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THE AMERICANS WITH DISABILITIES ACT: BOTH SWORD AND SHIELD

LOUIS GRAZIANO*

If the definition of disability in the Americans With Disabilities Act ("ADA")1 was limited only to those with a disability, then the law might be considered simply a shield. However, the law was enacted also to attack the myths and stereotypes associated with disabilities, and to change the attitudes of people in this country.2 In order to facilitate these efforts, the ADA has provided an expansive definition of disability, which includes those who have a record of disability, as well as those who are regarded as disabled.3

The breadth of the definition indicates that the law is not meant to act just as a shield, protecting disabled individuals from discrimination. It is also a sword, that will seek out and attempt to eradicate the long-standing prejudices that are associated with

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1 Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-213 (Supp. V 1993)). The ADA is comprehensive legislation enacted to improve the lives of individuals who have suffered discrimination because of disability prejudice. Id. In addition to the employment provisions found in §§ 12101 through 12134 and portions of subchapter IV, the ADA has provisions that deal with accessibility to public transportation, as well as accommodations in public facilities. Id.

2 See School Bd. of Nassau v. Arline, 480 U.S. 273 (1987). "Congress' concern [was] with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps...'. To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of 'handicapped individual' so as to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" Id.

3 42 U.S.C. § 12102(2) (Supp. V 1993). "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." Id.; see EEOC Compl. Man. (BNA) § 902, at 0:2401 (Mar. 1995).
the disabled.\textsuperscript{4} It is not, however, a bludgeon, for the law covers only those who are “qualified individuals with disabilities.”\textsuperscript{5}

Litigation under the ADA has undertaken this spirit. There is a need to attack not only the acts of discrimination, but also its causes. The broad remedies sought under this law include actions against a health insurance provider to prevent the discriminatory denial of equal health benefits to union members that suffer from AIDS,\textsuperscript{6} as well as the recovery of over $200,000 in damages for an individual who was discharged because he had cancer.\textsuperscript{7}

The foregoing examples were actions in which Equal Employment Opportunity Commission (“EEOC”) had direct involvement. This is not to suggest that the EEOC has acted alone in litigating ADA cases.\textsuperscript{8} Nonetheless, since all ADA actions must pass through the EEOC,\textsuperscript{9} it is a good place to begin an examination of the emerging issues under the ADA. The EEOC’s experience will be helpful in understanding the areas of potential violation, and deciding where efforts must be directed to best effectuate the purpose of this law.\textsuperscript{10}

Evidence suggests that the ADA is in the process of working a major change in the landscape of employment discrimination.\textsuperscript{11} The ADA represents the first time since 1967 that a new anti-discrimination employment law has been enacted for the general public. The EEOC has kept information about the charges it has

\textsuperscript{4} See 42 U.S.C. § 12101(a)(9) (Supp. V 1993). According to the findings of the ADA, “the continuing existence of unfair and unnecessary discrimination and prejudice denies people living with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.” \textit{Id.}

\textsuperscript{5} 42 U.S.C. § 12111(8) (Supp. V 1993). The ADA defines “qualified individual with a disability” as a disabled person who with or without reasonable accommodation, is able to achieve the essential functions of the position. \textit{Id.; see also} C.F.R. § 1630.2(m) (1992). To be protected by the ADA, a person must not only be an individual with a disability, but must be qualified. \textit{Id.}


\textsuperscript{8} See, \textit{e.g.}, Mason Tenders v. Donaghey, No. 93 Civ. 1154, 1993 U.S. Dist. LEXIS 10732, at *1 (S.D.N.Y. Nov. 22, 1993).


\textsuperscript{11} See \textit{U.S. DEP’T OF COMM., CURRENT POPULATION REP.} (1993). There are 49 million individuals with disabilities. \textit{Id.} This is the largest single minority covered by any discrimination law. \textit{Id.} Only sex and race, which include all individuals, have more universal coverage. \textit{Id.}
received and broken them down into categories. Though statistics do not always tell the whole story, they can offer meaningful insight into emerging trends with respect to the charges filed and the actions litigated by the EEOC.

The EEOC has data from the inception of the ADA, in July of 1992, through the end of 1994; data on the types of impairments is available through the end of last year, 1994. The most cited claim was back impairments at nineteen and one-half percent. This was followed by neurological impairments at twelve and one-tenth percent, and emotional and psychiatric impairments, at eleven and four-tenths percent. No other identified category received more than ten percent, with claims due to extremities, the next highest, recorded at seven and three-tenths percent.

