DIFFERENT FEDERAL DISTRICT COURT, DIFFERENT DISPOSITION: AN EMPIRICAL COMPARISON OF ADA, TITLE VII RACE AND SEX, AND ADEA EMPLOYMENT DISCRIMINATION DISPOSITIONS IN THE EASTERN DISTRICT OF PENNSYLVANIA AND THE NORTHERN DISTRICT OF GEORGIA

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INTRODUCTION

In the first 17 years of the Americans with Disabilities Act (ADA) considerable criticism has surfaced about the ADA's real effects on sustained employment for persons with disabilities. Many contend that the ADA is a near-complete loss to plaintiffs whose lack of success in ADA

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employment discrimination litigation parallels the abysmal plaintiff success rates in prisoner rights cases.[1] It is argued that defendants win 93% of all ADA employment discrimination cases at the trial level.[2] The Supreme Court has reinforced the perception of the ADA as a failure by increasingly narrowing its interpretation of the definition of disability.[3] In the 2002 decision *Toyota Motor Manufacturing v. Williams* (hereinafter *Toyota Manufacturing*), the Court further narrowed the definition of disability to consider those activities that substantially limit a person in his or her daily life, and thereby prohibited exclusive consideration of a person's limitation at work.[4] This interpretation considerably reduced the scope of disabilities covered by the ADA.[5]

In an attempt to understand the relative success or failure of the ADA, this paper compares ADA employment discrimination case dispositions to race, sex, and age employment discrimination case dispositions in the Eastern District of Pennsylvania and in the Northern District of Georgia. This analysis includes dispositions in the Northern District of Georgia, which includes Atlanta, and the Eastern District of Pennsylvania, which includes Philadelphia, in the six month period of case terminations before and the six month period of case filings after the decision in *Toyota Manufacturing*. This study demonstrates that ADA dispositions fare comparably to race, sex, and age employment discrimination dispositions. Differences in case dispositions appear to depend on the district court studied, not on the type of claim filed (whether race, sex, age, or disability discrimination claims). Finally, the Supreme Court's narrowing definition of disability has not affected ADA outcomes in post-*Toyota Manufacturing* case dispositions.

Despite edicts in legal journals[6] and the media[7] proclaiming the ADA's inadequacy and the Supreme Court narrowing of the definition of "disability," the relative success of the ADA is unsettled.[8] Quantitative

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[1] *See e.g.*, Eliza Kaiser. *The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA J. LAB. & EMP. L., 735, 738 (2004).

[2] *Id.* (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999)).

[3] *See* Sutton v. United Airlines 527 U.S. 471 (1999) (restricting definition of visually disabled to include only people who remain visually impaired after employing a "mitigating measure" such as glasses or contacts); Murphy v. United Airlines 527 U.S. 516 (1999)(extending "mitigating measure" restriction to determination of "substantial limitation" evaluation in the context of medication for hypertension); Albertson's v. Kirkingburg 527 U.S. 516 (1999) (extending "mitigating measure" restriction to cover conscious or subconscious methods one's own body uses to compensate for visual impairment).

[4] *See* Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 197–98 (2002).

[5] *See id.*

[6] *See, e.g.*, Kaiser, *supra* note 1.

[7] *See* Ruth Colker, *The Americans with Disabilities Act. An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. PA J. LAB. & EMP. L., 735,738 (2004).

[8] *See Toyota Manufacturing*, 534 U.S. at 184.

analysis of ADA trial court outcomes is sparse. One study, by Ruth Colker, analyzed ADA trial dispositions collected by the American Bar Association (ABA). Colker reported that of the 615 cases collected, 570 were resolved in the defendant-employer's favor.[9] She claimed that of the 570, nearly 238 were disposed of on summary judgment grounds and the remainder were "resolved through a decision on the merits."[10] However, she does not acknowledge that the vague category "decision on the merits," accounting for 332 (54%) of the total dispositions, quite probably consisted of some pro-plaintiff settlements and instead claimed that the "defendant-employer prevailed in 570 cases (92.7%)."[11]

In addition to neglecting the pro-plaintiff role that settlement outcomes may serve, scholars tend to assess the ADA in a vacuum. For example, Colker's data does not provide useful information without a base of comparison. Her claim that defendants win 93% of all ADA employment discrimination cases[12] presents information without context. While it may be true that in some district courts most employers win most cases that proceed to trial,[13] the vast majority of employment discrimination cases end in pre-litigation Equal Employment Opportunity Commission (EEOC) mediated resolutions, voluntary dismissals, or settlement before trial.[14] The percentage of filed claims that reach the final stage of litigation is often very small and therefore does not represent the vast majority of employment discrimination cases.[15] ADA litigation is comparable to litigation in other areas of employment discrimination where the bulk of charges filed with the EEOC and other cases filed never reach the final stages of litigation. Thus, a comparison of different categories of employment discrimination cases yields a more telling picture of the ADA's relative success than reporting the overall success rates of ADA plaintiffs with cases that proceed to trial.

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9 Colker, *supra* note 7, at 109. Colker used ABA data to avoid under-representing cases where no judicial opinion is published upon disposition, a bias inherent in studies that use databases such as Westlaw that primarily include data from published opinions.

10 *Id.* at 109.

11 *Id.*

12 *See* Kaiser, *supra* note 1, at 197.

13 However, whether the figure is as high as 93% is challenged in the Table 5 series below.

14 *See* Table 5.3, *infra,* where 97.5% of of race, sex, disability, and age discrimination cases in federal court were disposed of in some form other than a jury verdict or bench decision.

15 *See* Table 5.3, *infra*, where 97.5% of race, sex, disability, and age discrimination cases were disposed of in some form other than a jury verdict or bench decision. Consideration of the additional administrative remedies the EEOC often provides in cases that never reach trial court reveals that the percentage of jury verdict or bench decision outcomes is not the most representative measure of how employment discrimination cases fare.

This note compares ADA employment discrimination trial court dispositions to race[16] (Title VII), sex (Title VII), and age (Age Discrimination Employment Act (ADEA)) employment discrimination trial court dispositions. These four categories of employment discrimination constitute the majority of charges considered by the EEOC.[17]

I. BACKGROUND

The Americans with Disabilities Act (ADA) became law in 1990.[18] Its provisions apply to employment, state accommodations, public accommodations, and telecommunications.[19] Title I of the ADA addresses employment[20]: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[21] Title I prohibits discrimination in employment practices by private employers, state and local governments, employment agencies, and labor unions for employers with 15 or more employees.[22] The Justice Department has the authority to enforce the ADA[23], but like the Civil Rights Act of 1964, plaintiffs are encouraged to bring their claims forward independently.[24] The Equal Employment Opportunity Commission (EEOC) operates as a first point of settlement determination for all Title VII, ADEA, and ADA claims.[25] Plaintiffs must usually file their charges with the EEOC within 180 days of the occurrence of the allegedly discriminatory event.[26] If a state or local agency exists and participates in the pursuit of employment discrimination charges, plaintiffs must file the charge with the agency within 60 days of the allegedly discriminatory event and must file with

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16 Under race employment discrimination dispositions, I also counted §1981 filed as 442 employment discrimination causes of action in federal court.

17 *See* U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges FY 1992-2005, http://www.eeoc.gov/stats/ada-charges.html (last visited Nov. 20, 2006) (ADA, Race, Sex, and Age claims accounted for more than 85% of all employment discrimination charges) (hereinafter EEOC, ADA Charges).

18 Americans with Disabilities Act, 42 U.S.C. § 12101 (1990).

19 *Id.*

20 *Id.*

21 42 U.S.C. § 12112(a). A "covered entity" includes an "employer, employment agency, labor organization, or joint labor management committee." 42 U.S.C. § 12111(2).

22 42 U.S.C. § 12111(2); 42 U.S.C. § 12111(5)(A).

23 *See* 42 U.S.C. § 12117(a).

24 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(f)(1).

25 42 U.S.C. § 2000e-5(a); 42 U.S.C. § 2000e-2(a)(d). In addition to discrimination claims based on race, sex, age and disability, the EEOC also enforces the Equal Pay Act and Title VII provisions relating to discrimination on the basis of national origin and religion. 42 U.S.C. § 2000e-2(a)(1).

26 42 U.S.C. § 2000e-5(e)(1).

the EEOC within 300 days.[27] If the EEOC is unable to resolve the issue (a result known as "unsuccessful conciliation"), the claim is not withdrawn, and there is not a settlement, then the plaintiff can request a "right to sue" letter to pursue their claim in federal court.[28]

Although the EEOC does not offer detailed settlement information, its data indicate that, of the ADA charges filed in 2006, approximately 12% of ADA charges resulted in settlements, 23.4% resulted in "merit resolutions," in favor of the filing plaintiff.[29] In addition to merit resolutions, 5.6% of the claims between 1992 and 2006 were deemed "reasonable cause," however the EEOC was only able to successfully resolve 2.2%, leaving 3.5% deemed to have "reasonable cause," but unresolved by the EEOC where a pre-litigation settlement was not reached.[30] Of the remaining cases, approximately 16.3% were closed administratively,[31] and 60.3% were dismissed by the EEOC as being without "reasonable cause."[32] When a charge is determined to be without reasonable cause, the EEOC does not participate in its settlement but gives plaintiffs a "right to sue" letter, enabling them to take their claim to federal civil court.[33]

The majority of claims that reach federal court are not claims that the EEOC has deemed meritorious. In addition to 12% settlements, 18.6% "merit resolutions," the EEOC is only able to resolve about forty percent of the 5.6% of ADA discrimination charges that it deems meritorious.[34] The majority of the ADA employment discrimination claims

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27 42 U.S.C. § 2000e-5(d); 42 U.S.C. § 2000e-5(e)(1).

28 42 U.S.C. § 2000e-5(f)(1). To determine the percentage of "right to sue" letters issued one subtracts the sum of successful conciliations, withdrawals, and settlements from the total number of charges. Therefore, from 1992 to 2004, on average 85% of all ADA charges could in theory receive "right to sue" letters. *See* EEOC, ADA Charges, *supra* note 17.

