommodation or leave in order to avoid the accompanying stigma. To address these dilemmas, the author proposes a multi-part solution: First, employers should provide individual notice to their workers at regular intervals. Second, employers should notify employees of the Acts' protections when an employee demonstrates a performance problem resulting from lack of accommodation or leave, as it is at that point that the employee might wish to come "out of the closet" to enjoy the Acts' protections.*

Vivienne Sales has attention deficit hyperactivity disorder (ADHD).<sup>1</sup> At the library where she worked this often made her the antithesis of a model employee: She was chronically late, sloppy, and often made inappropriate comments. Yet she believed that with certain accommodations for her condition—such as set deadlines and weekly progress reports—she could perform effectively. Vivienne, however, did not want to tell her employer about her condition. She feared that if she came “out of the closet”—her words—she would get fired. Similarly, when Judi Swedek found out she had breast cancer, she did not tell her employer, a New York investment bank, and went so far as to refuse chemotherapy in order to keep her illness invisible. She explains: “At the time I was more afraid of losing my job than I was of the cancer.”<sup>2</sup>

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<sup>1</sup> Vivienne Sales's story is recounted in Lisa Belkin, *Office Messes*, N.Y. TIMES, July 18, 2004, § 6 (Magazine), at 24.

<sup>2</sup> Carol Marie Cropper, *Keeping Your Job When You're Ill: Federal Laws Provide Sick Workers with Some Protection, but You Need to Play Your Cards Carefully*, BUS. WK., Jan. 17, 2005, at 80.

Vivienne and Judi are likely not alone. Vivienne, like many employees, has a medical condition that may make her eligible for statutory protections. Under the Americans with Disabilities Act (ADA),<sup>3</sup> she may have a right to reasonable accommodation,<sup>4</sup> yet she did not invoke that protection. Judi's situation would make her eligible for unpaid leave under the Family and Medical Leave Act (FMLA),<sup>5</sup> allowing her time to recover from cancer treatment.<sup>6</sup>

Both Acts are unique in that they provide substantive protections<sup>7</sup> to workers, but only if the workers request those rights. Unlike other federal employment statutes, such as Title VII of the Civil Rights Act, the Acts create no employer obligations to workers who do not invoke such protections.<sup>8</sup>

There are several reasons why workers might not assert their rights. Workers may be ignorant of the complex statutory and regulatory scheme that governs employment protections. Even those who are generally aware of the statutes may not recognize that the laws apply to them; this is particularly true for employees who fall outside the classes most typically believed to be protected by the ADA—the physically disabled—and the FMLA—pregnant women.

Vivienne's and Judi's stories, however, illustrate another reason: Some employees simply decide to downplay their identities—"covering," to use Kenji Yoshino's term.<sup>9</sup> There is a great deal of stigma

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<sup>3</sup> 42 U.S.C. §§ 12101–12213 (2000).

<sup>4</sup> Attention deficit hyperactivity disorder (ADHD) can constitute a disability within the meaning of the Americans with Disabilities Act (ADA). See *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003) (determining that each of plaintiff's impairments—bipolar disorder, attention deficit disorder, and hypothyroidism—could constitute disability under ADA); *Davidson v. Midelfort Clinic*, 133 F.3d 499, 506 (7th Cir. 1998) (same); see also Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h)(2) (2000) (including learning disabilities in definition of disability in EEOC regulations). However, courts consider each case individually, and it may be difficult for an employee to prove that her ADHD "substantially limits" any major life activities. See, e.g., *Calef v. Gillette Co.*, 322 F.3d 75, 86 (1st Cir. 2003) (holding that employee with ADHD was not substantially limited in major life activities of learning or speaking); *Doebele*, 342 F.3d at 1129–31 (same); *Davidson*, 133 F.3d at 506–09 (same).

<sup>5</sup> 29 U.S.C. §§ 2601–2654 (2000). For purposes of this Note, the Family and Medical Leave Act (FMLA) and the ADA will be collectively referred to as "the Acts."

<sup>6</sup> See *id.* § 2612 (providing leave for qualifying employees).

<sup>7</sup> For debate about whether the ADA provides benefits to the disabled or whether it merely equalizes treatment, see *infra* note 38.

<sup>8</sup> One exception is the Religious Discrimination Section of Title VII, Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(1) (2000), which requires employers to accommodate their employees' religion, § 2000e(j), but only if the employees request accommodations, 29 CFR § 1605.2(c)(1) (2004).

<sup>9</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). See *infra* Part II.B for a discussion of this work.

associated with being a disabled,<sup>10</sup> pregnant,<sup>11</sup> ill, or caretaking employee.<sup>12</sup> Given this stigma, and recognizing that the law cannot stop employees from being fired but at best can only compensate them after the fact, workers may believe that their employment success depends on hiding their identity and not invoking the protections to which they are entitled.

It is troubling when employees who could benefit from accommodation or leave do not request it due to misinformation about their legal rights or fear of the repercussions of asserting those rights. When benefits are forsaken, the Congressional purpose in enacting this statutory scheme may be frustrated. Furthermore, the belief that fundamental fairness requires notice of one's rights is endemic to American law<sup>13</sup>—as embodied in the due process clause<sup>14</sup>—and indi-

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<sup>10</sup> See 42 U.S.C. § 12101(a) (“[D]iscrimination against individuals with disabilities persists in such critical areas as employment[;] . . . individuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . .”); EQUAL EMPLOYMENT OPPORTUNITY COMM’N, A REPORT ON THE TENTH ANNIVERSARY OF THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), <http://www.lawmemo.com/eeoc/ada2000.htm> (“Workers with disabilities often found their careers and earning capacity stunted because of discriminatory attitudes.”).

<sup>11</sup> Though the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), was enacted in 1978, such discrimination persists. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PREGNANCY DISCRIMINATION CHARGES, EEOC & FEPAs COMBINED: FY 1992–FY 2004, <http://www.eeoc.gov/stats/pregnanc.html> (last modified Jan. 27, 2005) (reporting over 4600 pregnancy discrimination complaints filed to state and federal employment agencies in 2004 alone, 37% increase from 1992); see also NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *Executive Summary to WOMEN AT WORK: LOOKING BEHIND THE NUMBERS 40 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964* (2005), available at <http://www.nationalpartnership.org/portals/p3/library/CivilRightsAffAction/WomenAtWorkCRA40thAnnReport.pdf> (reporting that EEOC pregnancy complaints increased 39% even while birthrate dropped 9%).

<sup>12</sup> 29 U.S.C. § 2601(a)(3) (2000) (“[T]he lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting.”); see also Martha F. Davis, *Child Care as a Human Right: A New Perspective on an Old Debate* 4 n.2 (2003) (on file with the *New York University Law Review*), [http://www.iwpr.org/pdf/Davis\\_Martha.pdf](http://www.iwpr.org/pdf/Davis_Martha.pdf) (explaining that FMLA has lessened stigma associated with caretaking).

<sup>13</sup> See, e.g., FED. R. CIV. P. 23(c) (requiring notification of potential claimants in class action lawsuits); *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (requiring notice and opportunity for hearing before deprivation of welfare benefits); *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (requiring notice to arrestees of right to remain silent).

<sup>14</sup> The Due Process Clause would not mandate notice in the case of the rights described in this Note for many reasons, not least of which is that any deprivation here would result from the actions of a private employer, not a government actor. See U.S. CONST. amend. V (prohibiting deprivation of life, liberty, or property without due process of law); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (“The Fifth Amendment ‘is a limitation only upon the powers of the General Government,’ and is not directed against the action of individuals.”) (citing *Talton v. Mayes*, 163 U.S. 376, 382 (1896)).

cates the value we place on such notice.<sup>15</sup> Both statutory efficacy and fairness concerns, then, indicate that notice to employees of their rights under the FMLA and ADA should be a crucial component of the legal scheme.

Notice in the context of the ADA and FMLA accomplishes two distinct goals. First, it can inform an employee of her rights. Second, it can give the employee an opportunity to assert statutory protection by informing her that she need not hide her need for that protection.

This Note proceeds as follows: Part I describes the FMLA and the ADA generally and the Acts' provisions governing notice. Part II discusses the chief reasons why that framework is insufficient to inform employees of their rights, focusing on both employees who are ignorant or misinformed and those who choose to downplay their need for accommodation or leave. Part III proposes a multi-part solution to this dilemma: Employers should provide individual notice to their workers regularly and should be encouraged to create a workplace disciplinary scheme to provide notice at the point where a rational employee would come "out of the closet."

## I

### THE STATUTORY, REGULATORY, AND JUDICIAL FRAMEWORK

The FMLA and ADA each provide important protections to employees and include general notice provisions. At the same time, the primary burden for initiating the request for leave or accommodation remains with the employee. Before proposing additional notice provisions it is worth analyzing how courts and administrative agencies have interpreted these statutory provisions and the means by which agencies have aimed to protect employees who may be ignorant of their rights.

