

Defining the Disabled: Public Policy in the Workplace

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A very recent set of U.S. Supreme Court rulings has once again upended the already elusive understanding of the word “disability” when applied to employees in the workplace or applicants seeking employment. With over thirty years of shifting Federal and state legislation, our understanding of what the “disability concept” means remains clouded. To further cloud the definition, California law and Federal law currently appear to reflect different concepts of public policy on employers (among others) that have important and different implications. Unsettled by shifting court decisions, disabled individuals remain perplexed about public policy regarding the “disabled” and their ability to access employment opportunities and successfully compete in the workplace.

Introduction

The latest development in the on-going struggle to define our Nation’s “disabled” population was reported on January 9, 2002, when the Supreme Court unanimously narrowed the definition of a disability as a condition substantially limiting major life activities in the case of *Toyota vs. Williams*. This recent ruling narrows the scope of the Americans With Disabilities Act (ADA), stating that an impairment must have a substantial effect on a person’s daily life to qualify as “disabled” under ADA.

Justice Sandra Day O’Connor, author of the Supreme Court’s unanimous ruling, reported that the Court’s ruling states that claimants must demonstrate that the impairment limits a major life activity, not only the performance of a specific job-related task. “To be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the performance of activities that are of central importance to most people’s daily lives,” O’Connor wrote. “The impairment’s impact must also be permanent or long-term” (Hoyer, 2002).

The changing definition of the “disabled” worker has concerned employers since the passage of the Americans With Disabilities Act on July 26, 1990. Employers dealing with demands for public accommodations, access to services and employment opportunities have had to tackle both moral and legal issues. In a nation with over 290 million people, public policy toward people with disabilities continues to challenge our court system, our public-private workplaces and our underemployed-unemployed population.

The History of ADA

In reviewing the history of ADA in the workplace, we must begin with the objectives of the Rehabilitation Act of 1973 and subsequent legislation enacted to provide equal employment opportunities, expanded educational opportunities, and an enhanced ability to integrate disabled persons into the workforce and into an increased access to daily community life.

With approximately 54 million people “reported” with disabilities, 20% of the national population, Federal and state legislators passed the Rehabilitation Act of 1973, which funded rehabilitation services focused on providing services such as medical, support, training and assistive technology which enabled the disabled in locating and obtaining services essential to their employability.

Motivated by activist groups and rehabilitation professionals, additional and expansive legislation was enacted in the late 1980s. In 1984, the Voting Accessibility for the Elderly and Handicapped Act was enacted, followed by the Air Carriers Access Act of 1986 and the Fair Housing Act Amendments of 1988. This legislation sought to regulate equal access to and use of public services, facilities and accommodations provided by both public and private employers.

On July 26, 1990, President George H. W. Bush signed into law landmark federal civil rights legislation, the Americans with Disabilities Act that provides comprehensive protections to individuals with disabilities in the areas of employment, public accommodations, obtaining state and local government services and telecommunications. This landmark legislation targeted protecting “disabled” people throughout this nation. However, defining the disabled has become a major workplace challenge.

The original purpose of ADA legislation, subsequent changes to the definition of “Disability,” California’s trend supporting a broader definition, and recent Supreme Court rulings supporting a narrow definition of the word have all contributed to confusion and concern regarding disabled people in the workplace.

Add to this scenario President George W. Bush’s commitment to tear down barriers to equal employment opportunities for disabled Americans through his “New Freedom Initiative.” Focused on increasing access to assistive technologies, expanding educational opportunities and promoting home ownership opportunities, the New Freedom Initiative is comprised of a number of key components:

- * Increased access to assistive and universally designed technologies through federal investment in research and development and funding for low interest loan programs to purchase assistive technology.
- * Expanded educational opportunities through increased funding for Individuals with Disabilities Education Act (IDEA), funding for Focus on Reading in Early Grades, expanding telecommuting by funding the purchase of computers and enhanced promotion of ADA compliance by small businesses through the Disabled Access Credit.
- * Enhanced promotion of homeownership through the passage of the American Homeownership and Economic Opportunity Act of 2000, which provides disabled Americans with a year’s worth of vouchers for down payment on a home and enhanced support of the Olmstead Decision, supporting integrated community-based settings.

According to the California Department of Rehabilitation, with an aging national population and a projected increase in the disabled population, ADA law will soon affect over 54 million Americans .

Purpose and Definitions

Designed to prohibit discrimination against people with disabilities, ADA’s purpose is (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the

Federal Government plays a central role in enforcing the standards established by ADA; and (4) to invoke congressional authority and the power to enforce the fourteenth amendment and regulate commerce, in order to address major areas of discrimination faced day-to-day by people with disabilities.

