

# Legal Forum Implementing the Americans With Disabilities Act 1996 Follow-Up Report on Sears, Roebuck and Co.

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## ABSTRACT

This article is the second in a series examining the employment practices of Sears, Roebuck and Co. in light of its compliance with the Americans with Disabilities Act of 1990. Sears employs approximately 20,000 persons with disabilities, nearly 7000 individuals with orthopedic disabilities. The article describes findings from two major areas of inquiry relevant for spine professionals: 1) the costs and benefits of workplace accommodations, and 2) the ways in which Sears and other companies informally and formally resolve Americans with Disabilities Act Title I disputes. [Key words: Americans with Disabilities Act, legal, Sears, Roebuck and Co.] Spine 1996;21:1602-1608

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More than any other law, Title I of the Americans with Disabilities Act of 1990 (ADA) has shaped public attitudes toward the employment of persons with disabilities.<sup>1</sup> Title I of the ADA is the most comprehensive federal law to address employment discrimination against millions of Americans. Its implementation remains the subject of intense public policy debate.

An article by Blanck<sup>4</sup> described the pre-ADA and post-ADA Title I employment practices of Sears, Roebuck and Co. during the period from 1978 to 1992. The present article has three central goals: 1) to stimulate further discussion and debate of the issues that Sears and

other companies face regarding Title I implementation; 2) to provide data collected during the period from 1993 to 1996 on the costs and benefits of workplace accommodations and on dispute avoidance and resolution practices that transcend ADA Title I compliance; and 3) to identify the broader implications of Sears' employment-related experiences and philosophy for future policymaking in this area.<sup>8</sup>

As a result of the studies at Sears and elsewhere, five core implications regarding effective ADA Title I implementation may be drawn:

1. The impact of the ADA on American business is evolutionary and not revolutionary.
2. Universal design and access fulfill the objective of including persons with and without disabilities into productive work force participation.
3. Efforts to educate management and the work force about the ADA and the capabilities of persons with disabilities must be based on facts, not on myths.
4. Starting from a base of ADA compliance, companies can look beyond mere compliance to transcendence in ways that make strong economic sense.
5. Far from creating onerous legal burdens, the ADA can provide employers and employees a framework for effective dispute avoidance and resolution.<sup>2</sup>

Sears employs among its 300,000 person work force an estimated 20,000 persons with physical or mental disabilities, nearly 7000 individuals of whom have orthopedic disabilities.<sup>2</sup> Although these numbers are not exactly proportionate to the estimated 50 million Americans with disabilities among an overall U.S. population approaching 300 million, they are representative of the scope of disabilities and related accommodations that enable productive, meaningful work force participation.

In light of a growing concern, or, some argue a "backlash" against ADA implementation to date, the present areas warrant study. In 1995, the House Committee on Economic and Educational Opportunities requested that the General Accounting Office evaluate the impact of Title I of the ADA on employers and persons with disabilities.<sup>7</sup> The impetus for the Congressional request was based on anecdotal stories reported in the press and elsewhere about the costly and burdensome nature of Title I. As a result, some in Congress have sought to repeal the law, while others presently are seeking to narrow its scope.

Regardless of any particular view of the law, there exists little systematic information and study to evaluate Title I's effectiveness.<sup>5,11</sup> These issues need to be addressed, particularly as questions about U.S. corporate policy in the 21st century toward the emerging work force of persons with disabilities come to the fore of other national debates on welfare, health care, Medicaid, and Medicare reform.<sup>7</sup>

The experiences of any one corporate "laboratory" are, of course, insufficient for drawing sweeping conclusions about ADA implementation or other policy reforms that may apply throughout corporate America. In the studies at Sears and elsewhere, however, Title I implementation and transcendence is examined in light of the five core values mentioned above. Earlier articles in this series have reviewed the law of Title I of the ADA.<sup>1</sup>

## EMERGING FINDING

### Workplace Accommodations at Sears from 1978 to 1996

Figure 1 presents the cost of providing workplace accommodations to Sears employees with disabilities from 1993 to 1996. During these years, almost all (99%) accommodations sampled at Sears required little or no cost. A closer look at Figure 1 shows that 72% required no cost, 17% cost less than \$100, 10% cost less than \$500, and only 1% cost more than \$500, but not more than \$1000. For the 71 accommodations studied during the years from 1993 to 1996, the total cost was \$3209. The average cost for these accommodations was \$45.