#### A. *The Family and Medical Leave Act*

The FMLA provides an employee with twelve weeks of unpaid<sup>16</sup> leave annually to care for a newborn or adopted child, an ailing family

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<sup>15</sup> As the Court states in *Fuentes v. Shevin*, "[P]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). The Court continues: "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>16</sup> While leave is unpaid, employers must continue health insurance coverage, which is a particularly crucial benefit for those on leave for medical reasons. 29 U.S.C. § 2614(c) (2000).

member, or herself, if she is ill.<sup>17</sup> The FMLA only applies to employers that have fifty or more employees<sup>18</sup> and only to those employees within that subset who have been employed for at least twelve months and worked 1250 hours or more over the previous year.<sup>19</sup>

The FMLA places the onus on the employee to ask for leave. The statute provides that where leave is “foreseeable,” the employee must provide thirty days notice; where that is impossible, the employee shall provide “such notice as is practicable.”<sup>20</sup> The employers’ burden is more general: Employers must post a notice “in conspicuous places” detailing employees’ rights under the FMLA.<sup>21</sup>

The Department of Labor (DOL) supplemented the statutory scheme by promulgating regulations requiring “more comprehensive and individualized notice” but *only* to those employees who request leave.<sup>22</sup> The DOL recognized that general notices may be insufficient and that employees, ignorant of their FMLA rights, would be disadvantaged by the resulting information asymmetry.<sup>23</sup>

This regulatory scheme was modified by the Supreme Court in *Ragsdale v. Wolverine World Wide*, a 5-4 decision authored by Justice Kennedy.<sup>24</sup> *Ragsdale* struck down a DOL regulation<sup>25</sup> providing that where an employer does not notify an employee taking leave that her

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<sup>17</sup> 29 U.S.C. § 2612(a)(1) provides:

(1) Entitlement to leave. Subject to section 2613 of this Title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. (B) Because of the placement of a son or daughter with the employee for adoption or foster care. (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

<sup>18</sup> *Id.* § 2611(4)(A).

<sup>19</sup> *Id.* § 2611(2)(a).

<sup>20</sup> *Id.* § 2612(e)(1).

<sup>21</sup> *Id.* § 2619(a). The penalty for not posting such notices is a civil fine of \$100 or less. *Id.* § 2619(b). The Employment Standards Administration of the Department of Labor (DOL) has created a poster that employers can download and post to provide the required notice. See DEP’T OF LABOR, YOUR RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, available at <http://www.dol.gov/esa/regs/compliance/posters/pdf/fmlaen.pdf>.

<sup>22</sup> *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 87–88 (2002) (describing regulations).

<sup>23</sup> See *id.* at 88 (“According to the Secretary . . . more comprehensive and individualized notice . . . is necessary to ensure that employees are aware of their rights when they take leave.”).

<sup>24</sup> *Ragsdale*, 535 U.S. 81. The Eighth Circuit had previously invalidated the regulation. *Ragsdale v. Wolverine World Wide*, 218 F.3d 933, 939 (8th Cir. 2000). For an in-depth discussion of the Eighth Circuit’s analysis as well as the Supreme Court’s reasoning, see

leave is covered by the FMLA, the employee retains her right to twelve weeks of FMLA leave annually.<sup>26</sup> Justice Kennedy saw this grant of additional leave as a “penalty” against any employer that did not provide sufficient notice to its employees and found that the penalty was inappropriate given the statute’s language and Congressional intent.<sup>27</sup>

Despite the Court’s modification, other important components of the DOL’s regulation regarding notice were not examined in *Ragsdale* and therefore remain good law. Under DOL regulations, the employer remains responsible for “designat[ing] leave, paid or unpaid, as FMLA-qualifying, and [for] giv[ing] notice of the designation to the employee.”<sup>28</sup> If the employee does not explain why he or she needs leave, “the employer should inquire further . . . to ascertain whether the paid leave is potentially FMLA-qualifying.”<sup>29</sup>

The *Ragsdale* Court explicitly left open the question of whether the “comprehensive and individualized notice required by the regulations . . . accords with the text and structure of the FMLA, or whether Congress has instead ‘spoken to the precise question’ of notice, and so foreclosed the notice regulations.”<sup>30</sup> Justice O’Connor tackled this question head-on in her dissent, and argued that the DOL is well within its rights to require individual notice as such “notice reminds employees of the existence of the Act and its protections at the very moment they become relevant.”<sup>31</sup> Neither *Ragsdale* nor the DOL, however, have addressed the type of individual notice with which this

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Richard Bales & Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 MO. L. REV. 883, 883–89 (2002).

<sup>25</sup> The DOL regulation stated that if an employee takes medical leave “and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” 29 C.F.R. § 825.700(a) (2004).

<sup>26</sup> *Ragsdale*, 535 U.S. 81.

<sup>27</sup> *Id.* at 88–96. This penalty concerned the Court for three primary reasons. First, the penalty was not “tailored to the harm suffered.” *Id.* at 89. Even if the employee would not have acted differently had she been notified of her FMLA rights, she was entitled to twelve additional weeks without a showing of “any real impairment of [her] rights and resulting prejudice.” *Id.* at 90. Second, the language of the FMLA indicates that Congress intended a lesser penalty for employers that did not provide appropriate notice, since the fine was at most a mere \$100 for employers that did not post the general notice required. *Id.* at 95 (discussing FMLA, 29 U.S.C. § 2619(b) (2000)). Finally, the Court was concerned that this regulation would discourage employers from offering more than the FMLA-minimum of twelve weeks of leave, since only those employers providing additional leave must decide whether to designate an absence as FMLA leave. *Id.* at 95–96.

<sup>28</sup> 29 C.F.R. § 825.208(a).

<sup>29</sup> *Id.*

<sup>30</sup> *Ragsdale*, 535 U.S. at 88 (internal citations omitted).

<sup>31</sup> *Id.* at 97 (O’Connor, J., dissenting).

Note is concerned—notice to employees who may need leave but have not requested it.

### B. *The Americans with Disabilities Act*

The ADA was crafted as an antidiscrimination statute: The purpose of the Act is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>32</sup> Title I<sup>33</sup> applies to all employers with fifteen or more employees.<sup>34</sup> It bars “discriminat[ion] against a qualified individual with a disability,”<sup>35</sup> defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>36</sup> Failure to “mak[e] reasonable accommodations to the known physical or mental limitations” of an employee or applicant constitutes discrimination unless such accommodation would “impose an undue hardship” on the employer.<sup>37</sup> Nowhere does the ADA lay out the procedure by which employers would come to “know” of an employee’s disability. Perhaps this deficiency is unsurprising given that, unlike the FMLA, the ADA was not envisioned as legislation to provide a benefit to the target employees—here, accommodations to the disabled—but was instead envisioned as outlawing discrimination against disabled persons.<sup>38</sup> As a result, the statute does not focus on the mechanism for providing the benefit.

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<sup>32</sup> 42 U.S.C. § 12101(b) (2000). Congress stated three other purposes which are similarly focused on eliminating discrimination:

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.*

<sup>33</sup> This Note only examines Title I of the ADA, which focuses on employment. Titles II (state and local government) and III (public accommodations operated by private entities) are irrelevant to my analysis.

<sup>34</sup> 42 U.S.C. § 12111(5)(a).

<sup>35</sup> *Id.* § 12112(a).

<sup>36</sup> *Id.* § 12111(8).

<sup>37</sup> *Id.* § 12112(b)(5)(A) (emphasis added).

<sup>38</sup> While recognizing that the ADA is styled as an antidiscrimination statute, some scholars have characterized it as distinct from the prototypical antidiscrimination statute: Title VII of the Civil Rights Act. In contrast to Title VII, the ADA’s requirement of reasonable accommodation imposes costs on employers that mean that “disabled individuals” can often “insist on discrimination in their favor.” Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996); see also Linda Hamilton Kreiger, *Foreward—Backlash Against the ADA: Inter-*

Like the FMLA, the ADA also requires employers to post notices “in an accessible format . . . describing the applicable provisions of this [Act].”<sup>39</sup> Unlike the FMLA, however, the ADA does not require that the notices be posted in “conspicuous places”; more importantly, the ADA does not dictate a penalty, such as a fine, for employers that do not post the required notice.

The Equal Employment Opportunity Commission (EEOC), however, regulates how employers can learn of and accommodate a disabled employee. EEOC regulations describe an “informal, interactive process” by which employers “identify the precise limitation resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>40</sup> While the language of the regulations implies that the initiation of this process is within the employer’s discretion by stating that “it *may* be necessary for the [employer] to initiate,”<sup>41</sup> further EEOC guidance and court rulings have clarified that employers are required to initiate the process once an employee requests accommodation.<sup>42</sup>

This, of course, raises the question of what constitutes a “request for reasonable accommodation,” as well as what an employer needs to do to initiate the formal process. EEOC enforcement guidance requires employees to “inform the employer that an accommodation

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*disciplinary Perspectives and the Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3–4 (2000) (“The ADA require[s] . . . that in certain contexts [disabled individuals] be treated differently, arguably better, to achieve an equal effect.”); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199–1200 (2003) (“Although the ADA uses a sameness model in part, its distinctive thrust is a ‘difference’ model, requiring employers to treat individuals with disabilities differently and more favorably than others.”). Others disagree, arguing that the ADA is quite similar to Title VII in that all equal opportunity legislation requires “employers [to] abandon the profit maximizing calculus in favor of inclusion of members of protected groups.” Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation, and Universal Mandates—Aren’t They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 125–26 (2003); see also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (“[A]ntidiscrimination and accommodation are [in some instances] overlapping rather than fundamentally distinct categories . . . . [E]ven those aspects of antidiscrimination law that are not in fact accommodation requirements . . . [still] operate[ ] to require employers to incur undeniable financial costs associated with employing the disfavored group of employees.”).

<sup>39</sup> 42 U.S.C. § 12115.

<sup>40</sup> 29 C.F.R. § 1630.2(o)(3) (2004).