Implementation, compliance and monitoring of ADA requirements are all founded on a generally accepted definition of "disability." The Federal definition as stated in ADA has been the springboard for state, county and city government interpretation. Over the eleven years that ADA has been in existence, this definition has been broadened to accommodate changing workplace and individual needs.

ADA Definition of Disability: "A physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such an impairment, or being regarded as having such an impairment."

U.S. Department of Justice Definition of Impairment: Impairment means a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems, any mental or psychological disorder, and specific learning disabilities.

U.S. Department of Justice Definition of Substantially Limits: "Substantially limits" means an individual must be unable to perform, or be significantly limited in the ability to perform, an activity competently performed by the average person in the general population. Prior to determining if a person is substantially limited, the nature and severity of the impairment must be established, the duration or expected duration of the impairment must be established and the permanent or long term impact or the expected permanent or long term impact of the impairment must be established.

U.S. Department of Justice Definition of Major Life Activities: The definition of "major life activities" is based on the definition in Section 504 of the Rehabilitation Act. It states that major life activities are those basic activities that the average person in the general population can perform with little or no difficulty. This includes the performance of manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. This may also include the acts of sitting, standing, lifting and reaching.

ADA does not establish quotas or require employers to give preference to disabled people. ADA encourages outreach to disabled persons and requires employers to remove barriers to the employment of disabled people who are qualified to perform the essential functions of a job by making reasonable accommodations in the way the work is performed or to the work environment. ADA's purpose is to enable disabled people to compete in the workplace based on the same requirements and performance standards employers demand of workers who are not disabled.

The essential functions of a job are defined as "those functions that the individual must be able to perform unaided or with the assistance of a reasonable accommodation." The key factor is if the employer actually requires employees to perform the functions described as essential. Employers are not required to provide accommodations that would impose undue hardship on the operation of their business (Marrelli, 1994).

Legislative Overview

ADA, Public Law 101-336 enacts subtitle A of Title II which prohibits discrimination on the basis of disability by public entities, or all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance and incorporates specific prohibitions of discrimination on the basis of disability from Titles I, III and V of ADA.

As most State and local governments are recipients of Federal assistance from one or more Federal funding agencies, government agencies are already covered by Section 504 of the Rehabilitation Act which prohibits discrimination on the basis of handicaps in federally assisted programs and activities. However, ADA Title II extends this nondiscrimination mandate to State and local governments that do not receive Federal financial assistance.

The first regulation implementing Section 504 of the Rehabilitation Act was issued in 1977 by the Department of Health, Education and Welfare for programs provided Federal financial assistance. In 1978, in response to Executive Order 11914, the former Department of Health, Education and Welfare issued its coordination regulation for federally assisted programs, which served as a model for regulations issued by other Federal agencies. Coordination of regulation authority was transferred to the Department of Justice in 1980 by Executive Order 12250. More than 80 Federal agencies have now issued final regulations based on this model, prohibiting discrimination based on a handicap in programs and services they conduct.

In 1992, the Department of Justice, Office of Attorney General, implemented ADA and Public Law 101-336 by adopting Rule 28 CFR PART 35 that cited the general prohibitions of discrimination established under Section 504 of the Rehabilitation Act. Rule 28 CFR PART 35 enacted a number of employer requirements making programs accessible to individuals with disabilities and established a complaint mechanism for resolving allegations of discrimination.

Rule 28 CFR PART 35 is organized into seven Subparts. Subpart A "General" includes the purpose and application sections, describes ADA's relationship to other laws and defines terms. Subpart B, "General Requirements" contains the general prohibitions, issues of retaliation and coercion against those asserting their ADA rights, illegal use of drugs and restrictions on smoking. Subpart C addresses employment by public entities. Subpart D sets the requirements for program accessibility in existing facilities and for new construction, including alterations. Subpart E establishes specific requirements related to communications. Subpart F establishes administrative procedures for enforcement of Title II and restates the provisions of ADA Title V on attorney fees, dispute resolution, the effect of unavailable technical assistance and State immunity. Subpart G designates the Federal agencies responsible for investigation of complaints. It also assigns enforcement responsibility for particular public entities to eight Federal agencies and provides that the Department of Justice has enforcement responsibility for all State and local government entities not specifically assigned to other designated agencies. As stated, enforcement authority for various sections of ADA has been assigned to appropriate Federal agencies. Among them is the U.S. Equal Employment Opportunity Commission who has published guidelines that address reasonable accommodation and undue hardships under ADA.