Figure 1. Workplace accommodations at Sears, January 1, 1993, to December 31, 1995 (cost).

No Cost (72%) -- 51 cases

Cost Less than \$100 (17%) -- 12 cases

Cost \$100 to \$499 (10%) -- 7 cases

Cost \$500 to \$1,000 (1%) -- 1 case

Total number of accommodations = 71

Total cost of accommodations = \$3,209.20

Average cost of accommodations = \$45.20

The costs of providing accommodations to Sears employees with disabilities during the years from 1978 through 1992 are shown in Figure 2. Before Title I implementation, almost all of the 436 accommodations studied at Sears required little or no cost (69% required no cost, and 28% cost less than \$1000). The total cost of accommodations from 1978 to 1992 was \$53,000, with an average cost per accommodation of \$121. When removing from the total cost those accommodations involving purchases of advanced technology (i.e., the

3% of accommodations costing more than \$1000), the average cost per accommodation for this pre-effective Title I period is \$36, consistent with the \$45 average cost from 1993 to 1996.

Figure 2. Workplace accommodations at Sears, January 1, 1978, to December 31, 1992 (cost).

No Cost (69%) -- 301 cases

Cost Less than \$1,000 (28%) -- 122 cases

Cost More than \$1,000 (3%) -- 13 cases

Total number of accommodations = 436

Total cost of accommodations = \$52,939.80

Average cost of accommodations = \$121.42

Total cost of accommodations minus those costing \$1,000 or more = \$15,233.25

Average cost per accommodation minus those costing \$1,000 or more = \$36.01

One shortcoming that many companies have found in implementing Title I is the lack of standardized databases to compile information on disability, accommodations, costs, and related economic impact analyses.<sup>3</sup> Figure 3 illustrates the percentage of Sears employees, separated by type of disability, requesting and receiving workplace accommodations from the period January 1, 1993, to December 31, 1995. Almost half (47%) of the accommodations examined during this 3-year period involved orthopedic impairments. The average cost for accommodations for employees with orthopedic impairments is \$43. Roughly one third (31%) of the accommodations involved employees with sensory impairments (primarily hearing and visual impairments) at an average cost of \$75. Neurologic impairments account for 8% of the requested accommodations (at an average cost of \$13), and behavioral impairments account for 7% (at an average cost of \$0).

Figure 3. Sears 1996 work force. Percentage of persons with disabilities requesting accommodations from 1993 to 1996 (type of impairment).

Orthopedic (47%) -- 33 cases -- \$43.35 avg. cost

Sensory (31%) -- 22 cases -- \$75.70 avg. cost

Neurological (8%) -- 6 cases -- \$13.33 avg. cost

Behavioral (7%) -- 5 cases -- \$0 avg. cost

Internal/Skin (3%) -- 2 cases -- \$0 avg. cost

Other (1%) -- 1 case -- \$0 avg. cost

Cancer, Cardiovascular, Respiratory = 0 cases

Unknown = 2 cases (3%); \$0 avg. cost

Total number of cases = 71

Average cost of accommodations = \$45.20

Two general implications, among others, may be drawn from these findings. First, from a business planning perspective, the proportion of accommodations provided for employees with particular disabilities is consistent with the overall proportion of employees with similar disabilities in Sears' work force. Second, from an economic perspective, the direct costs associated with accommodations for any particular disability are low and do not deviate substantially from the overall average cost of \$45.

The Sears findings are consistent with other studies. For instance, the Job Accommodation Network (JAN) provides information on workplace accommodations, at no cost to businesses, rehabilitation professionals, and people with disabilities.<sup>8,15</sup> More than 66% of effective workplace accommodations implemented as a result of a JAN consultation cost less than \$500. Moreover, the median cost of an accommodation implemented as a result of a JAN consultation is approximately \$200, and almost 66% of the workplace accommodations implemented result in savings to the company in excess of \$5000. The savings associated with effective workplace accommodations tracked by JAN include lower job training costs, increased worker productivity, lowered insurance claims, and reduced rehabilitation costs after injury on the job. In a recent JAN survey, employers reported that for every dollar invested in an effective accommodation, the companies realized an average of \$50 in benefits.<sup>8</sup>

Likewise, the results of a 1995 Harris Poll of more than 400 executives show that: 1) more than 75% of those surveyed report minimal or low increases in costs associated with the provision of workplace accommodations; 2) 75% of those surveyed report that the average cost of employing a person with a disability is not greater than employing a person without a disability; 3) the median cost for the provision of accommodations was \$233 per

employee; and 4) from 1986 to 1995, the proportion of companies surveyed providing workplace accommodations rose from 51% to 81%.<sup>8,14</sup>

Sears continues to encounter hundreds of workplace accommodations since the adoption of the ADA, most of which are not recorded formally. For purposes of future planning, Figure 4 sets forth the estimated percentage of persons with disabilities, by type of impairment, in the 1994 Sears work force. Orthopedic impairments account for more than one third (36%) of reported disabilities, followed by cardiovascular impairments and internal, sensory, and respiratory impairments.