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> See *id.* § 1630.9 (“[I]t is unlawful for a[n] [employer] not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant . . . .”); see also *Barnett v. U.S. Air*, 228 F.3d 1105, 1112, 1114 (9th Cir. 2000) (stating that “[a]lmost all of the circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process and that this obligation is triggered either by the employee’s request for accommodation or by the employer’s recognition of the need for accommodation” and holding same).



is needed.”<sup>43</sup> No request is required if the employer knows or should know that the employee “is experiencing workplace problems because of the disability” and also knows that “the disability prevents the employee from requesting a reasonable accommodation” because, for example, an employee is mentally retarded.<sup>44</sup> Where this “limited circumstance[ ]” does not apply, an employee has the burden of letting her employer know that she “needs an adjustment or change at work for a reason related to a medical condition.”<sup>45</sup> As under the FMLA regulations, the employee need not specifically invoke her ADA rights, but she must “link” her need for a work adjustment with her disability.<sup>46</sup> The Fifth Circuit has expanded on the employee’s burden, holding that an employee must not merely explain that he has a disability but must further state “that he suffered a *limitation* as a result of his alleged impairment.”<sup>47</sup>

While employees requesting FMLA leave must provide the employer with thirty days notice, those requesting ADA accommodations have the choice of when to inform their employers and can choose to request the accommodation when they believe it would be most helpful.<sup>48</sup> The employee may have to provide documentation of her disability.

After such a request is received, the employer must “initiate or participate in an informal dialogue.”<sup>49</sup> Once the employer has initiated a dialogue, both parties have the responsibility to engage in a

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<sup>43</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002) [hereinafter EEOC GUIDANCE], available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>44</sup> *Id.* As an example of this exception, the Guidance describes a mentally-retarded employee who, due to his disability, mistakenly delivers messages meant for “R. Miller” to “T. Miller.” His disability also prevents him from requesting the reasonable accommodation of having the employer spell out “Robert” and “Tom” to better distinguish the names. It is therefore the employer’s responsibility to offer such an accommodation proactively.

<sup>45</sup> *Id.*

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

<sup>47</sup> Taylor v. Principal Fin. Group, 93 F.3d 155, 164 (5th Cir. 1996).

<sup>48</sup> The Guidance states:

An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. . . . [A]n individual with a disability should request a reasonable accommodation when s/he knows there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment. As a practical matter, it may be in an employee’s best interest to request a reasonable accommodation before performance suffers or conduct problems occur.

EEOC GUIDANCE, *supra* note 43.

<sup>49</sup> EEOC GUIDANCE, *supra* note 43.

conversation<sup>50</sup> to determine what type of accommodation would be effective.<sup>51</sup> The law places some of the burden of determining an appropriate accommodation on the employer, who might have greater access to information about the types of accommodation the company could provide.<sup>52</sup> Throughout the process, employers must act in good faith.<sup>53</sup>

The EEOC is reluctant to allow employers to ask employees who are not known to be disabled whether they need accommodation.<sup>54</sup> The guidance allows an employer to offer an accommodation only to an employee who indicates that she needs such an accommodation, either directly or indirectly, by exhibiting "performance or conduct problems."<sup>55</sup> The EEOC never explains why employers should be barred from asking *any* employee whether she is a qualified individual with a disability who could benefit from a reasonable accommodation. Given that the EEOC generally encourages dissemination of information regarding the ADA,<sup>56</sup> this requirement likely stems from a con-

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<sup>50</sup> See, e.g., *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (holding that where mentally ill employee explained that he found workplace stressful but "did not specifically request a reasonable accommodation," it was employer's "duty to engage in the interactive process and find a reasonable way for him to work despite his fears"); see also *Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) ("Both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith."); *Taylor*, 93 F.3d at 165 ("[O]nce an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer.").

<sup>51</sup> If more than one accommodation would be effective, the "employer providing the accommodation has the ultimate discretion to choose between effective accommodations" based on which is "less expensive or burdensome." EEOC GUIDANCE, *supra* note 43.

<sup>52</sup> See *Barnett v. U.S. Air*, 228 F.3d 1105, 1113 (9th Cir. 2000) ("Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has.").

<sup>53</sup> See, e.g., *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999) ("All the interactive process requires is that employers make a good-faith effort to seek accommodation."); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary."); *Bultemeyer*, 100 F.3d at 1285 ("[T]he employer must make a reasonable effort to determine the appropriate accommodation.").

<sup>54</sup> A helpful comparison is the Individuals with Disabilities Education Act (IDEA), which provides funding to the states to aid disabled children (federal special education). The IDEA has a "Child Find" provision which requires that disabled children be "identified, located, and evaluated" and that "a practical method [be] developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." 20 U.S.C. § 1412(a)(3)(A) (2000); see also *Child Find*, 34 C.F.R. § 300.125 (2004) (implementing Child Find provisions).

<sup>55</sup> EEOC GUIDANCE, *supra* note 43.

<sup>56</sup> See *id.* ("Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with infor-

cern that the very offer of accommodation could be stigmatizing. This approach is mistaken, however, because an offer of accommodation need not be stigmatizing if it is provided to all employees.

Congress, the DOL, the EEOC, and the courts have been quite concerned with providing notice to employees of their rights under both the ADA and the FMLA and fairly allocating the burden of such notice between employees and employers. However, the law in this area is quite complicated, and it is the rare employee who would be conversant in all its component parts. Furthermore, the existing notice scheme does little to help an employee who has not informed her employer that she has a disability that limits her work performance or needs to take time off from work.

## II

### PROBLEMS WITH THE CURRENT FRAMEWORK

There are several reasons why the legal framework laid out in Part I is insufficient to inform employees of their rights and allow them to exercise those rights: First, there is widespread ignorance of employment law protections among employees. Second, given the complexity of these Acts and the government's frequently inaccurate representations of them, misinformation is likely even among those who know about the Acts' existence. Finally, employees may decide to cover their need for accommodation or leave and forego these protections so as to avoid workplace stigma and discrimination. I will consider each in turn.

#### A. *Employee Ignorance and Misinformation*

##### 1. *Ignorance Generally*

First, there is convincing data that employees are ignorant of their legal rights. A Department of Labor Study in 2000 indicated that more than 40% of employees have never heard of the FMLA.<sup>57</sup> The number was similarly high even when limited to those employees who worked at companies that must comply with the FMLA—indi-

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mation about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act) . . .").

<sup>57</sup> DAVID CANTOR, ET AL., DEP'T OF LABOR, *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 3–8*, available at <http://web.archive.org/web/20041024201047/http://www.dol.gov/asp/fmla/toc.htm> (last visited Oct. 17, 2005) (reporting that "slightly over half of employees reported having heard of the Act"); see also *Family Leave: Majority of U.S. Workers Are Unaware of FMLA Provisions*, BNA Survey Finds, DAILY LAB. REP. (BNA), Dec. 12, 1994, at CC1 (reporting that in 1994 "slightly more than half of all American workers knew little or nothing about [the FMLA]").

cating that the general notice provisions required by the statute are rather ineffective.<sup>58</sup> While there is no similar study regarding knowledge of the ADA's protections, there is no reason to expect it to be much higher. Such ignorance is not surprising given Pauline Kim's influential study demonstrating that employees grossly miscalculate their legal rights with regard to a different component of employment law—employment at will.<sup>59</sup>

Even among those employees who have heard of the Acts, there are several reasons to believe that they would not be fully knowledgeable or might not recognize that the protections would apply to them. First, the Acts are fairly new, having been enacted within the past two decades, so there has been limited time for these Acts to be incorporated into our legal consciousness about basic legal rules and entitlements.<sup>60</sup> There are indications that just this sort of legal consciousness is developing, but the process is far from complete.<sup>61</sup> Second, the statutory and regulatory structures surrounding the Acts are quite complicated, making it difficult for an employee to learn all the relevant law regarding the FMLA and ADA. For example, it may even be difficult for employees to determine whether the FMLA applies to their employment relationship, since, as explained above, the FMLA only

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<sup>58</sup> See CANTOR, ET AL., *supra* note 57, at 3–8 (reporting that 59.3% of employees working in covered establishments had “heard of the FMLA”); *supra* notes 18–19 and accompanying text (explaining that FMLA is limited to employers with fifty or more employees).

<sup>59</sup> Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133 (1997) (finding that on average 51% had correctly answered whether they would be “legally protected” from being fired in an at-will jurisdiction and pointing out that this was little better than chance since the only options were “lawful” or “unlawful”). On certain questions, employee error rates approached 90%. *Id.*; see also Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U. ILL. L. REV. 447, 447 (finding “remarkably similar” response in follow-up study). In concluding that employees may overestimate their rights, Kim’s study provides further data that employees are often not knowledgeable about their rights. *Id.* at 453–65.

<sup>60</sup> There is an extensive sociolegal literature on legal consciousness. See Susan S. Silbey, *Legal Culture and Legal Consciousness*, in INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES 8624, 8626 (2001), available at [http://web.mit.edu/anthropology/faculty\\_staff/silbey/pdf/14iebss.pdf](http://web.mit.edu/anthropology/faculty_staff/silbey/pdf/14iebss.pdf) (explaining that “the study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings” and citing important scholars in field). See generally SUSAN S. SILBEY & PATRICIA EWICK, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998) (identifying and exploring three common narratives captured in stories people tell about law).

<sup>61</sup> Cf. CANTOR, ET AL., *supra* note 57, at 3–10 (“Employees’ general awareness of the FMLA increased slightly and significantly between 1995 and 2000, but only among those working in non-covered establishments. More than half (59.2%) had heard of the Act in 2000, a significant increase over 1995, when only 50.2 percent reported having heard of the FMLA.”).

applies to employees who work more than half-time and larger employers.<sup>62</sup> At the time of its passage in 1993, the FMLA did not cover 95% of private employers, and 40% of all employees.<sup>63</sup> The DOL, in 2000, estimated that between 83 and 94 million employees met the requirements for FMLA protection, while “[a]n estimated 18.5 to 24.4 million work for covered establishments but are not eligible to take FMLA leave.”<sup>64</sup> Indeed, many employees are confused about FMLA eligibility: About half of all employees surveyed were unsure whether they were protected by the FMLA.<sup>65</sup>

## 2. Groups Particularly Vulnerable to Misinformation

There are several groups who may be particularly vulnerable to misinformation about the Acts’ protections: in the FMLA context, employees who need sick leave to care for themselves, and to a lesser extent, those seeking leave to care for an ailing relative; in the ADA context, those with mental disabilities.