Additionally, the EEOC maintains records based upon adverse actions by employers. Records indicate that fifty and one-half per-

12 Data compiled by the Office of Program Operations from EEOC's Charge Data System's National Data Base.

CUMULATIVE ADA CHARGE DATA
FOR JULY 26, 1992 - DECEMBER 31, 1994 REPORTING PERIOD
Total ADA charges received during reporting period: 39,927

<table>
<thead>
<tr>
<th>Impairments Most Often Cited</th>
<th>Number</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Back Impairments</td>
<td>7,799</td>
<td>19.5%</td>
</tr>
<tr>
<td>Neurological</td>
<td>4,824</td>
<td>12.1</td>
</tr>
<tr>
<td>Emotional/Psychiatric</td>
<td>4,569</td>
<td>11.4</td>
</tr>
<tr>
<td>Extremities</td>
<td>2,934</td>
<td>7.3</td>
</tr>
<tr>
<td>Heart</td>
<td>1,833</td>
<td>4.6</td>
</tr>
<tr>
<td>Diabetes</td>
<td>1,437</td>
<td>3.6</td>
</tr>
<tr>
<td>Substance Abuse</td>
<td>1,416</td>
<td>3.6</td>
</tr>
<tr>
<td>Hearing</td>
<td>1,291</td>
<td>3.1</td>
</tr>
<tr>
<td>Vision</td>
<td>1,148</td>
<td>2.9</td>
</tr>
<tr>
<td>Blood Disorders</td>
<td>1,054</td>
<td>2.6</td>
</tr>
<tr>
<td>HIV (Subcategory of Blood)</td>
<td>729</td>
<td>1.8</td>
</tr>
<tr>
<td>Cancer</td>
<td>970</td>
<td>2.4</td>
</tr>
<tr>
<td>Asthma</td>
<td>714</td>
<td>1.8</td>
</tr>
</tbody>
</table>

(This is not a complete list. Therefore, percentages do not add up to 100%. Percentages are rounded off.)

<table>
<thead>
<tr>
<th>ADA Violations Most Cited</th>
<th>Number</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>20,171</td>
<td>50.5</td>
</tr>
<tr>
<td>Failure to Provide Reasonable Accommodation</td>
<td>10,264</td>
<td>25.7</td>
</tr>
<tr>
<td>Hiring</td>
<td>4,364</td>
<td>10.9</td>
</tr>
<tr>
<td>Harassment</td>
<td>4,294</td>
<td>10.8</td>
</tr>
<tr>
<td>Discipline</td>
<td>2,947</td>
<td>7.4</td>
</tr>
<tr>
<td>Layoff</td>
<td>2,069</td>
<td>5.2</td>
</tr>
<tr>
<td>Benefits</td>
<td>1,576</td>
<td>3.9</td>
</tr>
<tr>
<td>Promotion</td>
<td>1,495</td>
<td>3.7</td>
</tr>
<tr>
<td>Rehire</td>
<td>1,472</td>
<td>3.7</td>
</tr>
<tr>
<td>Wages</td>
<td>1,385</td>
<td>3.5</td>
</tr>
<tr>
<td>Suspension</td>
<td>910</td>
<td>2.3</td>
</tr>
</tbody>
</table>

(This list adds up to more than 100% because individuals can allege multiple violations. Percentages are rounded off.) Id.
percent of all charges include complaints about being discharged because of a disability. More than twenty-five percent concern actions regarding the lack of accommodations made for employees with disabilities.

This information suggests that discrimination very often occurs within the workplace, and not necessarily upon those trying to enter it. Many disabilities appear to develop during the individual's working life. For example, less than eleven percent of all charges filed with the EEOC deal with failure to hire issues. Factors such as the likelihood that discrimination may be easier to recognize once on the job and that employees may have a greater stake in job loss than applicants, may impact this disparity. It should also be noted that the filing of a charge does not necessarily mean that there is a violation. Even taking these factors into account, the disparity suggests that discrimination occurring to employees within the workplace is quite substantial, and that employees are using the ADA to protect their jobs.

It is also important to note the pre-litigation issue of unsuccessful conciliations.\(^{13}\) Unsuccessful conciliations are charges that have completed the process of investigation and conciliation.\(^{14}\) After a letter of determination has been rendered, if the EEOC is unable to resolve the case, only then is there a recommendation regarding whether the EEOC will litigate. With back impairments, while recognizing that other factors may pare down this number, only two percent of all cases have resulted in a failure to conciliate. However, with respect to persons afflicted with HIV, ten percent of those cases have been unable to reach resolution through the conciliation process.