In summary, Congress adopted the same basic definition of "disability" first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. This standardized definition was used for a number of reasons. First, it has worked well since its adoption in 1974. Second, it would be impossible to create a comprehensive list of specific disabilities, which could remain current. With a continued discovery of new "eligible" disorders, existing

eligible disabilities would quickly be outdated. Therefore, determination of eligibility became handled on a case-by-case basis.

California ADA Law

Los Angeles County, as one of the largest employers in Southern California, has also struggled with issues of ADA policy implementation, appeal processes and enforcement systems for more than ten years. As a prior Administrative Deputy with the County's Department of Personnel, the first author has assisted senior managers coping with issues related to management and personnel training on ADA sensitivity, recruitment strategies, testing accommodations, hiring practices, and upward mobility and retention issues as County departments have struggled to integrate the disabled employee into the County's workforce.

In California, the California Health and Human Services Agency's Department of Rehabilitation's mission is to assist Californians with disabilities in obtaining and retaining employment, maximizing their ability to live independently in their communities and achieving economic self-sufficiency. With 4.5 million Californians reporting over 900 disabilities, defining the term "disability" is a challenge unique to Californian employers. Originally based on the Rehabilitation Act's definition of "disability," California's definition was broadened in 2001. Effective January 1, 2001, through the efforts of a liberal California legislature, legislation broadened the definitions.

California's Assembly Bill 2222, Kuehl, modifies the definition of "mental disability" and "medical condition" under the Fair Employment and Housing Act, limits an employer's ability to require medical or psychological examinations or inquiries, and requires an employer to engage in a good faith, interactive process to determine reasonable accommodations for a disabled applicant or employee (Kuehl, 2000).

In full recognition of ADA's (Public Law 101-336) intent to provide a desirable floor of protection, California law seeks additional protections under AB 2222. Containing broad definitions of physical disability, mental disability and medical condition, AB 2222's intent is to establish broader coverage than coverage under FEHA or ADA. AB 2222 specifically modifies California law (Government Code Section 12926 h) by defining "medical condition" to include any health impairment related to or associated with a diagnosis of cancer or "a record or history of cancer." California law now requires only a "limitation" of a major life activity not a "substantial" limitation as required by ADA.

California law further states that the phrase "major life activities" shall be broadly defined and shall include physical, mental, working and social activities. Provisions that determine whether an individual has a "mental or physical disability" were henceforth conducted without regard to "mitigating measures" such as prosthesis, corrective lenses, or medications. These provisions clearly deviated from recent U.S. Supreme Court decisions stating that persons may not be substantially limited in a major life activity if they were using a mitigating measure. Such persons are therefore not disabled (Whitmore, 2001).

California law also states that "working" is a major life activity, whether or not the actual or perceived working limitation involves a particular employment, a class, or broad range of employments. AB 2222 deletes the definition of "reasonable accommodation" in reference to the unlawful employment practice of an employer who fails to engage in a timely, good faith, interactive process to determine effective reasonable accommodations, if any, at the request of an applicant/employee with a known disability.

One of the sponsors of AB 2222, the Employment Law Center, supports the efforts of the California legislature over the past 30 years to promote the integration of persons with disabilities in every aspect of social and economic life. Government Code section 12916 (1) expressly states that ADA definitions of disability apply to Fair Employment and Housing Act cases only if the ADA definition results in broader protections of the civil rights of disabled persons.

In California, ADA is viewed as a minimum floor below which California law will not go and AB 2222 is viewed as sending a clear message that California is not in accord with the recent trilogy of U.S. Supreme Court decisions in *Sutton v. United Airlines* (1999) 119 S. Ct. 2139, *Murphy v UPS* (1999) 119 S. Ct. 2133, and *Albertsons v. Kirkingburg* (1999) S. Ct. 2162 that found that, in determining whether a person has a disability under ADA, consideration must be given to mitigating measures. This is an important distinction in legal applications for employers in California.

In California, the Department of Industrial Relations, Division of Workers' Compensation under provisions of the Labor Code, has adopted a model framework for rating permanent disabilities and establishing meaningful indexes of disability that could function as a reference point for case-by-case eligibility determination of a short-term disability. Workers' Compensation policy is introduced in this article only as a related part of effective disability management programs and the generation of employer costs related to "disabled" workers. With distinct objectives, workers' compensation laws are designed to provide needed medical, economic and rehabilitation assistance to employees injured on the job and the ADA protects disabled people from discrimination (DOL, 1995). However, ADA and workers' compensation programs share a common goal: retaining employees with disabilities in the workplace.