The FMLA clearly provides for unpaid leave where, “[b]ecause of a serious health condition, [an employee is] unable to perform the functions” of her job (“self-care”) or where an employee needs “to care for [a family member with] a serious health condition.”<sup>66</sup> However, in the political and judicial discussion of the FMLA, the focus has been on maternity leave; while there has been some acknowledgment of the caretaking provisions, the self-care component has been virtually ignored. It is therefore unsurprising that many workers believe that the Act only protects maternity leave.<sup>67</sup>

When President Clinton signed the FMLA in 1993, he described the Act as providing “unpaid leave . . . when it’s urgently needed at home to care for a newborn child, or an ill family member.”<sup>68</sup> The goal, according to President Clinton, was to ensure that employees do not “lose their jobs because they’re trying to be good parents, good

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<sup>62</sup> See 29 U.S.C. § 2611(2)(a), (4)(a) (2000). In contrast, the ADA applies to all employers with fifteen or more employees. 42 U.S.C. § 12111(5)(a) (2000).

<sup>63</sup> Elizabeth Mehren, *Who’ll Benefit from the Act and When?*, WASH. POST, Mar. 9, 1993, at C5.

<sup>64</sup> CANTOR, ET AL., *supra* note 57, at 3–4.

<sup>65</sup> *Id.* at 3–9.

<sup>66</sup> 29 U.S.C. § 2612(a)(1) (2000).

<sup>67</sup> A union website provides a good example of this, stating, “Although many workers think FMLA covers only maternity leave, the law provides much more.” INT’L BD. OF ELEC. WORKERS, ISSUE FOCUS: THE FAMILY AND MEDICAL LEAVE ACT 10 YEARS LATER (2003), [www.ibew.org/stories/03journal/0301/page10.htm](http://www.ibew.org/stories/03journal/0301/page10.htm).

<sup>68</sup> President William J. Clinton, Remarks by the President at Family and Medical Leave Act Bill Signing Ceremony (Feb. 5, 1993), <http://www.clintonpresidentialcenter.org/legacy/020593-speech-by-president-at-signing-of-family-medical-leave-bill.htm>.

children.”<sup>69</sup> He clearly framed the Act as protecting caretakers, those who protect others, not as a means of ensuring that employees retain their jobs during times of acute personal stress because of their own qualifying health needs.<sup>70</sup>

The Supreme Court has similarly mischaracterized the FMLA as a statute only for caretakers. In *Nevada Department of Human Resources v. Hibbs*,<sup>71</sup> Justice Rehnquist upheld the FMLA as a proper use of congressional power to correct gender-based discrimination. Rehnquist’s opinion analyzed the “history of the many state laws limiting women’s employment opportunities”<sup>72</sup> and the disparity between employers who offer maternity leave (37%) and those offering paternity leave (18%).<sup>73</sup> He concluded that “the States’ record of . . . gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.”<sup>74</sup> His focus on gender discrimination is essential to considering the paternity leave provision of the FMLA, is relevant but less essential to determining the constitutionality of the caretaking provision,<sup>75</sup> but is irrelevant to an analysis of the self-care provision as there is no gender gap in susceptibility to illness. In focusing on parental leave policies, Rehnquist nearly ignored Hibbs himself, a man who sought leave to care for his ailing wife, not his child.<sup>76</sup> His opinion, then, distorted the scope of the FMLA. The Ninth Circuit, which had upheld the statute on appeal, recognized this “weakness in [the] evidence” that Congress relied upon, which “deal[t] only with parental leave, not with leave to care for a sick family member.”<sup>77</sup> However, the Ninth Circuit similarly ignored the self-care provision.

That said, in a 2000 survey the DOL indicated that most employees who took FMLA leave did so in order to care for their own

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* Similarly, President Clinton’s archived website, documenting his accomplishments as President, describes the FMLA as “enabl[ing] workers to take up to 12 weeks unpaid leave to care for a new baby or ailing family member without jeopardizing their job,” with no mention of sick leave. PRESIDENT CLINTON AND VICE PRESIDENT GORE: SUPPORTING WOMEN AND FAMILIES, <http://clinton2.nara.gov/WH/Accomplishments/ac699.html> (last visited Aug. 28, 2004).

<sup>71</sup> 538 U.S. 721 (2003).

<sup>72</sup> *Id.* at 729.

<sup>73</sup> *Id.* at 730.

<sup>74</sup> *Id.* at 735.

<sup>75</sup> At the conclusion of his opinion, Rehnquist cites legislative findings that “two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women,” but that is his only attempt to square his gender discrimination analysis with the caregiving protections afforded by the FMLA. *Id.* at 738.

<sup>76</sup> *Id.* at 725.

<sup>77</sup> *Hibbs v. Dep’t of Human Res.*, 273 F.3d 844, 859 (9th Cir. 2001), *cited in Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting).

health.<sup>78</sup> There are three possibilities for incorporating this information into the previous analysis. First, it may indicate that employees are most willing to take self-care leave, perhaps because there is less stigma associated with such leave, particularly as compared to the “gendered” maternity or care-giving leave.<sup>79</sup> Second, this statistic could rebut any indication that employees believe the FMLA only applies to maternity leave.<sup>80</sup> Finally, this may indicate that most employees need leave for self-care, and therefore we should be most concerned about whether this need is being met. This approach is bolstered by the DOL’s finding that most employees who needed leave but did not take it needed leave to care for their own health.<sup>81</sup> Further research is necessary to determine whether employees are less aware of some FMLA provisions than others.

A similar distinction may exist regarding the extent of ADA coverage. Specifically, mentally disabled employees may believe that the ADA covers only physical disabilities, even though the ADA explicitly covers those with mental or emotional disabilities.<sup>82</sup> It was the physically disabled who lobbied for the ADA,<sup>83</sup> and it is therefore not surprising that “the drafters . . . created the ADA without giving much thought to its impact on the mentally ill population.”<sup>84</sup> More generally, the common perception of a disabled employee is one in a wheelchair; even ADA education campaigns have not focused on the wide

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<sup>78</sup> CANTOR, ET AL., *supra* note 57, at 2–5 tbl.2.3 (reporting that 52.4% of leave takers in eighteen months previous to 2000 survey did so for their own health; only 7.9% took maternity-disability leave; and 18.5% took leave to care for new child).

<sup>79</sup> See *supra* notes 72–74 and accompanying text (describing gender discrimination in leave policies); see also *infra* note 134 and accompanying text (stating Congress’s determination that choosing between work and parenting affects women more severely).

<sup>80</sup> Cf. *supra* note 67 and accompanying text.

<sup>81</sup> CANTOR, ET AL., *supra* note 57, at 2–15 tbl.2.16.

<sup>82</sup> 42 U.S.C. § 12102(2)(A) (2000) (including “mental impairment” in definition of disability). While it is difficult to know what proportion of disabled employees have mental disabilities, a rough estimate may be provided by the fact that about 13% of ADA complaints filed with the EEOC alleged discrimination based on a nonphysical disability. Nancy Montwieler, *Disabilities Discrimination: EEOC Sets out Employer Guidance on Psychiatric Disabilities Under ADA*, 59 DAILY LAB. REP. (BNA), Mar. 27, 1997, at D7.

<sup>83</sup> See Michelle Parikh, Note, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 728 (2004) (citing Christopher G. Bell, *The Americans with Disabilities Act, Mental Disability, and Work*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW 203, 204 (Richard J. Bonnie & John Monahan eds., 1997)).

<sup>84</sup> *Id.* at 723; see also Randal I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Air Lines*, 86 CORNELL L. REV. 927, 942 n.123 (2001) (“A survey of the legislative history reveals that both Congress and those experts who testified before it primarily contemplated the challenges of individuals with physical disabilities. The legislators’ and scholars’ practical considerations, therefore, focused on how the legislation would apply to these individuals only.”).

range of disabilities protected by the Act. For example, when the New York City welfare department posted notices informing its clients of their ADA rights, the signs asked, "Are you disabled?" In the background was a large wheelchair access symbol, an image that excludes the mentally and emotionally disabled.<sup>85</sup>

*B. Knowledgeable Employees Who Do Not Assert Their Rights*

Even employees, like Vivienne and Judi, who are well aware of their rights and knowledgeable of the intricate contours of the ADA and FMLA may choose not to reveal their disabilities or not to request accommodation or leave. There is an extensive literature, mainly discussing gays and racial minorities, on individuals who downplay aspects of their identity in response to stigma. Given the negative workplace reaction to disabled, pregnant, or caretaking workers,<sup>86</sup> it is likely that a similar phenomenon occurs in the contexts relevant here.

Kenji Yoshino, in his influential article, *Covering*, describes how gays and lesbians "cover" their identities.<sup>87</sup> Documenting the long history of American homophobia, he describes three forms of assimilationist behavior in which gays and lesbians engage: conversion, passing, and covering.

Conversion occurs when a lesbian changes her orientation to become straight. Passing means the underlying identity is not altered, but hidden. Passing occurs when a lesbian presents herself to the world as straight. Covering means the underlying identity is neither altered nor hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.<sup>88</sup>

Yoshino argues that the pressure to assimilate may be severe. Yoshino documents "instance after instance in which . . . [i]ndividuals

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<sup>85</sup> See Complaint from Welfare Law Center on Behalf of People with Psychiatric Disabilities Who Are Applicants and Recipients in the Family Assistance and Safety Net Assistance Programs to U.S. Department of Health and Human Services, Office for Civil Rights 47 (Apr. 2, 2002), available at [http://www.welfarelaw.org/contents/disability\\_rep/ocr/ocr03-2002AB.pdf](http://www.welfarelaw.org/contents/disability_rep/ocr/ocr03-2002AB.pdf) (describing "misleading" consumer education materials distributed by New York City Human Resources Administration and urging investigation of allegedly discriminatory policies and practices of same). I worked at the Welfare Law Center in the summer of 2003 and saw these posters myself when I visited welfare centers to research a follow-up report to the complaint.