As of February, 1995, the EEOC had filed over fifty cases under the ADA. Many more are expected to follow since a number of cases have completed the preliminary process and the EEOC has granted permission to litigate. Examples of upcoming cases include discrimination because of HIV or the denial of equal health care benefits. The number of cases in this area is increasing. The EEOC district office in New York recently filed a case against

\(^{13}\) See I-X Enforcement Provisions, supra note 10. The EEOC receives and investigates claims of discrimination and seeks to resolve acts of discrimination through conciliation. Id.

\(^{14}\) Id. If such conciliation is unsuccessful, the EEOC may file an action or issue a right-to-sue letter. Id. The EEOC's aim is to resolve the issues through conciliation, thus avoiding litigation. Id.
Metro North, an employer who is purportedly discriminating on the basis of HIV.  

Another area of litigation that has resulted in a substantial number of charges for the EEOC is the area of accommodation. Approximately twenty-five percent of the EEOC's cases deal with accommodations. Furthermore, another nearly twenty-five percent have been filed under the "record of," or "regarded as," prong of the act. This will certainly be another important area of litigation because it places in issue the misconceptions, regarding disability often held by the general public.

Litigation under the "regarded as," and "record of," prongs is not only important as part of the educational process aimed at debunking myths and stereotypes concerning the "limitations" of persons with disabilities but also is important for those with actual disabilities. The use of the "regarded as" prong is also important where the impairment at issue is not one generally accepted by either the legal or medical community as a disability. However, when used in tandem with the disability prong, it offers an opportunity to expand the law. A fine example of such an application is *Cook v. State of Rhode Island*. Though *Cook* was litigated under the Rehabilitation Act of 1973, the ADA analysis would have been similar.

The plaintiff in *Cook* was "morbidly obese," and at the time the case was litigated, there was a question as to whether obesity could be considered a disability. By successfully arguing the first prong of the definition, that the plaintiff was disabled, and also arguing the third prong, that she was "regarded as" disabled, the plaintiff was able to combat discrimination based upon obesity.

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16 42 U.S.C. § 12182(b) (Supp. V 1993). Title III of the ADA sets forth that discrimination on the basis of a disability includes, denying disabled persons the opportunity to benefit from goods, services, privileges, advantages or accommodations. *Id.*
18 *Id.* The definition of disability is tailored to eliminate discrimination, in keeping with the purpose of the ADA. *Id.*
19 10 F.3d 17 (1st Cir. 1993).
21 29 C.F.R. app. § 1630.2(j) (1991). The EEOC's regulations on the ADA state that "[s]imilarly, except in rare circumstances, obesity is not considered a disabling impairment." *Id.*; see also *Cook*, 10 F.3d at 21.
where there was a significant question as to whether she would have prevailed under the first prong alone.22

The EEOC has issued three enforcement guidelines since the enactment of the ADA. The guidelines are a good barometer with which to view current issues affecting EEOC investigations. The topics are illustrative of the issues that are at the forefront of the enforcement of the ADA. The first interim guidance concerns disability based distinctions in employer provided health insurance.23 Early on, it was apparent to the EEOC that the issue of health benefits would require additional guidance. This was sparked, in part, by the increasing number of health benefit claims by people afflicted with HIV, AIDS and AIDS-related illnesses. It was also, in part, a result of the decision by the United States Court of Appeals for the Fifth Circuit in McGann v. H & H Music.24 The McGann court remarked that under the Employment Retirement Income Security Act ("ERISA"),25 distinctions based upon different illnesses were not discriminatory. According to the EEOC, however, this is an area where the ADA's impact can prevent the broad-based discriminatory denial of benefits to individuals suffering from AIDS and its related illnesses.26

While the guidance still provides for some disability-based distinctions, it is narrow, and there has to be an actuarial basis for excluding a particular disability.27 The United States Court of Appeals for the First Circuit addressed a related case under the ADA, Carparts Distributions, Inc. v. Automotive Wholesaler's Association, Inc.,28 a decision significant in its expansion of the law beyond the direct employer, to the provider of benefits as well. In Carparts, the plaintiff went beyond the employer, and commenced