Figure 4. Sears 1994 work force. Percentage of persons with disabilities (type of impairment).

Orthopedic (36%)
Cardiovascular (19%)
Internal (8%)
Cancer (2%)
Sensory (7%)
Respiratory (7%)
Behavioral (5%)
Neurological (4%)
Other (12%)

These trends suggest the need for future study to guide work force planning and ADA transcendence at Sears and at other organizations, including analysis of: 1) the extent to which particular back and spine injuries on the job account for a large proportion of disability identifications; 2) the relation of workers' compensation programs and workplace strategies for maintaining a qualified, healthy, and safe work force; and 3) the reasons why large numbers of qualified employees and potential job applicants with "hidden" disabilities are unable or unwilling to self-identify in the workplace.<sup>6</sup>

## Avoiding and Resolving Americans With Disabilities Act Disputes

A second major area of study involves the ways ADA transcendence fosters corporate strategies that avoid and resolve litigation and support an environment of cooperation rather than confrontation in managing disability issues in the workplace.<sup>6, 17</sup>

Informal ADA dispute avoidance and resolution processes illustrate a commitment to ADA transcendence. For instance, as a component of the Sears Ethics and Business Policy Assist Program, a "help line" is available to employees for guidance on ADA-related policy.<sup>8</sup> Inquiries are confidential and advice and follow-up information is provided by trained personnel. The program reflects a commitment to ADA transcendence by fostering a dialogue and a collaborative approach to problem solving and the provision of accommodations and, when necessary, providing feedback and follow-up regarding dispute resolution.

Figure 5 illustrates the breakdown by type of disability of 20 informal ADA disputes primarily regarding accommodations at Sears studied from 1993 to 1996. Of the informal disputes examined, 30% involved orthopedic impairments, whereas 10% each involved sensory, respiratory, neurologic, internal, and behavioral impairments. Roughly 80% of the informal ADA inquiries sampled were resolved successfully, including through the provision of reasonable accommodations, the revision of corporate or store policies, and the development of individual, group training, and awareness programs regarding Title I compliance.

Figure 5. Informal dispute resolution at Sears, January 1, 1994, to December 31, 1995 (type of impairment).

Orthopedic (30%) -- 6 cases

Sensory (10%) -- 2 cases

Respiratory (10%) -- 2 cases

Neurological (10%) -- 2 cases

Internal (10%) -- 2 cases

Behavioral (10%) -- 2 cases

Unknown (20%) -- 4 cases

Total number of cases = 20

## Formal Avoidance and Resolution of Americans With Disabilities Act Disputes at Sears

Sears has not seen the explosion of formal Title I litigation that many are claiming.<sup>8</sup> Workplace strategies often have led to better workplace solutions, streamlined dispute resolution, and enhanced workplace safety for employees with and without disabilities.<sup>12,17</sup>

From January 1, 1990, to August 10, 1995, 141 Title I complaints were filed with the Equal Employment Opportunity Commission (EEOC) against Sears. Figure 6 presents the breakdown of EEOC filings by type of disability. Almost half (43%) of the charges filed against Sears involve orthopedic impairments. The relatively high proportion of orthopedic claims against Sears may reflect factors inherent to a large retail business, particularly when compared to national trends showing that roughly 20% of all EEOC charges raised to date involve orthopedic impairments.<sup>4,8</sup>

Figure 6. Formal dispute resolution at Sears, January 1, 1990, to August 10, 1995 (type of impairment).