29 *See* EEOC, ADA Charges, *supra* note 17.

30 *Id.*

31 *Id.*; *see also* U.S. Equal Employment Opportunity Commission, Definition of Terms, http://www.eeoc.gov/stats/define.html (last visited Nov. 20, 2006)(defining administrative closure as a response to one of the following events: "failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.") (hereinafter EEOC, Definition of Terms).

32 *See* EEOC ADA Charges, *supra* note 17; EEOC, Definition of Terms, *supra* note 31.

33 There is some dispute regarding how easy it is for plaintiffs to receive a "right to sue" letter. The ADEA provides routes to bypass the full EEOC review process and allows suits in a more direct fashion.

34 EEOC ADA Charges, *supra* note 17 the EEOC deemed 6.3% of all cases to have reasonable cause, but was only able to administer a successful conciliation in 2.2% of all cases. 2.2%/5.6% or 338/867 = 39%.

that reach federal court have been determined as lacking in merit by the EEOC.[35]

When ADA charges are compared to other charges, such as discrimination on the basis of race, sex, and age, the EEOC outcomes are similar. Of the sex discrimination charges filed in 2006, 12.1% of these claims resulted in a settlement favorable to the charging party, 24.7% resulted in merit resolutions in favor of the filing plaintiff.[36] Approximately, 6.3% were deemed to have reasonable cause, but only 1.9% of all charges were successfully reconciled, leaving 4.4% deemed to have reasonable cause but where a pre-litigation settlement was not reached.[37] Of the remaining cases, approximately 18.9% closed administratively[38] and 56.5% were dismissed by the EEOC as being having "no reasonable cause."[39] Similarly, of the race-based charges filed in 2006, only 11.7% of these claims resulted in a settlement favorable to the charging party, and 17.6% resulted in merit resolutions, in favor of the filing plaintiff.[40] Approximately 20% resulted in a "merit resolution," an additional 3.9% were deemed to have reasonable cause, but only 1.1% of all charges that were also deemed to have reasonable cause resulted in a successful conciliation. The remaining 2.8% of charges deemed to have "reasonable cause" were unresolved by the EEOC and a pre-litigation settlement was not reached.[41] Of the remaining cases, approximately 13.2% closed administratively and 66.7% were dismissed by the EEOC as being without cause.[42]

Finally, of the age-based charges filed in 2006, 10% of ADEA charges resulted in a settlement favorable to the charging party, and approximately 19.8% resulted in merit resolutions in favor of the filing plaintiff.[43] An additional 4.3% were deemed to have reasonable cause, but only 1.3% of charges also deemed to have reasonable cause resulted in a successful EEOC conciliation, the remaining 3.1% of charges deemed to have reasonable cause were unresolved by the EEOC and a

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35 *See* EEOC ADA Charges, *supra* note 17.

36 *See* U.S Equal Employment Opportunity Commission, Sex-Based Charges FY 1992-2005, http://www.eeoc.gov/stats/sex.html (last visited Nov. 20, 2006) (hereinafter EEOC Sex-Based Charges.

37 *Id.*

38 *Id.*; *see* EEOC ADA Charges, *supra* note 17; *see also* EEOC, Definition of Terms, *supra* note 30. .

39 *See* EEOC Sex-Based Charges, *supra* note 36; EEOC, Definition of Terms, *supra* note 31.

40 *See* U.S. Equal Employment Opportunity Commission, Race-Based Charges FY 1992 – FY 2005, http://www.eeoc.gov/stats/race.html (last visited Nov. 20, 2006).

41 *See id.*

42 *See id.*; *see also* EEOC, Definition of Terms, *supra* note 31.

43 *See* U.S. Equal Employment Opportunity Commission Age Discrimination in Employment Act (ADEA) Charges, http://www.eeoc.gov/stats/adea.html (last visited Nov. 20, 2006).

pre-litigation settlement was not reached.[44] Of the remaining cases, approximately 18.7% closed administratively and 61.8% were dismissed by the EEOC as being without cause.[45]

Although the data may seem to indicate that race-based charges fare worse than other types of charges in EEOC processing, EEOC outcomes are quite similar for disability, sex, race and age. The notion that the strongest cases are often resolved by the EEOC, or at the very least labeled as merit claims by the EEOC, may help explain why employment discrimination cases fare as they do in federal court: many of the strongest claims are settled early on in the EEOC process, leaving the weaker cases to be litigated in federal civil court.

II. CRITICISM OF THE ADA

Legal and media analyses of Title I of the ADA is uniformly critical. The media portrays the ADA as a tool for opportunistic plaintiffs with weak disability claims.[46] Legal scholarship tends to view the ADA as a failure for plaintiffs, demonstrated through windfall victories for defendants who win over 90 percent of all trial level ADA employment discrimination claims, but this figure is rarely given context.[47] Other publications allege that, "thirteen years on [after passage of the ADA], many fear that Title I of the ADA ultimately may fail the worker (or the aspiring worker) with disabilities."[48]

> Although the statistics vary by a few percentage points, the consensus of academics, the American Bar Association, and practitioners for both employers and employees, is that employers prevail in over 90 percent of ADA Title I cases at the trial court level and in 84 percent at the appellate level.[49]

In addition to studying the ADA and employment outcomes in a broad manner that gives sufficient context for analysis, it also makes sense for legal scholars to assess the relative success of ADA claims by comparing ADA employment discrimination trial dispositions to other employment discrimination claims. Where employment discrimination suits are known to settle or be otherwise disposed of before reaching a

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44 *Id.*

45 *Id.*; *see also* EEOC, Definition of Terms, *supra* note 31.

46 Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act,* 62 OHIO ST. L. J. 239, 240 (2001).

47 *See* Kaiser, *supra* note 1 at 736; *see also* Louis S. Rulli & Jason A. Lekerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 597 (2005).

48 Rulli & Leckerman, *supra* note 47, at 596.

49 *See* Kaiser, *supra* note 1, at 736.

jury verdict or bench decision, it makes sense to study the dispositions of trial outcomes to understand how the ADA fares compared to other employment discrimination claims.

In contrast to academic reactions to the ADA, the media has portrayed the ADA as, "a lifelong buffet of perks, special breaks and procedural protections."[50] Some have attributed much of the media reaction to the landmark 1998 Supreme Court decision *Bragdon v. Abbott*, where the Court held that the ADA covered an asymptomatic HIV-infected dental patient.[51] It was feared that the ADA was being too loosely interpreted and that nearly anyone could establish themselves as having a disability.[52] To some extent, the media's reluctance to embrace the ADA may stem from deep-seated prejudices about the working abilities of people with disabilities. Disability law scholar Peter Blanck notes, "Conscious attitudinal biases about the abilities of people with disabilities have been amplified in media portrayals of persons with hidden impairments, such as stories suggesting that persons with histories of psychiatric impairments are prone toward violence or inappropriate behavior in the workplace."[53]

The media's reaction to the ADA is in part explained by the largely stereotyped view that only certain disabilities constitute legitimate disabilities.[54] But the view that the only people benefiting from the ADA are recovering drug addicts and people with hidden, less socially accepted disabilities is false.[55] The EEOC classifies disability charges by placing the alleged disability into one of 42 categories.[56] Below is a table of the ten most alleged categories of disability discrimination and the frequency of these charges.

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50 *See* Ruth Colker, *supra* note 7, at 99 (citing journalist Ruth Shalit for the New Republic).

51 *Bragdon v. Abbott*, 524 U.S. 624 (1998).

52 *See* Colker, *supra* note 7, at 99.

53 Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 350 (1997).

54 *Id.*

55 This is not to sanction the social stigma attached to disabilities that lack visibility and/or acceptance, only to mention that the perception of who is benefiting is not necessarily a reflection of who is actually benefiting.

56 *See* U.S. Equal Employment Opportunity Commission, ADA Charge Data by Impairments/Bases-Receipts, http://www.eeoc.gov/stats/ada-receipts.html (Last visited Mar. 25, 2007).

Table A: Top Ten EEOC Categories of Disability Charges[57]

Rank	Disability Category of Alleged Discrimination Charge	Percentage out of all EEOC disability discrimination charges
1	Other Disabilities	19.8%
2	Orthopedic and Structural Impairments of the Back	12.8%
3	Non-paralytic Orthopedic Impairment	8.7%
4	Depression	6.7%
5	Diabetes	4.d%
6	Record of Disability	3.9%
7	Heart/Cardiovascular	3.8%
8	Other Psychological Disorders	3%
8	Hearing	3%
8	Other Neurological Impairments	3%

The above listed categories of disability charges represent a wide array of disabling conditions that do not represent the handful of conditions stereotypically associated with the word "disability."[58] The failure of disability charges to conform to a stereotyped view of disability is hardly a worthy reproach of the statute. While fear of opening the ADA to abuse may have some merit, the root of the problem, as Peter Blanck mentions above, may be the hesitancy of critical sources to look beyond stereotypical conceptions of what constitutes a disability. The notion that back pain, or less visible disabilities such as depression are not as debilitating as other disabilities, persists. Part of this may stem from the fundamental difference between disability and race, age, and sex; whereas generally an individual's sex, race, or age is only subject to a relatively limited number of possibilities, and is relatively obvious to the casual observer, there exists a vast range of disabilities that the able-bodied public simply does not know about. This view may change as disability awareness increases. .

This discussion should consider the criteria the Social Security Administration (SSA) uses to determine whether a person is disabled. SSA's assessment looks to functional capacity and the ability to engage in the essential physical and mental obligations of the workplace. These functional restrictions are often determined by abilities to carry given amounts of weight, undertake particular movements, or the cognitive ability to follow directions and communicate effectively in the workplace.[59] These limitations are correlated to some of the categories indi-

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[57] *Id.*

[58] It is worth mentioning that the EEOC's method of categorizing disability charges is limiting. While it is true that there are a vast number of disabilities, where 20% of charges are being categorized as "other" there may be some legitimate concern as to what exactly these other disabilities entail.