County of Los Angeles ADA Policy

As the largest employer in Southern California, Los Angeles County and its 38 departments are responsible for providing Human Resource Management Policies, Employee Relations Policies, and equal opportunity employment practices for over 90,000 employees in over 2,000 classifications. In 1994, the County Board of Supervisors created and funded an Americans with Disabilities Act Compliance Program within the Office of Affirmative Action Compliance (OAAC). The OAAC soon issued a working definition to County departments which translates the ADA definition as a physical or mental impairment which may include but is not limited to: any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, emotional or mental illness and specific learning disabilities. Obviously, this definition is extremely broad and comprehensive.

The OAAC defines "major life activities" as functions such as caring for one's self, performing essential tasks, walking, seeing, hearing, speaking, breathing, learning and working. Having a "record" of such an impairment means having a history of being classified as having a mental or physical impairment that substantially limits one or more major life activities. Being "regarded" as having such an impairment means being treated by the employer as having such an impairment and having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments. The OAAC is also responsible for monitoring employment related issues, providing awareness training, and monitoring employment, access and telecommunication provisions of ADA. The OAAC is also responsible for a Countywide grievance procedure, including investigations (Arias, 1993).

Los Angeles County Code, Chapter 3.28 and Board Order No. 106 on February 28, 1989 had previously established a County Commission on Disabilities. The Commission was charged with advising the Board and assisting County departments on meeting the unique needs of people with disabilities in the areas of health, employment, education, public attitudes, barriers and recreation. The Commission was also to be responsible for conducting studies and making recommendations to the Board for improvements to policies, systems and procedures affecting people with disabilities. The 18-member Commission is also responsible for evaluating the adequacy of existing laws and proposed legislation related to the disabled population (Anthony, 2001).

The Commission's outreach includes advising the Board on efforts and activities made by other governmental agencies, private organizations and community-based organizations that affect the quality of life for disabled people. Commission members are appointed by the Board of Supervisors as representatives of a population with the following disabling conditions: (1) Blind (2) Deaf or hearing impaired (3) Speech impaired (4) Developmentally disabled (5) Wheelchair users (6) Ambulatory with difficulty (7) Energy limited (8) Learning disabled (9) Little People (10) Youth (11) State Department of Rehabilitation (12) Parents of disabled children (13) Legal profession (14) Psychology profession (15) Medical profession (16) Partially sighted, and (17) Deaf before language acquisition (LAC, 2001). It should be noted that this is a very comprehensive list of disabling conditions.

The County's ADA Policy requires that disabled applicants and employees will not be discriminated against on the basis of their disability. It also requires that voluntary affirmative action will be taken to ensure that the disabled have equitable representation in the County workforce. Further, disabled persons are to be employed on the same basis as non-disabled persons, unless it can be demonstrated that the job in question requires the individual to meet certain bona fide occupational qualifications in order to perform the essential duties of the job. Lastly, departments shall make reasonable accommodation to the known physical or mental limitations of an otherwise disabled applicant or employee.

Three categories of accommodation exist: (1) accommodations needed to ensure equal opportunity in the application and selection process (2) accommodations needed to allow disabled employees to perform essential functions and (3) accommodations that permit disabled employees to enjoy equal benefits and privileges of employment. However, the County is not required to provide accommodations that would impose undue hardship on the operation of business. Generally, it is the responsibility of the disabled person to request reasonable accommodations.

Court Cases

Recently tracking the Supreme Court PGA Tour v. Martin Case, the first author was pleased that the long awaited and publicized ruling was released as a 7-2 Supreme Court vote on May 29, 2001, that the PGA Tour, a professional golf's elite tournament organization was required to bend its rule to permit Casey Martin, a handicapped golfer with a right leg severely weakened by a rare disease, to ride a gold cart, rather than walk (Lane, 2001). A number of national television stations interviewed Senator Tom Harkin and former Senator Bob Dole who were quite pleased with the ruling and representatives from the PGA who viewed the decision as a "narrow" interpretation by the Supreme Court and an exception to the rule in this special case.

The U.S. Supreme Court held that the Americans with Disabilities Act required the PGA Tour to accommodate Martin's request to ride a cart since doing so is a "reasonable modification" that would not fundamentally alter professional golf. PGA Commissioner Tim

Finchem stated during a press conference, "Our PGA lawyers believe the ruling is clearly focused on Casey Martin and Casey Martin alone" (Lane, 2001).

In 1999, the U.S. Supreme Court decided three cases that significantly narrow the protections of ADA: *Sutton v. United Airlines, Inc.*, *Murphy v. United Parcel Service*, and *Albertson's v. Kirkingburg*. The Supreme Court held that the plaintiffs did not have disabilities covered by ADA because their impairments did not substantially limit a major life activity, due to the use of mitigating measures.