<sup>86</sup> Being a pregnant woman is not necessarily socially stigmatizing. It is only in the context of the workplace that pregnancy may become a source of embarrassment. When I refer to stigma in this discussion, I refer to stigma within the workplace, not stigma more generally.

<sup>87</sup> Yoshino, *supra* note 9.

<sup>88</sup> *Id.* at 772.



whose homosexuality, even if avowed, was ‘discreet,’ or ‘private,’ kept their jobs or children. Those whose homosexuality was ‘open and notorious,’ or ‘flagrant,’ were not so fortunate.”<sup>89</sup>

Similarly, Devon W. Carbado and Mitu Gulati describe a process of “comforting,” a strategy of partial passing, where those who are clearly outsiders “perform comforting acts to make insiders comfortable with their outsider status.”<sup>90</sup> For example, Asian-American scientists who are facing doubt about their national loyalty may change their name to be more “‘American sounding’” or “emphasize the fact that they attended American colleges” so as to “appear less foreign and more ‘American.’”<sup>91</sup> Carbado and Gulati argue that this process of “working identity” is a survival strategy, but a costly one, as it is time-consuming and may serve to compromise one’s social and political identity.<sup>92</sup>

While Yoshino focuses on gays and lesbians and Carbado and Gulati focus on racial minorities, both theories are useful for conceptualizing the demands that may be faced by disabled employees, caretakers (including those caring for their own illness), and pregnant workers. Even where a worker’s disability or pregnancy is visible and passing is therefore impossible, the worker may seek to cover or comfort by not being vocal about her need for accommodation or leave as that would mark her as an outsider. Yoshino himself argues that for mothers “[t]o be recognized as authentic workers . . . women must deemphasize their roles as potential or actual mothers.”<sup>93</sup> This demand on women to cover may serve to discourage them from requesting maternity leave or leave to care for a sick child.

Yoshino’s theory works differently for different types of disabled workers.<sup>94</sup> A physically disabled employee who is clearly unable to “convert” or to “pass” as an abled person—for example, a blind person or a wheelchair user—may still face demands to “cover” or “comfort.” As one blind person explains: “People frequently say, ‘I don’t consider you disabled.’ That’s because I make accommodations

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<sup>89</sup> *Id.* at 850.

<sup>90</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1301 (2000).

<sup>91</sup> *Id.* at 1302.

<sup>92</sup> *Id.* at 1262.

<sup>93</sup> Yoshino, *supra* note 9, at 913.

<sup>94</sup> See generally Melissa Cole, *In/Ensuring Disability*, 77 TUL. L. REV. 839, 840–41 (2003) (borrowing from Queer Theory, particularly Yoshino, to create “Gimp Theory,” which “provides a much needed framework for considering whether the [ADA] . . . usefully addresses disability status or merely contributes to its subordination”).

to my disability . . . all the time, but they don't know or realize it."<sup>95</sup> His language is instructive: Instead of requesting that his employer accommodate him, the blind employee continually accommodates his employer and coworkers. While requesting a reasonable accommodation clearly would not expose his disability, as it is not hidden, not making such a request marks him as a better employee, increases his chances for advancement (to the extent he can be productive without accommodation), and lessens the stigma he might face. For the many disabled employees with hidden disabilities,<sup>96</sup> another assimilationist option is passing.<sup>97</sup>

The EEOC has recognized that concerns about the negative consequences of revealing a disability may discourage employees from requesting accommodation.<sup>98</sup> Similarly, a DOL study in 2000 found that many employees who needed FMLA leave did not take it due to concerns that their "job might be lost," or "job advancement might be hurt," or they "did not want to lose seniority."<sup>99</sup> Particularly disturbing is the upward trend in the percentage of employees who forego leave due to "fear[s] that their work or careers would suffer."<sup>100</sup>

Of course this choice is risky: While a disabled worker may believe that she can excel as an employee without accommodation, or a mother may believe that she can juggle her caretaking responsibilities with her employment duties, their employers may disagree. At the point where an employer finds that the employee has not met her workplace obligations, her "covering" or "comforting" has failed, and

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<sup>95</sup> Jean Campbell & Caroline L. Kaufmann, *Equality and Difference in the ADA: Unintended Consequences for Employment of People with Mental Health Disabilities*, in MENTAL DISORDER, WORK DISABILITY, AND THE LAW, *supra* note 83, at 230 (quoting anonymous interviewee).

<sup>96</sup> Cole, *supra* note 94, at 849–50 (discounting argument that disability is distinct from homosexuality because gays can hide their identities and explaining that "most mental disabilities, particularly psychiatric disorders and learning disabilities, are not readily recognizable to others absent disclosure. Nor, for that matter, are vast numbers of physical disabilities—consider, for example, severe forms of heart disease or diabetes, deafness, or asymptomatic HIV infection.").

<sup>97</sup> An extreme example of this phenomenon is an employee with psychosis who struggled to "pass" as being without a disability: "The voices are talking to me almost all the time at work. . . . I have to concentrate all the time so they don't get loud so I can't hear." Campbell & Kaufmann, *supra* note 95, at 230 (quoting anonymous interviewee).

<sup>98</sup> EEOC Guidance on Psychiatric Disabilities and the Americans with Disabilities Act, 59 DAILY LAB. REP. (BNA), Mar. 27, 1997, at E1–E13.

<sup>99</sup> CANTOR, ET AL., *supra* note 57, at 2–16 tbl.2.17.

<sup>100</sup> *Id.* (noting that from 1995–2000, percentage of employees giving reason for foregoing leave due to belief that job might be lost increased from 29.7% to 31.9%; due to belief that "job advancement might be hurt" increased from 22.8% to 42.6%; and due to desire not "to lose seniority" increased from 15.1% to 27.8%).

she may be demoted or terminated. For example, if the investment bank which employed Judi (discussed at the outset of this Note) became frustrated that she kept leaving work early—she was attending radiology treatments about which her employer was unaware<sup>101</sup>—it might have fired her. Judi, who was hiding her cancer out of a desire to retain her job, would have then made a mistaken calculation.

Employees must therefore make an intricate and difficult calculation. They can refuse to cover their identity, demand accommodation or leave and thereby face discrimination that may stymie their careers. Alternately, they can continue to cover in the hope that they will persuade their employers that they are productive employees and avoid being fired.

Part of the ostensible calculation—to the extent employees weigh their options<sup>102</sup>—for an employee who chooses to open herself up to discrimination by requesting leave or accommodation is her legal recourse. An employee must therefore calculate whether she has the resources and stamina to bring suit if she is fired. Litigation is quite expensive, with one employment lawyer estimating that the cost “can easily run \$50,000.”<sup>103</sup> A lawsuit can also be demanding for those who need leave because they are ill or caring for the illness of others.<sup>104</sup>

This calculation is difficult for any worker, but it is particularly so for disabled workers because their legal victory is far from assured. First, the ADA requires an “individualized inquiry”<sup>105</sup> to determine whether the effect of the “impairment . . . substantially limits one or more of the major life activities.”<sup>106</sup> Even HIV infection does not constitute a *per se* disability.<sup>107</sup> It is therefore difficult for an employee to assess whether her condition is sufficiently “limiting” as to be considered a disability. Second, an employee must demonstrate

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<sup>101</sup> See *supra* note 2 and accompanying text.

<sup>102</sup> The rational actor model employed in much contemporary legal analysis imagines such a calculating individual. See Lewis A. Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349, 353–54 (1984) (“The economic theory of behavior under law treats rules of law like prices and legal actors like perfectly rational individuals. In deciding how to act, an individual considers all personal costs and benefits of each possible action.”).

<sup>103</sup> Cropper, *supra* note 2, at 81.

<sup>104</sup> *Id.*

<sup>105</sup> *Sutton v. United Air Lines*, 527 U.S. 471, 483 (1999) (holding that severely myopic applicant was not disabled under ADA as myopia can be corrected); see also Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act: Definitions, 29 C.F.R. § 1630.2(j) (2004) (“The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”).

<sup>106</sup> 42 U.S.C. § 12102(2)(A) (2000).

<sup>107</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 641–42 (1998) (declining to consider whether HIV infection is *per se* disability under ADA).

that despite her disability she remains qualified for the position. One commentator has described these dual burdens as “burn[ing] the candle at both ends,” explaining that an employee must prove that she is “affected by her illness seriously enough to be considered disabled under the ADA definition, but not so disabled that she is unqualified for the position.”<sup>108</sup>

Most employees fail this test: A recent American Bar Association (ABA) survey of federal ADA suits decided in 2003 found that employees lost over 97% of the time;<sup>109</sup> similarly, an empirical survey of administrative determinations from 1992 through 2000 found that only 12.4% “of charges filed with the EEOC . . . bring benefits to ADA claimants who file them.”<sup>110</sup> The ABA survey found that much of the reason for the low success rate—which is slightly lower than previous years<sup>111</sup>—was “due to employees’ failure to show that they had a protected disability.”<sup>112</sup>

Given these dismal success rates, it is worth questioning whether it is worthwhile to change the current notice regime for the ADA at all. After all, what is the value of notifying employees of their rights if employees are rarely able to use those rights? First, many employees receive the ADA accommodations to which they are entitled without having to resort to the EEOC or the courts. More notice to employees means more requests for accommodation and more voluntary compliance with the ADA on the part of willing employers. This is particularly the case where providing an accommodation benefits the employer by resulting in an increase in the worker’s productivity.<sup>113</sup> Second, such notice is valuable because these ADA statistics reflect a problem with the law—either in how it is interpreted by the courts, in how it is being interpreted by prospective litigants, or in how it was initially drafted.<sup>114</sup> In the future there may be an attempt to

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<sup>108</sup> Parikh, *supra* note 83, at 724.