[59] Code of Federal Regulations 20 C.F.R. § 404.1545 (Residual Functional Capacity).

cated in the table above, such as non-paralytic orthopedic impairment, orthopedic structural impairments of the back, and depression.[60]

Beyond the view that the ADA fails to encourage the establishment of legitimate and less stereotyped disability definitions, the ADA's short period of existence may be a factor. Like the civil rights laws that came before the ADA, it takes time and extended advocacy efforts before society at large can undergo a shift in stereotypes and establish new notions of acceptability.

III. HIGHER COURTS AND THE ADA

In her 2001 study, Ruth Colker compared ADA appellate judicial outcomes to appellate outcomes of similar civil rights statutes, including Title VII.[61] Colker reviewed 720 appellate cases filed after January of 2000 and found that ADA cases resulted in pro-defendant reversals in 60% of cases and pro-plaintiff reversals in only 21% of cases.[62] In contrast, of the Title VII claims filed during the same period, 34% received pro-plaintiff reversals and 41% resulted in pro-defendant reversals.[63] Colker notes that although Title VII claims appear to fare better in appellate courts than ADA claims, Title VII claims are not as successful as they were in the mid-1960s after Title VII was implemented.[64] It is worth noting both that Colker examined appellate decisions available on Westlaw, which does not publish all unpublished decisions, and that Colker's sample size of ADA and Title VII cases was rather small.[65]

Colker concedes that to fully understand how ADA litigation compares to litigation of other employment discrimination causes of action one must review settlement, verdict, and trial court data.[66] Nevertheless, her data is statistically significant and it reveals that courts of appeals are not receptive to the ADA. Colker's findings also indicate that a plaintiff who filed Title VII appeals along with ADA appeals tended to fare the same as if they had filed only an ADA appeal. This can be interpreted in one of two ways: that judges' dislike of the ADA taints their view of a party's other claims, or that individuals who file multiple claims are less likely to have multiple strong claims. The latter interpretation seems to make more sense, as strategically plaintiffs may feel tempted to plead multiple bases of discrimination in one transaction.

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60 *See supra* Table A.

61 *See* Colker, *supra* note 46, at 240-46.

62 *Id* at 253.

63 *Id.*

64 *Id.* at 253-354, 259-260.

65 *Id.* at 253-54 (indicating that the sample size of Title VII claims was 129 during the year assessed, not a particularly large sample size, especially considering the absence of many unpublished decisions).

66 *Id.* at 242.

Colker's assessment demonstrates higher courts' apprehension of the ADA, and although limited to court of appeals decisions, as Colker mentions, it is often court of appeals decisions that legal scholars and the media analyze. Colker's data, if taken at face value, brings forth questions about whether lower courts have responded to higher courts' seeming dislike of the ADA by giving less favorable dispositions to ADA plaintiffs than to other plaintiffs with different causes of action.

This idea is furthered by recent Supreme Court decisions restricting the scope of the ADA. After *Bragdon v. Abbott,* the 1998 Supreme Court decision mentioned above, the Court took a sharp turn in its definition of disability. Beginning in 1999, three decisions, *Sutton v. United Air Lines*,[67] *Murphy v. United Parcel Service*,[68] and *Albertson's, Inc. v. Kirkingburg*,[69] resulted in heavy burdens for plaintiffs to establish ADA claims. In *Sutton v. United Airlines* the court held that if a person uses mitigating measures to reduce the effects of a disability, use of those measures must be considered in determining whether the person is disabled.[70] In *Sutton* this meant that when United Airlines refused to hire pilots whose vision failed to meet the company standard, the pilots could not be considered disabled because, the effects of mitigating measures, both positive and negative, should be considered when determining whether an individual meets the definition of disability.[71]

In 2002, the Supreme Court's decision in *Toyota Motor Manufacturing v. Williams* narrowed the definition of disability. In *Toyota Manufacturing* the Court interpreted the term "major" in "major life activities" to mean activities central to daily living. The Court held that in order for a manual task to be considered a "major life activity," it must be an activity central to daily life, such as walking, seeing and hearing. If the impairment only prevents a person's ability to do a particular job and does not affect a major daily life activity as well, the individual is not disabled.[72] In *Toyota Manufacturing* the plaintiff had uncontested medical evidence of carpal tunnel syndrome, but was not determined to be disabled because the manual tasks she was restricted in doing at work were not tasks that she would have to undertake in her daily living activities. Therefore, carpal tunnel syndrome did not represent a disability in her daily living activities.[73]

The trend among higher courts demonstrates a narrowing of the definition of disability, making it difficult for plaintiffs to legally establish

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67 Sutton v. United Airlines, 527 U.S. 471 (1999).
68 Murphy v. United Parcel Service, 527 U.S. 516 (1999).
69 Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
70 *Sutton*, 527 U.S. at 482-83.
71 *Id.* at 482.
72 *See* Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 197 (2002).
73 *Toyota Manufacturing*, 534 U.S. at 201-203.

the existence of a disability. Furthermore, through Colker's study it appears that when ADA cases are appealed they tend to result in pro-defendant outcomes. The question remains how, if at all, the representation of higher court ADA dispositions has affected ADA dispositions in trial courts.

IV. EMPIRICAL STUDY

This paper analyzes 1,010[74] employment discrimination cases by reviewing docket sheets categorized as employment discrimination cases. These cases are available through the Public Access to Court Electronic Records (PACER), an electronic public access service that allows users to obtain case and docket information from United States federal appellate, district and bankruptcy courts, and from the U.S. Party/Case Index. I reviewed cases in the Northern District of Georgia and in the Eastern District of Pennsylvania. I selected the Northern District of Georgia because it is home to a major southern U.S. city, Atlanta, and it has experienced a significant amount of employment growth for a number of years.[75] I selected the Eastern District of Pennsylvania because it is home to a major northern U.S. city, Philadelphia, it has a substantial population base,[76] and since 2001 it has had positive employment growth.[77] On practical grounds, the Northern District of Georgia and the Eastern District of Pennsylvania provided sufficient descriptive information regarding types of employment discrimination alleged and the disposition of the cases. Furthermore, in both districts PACER labeled causes of action as early as the mid-1990s, making it possible for me to access cases filed in the mid-1990s that did not terminate for seven or eight years.

I initially wanted to determine whether the narrowing definition of disability in *Toyota Manufacturing* had an effect on the disposition of ADA outcomes. I compared ADA dispositions during the pre-*Toyota*

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[74] Of the sample size of 1,010, only 886 applied to Race, Age, Disability, and Sex Discrimination causes of action; I did not consider FMLA, ERISA, or National Origin or Religion Title VII causes of action.

[75] *See* The Top 25 Cities for Doing Business in America, INC. MAGAZINE, Mar. 2004, http://www.inc.com/magazine/20040301/top25.html. Atlanta is ranked first overall and noted for its economic diversity, growth rate and affordability. Growth rate is significant in employment discrimination assessments because often economies with slow growth are less likely to have comprehensive representation of employment discrimination.

[76] U.S. Census states the 2005 population of the city of Philadelphia as 1,463,281, www.census.gov (last visited Jan. 16, 2007).

[77] THE FEDERAL RESERVE BANK OF PHILADELPHIA, REGIONAL HIGHLIGHTS 2 (4th Qtr. 2004), http://www.philadelphiafed.org/files/reghigh/rh0404a.pdf (last visited Dec. 21, 2005). I would have preferred to use data from New York and Houston as both cities consist of larger relative northern and southern populations, but the docket sheets in both districts inconsistently indicated the type of employment discrimination alleged.

and post-*Toyota* period to race, sex, and age dispositions. I analyzed all race (Title VII), sex (Title VII), age (ADEA) and disability (ADA) cases that terminated in each district in the six month period prior to *Toyota* (July 8, 2001-January 7, 2002) to all the cases filed in the six month period after *Toyota* (January 8, 2002-July 7, 2002). This included a large range of cases with some pre-*Toyota* filing dates as early as 1994 and some post-*Toyota* cases terminating in 2005. This is, therefore, an asymmetrical assessment. I chose to look at terminations in the pre-*Toyota* category and filings in the post-*Toyota* category because employment discrimination cases typically take from one to three years to complete, making it difficult to take a sample of filings even one to two years before Toyota. Additionally, as will be further discussed below, from 1998 to 2002 the ADA was increasingly construed narrowly, making it even more difficult to select a period sufficiently far from the *Toyota* decision to ensure that cases would be terminated before the decision while also selecting a period that would accurately gauge the pre-*Toyota* climate.

I did not include all docket sheets that were brought forth through my PACER search; where the docket sheets labeled as employment discrimination lacked a categorical employment discrimination cause of action, were duplicates, personal injury cases, or were misplaced prisoner rights and workers' compensation cases, I did not include them.[78] My analysis only includes race, sex, age and disability claims, at the exclusion of Title VII National Origin and Religion claims, Family Medical Leave Act (FMLA), Employee Retirement Income Security Act (ERISA) claims.

In analyzing these cases, I paid particular attention to the disposition details, who the disposition favored, and the procedural details of the disposition. I then categorized each disposition into one of eight categories, detailed below in Table 1. I compared details of disposition to causes of action in order to determine the rates of summary judgment, likely settlement, non-summary judgment dismissal, dismissals without prejudice, and bench decisions of race, sex, age, and disability employment discrimination cases. I also compared pre-Toyota employment discrimination cases to post-Toyota cases to determine if there had been a measurable reduction in plaintiff success rates after *Toyota Manufacturing*.

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[78] I also did not include about 20 FMLA and ERISA cases out of the Eastern District of Pennsylvania. All of these cases were settled, but as I was particularly interested in comparison to race, sex, age, and disability, I did not include them.