Orthopedic (43%) -- 61 cases

Behavioral (15%) -- 21 cases

Undocumented (14%) -- 19 cases

Internal (9%) -- 12 cases

Sensory (10%) -- 14 cases

Neurological (4%) -- 6 cases

Cardiovascular (3%) -- 4 cases

Cancer (1%) -- 2 cases

Respiratory (1%) -- 2 cases

Blood/Skin = 0 cases

Total number of cases = 141

Another prominent issue facing Sears and many other companies is the relation of Title I protections to state workers' compensation laws, particularly in circumstances when employees are injured on the job. Figure 7 illustrates the EEOC filings against Sears broken down by the period of disability occurrence. Almost half (41%) of the Sears employees who filed charges with the EEOC evidenced a disability before their employment at Sears or to their current job at Sears. More than one quarter (29%) of those who filed charges were injured on the job and 18% injured off the job.

Figure 7. Formal dispute resolution at Sears, January 1, 1990, to August 10, 1995 (disability occurrence).

Prior Disability (41%) -- 56 cases

Injured on the Job (29%) -- 40 cases

Injured off the Job (18%) -- 25 cases

Unknown (12%) -- 16 cases

Total number of cases = 137

These trends suggest, at least regarding Sears, that the bulk of ADA Title I issues involve potentially qualified employees with pre-existing disabilities seeking the protections of the law. In support of this conclusion, analyses of the Sears data show that 75% of those employees injured on the job and 50% of those injured off the job raise complaints involving orthopedic impairments.

In contrast, of those Sears employees reporting disabilities before their employment, 25% involved orthopedic impairments and 25% involved behavioral impairments, with the remaining 50% split among other impairments. The findings do not support the critique that Title I claims reflect, in large part, issues that would otherwise be raised under traditional workers' compensation laws.<sup>8</sup>

Study is needed of ADA strategies that enable qualified individuals with disabilities to return to work safely and cost effectively, thereby reducing workers' compensation costs and unemployment levels.<sup>9,10</sup> The Occupational Safety and Health Administration estimates that work-related orthopedic impairments account for \$1 of every \$3 spent on workers' compensation. The Occupational Safety and Health Administration estimates that employers spend \$20 billion a year on direct costs for workers' compensation, and up to five times that amount for indirect costs.<sup>8</sup>

For long-term planning purposes, Sears and many companies also track the resolution patterns of Title I charges filed with the EEOC. Figure 8 illustrates the status of 138 Title I charges filed with the EEOC against Sears, studied during the period from 1990 to 1995. Virtually all (98%) of the 138 formal charges studied were resolved without trial litigation with 12% settled, 9% withdrawn, 33% dismissed, and 8% issued a "right to sue" letter by the EEOC. In 34% of the cases, a decision is pending by the EEOC, whereas trial court litigation is pending in only 2% of the cases.

Figure 8. Formal dispute resolution at Sears, January 1, 1990, to August 10, 1995 (procedural status).

Pending EEOC Decision (34%) -- 47 cases

EEOC Dismissed (33%) -- 46 cases

Settlement (12%) -- 16 cases

Right to Sue Issued (8%) -- 11 cases

Complaint Withdrawn (9%) -- 12 cases

Unknown (2%) -- 3 cases

Litigation Pending (2%) -- 3 cases

Total number of cases = 138

Most striking is the finding that the overwhelming majority of formal ADA charges are resolved without resort to protracted litigation. The most effective resolutions involve compensatory payments and the provision of accommodations enabling qualified employees to return to work.

The effective settlement of Title I charges also is a major challenge facing companies. Figure 9 examines settlement costs associated with the resolution of 18 EEOC charges against Sears, examined separately by type of disability. Of the cases studied, the average settlement cost to Sears was \$6193. Settlement costs by type of disability range from a high of \$10,571, average for orthopedic charges (compared to \$16,700 average settlement in all EEOC charges involving back impairments), to a low of \$0 for those with sensory impairments. The majority (56%) of settlements studied involve orthopedic impairments. In contrast, roughly 11% of all Title I charges settled to date involve back impairments.

Figure 9. Formal dispute resolution at Sears, January 1, 1990, to August 10, 1995 (settlements by disability).

