2015

Finding New Inspiration in the ADAAA

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ARTICLE

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PHASE 1

Roughly thirty years ago, I probably wished there had been a statute like the Americans with Disabilities Act (ADA). I was a teenager with a new driver's license who used to drive his mobility-impaired grandfather around town once a week or so that he could do some chores. Going to the barbershop or the bank was as much about him attempting to feel that he was still an active participant in society as it was about getting a haircut or depositing a check. My grandfather needed a cane and my arm to walk, so getting from the parking lot to the front door was sometimes a challenge. Sometimes the distance was longer than others. Sometimes I worried about his ability to make it to the door without falling. Sometimes I just felt embarrassed to be a teenager walking an old man through a parking lot to the front door. Regardless, it would have been nice to have been able to do something as simple as park closer to the front door.

Roughly five years later, the unformed thought in my head about the need for some kind of law that might make it easier for people with disabilities to get around when they needed to started to become a reality. I first learned that Congress was considering such a law while I was in college. In one of my political science classes, we were assigned the task of identifying a piece of pending legislation. As I recall, we were supposed to find a bill and describe what it was about, who introduced it, which interest groups supported it or opposed it, its status, etc. My grandfather had died by this point, and I honestly don't remember whether his disability was on my mind when I chose the ADA as the legislation I'd monitor. It probably was. Regardless of the reason, I did—if I do

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say so myself—an awesome job on the project. I went to the library and looked through the microfiche issues of *Time* and *Newsweek*. I wrote interest groups and tried to get a sense of what was going on behind the scenes. I read the bill (or as much of it as I could get through). I made a 100 on the paper, and my professor said he had no criticisms and that it was a "home run." That summer, I watched a news story over at my friend's house[1] about President George H. W. Bush signing the bill—the ADA—into law. Driving my grandfather around had given me a greater appreciation for the need for the ADA, and seeing it become law made me happy.

Upon passage of the law, much of the discussion concerning disability law centered on employment issues. Prior to the passage of the ADA, employment discrimination claims based on disability were relatively uncommon.[2] While federal employees with disabilities had enjoyed the right to be free from discrimination for some time,[3] private employees had been forced to look to a patchwork of state laws for protection.[4] Now that the ADA had created a potential class of millions of private employees, the attention naturally turned to the employment provisions of the ADA. Within a few years, much of the initial optimism about the ADA's ability to address longstanding problems of unemployment for people with disabilities would fade.[5]

Roughly five years after the passage of the ADA, I was in law school. Within a couple of years, I was learning about how courts were limiting the reach of the ADA's employment provisions.[6] A

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1. Robert Rogan.

2. *See* Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivor's Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 MD. L. REV. 352, 364 (2000) ("Prior to 1990, the Federal Rehabilitation Act of 1973 provided the only federal remedy to disability-based employment discrimination[, but] [t]he Rehabilitation Act . . . failed to protect most person with disabilities . . . .").

3. *Id.*

4. *See id.* at 373 ("[W]ithout the passage of the ADA, . . . an 'inadequate patchwork' of state laws . . . failed to address most instances of cancer-based employment discrimination.").

5. *See, e.g.*, Louis S. Rulli & Jason A Leckerman, *Unfinished Business: The Fading Promise of the ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. Gender Race & Just. 595, 595, 623–30 (2005) ("[T]hirteen years after the passage of the ADA, the disabled remain disproportionately poor[, and] . . . their unemployment rates have remained relatively constant.").

6. *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 475 (1999) (holding that the determination of whether an individual has a disability may take into account mitigating measures); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523–25 (1999) (holding that the termination of an employee for a failure to obtain a Department of Transportation health certification because the employee suffered from hypertension did not amount to employment discrimination on the basis of a disability); Albertson's Inc. v. Kirkingburg, 527 U.S. 471, 564–67 (1999) (concluding that "measures undertaken, whether consciously or not, with the body's own systems," must be taken into account when determining whether an individual has a disability).

couple of years after that, I was in practice, getting a firsthand look at this phenomenon. It was around this time that a steady chorus of criticism concerning the federal courts' handling of employment discrimination claims under the ADA began.[7] Nearly all of the criticism centered on the difficulties that employment discrimination plaintiffs faced under the ADA.[8] And, nearly all of the criticism focused on the courts' overly restrictive interpretations of the terms within the ADA's definition of a "disability."[9] When I entered academia, I joined the chorus. It seemed obvious to many that employment discrimination plaintiffs were almost in a no-win situation. If an ADA plaintiff could somehow manage to survive summary judgment on the issue of being a qualified individual with a disability, the plaintiff still had to contend with a body of more general employment discrimination law that was generally unfavorable to discrimination plaintiffs.