A. METHODOLOGY

I analyzed each docket sheet in the Eastern District of Pennsylvania and in the Northern District of Georgia to determine the type of employment discrimination alleged. I also recorded information about the plaintiff, defendant, case number, whether the plaintiff proceeded pro se, which party requested a jury trial, the disposition of the case, the procedural details of the disposition, who the disposition favored, whether the case was appealed and how it fared on appeal. I categorized dispositions on docket sheet into one of the eight categories below. The procedural details of dispositions were similar in both districts, with the exception of the rampant use of the local rule 41.1(b) for settlements in the Eastern District of Pennsylvania.

Table 1[79]: Categories of Employment Discrimination Disposition

Code	Title	Entailing
1	Summary Judgment	56(b) (all summary judgments assessed were pro-defendant)
2	Likely Settlement[80]	41(a)(1), 41(a)(1)(i), 41(a)(1)(ii) (dismissed by stipulation with prejudice, joint stipulation), consent decree, dismissed or administratively closed (where "disposition" indicates settlement), Local Rule 41.1(b) (used in the Eastern District of Pennsylvania, this indicates settlement on docket sheets).
3	Procedural Default	default, failure to pay filing fee. 4(m) (failure to serve), failure to exhaust administrative remedy, local rules, lack of subject matter jurisdiction, 28 U.S.C. § 1915 (e)(2) (fraud in alleging *forma pauperis*)
4	Non-Summary Judgment Dismissal Pre-Trial with prejudice	12(c) (motion to dismiss), 12(b)(6) (failure to state a claim upon which relief can be granted) with prejudice, 50 (judgment as a matter of law), 37(d) (failure to participate in discovery), failure to prosecute with prejudice, failure to comply with court order with prejudice
5	Jury Verdict	Jury verdict
6	Miscellaneous	death of plaintiff, transfer of venue, joint motion to transfer, unclear, administratively closed, bankruptcy, mediation, undetermined
7	41(a)(1)(i) without prejudice	Voluntary dismissal by plaintiff without prejudice, any disposition without prejudice other than procedural default
8	Bench Verdict	Bench verdict

V. FINDINGS

Notable findings include the consistency of employment discrimination dispositions among the categories of race, sex, disability, and age within a given district court. Perhaps most noteworthy were the differing rates of pro-defendant summary judgment and settlement when compar-

79 Original data for all tables are available upon request.

80 The label "likely settlement" marks the upper-limit of claims that were likely settled.

ing cases filed in the Northern District of Georgia with cases filed in the Eastern District of Pennsylvania.

Of all the race, sex, disability, and age employment discrimination dispositions analyzed in the Northern District of Georgia and in the Eastern District of Pennsylvania, 17.5% resulted in pro-defendant summary judgment dispositions, 57.2% were likely settled, 4.9% were dismissed with prejudice on non-summary judgment grounds (pro-defendant), 2.3% resulted in jury verdicts (46% pro-plaintiff and 54% pro-defendant),[81] and .23% resulted in bench decisions (all pro-defendant).[82] As is demonstrated below, these outcomes were relatively consistent when comparing disability dispositions to race, sex, and age employment discrimination dispositions.

Table 2.0: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Northern District of Georgia and the Eastern District of Pennsylvania

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed with prejudice	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Race, Sex and Age	**137**	**434**	**52**	**40**	**15**	**48**	**39**	**2**	**767**
	17.8%	56.5%	6.7%	5.2%	1.9%	6.3%	5.1%	.26%	100%
ADA	**18**	**73**	**6**	**3**	**5**	**7**	**7**	**0**	**119**
	15.1%	61.3%	5%	2.5%	4.2%	5.9%	5.9%	0%	100%
All	**155**	**507**	**58**	**43**	**20**	**55**	**46**	**2**	**886**
	17.5%	57.2%	6.5%	4.9%	2.3%	6.2%	5.2%	.23%	100%

Table 2.1: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Northern District of Georgia and the Eastern District of Pennsylvania on the Merits

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Race, Sex and Age	**137**	**434**	**40**	**15**	**2**	**628**
	21.8%	69.1%	6.4%	2.4%	.32%	100%
ADA	**18**	**73**	**3**	**5**	**0**	**99**
	18%	73.7%	3%	5.1%	0%	100%
All	**155**	**507**	**43**	**20**	**2**	**727**
	21.3%	69.7%	5.9%	2.8%	.28%	100%

When accounting only for disposition of all cases on the merits (cases not dismissed for procedural defects or unexplained reasons), approximately 21.3% resulted in summary judgment (pro-defendant),

[81] *See infra* Table 2.0; *infra* Table 5.1.

[82] *See infra* Table 2.0. Although I looked at 1,010 cases, only 886 consisted of race, sex, disability, or age employment discrimination cases.

69.7% were likely settled, 5.9% resulted in non-summary judgment (pro-defendant) dispositions, 2.8% resulted in jury verdicts, and .28% in bench decisions.[83] Even in the extreme situation where all jury verdicts and bench decisions are pro-defendant, the data in these two jurisdictions demonstrate that 69.7% of the remaining cases would likely settle.[84] Settlement dispositions may be considered at least in large part pro-plaintiff, as settlement often represents some acceptance of fault by the defendant.

Also noteworthy is the similarity between ADA employment discrimination cases and race, sex, and age employment discrimination cases. Where cases not decided on the merits are also considered, ADA dispositions resulted in summary judgment in 15.1% of dispositions and were likely settled 61.3% of the time.[85] When considered only on the merits, ADA employment discrimination cases appear to result in slightly fewer summary judgment dispositions (18% compared to 21.8% for race, sex, and age) and are slightly more likely to settle (73.7% compared to 69.1% for race, sex, and age).[86]

A. DIFFERENCE BETWEEN DISTRICT COURTS

Table 3: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Eastern District of Pennsylvania

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Race, Sex and Age	**23** 7.6%	**220** 72.9%	**4** 1.3%	**11** 3.6%	**10** 3.3%	**21** 6.9%	**12** 3.9%	**1** .33%	**302** 100%
ADA	**6** 9.2%	**48** 73.8%	**2** 3.1%	**0** 0%	**3** 4.6%	**3** 4.6%	**3** 4.6%	**0** 0%	**65** 100%
All	**29** 7.9%	**268** 73%	**6** 1.6%	**11** 3%	**13** 3.5%	**24** 6.5%	**15** 4.1%	**1** .27%	**367** 100%

[83] *See supra* Table 2.1.
[84] *See supra* Table 2.1
[85] *See supra* Table 2.0.
[86] *See supra* Table 2.0.

Table 3.1: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Eastern District of Pennsylvania Dispositions on the Merits

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Race, Sex and Age	23 8.5%	220 81.8%	11 4.1%	10 4.4%	1 .37%	265 100%
ADA	6 10.5%	48 84.2%	0 0%	3 5.3%	0 0%	57 100%
All	29 8.9%	268 83.2%	11 3.4%	13 4%	1 .31%	322 100%

In the Eastern District of Pennsylvania, dispositions lean heavily towards settlement. When compared to all dispositions, ADA settlements accounted for 73.8% of all ADA dispositions, compared to 72.9% of all dispositions for race, sex and age.[87] ADA dispositions resulting in summary judgment accounted for 9.2% of ADA dispositions compared to 7.6% summary judgment outcomes for race, sex, and age[88]. When assessed only on the merits 84.2% of all ADA dispositions resulted in settlement, compared to 81.8% for race, sex, and age, whereas the remaining 15.8% of ADA cases and 18.2% of race, sex, and age cases were disposed of either through summary judgment or through other pro-defendant dispositions such as motions to dismiss, jury verdicts, or bench decisions.[89]

Table 4: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Northern District of Georgia

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Race, Sex and Age	114 24.5%	214 46%	48 10.3%	29 6.2%	5 1.1%	27 5.8%	27 5.8%	1 .22%	465 100%
ADA	12 22%	25 46.3%	4 7.4%	3 5.6%	2 3.7%	4 7.4%	4 7.4%	0 0%	54 100%
All	126 24.3%	239 46%	52 10%	32 6.2%	7 1.3%	31 6%	31 6%	1 .19%	519 100%

[87] *See supra* Table 3.

[88] *See supra* Table 3.

[89] *See supra* Table 3.1.

Table 4.1: Comparing ADA to Race, Sex (Title VII) and Age (ADEA) Discrimination in the Northern District of Georgia Decided on the Merits

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Race, Sex and Age	114 31.4%	214 59%	29 8%	5 1.4%	1 .28%	363 100%
ADA	12 28.6%	25 59.5%	3 7.1%	2 4.8%	0 0%	42 100%
All	126 31e1%	239 59%	32 7.9%	7 1.7%	1 .25%	405 100%

In contrast to the Eastern District of Pennsylvania, the Northern District of Georgia has more pro-defendant summary judgment dispositions. ADA settlements accounted for only 46.3% of all ADA dispositions, compared to 46% of all dispositions for race, sex and age.[90] ADA dispositions resulting in summary judgment accounted for 22% compared to 24.5% summary judgment outcomes for race, sex, and age.[91] When assessed on the merits, 59.5% of all ADA dispositions resulted in settlement, compared to 59% for race, sex, and age.[92]

When assessed on the merits, 28.6% of ADA dispositions resulted in summary judgment and 31.4% of race, sex, and age dispositions resulted in summary judgment.[93] Thus, nearly 40.5% of ADA cases and 41% of race, sex, and age cases were disposed of through summary judgment or other typically pro-defendant dispositions such as motions to dismiss, jury verdicts, or bench decisions.[94]

This accounts for a stark difference in the likelihood of a pro-plaintiff[95] outcome depending on the district court. When race, sex, age and disability cases on the merits are assessed together this means that in the Eastern District of Pennsylvania 83.2% of all race, sex, age, and disability cases are likely to settle compared to only 59% in the Northern District of Georgia.[96] For all other dispositions on the merits, with the exception of the occasional jury verdict or bench decision that is pro-plaintiff, only 16.8% of cases in the Eastern District of Pennsylvania

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[90] *See supra* Table 4.

[91] *See supra* Table 4.

[92] *See supra* Table 4.1.

[93] *See supra* Table 4.1.

[94] *See supra* Table 4.1 (Subtracted likely settlement dispositions from all other dispositions on the merits).