<sup>109</sup> Amy L. Allbright, 2003 *Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319 (2004).

<sup>110</sup> Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 4 (2001).

<sup>111</sup> See Allbright, *supra* note 109, at 322 (reporting employee win rates of 5.5% in 2002, 4.3% in 2001, 3.6% in 2000, 4.3% in 1999, and 5.6% in 1998).

<sup>112</sup> *Id.* at 320 (noting that “clear majority of the employer wins in this survey were due to” this reason).

<sup>113</sup> See, e.g., *Criado v. IBM*, 145 F.3d 437, 444 (1st Cir. 1998) (“IBM management representative testified that [52 weeks of paid disability leave] did not financially burden IBM because it recognized that it was always more profitable to allow an employee time to recover than to hire and train a new employee.”).

<sup>114</sup> Some commentators have argued that courts have narrowly construed the ADA’s sweeping antidiscrimination mandate. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (“Courts

solve this problem. When that time arrives, it is important that all those who will be covered by the law benefit from its provisions, not just those lucky enough to be aware of its protections.

Where employees are ignorant of the protections afforded them they may fail to make use of their statutory rights. The fact that employees are unlikely to know about employment law generally, and particularly whether and how the protections of the ADA and FMLA may affect them, compels the conclusion that increased, more individualized, notice is needed. Simply providing periodic notice, however, is insufficient for employees that do not request accommodation or leave due to fears of discrimination. Such employees may make calculating, risk-averse decisions to cover their need for statutory protection. Those employees, however, can still benefit from a notice regime that informs them of their rights at the moment they would be least inclined to cover.

### III TOWARD A NEW NOTICE REGIME

In response to the two distinct reasons why employees might not make use of their ADA and FMLA rights, I propose two remedies: First, notice should be calculated to inform ignorant employees of their rights, whether the employees are ignorant about the Acts generally or ignorant about the applicability of the Acts to their situation. Second, notice should also inform “covering” employees of the law’s protections at the point where they are having a performance problem. When a performance problem results from an employee’s decision to hide her need for leave or accommodation, notice of her rights at that time will equip her to make a more informed decision as to whether to come “out of the closet.”

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are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA.”); Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of “Disability” Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997) (“In large part, the failure of the ADA to provide comprehensive protection against discrimination can be attributed to judicial narrowing of its provisions. As ADA filings continue to increase in number, many federal courts have proven to be hostile to claims of discrimination on the basis of disability.”). *But see* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 29–30 (2000) (refuting argument that ADA was revolutionary act that was “thwarted by [the] courts” and arguing for narrower understanding of Act’s original intent). For an example of a decision interpreting the statute narrowly, see *Pedigo v. P.A.M. Transp.*, 891 F. Supp. 482, 485–86 (W.D. Ark. 1994), *rev’d*, 60 F.3d 1300 (8th Cir. 1995) (“The court advised that the ADA as it was being interpreted had the potential of being the greatest generator of litigation ever, and that the court doubted whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker’s compensation claim into a federal case.”).

### A. *Remedy for Uninformed Employees: Individual Notice*

The appropriate remedy for uninformed employees is rather straightforward. The classic response when there is evidence that legal rights are not effectively communicated is to place the burden on the knowledgeable party to communicate those rights.<sup>115</sup> Indeed, that is exactly what Congress did in requiring the general notice posting under both statutes.<sup>116</sup> However, given that there is reason to believe that this posting is insufficient, individualized notice should be the next step.

Many statutory employment schemes include a general notice requirement, meaning a requirement for posters describing employees' rights. The ADA and FMLA posting requirements described above are just the tip of the iceberg: The Department of Labor lists ten separate posting requirements for small businesses, including postings on the Fair Labor Standards Act and on health and safety laws.<sup>117</sup> Congress has made a clear decision that, first, such posters are necessary in order for workers to be fully apprised of their rights and, second, if employees know of their rights they are more likely to assert those rights.<sup>118</sup>

Professor Charles Morris, in arguing that such general notice requirements should be extended to NLRB rights, describes this as the "information factor," and explains that notice is important where an employment protection is provided to "millions of individual employees with levels of education and sophistication that range from illiterate, unskilled, and naive at one end of the spectrum, to highly educated, professional, and astute at the other. Adequate dissemination of substantive rules to persons whose employment can be affected by those rules is . . . critical . . . ."<sup>119</sup>

<sup>115</sup> See, e.g., 2 MCCORMICK ON EVIDENCE, § 337, at 413 (John W. Strong ed., 5th ed. 1999) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."); William Hubbard, Note, *Communicating Entitlements: Property and the Internet*, 22 YALE L. & POL'Y REV. 401, 423-24 (2004) (arguing that it is efficient to allocate burdens to parties with knowledge and describing how such allocation occurs in patent law).

<sup>116</sup> See *supra* notes 21 and 39 and accompanying text.

<sup>117</sup> DEP'T OF LABOR, WORKPLACE POSTER REQUIREMENTS FOR SMALL BUSINESSES AND OTHER EMPLOYERS, <http://www.dol.gov/osbp/sbrefa/poster/matrix.htm> (last visited May 14, 2005). But see Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 528 n.45 (1994) (explaining that "the NLRB has never required employers to post general notices advising employees of their statutory rights").

<sup>118</sup> We can question the effectiveness of such general notices. See, e.g., *supra* text accompanying note 58.

<sup>119</sup> Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 38 (1987).

General notice, however, may not serve this information-dissemination goal, so it is instructive to consider other employment statutes where Congress has required individual notice. Such individual notice regimes can serve as a model for the type of notice this Note envisions. One example is the type of notice provided by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA).<sup>120</sup> COBRA provides employees and their spouses the right to continue their health insurance coverage when that coverage would otherwise end, for example, upon termination.<sup>121</sup> The statute requires the health plan administrator to “provide, at the time of commencement of coverage under the plan, written notice to each covered employee and spouse of the employee (if any) of the rights provided under” COBRA.<sup>122</sup> The DOL’s regulations require that notice “be written in a manner calculated to be understood by the average plan participant”<sup>123</sup> and be delivered “us[ing] measures reasonably calculated to ensure actual receipt of the material by plan participants,” such as handing the employee notice at work, placing it in a union newspaper or a widely distributed company publication, or sending it in the mail.<sup>124</sup>

Similarly, the Worker Adjustment and Retraining Notification (WARN) Act<sup>125</sup> requires sixty-day advance notice to employees before “plant closings and mass layoffs.”<sup>126</sup> Such notice must be given in writing to the employees’ representative, “or, if there is no such representative . . . to each affected employee.”<sup>127</sup> Where notice is given directly to the employees, the regulations require that such notice “be written in language understandable to the employees” and specifically contain the relevant information.<sup>128</sup>

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<sup>120</sup> Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. §§ 1161–69 (2000).

<sup>121</sup> 29 U.S.C. § 1161(a) (2000) provides: “The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan”; *see also id.* § 1163 (defining “qualifying events”).

<sup>122</sup> *Id.* § 1166(a)(1). The employee, however, remains responsible for notifying the health plan when a “qualifying event,” such as a termination, has occurred. The health plan administrator is then required to notify any beneficiaries of the health plan. *Id.* § 1166(a)(3).

<sup>123</sup> 29 C.F.R. § 2590.606-1(c) (2004).

<sup>124</sup> *Id.* § 2520.104b-1(b).

<sup>125</sup> 29 U.S.C. §§ 2101–09 (2000).

<sup>126</sup> *Id.* § 2102.

<sup>127</sup> *Id.*

<sup>128</sup> 20 C.F.R. § 639.7(d) (2005).

Per these models, the DOL and EEOC should issue regulations requiring notice to employees at the point of hiring and annually<sup>129</sup> thereafter of employees' rights under the Acts. Such notice should be written using clear, specific language with the agencies creating model notices in a manner calculated to ensure that the employee receives the notice.<sup>130</sup> These regulations can be promulgated pursuant to each statute's general notice provisions.<sup>131</sup>

Such notice would be an appropriate addition to the current regulatory scheme. Congress's extensive fact-finding led it to conclude that the Acts were necessary to remedy discrimination and benefit the economy by ensuring that qualified employees were not needlessly discharged.<sup>132</sup> In the case of the ADA, Congress found that disability discrimination resulted in "billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."<sup>133</sup> In the FMLA context, Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting . . . and such responsibility affects the working lives of women more than . . . men."<sup>134</sup> Congress determined that for full economic integration, accommodation for the disabled and leave for caretakers might be necessary. Where employees require but do not receive those protections, they remain limited by

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<sup>129</sup> Such annual notice is part of other employment notice schemes. See, e.g., 5 U.S.C. § 7114 (2000) (requiring annual notice of right to union representation during investigation); Annual Notice Required by Public Law 95-317, 5 C.F.R. 831.681 (2005) (requiring annual notice to retirees about annuities).

<sup>130</sup> See *supra* note 21 (describing DOL's model notice provision). Cf. Ann Marie Rakowski, *Just Who Do You Think You're Talking To? The Mandate for Effective Notice to Food Stamp Recipients with Mental Disabilities*, 37 COLUM. J.L. & SOC. PROBS. 485, 517-23 (2004) (suggesting how to make food stamp notices effective).