Perhaps most disturbing was the fact that the law had not appeared to have moved the needle with respect to the unemployment numbers concerning individuals with disabilities.[10] When the law was still under consideration in Congress, supporters used the promise of increased employment and reduced economic dependency as some of the main selling points.[11] But, as the law developed into maturity, it became clear that the law wasn't making much of a dent in the thoroughly depressing unemployment statistics involving people with disabilities.[12]

To the surprise of many—myself most definitely included—Congress radically overhauled the ADA's definition of disability in 2008.[13] In explaining its reasoning, Congress singled out several Supreme Court decisions in the employment context that it

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7. *See, e.g.*, Rulli & Leckerman, *supra* note 5, at 613–61 ("Quite clearly, measured by judicial outcomes, the state of things under Title I of the ADA for all people with qualifying disabilities may be summed up succinctly a promise not much closer to fulfillment than it was thirteen years ago.").

8. *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560–62 (2001) (using statistical studies to show that the prevailing mantra that employment discrimination cases are easy, not hard, to win is patently false for disabled plaintiffs).

9. *See id.* at 571; *see also* NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT 2 (2013), *available at* http://www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb.

10. Selmi, *supra* note 8, at 560–62.

11. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 926–27 (2003)

12. *See* Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 UTAH L. REV. 429, 431 (citing high unemployment numbers).

13. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended 42 U.S.C. §§ 12101–12213 (2012)).

believed were unduly restrictive in applying the ADA's definition of disability.[14] Since the passage of the ADA Amendments Act of 2008 (ADAAA), plaintiffs have at least enjoyed greater success in establishing the existence of disability under the Act, even if it is still too early to gauge the long-term effects of the amendments.[15]

PHASE 2

The passage of the ADAAA should have made me happy. And, I guess it did. But, by this point, I was losing interest more generally in employment discrimination law. And, since my scholarship focused on the employment law aspects of the ADA, that malaise carried over to the ADAAA.

Looking back, that was really stupid. It was stupid because it wasn't the chronic unemployment issues that many people with disabilities face that got me interested in the ADA. It was the fact that I couldn't find a parking space close to the bank and didn't want my grandfather to suffer the indignity of being dropped off at the front alone to wait for me while I tried to find a parking place. The fact that the majority of decisions up to that point involved employment discrimination claims led many—myself included—to focus on the employment provisions to the exclusion of other issues. That's a shame because there is so much more to the ADA than the prohibition on employment discrimination. While there are many areas outside of the employment context in which the ADA has not reached its full potential, the ADA has had a dramatic impact in terms of increasing accessibility and making services available to people with disabilities that were previously unavailable.

It wasn't until I had a conversation with a colleague in legal academia a few years ago that I began to see that I was being shortsighted by allowing my antipathy toward employment discrimination law to override my interest in the ADA. The conversation actually wasn't a pleasant one. We were discussing diversity in hiring. I suggested that the concept of diversity included disability as well as more obvious things like race and gender. To me, this was self-evident. The colleague responded by saying that there was no meaningful comparison between people with disabilities and women in terms of the extent and kinds of discrimination that the groups had historically experienced. I was pretty much floored. I was floored, in part, because there is a wealth of scholarship that draws clear parallels between the ways

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14. *Id.* § 2(a)(4)–(7).

15. NAT'L COUNCIL ON DISABILITY, *supra* note 9, at 87–88; *see also* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–52 (2013).

in which women and people with disabilities have been discriminated against.[16] Yet, this person—who cares deeply about equality and justice and is generally wellversed in the law in this area—had apparently never made the connection before. More alarmingly, when I pointed out the history of institutionalization, forced sterilization, and outright exclusion from participation in elections, judicial proceedings, and other institutions of democratic self-governance that people with disabilities have faced, this person was quickly dismissive of this history as "not being as bad as" the history of discrimination against women.[17]

After fuming about the incident for a while,[18] I realized a couple of things. First, the message about the need for a law like the ADA hasn't been disseminated as widely as it should. So much attention has been devoted to the supposed excesses of the ADA and the demonstrable failures of the law with respect to the workplace that people who might be inclined to pay attention to stories about the ADA's successes and remaining challenges beyond the workplace have not heard those stories to the extent they should have. People with a special interest in disability law need to do a better job of getting the message out there.

The second thing I realized is that one of the most logical places to start is in the legal profession. If, as I learned, a legal scholar who is well versed in employment discrimination law is genuinely incapable of recognizing the historical and present obstacles individuals with disabilities face, disability law scholars have done a poor job of educating our colleagues. In short, lawyers—of all people—ought to understand why equality for people with disabilities matters.

The legal profession has special obligations when it comes to promoting equality. Given their monopoly on the practice of law, lawyers have a special responsibility when it comes to promoting access to justice. People with disabilities may face numerous barriers to access justice, including inaccessible courtrooms, inflexible court policies and practices, and the unwillingness of some lawyers to take on a client with a disability for fear of the perceived added expense or difficulty involved in such a representation.[19] Judges and lawyers also have special reason to

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16. *See, e.g.*, SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 165–80 (1996).

17. My colleague also used the outdated term "the handicapped" when discussing the issue, quickly leading me to believe that the past twenty-five years' worth of progress and frustration in the field had somehow quietly passed by this person.