[95] If one considers settlement to be at least partially pro-plaintiff.

[96] *See supra* Table 3.1; *supra* Table 4.1.

were pro-defendant compared to 41% in the Northern District of Georgia.[97]

B. CONSISTENCY AMONG CATEGORIES OF DISCRIMINATION WITHIN EACH DISTRICT COURT

Although part of the original goal was to measure differences in filings and outcomes in the periods before and after *Toyota Manufacturing* (decided on January 8, 2002), I found nothing statistically significant in this assessment. However, by separating each employment discrimination claim into a before and after period, I found a general consistency among the dispositions over time and across groups, but as demonstrated above, not across district court. The general consistency of dispositions across the protected categories is particularly significant when one considers the large span of time these cases covered. All of the cases categorized as "pre" *Toyota Manufacturing* ended by January 7, 2002, but were filed between 1999 and 2001. All of the cases categorized as "post" *Toyota Manufacturing* were filed as early as January 8, 2002 and many ended as late as 2005, with a few still in process at the time I collected the data. This seems to demonstrate that despite the lack of symmetry in the "pre" and "post" cases reviewed, courts of a particular district tend to treat employment discrimination cases similarly, with the major variation attributable to the location of district court.

1. *ADA Disability Dispositions in the E.D. of Pennsylvania and the N.D. of Georgia*

Table 3.2: Dispositions of ADA Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**1**	**26**	**2**	**0**	**2**	**1**	**2**	**0**	**34**
	2.9%	76.5%	5.9%	0%	5.9%	2.9%	5.9%	0%	100%
Post-Toyota	**5**	**22**	**0**	**0**	**1**	**2**	**1**	**0**	**31**
	16.1%	71%	0%	0%	3.2%	6.5%	3.2%	0%	100%
Total	**6**	**48**	**2**	**0**	**3**	**3**	**3**	**0**	**65**
	9.2%	73.8%	3.1%	0%	4.6%	4.6%	4.6%	0%	100%

[97] *See supra* Table 3.d; *supra* Table 4.1. To arrive at these figures, subtract likely settlement dispositions from all other dispositions on the merits.

Table 3.3: Dispositions on the Merits of ADA Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	1 3.4%	26 89.7%	0 0%	2 6.9%	0 0%	29 100%
Post-Toyota	5 17.9%	22 78.6%	0 0%	1 3.6%	0 0%	28 100%
Total	6 10.5%	48 84.2%	0 0%	3 5.3%	0 0%	57 100%

As demonstrated above in Tables 3.2 and 3.3, disability cases in the Eastern District of Pennsylvania in the periods before and after *Toyota Manufacturing* demonstrated substantial difference in rates of summary judgment and settlement. Pre-*Toyota Manufacturing* disability cases had summary judgment dispositions only 2.9% of the time, or 3.4% of the time when only considering decisions on the merits.[98] In contrast, after *Toyota Manufacturing*, summary judgment dispositions increased to 16.1%, or to 17.9% when considering only dispositions on the merits.[99] Pre-Toyota disability cases were settled 76.5% of the time, or 89.7% of the time when only considering decisions on the merits.[100] In contrast, after *Toyota Manufacturing*, settlements fell to 71%, or to 78.6% when only considering decisions on the merits.[101]

The most striking element in disability dispositions is the dramatic increase in summary judgment dispositions. The large percentage increase is at least in part explained by the very small ADA summary judgment sample size in the Eastern District of Pennsylvania. Considering that there was just one ADA summary judgment disposition in the pre-*Toyota Manufacturing* period, compared to five in the post- *Toyota Manufacturing* period, the real change was the increase of four cases. Additionally, the post-*Toyota* ADA dispositions resulted in settlement in 71% of cases, a number comparable to the 72.9% of settlement outcomes for race, sex, and age cases combined, perhaps indicating that the post-*Toyota Manufacturing* figures demonstrate a normalization of settlement rates from the especially high rate of 90% before *Toyota Manufacturing*.[102]

Finally, all disability jury verdicts were pro-defendant, leaving everything decided on the merits a pro-defendant outcome. Despite the heavy increase in summary judgment dispositions, it is the case that

98 *See supra* Table 3.2; *supra* Table 3.3.
99 *See supra* Table 3.2; *supra* Table 3.3.
100 *See supra* Table 3.2; *supra* Table 3.3.
101 *See supra* Table 3.2; *supra* Table 3.3.
102 *See supra* Table 3; *supra* Table 3.2.

78.6% of all cases decided in the period after *Toyota* were at least partially pro-plaintiff outcomes of settlement.[103] It is worth noting that the pre-*Toyota Manufacturing* rate of settlement represents cases that were filed after the definitional scope of the ADA had considerably narrowed, making it appear that at the time of analysis the Supreme Court decision had a limited effect on the Eastern District of Pennsylvania.[104] Conversely, it is possible that district courts take two or three years to align their decision-making with the Court, or simply that all cases heard by the Eastern District of Pennsylvania were strong enough to avoid summary judgment dispositions despite the reduced scope of the ADA, although this possibility seems least likely.

Table 4.2: Dispositions of ADA Filings in the Northern District of Georgia Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**7**	**11**	**3**	**2**	**1**	**1**	**3**	**0**	**28**
	25%	39.3%	10.7%	7.1%	3.6%	3.6%	10.7%	0%	100%
Post-Toyota	**5**	**14**	**1**	**1**	**1**	**3**	**1**	**0**	**26**
	19.2%	53.8%	3.8%	3.8%	3.8%	11.5%	3.8%	0%	100%
Total	**12**	**25**	**4**	**3**	**2**	**4**	**4**	**0**	**54**
	22.2%	46.3%	7.4%	5.6%	3.7%	7.4%	7.4%	0%	100%

Table 4.3: Dispositions on the Merits of ADA Filings Pre/Post *Toyota Manufacturing* Cases in the Northern District of Georgia

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	**7**	**11**	**2**	**1**	**0**	**21**
	33.3%	52.4%	9.5%	4.8%	0%	100%
Post-Toyota	**5**	**14**	**1**	**1**	**0**	**21**
	23.8 %	66.7%	4.8%	4.8%	0%	100%
Total	**12**	**25**	**3**	**2**	**0**	**42**
	28.6%	59.5%	7.1%	4.8%	0%	100%

In the Northern District of Georgia, the changes in dispositions on the merits were noteworthy. ADA summary judgment dispositions decreased from 33.3% to 23.8% on the merits.[105] Though this demonstrates a substantial change in percentage it is important to recognize the small sample size, and that this change stemmed from a difference in two real cases Post-Toyota. One of the two jury verdicts in the pre-*Toyota*

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[103] *See supra* Table 3.3 "likely settlements" for ADA cases post-Toyota.

[104] *Bragdon v. Abbott* was decided in 1998 and *Sutton v. United Airlines* was decided in 1999.

[105] *See supra* Table 4.3.

Manufacturing period was pro-plaintiff, bringing the pro-plaintiff on the merits pre-*Toyota Manufacturing* dispositions to 57.2% (where "likely settlements" are considered to be pro-plaintiff dispositions), a lower percentage of settlements on the merits than the post-*Toyota Manufacturing* figure of 66.7%.[106]

In conclusion, comparing the two districts, total ADA settlements are more likely in the Eastern District of Pennsylvania where 73.8% of outcomes after *Toyota Manufacturing* were settled compared to 46.3% in the Northern District of Georgia.[107] During the two periods percentages of ADA settlements increased in Georgia from 39.3% to 53.8% and decreased in Pennsylvania from 76.5% to 71%.[108]

2. *Title VII Sex Dispositions in the E.D. of Pennsylvania and the N.D. of Georgia*

Table 3.4: Dispositions of Sex Discrimination Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**3**	**38**	**0**	**3**	**3**	**6**	**4**	**0**	**57**
	5.3%	66.7%	0%	5.3%	5.3%	10.5%	7%	0%	100%
Post-Toyota	**2**	**54**	**1**	**2**	**0**	**4**	**0**	**0**	**63**
	3.2%	85.7%	1.6%	3.2%	0%	6.3%	0%	0%	100%
Total	**5**	**92**	**1**	**5**	**3**	**10**	**4**	**0**	**120**
	4.2%	76.7%	.83%	4.2%	2.5%	8.3%	3.3%	0%	100%

Table 3.5: Dispositions on the Merits of Sex Discrimination (Title VII) Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	**3**	**38**	**3**	**3**	**0**	**47**
	6.4%	80.9%	6.4%	6.4%	0%	100%
Post-Toyota	**2**	**54**	**2**	**0**	**0**	**58**
	3.4%	93.1%	3.4%	0%	0%	100%
Total	**5**	**92**	**5**	**3**	**0**	**105**
	4.8%	87.6%	4.8%	2.9%	0%	100%

Sex discrimination dispositions in the Eastern District of Pennsylvania demonstrated negligible changes in summary judgment disposi-

106 *See* data lanvers.xls (available upon request); *supra* Table 4.3.; *infra* Table 5.2.
107 *See supra* Table 3.2 and Table 4.2.
108 *See supra* Table 3.2 and Table 4.2

tions before and after *Toyota Manufacturing*. Although the summary judgment dispositions decreased from 6.4% to 3.4% in sex discrimination cases disposed of on the merits, the low number of actual summary judgment dispositions (three in the period before *Toyota Manufacturing* and only two in the period after) demonstrates the relative insignificance of the change.[109] In contrast to disability dispositions, settlements increased in cases filed after *Toyota Manufacturing*. Of cases disposed of on the merits, settlements increased from 80.9% to 93.1% after *Toyota Manufacturing*.[110] It should be mentioned that three of the cases determined by jury verdict before *Toyota Manufacturing* favored plaintiffs.[111] If we add those three cases to the pre- *Toyota Manufacturing* "likely settlement" cases to gauge pro-plaintiff dispositions, we find that pro-plaintiff dispositions on the merits constituted 87.2% before *Toyota Manufacturing* and 93.1% after *Toyota Manufacturing*.[112] There appears to be a slight increase in the likelihood of settlement and a decrease in the number of jury verdicts.