Orthopedic (56%) -- 10 cases -- \$10,571 avg. cost

Behavioral (16%) -- 3 cases -- \$100 avg. cost

Neurological (11%) -- 2 cases -- \$5,197 avg. cost

Cancer (11%) -- 2 cases -- \$256 avg. cost

Sensory (6%) -- 1 case -- \$0 avg. cost

Internal -- 1 case -- \$0 avg. cost

Total number of cases = 18 (includes 2 cases with multiple disabilities)

Average settlement cost = \$6,193.38

On the whole, Sears' formal commitment to Title I dispute resolution has generated a positive effect throughout the company. The results reflect a corporate culture of helping employees to pursue productive, safe, and stable careers, and when disputes arise, focusing on effective and timely problem solving.<sup>13, 16</sup>

As of December 1995, national trends show that more than 55,000 Title I complaints have been filed with the EEOC. The trends show that 19% involve orthopedic impairments (primarily back related), 11% involve behavioral impairments (primarily emotional and psychiatric impairments), 11% involve neurologic impairments, and 5% involve sensory impairments. The EEOC has resolved more than 36,000 charges of discrimination under Title I in the 4 years since the law has been in effect, only having had to proceed to federal court in roughly 125 cases.<sup>8</sup>

## NEW CHALLENGES AND EMERGING QUESTIONS

The ADA has reflected a dramatic shift in American public policy toward the equal employment of people with disabilities.<sup>10, 13</sup> Yet studies differ in their conclusions of whether the ADA has played, or will play, a significant role in enhancing labor force participation of qualified people with disabilities and in reducing dependence on government entitlement programs.<sup>11</sup> The resulting dialogue has been illustrative to small and large businesses as they attempt proactive compliance strategies. Several central themes are emerging, as discussed below.

First, contrary to popular belief, it is widely understood that the ADA does not require employers to hire individuals with disabilities who are not qualified or to hire qualified individuals with disabilities over equally qualified individuals without disabilities. Every manager interviewed at Sears understood Title I as an antidiscrimination law and not as a preferential treatment law.

Second, evolutionary ambiguity remains in the concept of discrimination and in the required provision of accommodations under Title I. Yet, as a result, some argue that Title I distorts the market value of American labor, requiring employers to take "affirmative" and unduly costly measures to accommodate persons with disabilities. These conclusions are not validated by the Sears findings, which do not reflect a trend under Title I of the ADA toward preferential treatment in the workplace, at the expense of economic efficiency, workplace safety, and business sense. These findings are as follows:

1. The costs of accommodating qualified workers is low and the relative economic, productivity, and safety-related benefits are high.
2. The costs of not accommodating and not retaining qualified workers are relatively high, with the average administrative cost per employee replacement at \$1800-\$2400.
3. There is no evidence that ADA implementation and transcendence have distorted the value of labor in the Sears work force.
4. There have been no "reverse-discrimination" cases at Sears or elsewhere (consistent with findings from a 1995 Harris Poll of business executives that 79% of those surveyed believe that the employment of people with disabilities is a boost to the economy whereas only 2% believe it poses a "threat to take jobs" from people without disabilities).
5. Virtually all Title I disputes studied at Sears have been resolved at a low cost without extensive trial litigation, keeping qualified employees at work.

Third, more research is needed to further identify the variables to be studied to achieve an understanding of the nature of an individual's disability and its relation to employment opportunity and career advancement. For example, what objective measures, besides employment rates and accommodation costs, are valid indicators of effective Title I implementation (e.g., job search rates, income levels, quality of jobs obtained)?

Fourth, assumptions are emerging that will help guide future study so that employers, policymakers, health professionals, courts, and others may evaluate more effectively ADA implementation. For instance, the study of disability policy requires interdisciplinary

analysis, grounded in the fields of medicine, rehabilitation, psychology, economics, law, ergonomics, and others.<sup>8</sup>

Finally, companies must continue to establish systems that measure objectively the costs and benefits of accommodating people with disabilities into their work forces. Large corporations, such as Sears, or smaller companies, through cooperatives or associations, increasingly require data collection systems that identify trends in Title I implementation to assist in business planning, dispute avoidance, and educational efforts. In studying future business strategies, examination is needed of both direct and indirect costs and benefits associated with ADA implementation, such as staff time spent on the planning of an accommodation or the positive effect of an accommodation on training and work requirements of fellow employees.<sup>8</sup>

## CONCLUSION

Assessing Title I implementation and ADA transcendence is, of course, a monumental task. No law, even one as far reaching as the ADA, can be the sole reason for social change. Policymakers, employers, employees, researchers, and others must assess how Title I implementation and transcendence is to be defined for legal, business, and other purposes. These assessments will vary for employees with different disabilities and for businesses of different sizes and in different markets.

Much dialogue and study are needed to raise awareness and to foster ADA Title I transcendence. With more examples of corporate leadership, we can expect to witness continued progress beyond minimal Title I compliance toward ADA transcendence throughout the American workplace.

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