22 See Cook, 10 F.3d at 23.
23 See Equal Employment Opportunity Comm'n, Interim Guidance on Application of Am. with Disabilities Act to Disability Based Distinctions in Employer Provided Health Ins., EEOC Compl. Man. ¶ 6902 (CCH) (June 8, 1993) [hereinafter Health Insurance Guidance].
24 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992).
26 See Health Insurance Guidance, supra note 23, ¶ 6902.
28 37 F.3d 12 (1st. Cir. 1994).
an action against the entity that had provided the health insurance benefits.\textsuperscript{29}

Another guidance that was promulgated by the EEOC is Pre-Employment Inquiry.\textsuperscript{30} This was created in response to the need for additional instruction regarding discrimination at the application stage of employment. In order to ensure a level playing field, to the extent possible, employers were permitted to get information about disabilities before deciding on whether to hire an applicant. Ultimately, this had a negative effect on disabled persons.\textsuperscript{31}

This guidance explains what questions are not permissible, such as medical questions and inquiries as to whether an individual has received workman's compensation. Though not an exhaustive list, the guidance provides some direction for both the EEOC and the general public in determining at what point an employer crosses the line.

The final guidance provides a definition of disability, which goes to the heart of understanding the breadth of the ADA.\textsuperscript{32} It has become apparent that further guidance on the definition of disability was helpful for distinguishing less obvious violations. This is especially true with respect to the "record of," and "regarded as," prongs of the definition of disability. Also noteworthy under this guidance, is the additional information provided for recognizing charges that lie on the fringes of the ADA.

Although the Rehabilitation Act of 1973\textsuperscript{33} provides the basis for the ADA and is the source of case law regarding disability discrimination, there are significant differences. While patterned after the Rehabilitation Act, the ADA provides coverage for many more individuals.\textsuperscript{34} Furthermore, the ADA is more procedurally tailored

\textsuperscript{29} Id. at 14. In \textit{Carparts}, the plaintiff claimed that the cap on AIDS reimbursements by his trade association health benefit plan was illegal discrimination under the ADA. \textit{Id.}


\textsuperscript{31} Id. at 292. Traditionally, potential employees with latent disabilities were discouraged from applying for jobs out of fear that a medical history questionnaire would reveal their disability. \textit{Id.} The ADA was enacted to remove this obstacle. \textit{Id.}

\textsuperscript{32} See EEOC Compl. Man. (BNA) ¶ 902, at 0:2401 (Mar. 1995) (discussing definition of disability); \textit{see also} EEOC Compl. Man. (CCH) ¶ 6880 (June 1993).

\textsuperscript{33} 29 U.S.C. § 794 (1988). The Rehabilitation Act prohibits federal government and entities, that receive federal funding, from discriminating in employment against people with disabilities. \textit{Id.}

\textsuperscript{34} 29 C.F.R. § 1630.2(e) (1991). The Rehabilitation Act forbids federal agencies, government contractors and recipients of federal funds from disability discrimination. \textit{Id.} In con-
from the perspective of Title VII of the Civil Rights Act of 1964.\textsuperscript{35} The ADA also makes it easier to prove claims based upon disability discrimination. Unlike the Rehabilitation Act, under the ADA, the disability need not be the sole reason for an adverse action by the employer.\textsuperscript{36}

The Civil Rights Act of 1991\textsuperscript{37} has codified, with some modifications, the decision of \textit{Price Waterhouse v. Hopkins}.\textsuperscript{38} In \textit{Price Waterhouse}, the Supreme Court set forth the mixed motive theory of discrimination.\textsuperscript{39} In order to prove a case under the ADA, one need only establish that the disability was a motivating factor in the decision by the employer taking the adverse action. A greater dynamic may exist in litigation under the ADA because parties can avail themselves of the right to trial by jury and the ability to receive both compensatory and punitive damages.\textsuperscript{40}

Throughout litigation, it is very important to continue the educational process, with experts playing an extremely important role in the process. For example, experts were effectively used in \textit{Cook v. Rhode Island}.\textsuperscript{41} The plaintiff's attorney realized that unless the jury learned that obesity was a disability, not the result of lack of self-discipline or self-neglect, it would be difficult to get the jury to rule in the plaintiff's favor. In reaching its decision, the First Circuit has affirmed the fact that obesity was considered both a disability in the denial of a job, and was regarded as a disability by the employer in denying the job.\textsuperscript{42}

The ADA is not simply a shield, used to protect individuals who have suffered from the effects of discrimination, but it can also be
a sword, used to provide a greater understanding for all individuals. The future of the ADA, both as a sword and a shield, will continue to be shaped by the numerous issues presently being litigated.