Table 4.4: Dispositions of Sex Discrimination (Title VII) Filings in the Northern District of Georgia Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**20**	**54**	**9**	**4**	**1**	**9**	**6**	**0**	**103**
	19.4%	52.4%	8.7%	3.9%	.97%	8.7%	5.8%	0%	100%
Post-Toyota	**22**	**43**	**7**	**6**	**1**	**5**	**9**	**0**	**93**
	23.7%	46.2%	7.5%	6.5%	1.1%	5.4%	9.7%	0%	100%
Total	**42**	**97**	**16**	**10**	**2**	**14**	**15**	**0**	**196**
	21.4%	49.5%	8.2%	5.1%	1%	7.1%	7.7%	0%	100%

109 *See supra* Table 3.5

110 *See supra* Table 3.5.

111 *See infra* Table 5.2; *also* lanvers.xls data (available upon request).

112 *See supra* Table 3.5. To get this figure, I added the three pro-plaintiff jury verdict dispositions to the 38 "likely settlement" dispositions and divided the sum 41 by the total pre-Toyota sex discrimination dispositions on the merits.

Table 4.5: Dispositions on the Merits of Sex Discrimination Pre/ Post *Toyota Manufacturing* Cases in the Northern District of Georgia

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	20 25.3%	54 68.4%	4 5.1%	1 1.3%	0 0%	79 100%
Post-Toyota	22 30.6%	43 59.7%	6 8.3%	1 1.4%	0 0%	72 100%
Total	42 27.8%	97 64.2%	10 6.6%	2 1.3%	0 0%	151 100%

Unlike the Eastern District of Pennsylvania, the Northern District of Georgia did not demonstrate an increase in settlement. Indeed, the dispositions of sex discrimination cases on the merits fell somewhat after *Toyota Manufacturing*. In cases decided on the merits, summary judgment dispositions went from 25.3% to 30.6% and settlements from 68.4% to 59.7%.[113] Although this represents an increase in summary judgment dispositions and a decrease in settlement dispositions, these results were not statistically significant. The increase in summary judgment dispositions to 30.6% brings sex discrimination suits disposed of by summary judgment to approximately the same proportion of summary judgment dispositions in race, age, and disability claims in the Northern District of Georgia. This reinforces the idea that the increase may represent stabilization in summary judgment dispositions for sex discrimination.[114]

The major difference between sex discrimination dispositions in comparing the districts is the greater frequency of settlement in the Eastern District of Pennsylvania versus the greater frequency of summary judgment in the Northern District of Georgia. This is exemplified where settlement differences for sex discrimination plaintiffs account for the difference of 93.1% settlements on the merits in the Eastern District of Pennsylvania and 59.7% settlements on the merits in the Northern District of Georgia after *Toyota Manufacturing*.[115] Finally, the differences for summary judgment dispositions after *Toyota Manufacturing* account

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[113] *See supra* Table 4.5.

[114] *See supra* Table 4.5. In the Northern District of Georgia post-*Toyota Manufacturing* period the proportion of summary judgment on the merits were: 23.8% for ADA claims, 30.6% for sex claims, 30.7% for race claims, and 33.3% for ADEA claims. *See supra* Table 4.3; *supra* Table 4.5; *infra* Table 4.7; *infra* Table 4.9. Interestingly ADA claims demonstrate a downward shift from 33.3% to 23.8%, however, given the relatively small sample size, it is reasonable to argue that in the Northern District of Georgia summary judgment dispositions in employment discrimination cases result in about 30% of possible outcomes.

[115] *See supra* Table 3.5; *supra* Table 4.5.

for 3.4% of outcomes in the Eastern District of Pennsylvania and 30.6% in outcomes in the Northern District of Georgia.[116]

3. *Title VII Race Dispositions in the Eastern District of Pennsylvania*

Table 3.6: Dispositions of Race Discrimination (Title VII) Filings in the Eastern District of Pennsylvania Pre/Post Filings Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settle-ment	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**8** 15.4%	**35** 67.3%	**2** 3.8%	**2** 3.8%	**0** 0%	**2** 3.8%	**3** 5.8%	**0** 0%	**52** 100%
Post-Toyota	**3** 5%	**41** 69.5%	**1** 1.7%	**2** 3.4%	**3** 5%	**5** 8.5%	**3** 5%	**1** 1.7%	**59** 100%
Total	**11** 9.9%	**76** 68.5%	**3** 2.7%	**4** 3.6%	**3** 2.7%	**7** 6.3%	**6** 5.4%	**1** .90%	**111** 100%

Table 3.7: Dispositions on the Merits of Race Discrimination (Title VII) Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	**8** 17.8%	**35** 77.8%	**2** 4.4%	**0** 0%	**0** 0%	**45** 100%
Post-Toyota	**3** 6%	**41** 82%	**2** 4%	**3** 6%	**1** 2%	**50** 100%
Total	**11** 11.6%	**76** 80%	**4** 4.2%	**3** 3.2%	**1** 1.1%	**95** 100%

Similar to sex discrimination dispositions in the Eastern District of Pennsylvania, race dispositions post-*Toyota Manufacturing* remained relatively consistent with pre-*Toyota Manufacturing* dispositions. Race dispositions demonstrated a decrease in summary judgment dispositions, from 17.8% to 6%.[117] Although summary judgment dispositions decreased by a dramatic percentage, the very small number of summary judgment dispositions in the before and after pool make determinations of decreases in the use of summary judgment difficult to accurately establish, and the results are not statistically significant. Furthermore, during this period, there were two pro-defendant jury verdicts and one pro-

116 *See supra* Table 3.5; *supra* Table 4.5.

117 *See supra* Table 3.7.

defendant bench decision.[118] When all pro-defendant dispositions on the merits are considered, the difference between pre-*Toyota Manufacturing* and post-*Toyota Manufacturing* figures is not as dramatic as the difference in summary judgment appears. In the pre-*Toyota Manufacturing* period, 24.2% resulted in pro-defendant dispositions whereas in the post-*Toyota Manufacturing* period, 14%[119] resulted in pro-defendant dispositions.[120]

The Eastern District of Pennsylvania demonstrated a slight increase in settlements. Of decisions on the merits, likely settlement dispositions went from 77.8% to 82%.[121] Jury verdicts consisted of one pro-defendant outcome pre-*Toyota Manufacturing* and two pro-defendant and one pro-plaintiff outcome post-*Toyota Manufacturing*. When combined with likely settlements, the pro-plaintiff jury verdict adds some weight to pro-plaintiff outcomes in the post-*Toyota Manufacturing* stage resulting in 84% pro-plaintiff dispositions.[122] While there appears to be an increase in the likelihood of settlement, the results in the post-*Toyota Manufacturing* period are reasonably consistent with figures from the pre-*Toyota Manufacturing* period.

Table 4.6: Dispositions of Race Discrimination (Title VII) Filings in the Northern District of Georgia Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**33**	**44**	**12**	**8**	**1**	**7**	**1**	**1**	**107**
	30.8%	41.1%	11.2%	7.5%	.93%	6.5%	.93%	.93%	100%
Post-Toyota	**27**	**50**	**15**	**10**	**1**	**4**	**7**	**0**	**114**
	23.7%	43.9%	13.2%	8.8%	.88%	3.5%	6.1%	0%	100%
Total	**60**	**94**	**27**	**18**	**2**	**11**	**8**	**1**	**221**
	27.6%	42.5%	12.2%	8.1%	.9%	5%	3.6%	.45%	100%

118 *See infra* Table 5.2.

119 *See supra* Table 3.7 where two jury verdicts resulted in pro-defendant outcomes, two cases were dismissed on the merits (presumed to be in favor of the defendant), three cases resulted in summary judgment dispositions, and the bench decision was decided in favor of the employer, resulting in 7/50 or 14% determined in favor of the employer. This consists of all dispositions that were not settled or that did not result in a pro-plaintiff jury verdict.

120 *See supra* Table. 3.7, pro-defendant outcomes were determined in part by jury verdict outcomes available *infra* Table 5.2, and by adding to summary judgment disposition non summary judgment dismissals on the merits.

121 *See supra* Table 3.7.

122 *See supra* Table 3.7 where there were 41 settlements on the merits post-Toyota, to this add 1 pro-plaintiff jury verdict, *see infra* Table 5.2 and the result is 42/50 or 84%.

Table 4.7: Dispositions on the Merits of Race Discrimination Pre/ Post *Toyota Manufacturing* Cases in the Northern District of Georgia

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	33 37.9%	44 50.6%	8 9.2%	1 1.1%	1 1.1%	87 100%
Post-Toyota	27 30.7 %	50 56.8%	10 11.4%	1 1.1%	0 0%	88 100%
Total	60 34.3%	94 53.7%	18 10.3%	2 1.1%	1 .57%	175 100%

Similarly, the Northern District of Georgia demonstrated relative stability before and after *Toyota Manufacturing*. Cases decided on the merits resulted in summary judgment dispositions 37.9% of the time before the decision, and 30.7% of the time after the decision.[123] Cases decided on the merits that resulted in settlements consisted of 50.6% of all pre-*Toyota Manufacturing* cases and 56.8% of all post *Toyota Manufacturing* cases.[124] Finally, the two jury verdicts resulted in pro-plaintiff dispositions, and the bench decision resulted in a pro-defendant outcome.[125] This reveals a slight net increase in pro-plaintiff dispositions when considered with likely settlements, creating an increase from 51.7% to 57.9%.[126]

Like the Eastern District of Pennsylvania, the Northern District of Georgia demonstrated an increase in the use of settlement dispositions and a decrease in the use of summary judgment dispositions. However, consistent with disability and sex dispositions described in the Northern District of Georgia above, race discrimination dispositions showed a similar proportion to other uses of summary judgment and settlement dispositions in Georgia, 30.7% summary judgment and 56.8% settlement in the post *Toyota Manufacturing* period.[127]

123 *See supra* Table 4.7.