18. Okay, a couple of years.

19. *See* Peter Blanck et al., *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 830 (2004) ("Although the Constitution provides that people engaged in the legal system have the right to be present

be concerned about excluding individuals from participation in the judicial process. For example, some people with disabilities may be denied equality of opportunity in terms of their ability to meaningfully participate in judicial proceedings due to the absence of auxiliary aids. Finally, given the legal profession's longstanding commitment to promoting equality of opportunity, the profession has a heightened obligation when it comes to eliminating discrimination and promoting diversity within the profession itself. Currently, people with disabilities are grossly underrepresented in the legal profession.[20] At some point, the profession's perceived commitment to equality and the rule of law will be subject to question if, as the American Bar Association's (ABA's) Presidential Diversity Initiatives has explained, "[P]eople see and come to distrust their exclusion from mechanisms of justice."[21]

Disability law scholars could assist in the effort to get out the message regarding the importance of the ADA. For the past twenty-five years, the vast majority of legal scholarship in the field has focused on employment discrimination. While workplace discrimination remains a major issue, disability law scholars could perhaps devote more time and attention to other areas of concern. To be sure, there are already exists significant scholarship in this regard.[22] But, as the ADA has gone from being the new kid on the block to just another civil rights statute, the message as to the ways in which the law has helped millions in their daily lives and the ways in which the law has also fallen short has gotten lost.

One place disability law scholars and disability rights advocates might start in terms of getting out the message about the importance of the ADA is with the American Association of Law Schools (AALS). The AALS Bylaws require that member schools provide equality of opportunity for all persons in legal education "without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual

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in the courtroom, not all courthouses are physically, programmatically, and technologically accessible to individuals with disabilities."); Elana Nightingale Dawson, Comment, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143, 1157 (2011) (discussing the difficulty some deaf clients have in finding a lawyer willing to represent them).

20. Nat'l Ass'n of Legal Prof'ls (NALP), *Reported Numbers of Lawyers with Disabilities Remains Small*, NALP BULL. (Dec. 2009),http://www.nalp.org/dec09disabled.

21. AM. BAR ASS'N PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (2011).

22. *See generally, e.g.*, Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" Civil Rights Litigation*, 54 UCLA L. REV. 1, 6–34 (2006); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1822–74 (2005).

orientation."[23] But, when it comes to the duty of member schools to seek to have a diverse student body, faculty, and staff, diversity is defined solely in terms of race, color, and sex.[24] The ABA law school accreditation standards take a similarly restrictive view of the concept of diversity.[25] It is estimated that 54 million Americans—or roughly 19% of the civilian noninstitutionalized population—have a disability.[26] Yet, some studies have found that lawyers with disabilities comprise less than 4% of the profession.[27] To the extent the legal profession wishes to look at least somewhat like the population as a whole, it might start by taking steps to increase diversity at the law school level. Disability law scholars could assist in this effort.

There are other areas in which disability law scholars could help the legal profession become an example for the rest of society in terms of ensuring equal opportunity and full integration for people with disabilities. For example, some state courts and bar associations have done a commendable job of taking steps to increase access to courtrooms and the judicial process for people with disabilities.[28] Disability law scholars have aided in these efforts.[29] But, there is more work to be done in this regard. By bringing attention to the ways in which people with disabilities still face significant barriers in terms of access to justice, disability law scholars, and lawyers more generally, may help nudge the legal profession toward being a leader in the quest for equality with respect to disability.

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23. *Membership Requirements*, ASS'N AM. L. SCHOOLS, http://www.aals.org/about/handbook/membership-requirements/ (last visited December 31, 2014) (quoting Bylaw § 6-3(a)).

24. *Id.* (referencing Bylaw § 6-3(c)).

25. ABA Accreditation Standard 213 similarly restricts the concept of diversity to gender, race, and ethnicity. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2014–2015 at 104–05 (2014), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf.

26. U.S. CENSUS BUREAU NEWS, FACTS FOR FEATURES: 20TH ANNIVERSARY OF AMERICAN WITH DISABILITIES ACT: JULY 26 at 1 (2010), *available at* http://www.census.gov/newsroom/releases/pdf/cb10ff-13.pdf.

27. AM. BAR ASS'N COMM'N ON MENTAL AND PHYSICAL DISABILITY LAW, *Statistical and Other Information and Lawyers with Disabilities: A New Beginning Amidst Gaps and Unanswered Questions*, *in* 2ND ABA NATIONAL CONFERENCE ON EMPLOYMENT OF LAWYERS WITH DISABILITIES 16, 22 (John W. Parry & William J. Phelan, IV eds., 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/09report.authcheckdam.pdf.

28. *See generally, e.g.*, GA. COMM'N ON ACCESS & FAIRNESS IN THE COURTS, A MEANINGFUL OPPORTUNITY TO PARTICIPATE: A HANDBOOK FOR GEORGIA COURT OFFICIALS ON COURTROOM ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES 17–52 (2004), *available at* http://www.georgiacourts.org/files/ADAHandbk_MAY_05_800.pdf.

29. *See* Blanck et al., *supra* note 19, at 834–38 (discussing ways of increasing accessibility through technology).