<sup>131</sup> See *supra* notes 21 and 39 and accompanying text. The DOL promulgated the regulations at issue in *Ragsdale* pursuant to these statutory sections. See *supra* notes 24-31 and accompanying text. While the Supreme Court struck down those regulations due to their financial penalties, it did not reach the basic question of whether a reasonable interpretation of the statute could require employers to give individual notice. *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 88 (2002). Justice O'Connor's dissent, in reaching that very question, concluded that the regulation was valid as "[t]he Secretary has reasonably determined that individualized notice is necessary to implement the FMLA's provisions." *Id.* at 97 (O'Connor, J., dissenting). Justice O'Connor's approach allows for suitable deference to the agency's determination under *Chevron*, particularly given that the FMLA's goals can only be met if employees know of the provisions. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

<sup>132</sup> See *supra* note 12.

<sup>133</sup> 42 U.S.C. § 12101(a)(9) (2000).

<sup>134</sup> 29 U.S.C. § 2601(a) (2000).



their status and the harm that the Acts were meant to correct continues.<sup>135</sup>

The notice this Note advocates would supplement currently-existing notice regulations by aiding a group that the current scheme ignores—those who do not come forward with a need for leave or a request for accommodation. Requiring such notice, however, is not without costs. On its face, an annual pamphlet describing the details of the plans would be fairly easy to produce, particularly where the regulatory agencies create models. While there would be a slight cost involved in disseminating the information—both at the point of hiring and annually thereafter—that too should be minimal and could occur easily within an office setting.

There are two categories of costs, however, that would be less than minimal. The first is the cost to the employer of the increased rights utilization. As described above, my analysis assumes that more employees will make use of their rights if given more information about those rights. Since there is a cost to employers for providing a reasonable accommodation, or leave with health insurance,<sup>136</sup> the cost to employers will increase as more employees make use of these benefits. This argument has little weight when applied to employees who qualify for the benefit of the Acts, however, because Congress chose to grant protections even after considering the costs involved. It does, however, raise more concerns when considering the possibility that additional notice may induce employees to claim protections that they do not deserve. After all, employers already perceive that such claims occur; according to one survey, over half of human resources professionals have received an FMLA request that they felt was illegitimate.<sup>137</sup> While illegitimate claims are a possibility, the Acts provide mechanisms for ensuring that the employees' claims are valid.<sup>138</sup>

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<sup>135</sup> This is not to say that eligible employees must make use of the benefits to which they are entitled. Rather, this Note is concerned with employees who are unaware of those benefits or feel that it would be imprudent to request them.

<sup>136</sup> See, e.g., U.S. GEN. ACCOUNTING OFFICE, FAMILY AND MEDICAL LEAVE COST ESTIMATE, HRD-93-14R, at 2 (1993), available at <http://archive.gao.gov/d36t11/148440.pdf> (estimating FMLA's cost to employers at \$674 million annually).

<sup>137</sup> *Employers Need Support and Clarity on FMLA, According to New SHRM Study*, U.S. NEWswire, Jan. 8, 2001 (reporting 2000 FMLA survey conducted by Society for Human Resources Management).

<sup>138</sup> Under the ADA, an employer may ask the employee "for reasonable documentation about his/her disability and functional limitations." EEOC GUIDANCE, *supra* note 43. Furthermore, an employer is exempt from the reasonable accommodation requirement if it "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A) (2000). Under the FMLA regulations, an "employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the

Moreover, any possibility of increased costs due to such claims would have to be weighed against the net loss to uninformed employees by not having such notice.

The bigger concern is enforcement costs. The notice regulation, to be effective, must allow the employee (or the relevant agency) to seek damages if the notice is not provided. This will inevitably lead to litigation about whether appropriate notice was, in fact, provided. The COBRA context is illustrative because there are often disputes as to whether notice was given.<sup>139</sup> In addition to the attorney costs, employers will likely incur administrative costs to ensure that they can meet their burden of proving that notice was actually given. Such administrative costs have served as the source of much of employers' current complaints about the FMLA (the ADA does not seem to generate the same complaints).<sup>140</sup>

However, these costs may bring concurrent benefits to employers. After all, one of Congress's findings was that allowing accommodation or leave would allow productive employees to remain employed and able to contribute to their workplaces.<sup>141</sup> Many employers, recognizing that employees may perform better when they are allowed sufficient time off to balance their familial obligations, offered disability or family leave before the Acts were enacted,<sup>142</sup> and today many choose to offer paid family leave though the statute does

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employee's immediate family member." What Is the Family and Medical Leave Act?, 29 C.F.R. 825.100 (2004).

<sup>139</sup> Roger C. Siske et al., *What's New in Employee Benefits: A Summary of Current Case and Other Developments*, 1 A.L.I.-A.B.A. COURSE OF STUDY: PENSION, PROFIT-SHARING, WELFARE, AND OTHER COMPENSATION PLANS 192 (1996) ("The issue of whether notice was provided to an employee is a factual matter and often comes down to the employer's word against the employee's. Accordingly, the party with the burden of proving whether notice was provided is at a significant disadvantage."). Courts enforcing COBRA have placed the burden on the employer to disprove an employee's contention that notice was not provided, given that the employer has the burden of providing the notice. See, e.g., *Stanton v. Larry Fowler Trucking*, 863 F. Supp. 908, 911 (E.D. Ark. 1994), *rev'd in part*, 52 F.3d 723 (8th Cir. 1995).

<sup>140</sup> See, e.g., *Hearing on the Family and Medical Leave Act (FMLA) of 1993 Before the Subcomm. on Oversight and Investigations of the Comm. on Educ. and the Workforce*, 105th Cong. 187 (1997) (prepared testimony of Laura Avakian, Sr. VP, Human Resources, Beth Israel Deaconess Medical Center and Caregroup).

<sup>141</sup> See *supra* notes 133–34 and accompanying text.

<sup>142</sup> See, e.g., *supra* note 113 (describing IBM's policy of offering disabled leave); *Hearing on the Family and Medical Leave Act (FMLA) of 1993 Before the Subcomm. on Oversight and Investigations of the Comm. on Educ. and the Workforce*, 105th Cong. 73 (1997) (statement of M. Theresa Hupp, Human Resources Director, Manufacturing, Hallmark Cards, Inc., as to Hallmark's pre-FMLA benefits, including "flexible leave of absence policies," "generous sick pay," "three month maternity leave," and "six month parental leave").

not require it.<sup>143</sup> The Federal Office of Personnel Management studied a leave program for federal employees<sup>144</sup> and concluded that “agencies reported that the Act has helped employees in their struggle to balance work and family responsibilities, and as a result, has made for a more productive and efficient workplace.”<sup>145</sup> This is not to say that employers only offer leave because it makes their employees more efficient—some employers likely offer such benefits to aid in recruiting<sup>146</sup> or because they believe it is the right thing to do. Employers, then, would be able to reap the productivity benefits and avoid the costs of terminating potentially productive employees<sup>147</sup> and hiring new employees.

Furthermore, it is also worth considering the costs to employees in the absence of such expanded notice: the costs of obtaining information or forsaking their rights. Employers are repeat players in the system, as they employ multiple employees.<sup>148</sup> If an employer spends time learning the law, that knowledge can then be shared with everyone she employs. The total cost of information gathering is therefore minimized by requiring employers to notify their employees of the law.<sup>149</sup>

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<sup>143</sup> See ERIKA FALK & ERIN GRIZARD, ANNENBERG PUB. POLICY CTR. OF THE UNIV. OF PA., *THE GLASS CEILING PERSISTS: THE 3RD ANNUAL APPC REPORT ON WOMEN LEADERS IN COMMUNICATION COMPANIES 3* (2004), available at [http://www.annenbergpublicpolicycenter.org/04\\_info\\_society/women\\_leadership/2003\\_04\\_the-glass-ceiling-persists-corrected\\_rpt.pdf](http://www.annenbergpublicpolicycenter.org/04_info_society/women_leadership/2003_04_the-glass-ceiling-persists-corrected_rpt.pdf) (reporting that half of employers surveyed offered paid maternity leave).

<sup>144</sup> See U.S. OFFICE OF PERS. MGMT., *REPORT TO CONGRESS ON THE “FEDERAL EMPLOYEES FAMILY FRIENDLY LEAVE ACT”* (PUBLIC LAW 103-388) (1997), <http://www.opm.gov/oca/leave/HTML/FEFLA.HTM#I.%20%20%20Executive>. The leave program studied was under the Federal Employees Family Friendly Leave Act, not the FMLA. The benefit or cost of family leave likely would be similar under the FMLA and ADA.

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *id.* (listing “new recruitment and retention tool” as one of Act’s benefits).

<sup>147</sup> This is particularly apt where an employee has had a long record of productive employment at the company. See, e.g., *Byrne v. Avon Products*, 328 F.3d 379, 380 (7th Cir. 2003) (“After more than four years of highly regarded service . . . Byrne started to read and sleep on the job.”).

<sup>148</sup> See *supra* note 52.

<sup>149</sup> Employers know more, or can more easily learn about, employment law. As Anthony T. Kronman argues:

If the parties to a contract are acting rationally, they will minimize the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer . . . . [A] court concerned with economic efficiency should impose the risk on the better information-gatherer.

Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 4–5 (1978). Adapting Kronman, Congress and the regulatory agencies should place the burden on the party who can more cheaply gather and disseminate information.

My notice scheme would require employers to bear administrative and enforcement costs, while also possibly enjoying a benefit in increased productivity. I do not contend that the latter would surely outweigh the former, though it may; even if there is a net cost to employers, there would be a concurrent benefit to employees.

*B. Remedy for Covering Employees: Notice at the Point of Adverse Employment Action*

The harder question is whether notice can help those who are making a calculation that it is in their rational self-interest to hide their identity and not assert their rights. After all, the traditional idea of notice is to apprise people of their rights<sup>150</sup> and this group is already cognizant of those rights. Notice seems beside the point given that the source of the problem is the employers' (real or hypothesized) discriminatory response when learning of an employee's need for leave or accommodation. Furthermore, it is unclear how many people such notice would help. Merely because an employee is covering does not indicate that she would necessarily qualify for the protections of either Act.