124 *See supra* Table 4.7.

125 *See infra* Table 5.2.

126 *See supra* Table 4.7; *infra* Table 5.2., add one pro-plaintiff disposition to pre and post Toyota likely settlement on the merit and get 45/87 and 51/88 or 51.7% and 57.9% respectively.

127 *See supra* Table 4.7; *supra* Table 4.5; *supra* Table 4.3.

4. *ADEA Age Dispositions in the Eastern District of Pennsylvania*

Table 3.8: Dispositions of Age Discrimination (ADEA) Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing* Cases

	Summary Judgment	Likely Settle-ment	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**2**	**22**	**0**	**0**	**4**	**1**	**1**	**0**	**30**
	6.7%	73.3%	0%	0%	13.3%	3.3%	3.3%	0%	100%
Post-Toyota	**5**	**30**	**0**	**2**	**0**	**3**	**1**	**0**	**41**
	12.2%	73.2%	0%	4.9%	0%	7.3%	2.4%	0%	100%
Total	**7**	**52**	**0**	**2**	**4**	**4**	**2**	**0**	**71**
	9.9%	73.2%	0%	2.8%	5.6%	5.6%	2.8%	0%	100%

Table 3.9: Dispositions on the Merits of Age Discrimination (ADEA) Filings in the Eastern District of Pennsylvania Pre/Post *Toyota Manufacturing*

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	**2**	**22**	**0**	**4**	**0**	**28**
	7.1%	78.6%	0%	14.3%	0%	100%
Post-Toyota	**5**	**30**	**2**	**0**	**0**	**37**
	13.5%	81.1%	5.4%	0%	0%	100%
Total	**7**	**52**	**2**	**4**	**0**	**65**
	10.8%	80%	3.1%	6.2%	0%	100%

Age discrimination suits in the Eastern District of Pennsylvania demonstrated no change in summary judgment dispositions and a slight increase in likely settlement. When considered on the merits, age summary judgment dispositions increased from 7.1% to 13.5% and likely settlement increased from 78.6% to 81.1%.[128] The change in pro-plaintiff disposition may appear to be greater than it is as two of the pre-*Toyota Manufacturing* jury verdicts favored plaintiffs. A more accurate demonstration of pro-plaintiff outcomes would include the two pro-plaintiff jury verdicts in the pre-*Toyota Manufacturing* period. This means that 85.7% of the pre-*Toyota Manufacturing* cases resulted in a pro-plaintiff disposition, if settlements are considered to be pro-plaintiff.[129]

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[128] *See supra* Table 3.9.

[129] *See* supra Table 3.9; *infra* Table 5.2, by adding two pro-plaintiff jury verdicts to 22 likely settlement outcomes on the merits and divided by all cases determined on the merits, resulting in 24/28 or 85.7%

Therefore, age discrimination cases have remained largely stable, with a slight increase in settlements.

Table 4.8: Dispositions of Age Discrimination (ADEA) Filings Pre/ Post *Toyota Manufacturing* in the Northern District of Georgia

	Summary Judgment	Likely Settle-ment	Procedural Default	Non SJ Dismissed	Jury Verdict	Misc.	Dismissed without prejudice	Bench	Total
Pre-Toyota	**6** 25%	**12** 50%	**2** 8.3%	**0** 0%	**1** 4.2%	**1** 4.2%	**2** 8.3%	**0** 0%	**24** 100%
Post-Toyota	**6** 25%	**11** 45.8%	**3** 12.5%	**1** 4.2%	**0** 0%	**1** 4.2%	**2** 8.3%	**0** 0%	**24** 100%
Total	**12** 25%	**23** 48%	**5** 10.4%	**1** 2.1%	**1** 2.1%	**2** 4.2%	**4** 8.3%	**0** 0%	**48** 100%

Table 4.9: Dispositions on the Merits of Age Discrimination (ADEA) Pre/Post *Toyota Manufacturing* Cases in the Northern District of Georgia

	Summary Judgment	Likely Settlement	Non SJ Dismissed	Jury Verdict	Bench	Total
Pre-Toyota	**6** 31.6%	**12** 63.2%	**0** 0%	**1** 5.3%	**0** 0%	**19** 100%
Post-Toyota	**6** 33.3%	**11** 61.1%	**1** 5.6%	**0** 0%	**0** 0%	**18** 100%
Total	**12** 32.4%	**23** 62.2%	**1** 2.7%	**1** 2.7%	**0** 0%	**37** 100%

As was the case in the Eastern District of Pennsylvania, age dispositions in the Northern District of Georgia demonstrated negligible changes in the periods analyzed. Age dispositions demonstrated a slight increase in summary judgment dispositions and a slight decrease in likelihood of settlement. Summary judgments, increased from 31.6% to 33.3% and likely settlements decreased from 63.2% to 61.1% of dispositions on the merits.[130] Finally, the lone jury verdict resulted in a pro-defendant disposition, maintaining the likelihood of a pro-plaintiff disposition before and after *Toyota Manufacturing* at 63.2% and 61.1%, respectively.[131]

130 *See supra* Table 4.9.

131 *See supra* Table 4.9.

5. *Jury Verdicts in the E.D. of Pennsylvania and the N.D. of Georgia*

Table 5.1: Jury Verdict Dispositions in the Northern District of Georgia and in the Eastern District of Pennsylvania

	Verdict Favors Defendant	Verdict Favors Plaintiff	Total
Northern District of Georgia	**5** 71.4%	**2** 28.6%	**7** 100%
Eastern District of Pennsylvania	**7** 54%	**6** 46%	**13** 100%
Total	**12** 60%	**8** 40%	**20** 100%

Finally, jury verdicts were twice as frequent in the Eastern District of Pennsylvania than in the Northern District of Georgia. In the Eastern District of Pennsylvania pro-defendant outcomes accounted for 54% of verdicts, and pro-plaintiff outcomes accounted for 46% of verdicts.[132] In the Northern District of Georgia pro-defendant outcomes accounted for 71.4% of verdicts, and pro-plaintiff outcomes accounted for 28.6% of verdicts.[133] Although these outcomes favor defendants, they are hardly a complete loss to plaintiffs.[134]

Table 5.2: Jury Verdict Dispositions by type of discrimination in the Northern District of Georgia and in the Eastern District of Pennsylvania[135]

	Race	Age	Sex	ADA	Total
P victory in NDGA	**1** 50%	**0** 0%	**0** 0%	**1** 50%	**2** 100%
P victory in EDPA	**1** 16.7%	**2** 33.3%	**3** 50%	**0** 0%	**6** 100%
D victory in EDPA	**2** 28.5%	**2** 28.5%	**0** 0%	**3** 42.9%	**7** 100%
D victory in NDGA	**1** 20%	**1** 20%	**2** 40%	**1** 20%	**5** 100%
Total	**5** 25%	**5** 25%	**5** 25%	**5** 25%	**20** 100%

The types of discrimination cases that fared best in the Eastern District of Pennsylvania (age and sex) fared worst in Northern District of

132 *See supra* Table 5.1.
133 *See supra* Table 5.1.
134 *See supra* Table 5.1.
135 *See* lanvers.xls (available upon request).

Georgia, and the cases that fared best in the Northern District of Georgia (disability and race) fared worst in the Eastern District of Pennsylvania. These figures are of limited use, as there are so few. Further, jury verdicts represent a unique form of disposition insofar as they probably reflect a more tedious assessment of facts and the relative merits of the given case. Finally, although jury verdicts are naturally of interest, they account for a minimal percentage of all dispositions.[136] No assessment of how anti-discrimination laws affect employees in practice is complete if it merely involves the analysis of jury verdicts or bench decisions, where 97.5% of cases are disposed of on and off the merits without a jury verdict or bench decision.[137]

Table 5.3: Jury Verdict and Bench Outcomes compared to all other Dispositions in Race, Sex, Disability, and Age Discrimination Cases in the Northern District of Georgia and the Eastern District of Pennsylvania

Jury Verdict	Bench Verdict	Other Dispositions on the Merits	Other Dispositions Dismissed without Prejudice	Total
20	2	704	160	886
2.3%	.23%	79.5%	18%	100%

VI. SUMMARY OF FINDINGS

In conclusion, although *Toyota Manufacturing* does not demonstrate a significant effect on the outcomes of dispositions, these dispositions provide insight into differences in district court dispositions and trends in those dispositions. Both districts demonstrated general consistency across categories of discrimination. Both also demonstrated slight differences in respective increasing tendency towards either summary judgment or settlement. Ultimately it appears that the ADA fares better than its critics allege, and that the variance between district courts contributes to a good degree of variation in employment discrimination case outcomes.

The Eastern District of Pennsylvania demonstrates a general increase in settlement dispositions, with the exception of disability claims. Indeed, when considering cases on the merits, disability settlement dispositions decreased from 89.7% to 78.6% of ADA dispositions, compared to sex settlement dispositions on the merits that increased from 80.9% to 93.1% of Title VII dispositions, age settlement dispositions on the merits that increased from 77.8% to 82% of ADEA dispositions, and

136 *See infra* Table 5.3.
137 *See infra* Table 5.3.

race dispositions on the merits that went from 78.6% to 81.1%.[138] This may be attributable to courts' response to the Supreme Court's narrowed definition of disability. However, it is also worth reflecting on the fact that in the years prior to *Toyota Manufacturing*, disability dispositions settled at nearly a rate of 90% when considered on the merits, compared to 77.8%, 78.6%, and 80.9% of age, race, and sex, respectively.[139] So it might be the case that ADA settlement rates were abnormally high and the resulting decrease reflects a normalization of settlement rates rather than a drastic decrease because of ADA definition narrowing and media attacks. Thus, in the Eastern District of Pennsylvania post-Toyota, settlement dispositions ranged from 78.6% to 93.1% of all cases decided on the merits.