As we have discussed, past and recent U.S. Supreme Court rulings have over ruled lower court decisions and thereby influenced state and local enforcement trends. For example, on June 22, 1999, the U.S. Supreme Court decided three cases that significantly narrow the protections of the ADA. In *Sutton v. United Air Lines, Inc.*, a case involving two sisters with vision impairment correctable to 20/20, United Air Lines rejected the sisters as commercial pilots due to their inability to meet position requirements without assistive devices (corrective lenses). In *Murphy v. United Parcel Service*, a mechanic was terminated for failing to meet health requirements due to his high blood pressure. Murphy's use of medication that controlled his blood pressure was considered an assistive device. In *Albertson's v. Kirkburg*, a company truck driver was terminated for failing to meet health requirements due to his monocular vision. However, the truck driver had learned to compensate for the disability by developing what was reported as a subconscious adjustment used to sense depth and perceive peripheral objects.

The U.S. Supreme Court held that the plaintiff (handicapped workers) in the cases summarized above did not have disabilities covered by the ADA because their impairments did not "substantially" limit a major life activity, due to the plaintiff's use of mitigating measures. The Court's ruling limits ADA's definition of "disability" to impairments that are substantially limiting after mitigating or corrective measures have been taken. This ruling basically states that the glasses worn by the Sutton sisters, the blood pressure medication Murphy used, and the corrective therapy that the truck driver used resulted in an acceptable work ability that negated their disability status.

We find, at present, no common practices or consistent interpretations of ADA guidelines, language and intent and expect to see an increasing number of ADA cases going to the courts. The law remains unsettled.

Court decisions based on the California Fair Employment and Housing Act (CFEHA) violations are evaluated on different criteria from the Federal law. The obvious reason is that CFEHA's statutory definition of disability is broader than the ADA. The California Supreme Court has defined a handicap as a disadvantage that makes achievement unusually difficult.

California Courts have also ruled that under FEHA, an impairment of substantial limitation is not a requirement. What we find is that California Courts do not take mitigating measures into consideration when determining whether an individual is disabled and is therefore protected under the FEHA. Erwin Chemerinsky, a liberal law professor at USC, states, "With regard to every federal civil rights law, we have seen a substantial narrowing. This is just a signal of where they are headed" (Savage, 2001).

With more than 10 million residents and over 90 languages spoken, L.A. County's workforce is reflective of its diverse communities. Flexibility in the California workplace, as opposed to other less diversely populated states, is essential and it is now apparent that one universal definition is not the solution. As the Courts have demonstrated, maybe the definition is most appropriately established one employee at a time. What is really important is that each person, disabled or not, is provided equal access to an employment opportunity and that is

achieved through employment policies in the public sector that are fair to the employer and employees and are supportive of equal opportunity objectives.

Conclusion

Exploring the cause and effect relationships between current legislation, employment practices, employment opportunities, statistics on employment of the disabled, we must logically concern ourselves with the future employment opportunities for disabled Americans. A changing work environment, new technology, access to assistive technologies, a national White House Initiative, and growth in self-employment opportunities support the broader employment opportunity trends in the future.

The National Center for the Dissemination of Disability Research (NCDDR) has released data reporting less than 33% of the employment age disabled population are in the national workforce, with less than 25% working full-time. NCDDR research suggests that social and health insurance policy disincentives and lack of physical access to jobs are the primary barriers for full employment of disabled people. Loss of federal aid, special safety net programs, and public services also function as deterrents to full employment.

Clearly, employment outcomes for the disabled are not adequate. Training, vocational rehabilitation, self-development, mentorship and job modifications, if appropriate, are all needed to significantly change these results. Self-sufficiency and independence for disabled people is society's goal. However, liberal Federal and State support systems and financial aid have created a social dependency for the disabled that is difficult to replace in a competitive workplace.

Hope does exist. Through enhanced education, training, self-development and a commitment to succeed, a handicapped person can find employment in the workplace. Also, with the aid of new technology, a national telecommuting trend and entrepreneurial support systems, a handicapped person can also become self-employed. One challenge remains: attitudinal tolerance! We must all become part of a support system that enables all Americans to become self-sufficient and a respected, contributing member of American society. According to the Census 2000, Americans are living longer thanks to improved medication, better health care and nutritional education. Older Americans, over 85, have increased by 37% and 50% of Americans over 65 reported having a disability. Why not focus on ways to assist each other and not on definitions.

Let us close with an insightful message displayed on the bumper of a passing car on the freeway, "A Negative Attitude is the Real Disability."

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