By reframing the issue in terms of notice "at a meaningful time and in a meaningful manner,"<sup>151</sup> however, the effects of an individualized notice regime take on a new dimension. Notice can be most meaningful for a covering employee at the moment where it becomes clear that the employee's calculations that informed her decision to cover were mistaken. Recall that employees like Vivienne and Judi choose to cover because they believe that they can still perform well despite not taking leave or receiving a reasonable accommodation.<sup>152</sup> However, an employee hiding a medical condition may not perform well, and, if so, her employer will eventually demote or fire her. It is at that moment, where the employer is prepared to take action against the employee, that it becomes clear that the employee has miscalculated the decision not to assert her rights. While an employee asserting her rights at the moment where her career is suffering may still face the discrimination she had feared, the change in circumstances diminishes the relative cost of taking the risk. A proper notice scheme, I argue, would incorporate an opportunity for the employee to correct her prior miscalculation by having an opportunity to request leave at this point where it is most relevant.

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<sup>150</sup> See *supra* notes 13–14 and accompanying text (describing due process).

<sup>151</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see also *supra* note 31 and accompanying text (citing Justice O'Connor's dissent in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 97 (2002), regarding appropriate timing of notice).

<sup>152</sup> See *supra* notes 1–2, 98–108 and accompanying text.

Such notice could be implemented easily in workplaces with progressive discipline schemes. Progressive discipline “features increasingly formal efforts to provide feedback to [an] employee [with a performance problem] so he or she can correct the problem,” beginning with counseling the employee and progressing to verbal reprimands, written verbal warnings, and suspensions from work.<sup>153</sup> The goal of these efforts is to “attempt to change a person’s behavior,” without resorting to discharge<sup>154</sup> and many employers, particularly large employers, have such systems.<sup>155</sup> For employers with such systems, the proper placement for additional notice is at the beginning of the discipline scheme (i.e., the point of counseling or verbal reprimand).

Because it can be difficult to pinpoint whether an employee is receiving such discipline due to an underlying condition that can be improved by accommodation or leave, such notice should be provided to all employees. It need not look any different from the annual notice described above but could be specific depending on the reason for the discipline. For example, an employee disciplined for being slow at work might receive a pamphlet which both explained the Acts generally and also gave examples of employees whose speed and accuracy increased after requesting and receiving an accommodation.

At the moment of an adverse action, we might have the most sympathy for the employer (assuming the employer lacks discriminatory intent) as the employee is demonstrably not fully suitable for the job. Nonetheless, Congress already resolved this tension through its decision that an employee who fits within the protected classes<sup>156</sup> is entitled to the protections of the Acts. Under the statutes, a previously demoted employee has the same rights as a star employee.

More difficult is the fact that a covering employee is making a personal decision to hide her need for accommodation or leave. My proposal allows that employee to externalize the costs of her decision by requiring additional notice.<sup>157</sup> However, the very need for the

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<sup>153</sup> Susan Heathfield, *Discipline (Progressive Discipline)*, HUM. RESOURCES GLOSSARY, <http://humanresources.about.com/od/glossaryd/a/discipline.htm> (last visited July 12, 2005).

<sup>154</sup> FAIRWEATHER’S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 323 (Ray J. Schoonhoven ed., 4th ed. 1999).

<sup>155</sup> See Lisa I. Fried-Grodin, *Disciplining Sexual Harassers in the Unionized Workplace: Judicial Precedent Is Influencing Arbitrator Attitudes, Awards*, 77 CHI.-KENT L. REV. 823, 835 (2002) (explaining that progressive discipline is common under collective bargaining agreements, i.e., in unionized workplaces).

<sup>156</sup> See *supra* notes 17 and 35–36.

<sup>157</sup> See e-mail from Helen Hershkoff, Professor of Law, New York University School of Law, to author (Mar. 28, 2005) (on file with *New York University Law Review*); *supra* notes 136–40 (describing costs of notice).

employee to make such a decision results from society's discriminatory attitudes toward the disabled and caretakers in the workplace. The employee therefore should shoulder fewer of those costs.

Implementing individual notice for covering employees is more difficult in workplaces that do not have a progressive discipline system and where employers are free to terminate employees at the first moment of poor performance. Here the Supreme Court's approach to vicarious employer liability in the sexual harassment context is helpful. In two companion cases, *Burlington Indus. v. Ellerth*<sup>158</sup> and *Faragher v. Boca Raton*,<sup>159</sup> the Court considered sexual harassment hostile work environment claims where the supervisor took no tangible employment action<sup>160</sup> against the employee. Crucially for this analysis, the Court (while holding the employer liable without a showing of negligence) created a structure to ensure that employers have effective incentives to combat harassment internally. The employer has an affirmative defense to a hostile environment claim where it provides "preventive or corrective opportunities" to report grievances but the employee fails to "take advantage" of those opportunities.<sup>161</sup> In this way, the Court found, Title VII law would fulfill "Congress' intention to promote conciliation rather than litigation . . . and the EEOC's policy of encouraging the development of grievance procedures."<sup>162</sup>

Similarly, ADA/FMLA law could encourage employers to develop such progressive discipline policies by creating the appropriate incentives. One incentive would be to hold an employer liable where they terminate an employee who can prove that she would have been able to make a claim for reasonable accommodation or leave. The employer would have an affirmative defense, however, if it provides "preventive or corrective opportunities" in the form of a progressive discipline system, and the employee received notice of FMLA/ADA rights upon demotion. Recognizing that progressive dis-

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<sup>158</sup> 524 U.S. 742 (1998).

<sup>159</sup> 524 U.S. 775 (1998).

<sup>160</sup> *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

<sup>161</sup> *Id.* at 765; see Ann M. Henry, Comment, *Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. CHI. LEGAL F. 553, 568 ("[The] Supreme Court stated that preventing employment discrimination is one of the main purposes of Title VII.").

<sup>162</sup> *Ellerth*, 524 U.S. at 764 (internal citations omitted). The Court also found a deterrent purpose to this structure as it "could encourage employees to report harassing conduct before it becomes severe or pervasive, [and thereby] serve Title VII's deterrent purpose." *Id.*

cipline schemes may be costly—especially for small businesses for whom the ADA, but not the FMLA, applies<sup>163</sup>—the employer would also have a defense if, upon termination, it gave the employee notice of her rights. That notice, of course, would have to be coupled with a short period where an employee with a legitimate claim for leave or accommodation could inform the employer and be reinstated.<sup>164</sup>

Given the extent of my proposal to provide notice to covering employees and its intrusiveness into the internal management practices of a wide variety of employers, I would caution courts against embracing this approach. Instead, I would encourage Congress to consider this proposal as a means of ensuring that the rights it grants are effectively asserted. Given the current political climate, such legal reform may be unlikely, but I hope this Note serves as a point of discussion and departure for other commentators.

### CONCLUSION

Notice is not a panacea. Where the law truly protects few employees—the direction in which ADA caselaw seems to be heading<sup>165</sup>—notice will only expose more employees to court defeat. Furthermore, notice alone may be ineffective, for example, where a disabled employee does not recognize herself as disabled and in need of help.<sup>166</sup> Similarly, where a disabled or caretaking employee believes that her disability or caretaking responsibilities do not lessen her work performance, even workplace discipline may fail to convince her otherwise. Still, notice can serve to protect that substantial group of employees who would make use of accommodation or leave if they had full information.

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<sup>163</sup> See *supra* note 63.

<sup>164</sup> This would raise some administrative concerns, such as whether the date of termination is the original date or the date after the relevant period had elapsed, as well as the difficulty of welcoming a terminated employee back into the workplace after a period of leave or an accommodation has been made.

<sup>165</sup> See *supra* notes 110–12 and accompanying text.

<sup>166</sup> Engel's discussion of IDEA (discussed *supra* note 54) captures the double-edged nature of this phenomenon:

[Parents] are cognizant of the stigmatizing effects of everyday categories of disability, and they often display uneasiness about the tendency to reify such categories through the types of disabilities listed in the Act . . . . They need the classification for their children, but they chafe under the necessity of participating in the same process of categorization whose stigmatizing effects they are attempting to mitigate.

David M. Engel, *Law in the Domains of Everyday Life: The Construction of Community and Difference*, in *LAW IN EVERYDAY LIFE* 123, 141 (Austin Sarat & Thomas R. Kearns eds., 1994).

More fundamentally, the notice regime described above is but one possible implementation. The larger issue, however, is re-conceptualizing how notice to employees is envisioned.<sup>167</sup> Effective notice must have several components. It must focus on actually reaching its target population; posters in employee lunchrooms are unlikely to serve as an effective means to inform employees of their rights. Instead, notice should be calculated to reach workers when there is an increased likelihood that they will need the protections afforded by relevant employment statutes. Furthermore, notice regimes must compensate for the difficulties inherent in asserting one's rights. Merely providing notice of rights, in an environment where there exists extensive pressure to hide one's need for such protections, will make little progress in increasing protection.

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<sup>167</sup> This Note suggests a legal scheme for providing notice to employees. The innovative work done by agencies and nonprofits to inform the public of statutory benefits could continue alongside this notice regime. See, e.g., U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMIN., WAGE AND HOUR DIV., FMLA PUBLIC SERVICE ANNOUNCEMENT, available at <http://www.dol.gov/esa/regs/compliance/whd/psa.htm> (last visited May 14, 2005) (depicting DOL's public service ad); *Consumer-Friendly Guide and TV Movie Addresses Family, Medical Leave*, U.S. NEWswire, Jan. 17, 1997 (reporting about CBS made-for-TV movie about family needing FMLA leave, with accompanying guide produced by Women's Legal Defense Fund).