Summary judgment disposition in the Eastern District of Pennsylvania demonstrated some fluctuations but also maintained a stable range. Disability summary judgment dispositions on the merits increased from 3.4% to 17.9%, compared to sex summary judgment dispositions on the merits which decreased from 6.4% to 3.4%, race summary judgment dispositions on the merits decreased from 17.8% to 6%, and age summary judgment dispositions increased from 7.1% to 13.5%.[140] This reflected a range of summary judgment dispositions pre-and post-*Toyota Manufacturing* between 3.4% and 17.9%.

The Northern District of Georgia was slightly more consistent across categories than the Eastern District of Pennsylvania. Outcomes post *Toyota Manufacturing* resulted in fewer settlement dispositions and more frequent summary judgment dispositions in most categories of cases determined on the merits. Summary judgment remained largely stable with slight increases in sex and age discrimination cases disposed of on the merits, and greater decreases in race and disability summary judgment dispositions decided on the merits. Disability dispositions decreased from 33.3% to 23.8%, sex dispositions increased from 25.3% to 30.6%, race dispositions decreased from 37.9% to 30.7%, and age dispositions increased from 31.6% to 33.3%.[141] The decrease in race and disability dispositions seems to reflect a general trend of summary judgment dispositions resulting in approximately 30% of dispositions on the merits in the Northern District of Georgia. The resulting range of summary judgment dispositions in the pre and post-*Toyota* decision in the Northern District of Georgia was between 23.8% and 37.9%.

However, consistent with the Northern District of Georgia's decrease in summary judgment dispositions in race and disability, was an

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138 *See supra* Table 3.3; *supra* Table 3.5; *supra* Table 3.7; *supra* Table 3.9.
139 *See supra* Table 3.3; *supra* Table 3.5; *supra* Table 3.7; *supra* Table 3.9.
140 *See supra* Table 3.3; *supra* Table 3.5; *supra* Table 3.7; *supra* Table 3.9.
141 *See supra* Table 4.3; *supra* Table 4.5; *supra* Table 4.7; *supra* Table 4.9.

increase in disability and race settlement dispositions. In the Northern District of Georgia, disability settlement dispositions increased from 52.4% to 66.7%, sex settlement dispositions decreased from 68.4% to 59.7%, race settlement dispositions increased from 50.6% to 56.8%, and age settlement dispositions decreased from 63.2% to 61.1%.[142] This reflects a range of settlement between 50.6% and 68.4%.

In settlement comparison between the Eastern District of Pennsylvania and the Northern District of Georgia pre and post-*Toyota*, settlement dispositions resulted in a range between 78.6% to 93.1%[143] and 50.6% and 68.4%[144], respectively, of all cases decided on the merits. In summary judgment comparison between the Eastern District of Pennsylvania and the Northern District of Georgia pre and post-*Toyota*, summary judgment dispositions resulted in a range between 3.4% and 17.9%[145],and 23.8% and 37.9%[146], respectively, of all cases decided on the merits.

This lends support to the idea that the merits of the actual case may not be as significant as the district court's leanings towards use of particular dispositions. In the Northern District of Georgia this may be explained by what some allege is an increased use of summary judgment dispositions in federal civil litigation.[147] It has been shown, for example, that summary judgment dispositions have risen substantially from 1960 to 2000, with one conservative range estimating that they have increased from 1.8% to 7.7% in particular districts.[148] Furthermore, the same research has demonstrated that these summary judgment outcomes vary, "sometimes dramatically" among courts and different types of cases.[149] Another notable aspect of this is the pro-defendant dispositions of all summary judgment outcomes I reviewed. Previous studies have suggested that 38.7% of trial court cases that were not appealed were resolved through summary judgment in favor of the defendant-employer, while only 1% were resolved through summary judgment in favor of the plaintiff.[150]

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142 *See supra* Table 4.3; *supra* Table 4.5; *supra* Table 4.7; *supra* Table 4.9.

143 *See supra* Table 3.3; *supra* Table 3.5; *supra* Table 3.7; *supra* Table 3.9.

144 *See supra* Table 4.3; *supra* Table 4.5; *supra* Table 4.7; *supra* Table 4.9.

145 *See supra* Table 3.3; *supra* Table 3.5; *supra* Table 3.7; *supra* Table 3.9.

146 *See supra* Table 4.3; *supra* Table 4.5; *supra* Table 4.7; *supra* Table 4.9.

147 These findings are consistent with recent work studying the increasing use of summary judgment dispositions in federal civil litigation. *See, e.g.* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1(3) J. EMPIRICAL LEGAL STUD. 591 (Nov. 2004).

148 Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1(3) J. EMPIRICAL LEGAL STUD. 591 (Nov. 2004).

149 *Id.*

150 *See* Colker, *supra* note 7, at 126.

Another possibility is that cases in the Eastern District of Pennsylvania are stronger, or are better able to avoid pro-defendant summary judgment. This seems unlikely, especially considering the consistency in proportion of type of disposition within each district despite the substantially different burdens of proof required under Title VII, ADA, and ADEA. Title VII race and sex claims allow the use of circumstantial evidence in establishing a prima facie case and give plaintiffs the opportunity to refute the employer's affirmative defense by demonstrating pretext, a lower burden of proof than that required for ADEA or ADA cases. Age discrimination plaintiffs effectively have to present direct evidence of animus against employees on the basis of age, such that indirect evidence such as statements regarding the costs of financing older employees' pensions are not sufficient to establish age discrimination.[151] Finally ADA employees have the burden of showing that mitigating measures do not reduce their disabilities, that they can perform the essential job function if provided a reasonable accommodation, and that this reasonable accommodation does not provide an undue burden on the employer.[152] This gives an employer multiple affirmative defenses, where the employer can demonstrate that the plaintiff could not do the work even with a reasonable accommodation, or that the accommodation presented an undue burden on the employer.[153] Given both the different burdens established by the separate statutes and the considerable constraints of these burdens it appears that trial court dispositions may be more a function of the characteristics of the given federal court and its tendency to dispose of cases in the form of settlement or summary judgment, than it reflects the quality of cases brought to each district.

VII. LIMITATIONS

The study presented has its limitations. As noted above, the lack of symmetry in the cases before and after *Toyota Manufacturing* may be problematic. It would also be prudent to use a control group where ADA case outcomes are compared to all federal civil litigation employment outcomes, or all civil litigation outcomes in each district studied. Finally, studies that attempt to determine the effects of Supreme Court decisions on plaintiff behavior and plaintiff outcomes are inherently limited because any change in frequency of cases or case outcomes may be the result of any number of undetermined and undeterminable factors includ-

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151 *See* Hazen Paper v. Biggins, 507 U.S. 604, 610-614 (1993).

152 *See* 42 U.S.C. § 12101; *see also* Sutton v. United Airlines 527 U.S. 471 (1999) (restricting definition of visually disabled to include only people who remain visually impaired after employing a "mitigating measure" such as glasses or contacts).

153 *See* 42 U.S.C. § 12101

ing changed plaintiff behavior, changed attorney behavior, or increased or decreased likelihood of pre-trial settlement.

CONCLUSION

This study demonstrates that disability discrimination cases fare comparably to race, sex, and age discrimination cases, that location may matter more than cause of action, and that settlements, although not perfect pro-plaintiff outcomes, are dispositions that cannot be dismissed categorically as pro-defendant outcomes. This poses deeper questions about how we assess civil rights laws. Can we accurately say that these laws are failing intended beneficiaries simply because jury verdicts and bench decisions, which represent less than 2.5%[154] of all cases decided on the merits, tend to be decided in favor of defendants? It seems that the analysis is focused at the tip of the iceberg, not where the majority of the action on the merits occurs. In addition to representing an inaccurate measure of defendant success, the scholarly focus on pro-defendant outcomes of bench trials and jury verdicts may have the effect of discouraging plaintiffs and plaintiff-side employment discrimination lawyers from taking potential cases.

The emphasis on jury verdicts and bench decisions further detracts from the goals of civil rights legislation. While a central goal of employment discrimination legislation is to give employees in protected categories a channel of recourse for discrimination, the intended purpose of these statutes is to change employer behavior and encourage compliance with anti-discrimination policies.

The EEOC was founded to foster a spirit of settlement for persons in protected categories of employment discrimination.[155] The use of the EEOC as a pre-litigation settlement administrator tends to emphasize the goals of compliance through alternative dispute resolution. Along these lines, the ADA was one of the first statutes to explicitly encourage the use of mediation for dispute resolution.[156] To measure the success of a statute by an outcome not central to, or even encouraged by, the statute itself seems to fail the purpose of the statute. What is more, the prevalence of EEOC settlements and pre-trial settlements tends to demonstrate that employment discrimination laws are anything but inactive, ineffective formalities. It runs counter to the spirit of civil rights laws that we

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154 *See supra* Table 5.3

155 *See* 42 U.S.C. § 12101(b). Indeed, the ADA has a specific provision encouraging the use of mediation. *See* 42 U.S.C. § 12212 (2006) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under this chapter.").

156 *See* 42 U.S.C § 12212.

opt to solely measure their success on the basis of outcomes of cases that are determined in a bench or jury verdict. The emphasis on bench and jury decisions goes beyond obscuring the actual nature of outcomes; it runs contrary to the goals of these particular laws, and it may have the adverse effect of discouraging individuals and groups facing discrimination from filing claims of discrimination.

Although an assessment of jury verdicts and bench trials is useful, the method of analysis should change to reflect a more comprehensive view of civil litigation dispositions. The method of analysis should also reflect the particular goals of the statute. In the case of employment discrimination, the goal seems to be to effect employer change through settlement, not through litigation.

Finally, this paper poses questions about the effects of narrowing legal definitions on dispositions. Conceding that this analysis reflected only two locations, Atlanta and Philadelphia, it appears that a local preference for summary judgment may affect settlement outcomes more than the effects of narrowing legal definitions. The ADA has been consistently narrowed since 1998, yet these changes are not reflected in a dramatic increase in defendant summary judgment dispositions in the years after the narrowing began. There was, however, remarkable consistency in each location's frequency of settlement and defendant summary judgment dispositions.