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A REVIEW OF THE AMERICANS WITH DISABILITIES ACT: ACCENT ON EMPLOYMENT DECISIONS

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ABSTRACT

This article focuses on Title I of the Americans with Disabilities Act (ADA), which prohibits discrimination against any qualified individual with a disability in hiring, compensation, promotion, termination, and job opportunities. The article is intended to be a follow up to Professor Cheryl Hein's article entitled "The Americans with Disabilities Act: Accent on Employment Decisions" that appeared in the Summer 1992 edition of the Central Business Review. The article begins with an overview of the ADA and offers a brief ten-year review of the ADA, as well as a discussion of two recent Supreme Court decisions and reactions to those decisions. The article concludes with some practical advice to employers about how to comply with provisions of the ADA.

I. INTRODUCTION

The numbers of persons with disabilities has steadily increased. In 1970, 11.7% of the persons in the United States had limited activity. By 1990, the population with disabilities had increased to 13.7% and by 1994, 15% of the population could be identified as being disabled. By the year 2000, 56.3 million (20%) out of 281 million people in the U.S. had some form of disability (Wiler, Lomax, 2000). The purposes of this article are to provide an overview of the Americans with Disabilities Act (ADA), to present a brief ten-year review of the ADA, and to discuss two recent Supreme Court decisions dealing with disabilities. Practical suggestions for complying with provisions of the ADA conclude the article.

II. ADA OVERVIEW

The Civil Rights Act of 1964 prohibited discrimination based on race, color, sex, religion, or national origin. But, in 1964, discrimination against the disabled remained legally acceptable. In 1973, the Vocational Rehabilitation Act (VRA) became the first federal piece of legislation that was passed to

protect employment rights for persons with disabilities. However, the VRA only applied to businesses that received federal financial assistance, leaving out some private employers as well as most local governments. The Individuals with Disabilities Act of 1975 helped promote greater accessibility to education for the disabled, but employment discrimination was not addressed until 1988 when the ADA was introduced. The ADA was strongly opposed by corporate interests fearing that compliance would be costly. The bill, however, had key sponsors and supporters from both parties and by mid July of 1990, both Houses of Congress passed the ADA by overwhelming majorities. President George Bush signed the ADA into law on July 26, 1990.

The ADA was modeled after the VRA. Existing state and local laws that provided greater protection to disabled people were not superseded by the enactment of the ADA. Rather, the ADA added a new layer of government regulation (VanZante, Hein, 1992). The ADA is the most comprehensive federal civil rights statute protecting the rights of persons with disabilities. The ADA has five titles providing protection in areas of employment, public entities, public transportation, and private entities with regard to public accommodations, telecommunications and miscellaneous provisions. Title I covers employment and became effective on July 26, 1992 for employers with twenty-five (25) or more employees, and on July 26, 1994 for employers with fifteen (15) or more employees (“The National Institute – Structure,” n.d.). Employers must not discriminate in job application procedures, hiring, advancement or discharge of an employee, employee compensation, job training and any other terms, conditions and privileges of employment. (U.S. Dept. of Justice –Title I, 1996). A qualified individual with a disability who meets the requirements for skills, experience, education and other conditions needed for the position, and who with or without reasonable accommodations can perform the essential functions of the job is protected by this title. Reasonable accommodation consists of a variety of modifications or adjustments that include:

- Job application procedure modification
- Changing work environment or the way work is customarily performed
- Enabling an employee with a disability to enjoy the same benefits of employment as employees without disabilities

The general definition of “disability” under the ADA reflects the specific types of discrimination experienced by people with disabilities. Under the ADA an individual with a disability is a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

A physical impairment is defined by the ADA as “any physiological disorder or condition that affects a body system,” and a mental impairment is defined as a “mental or psychological disorder.” The physical impairment is considered a disability only when it “substantially limits” one or more major life activities. The disabled individual must be unable or significantly limited to perform an activity, when compared to an average person of the general population. There are special considerations to the meaning of “substantially limits” and the question is answered by looking at the extent, duration and impact of the impairment. “Major Life Activities” are defined as activities that an average person can perform with little or no difficulty, but that are difficult for the person with disability. Under “record of such an impairment” the ADA protects persons who have a history/record of a disability from discrimination, whether or not they may be currently substantially limited. Finally, the definition for “regarded as having such an impairment” can protect an individual under three situations: (1) the individual may have an impairment that is not substantially limiting but is perceived by the covered entity as having a substantially limiting impairment, (2) the individual may have an impairment that is only substantially limiting because of the attitudes of others toward the impairment, or (3) the individual may have no impairment, but be regarded by the employer or other covered entity as having a substantially limiting impairment. The ADA however, does have exclusions. For example, illegal drug users are not covered unless they are actively engaged in or have completed a drug rehabilitation program and are no longer using drugs illegally. The ADA also does not cover homosexuality, bisexuality or sexual and behavioral disorders (The National Institute – What is the ADA: Definition of Disability (n.d.).

III. TEN YEAR PROGRESS REPORT

The ADA has changed how society accommodates citizens with disabilities. The design of products, buildings, public spaces and programs has helped create a society where curb cuts, ramps, lifts on buses and other access designs are increasingly common. These changes have not only assisted those with disabilities but also those without disabilities. Persons with baby

carriages, delivery personnel, those who use skateboards and roller blades, for example, use curb cuts. The result is that the ADA has created a more inclusive climate in which companies, institutions and organizations are reaching out to the people with disabilities, but in essence also assisting those without disabilities (Stothers (n.d.). However, the ADA has not fully delivered on its key promises to eliminate discrimination in the workplace or in public accommodations. The ADA's weaknesses continue to be in the area of access to employment. The unemployment rate for persons with disabilities has been and remains at 70 percent. (Stothers, 2000, July).

Much of the continued high unemployment of individuals with disabilities can be attributed to the fact that Americans with disabilities having a lower level of educational attainment than those without disabilities. On February 1, 2001, President George W. Bush unveiled his New Freedom Initiative (NFI). The NFI was designed to break down remaining barriers to equality that continue to face Americans with disabilities and to further the progress made since the passage of the ADA. One of the four components of the NFI is the expansion of educational opportunities for persons with disabilities (Tingus, 2003).

More than ten years after the ADA was passed by Congress, the issue of who is and who is not covered by the statutory provisions continues to be the source of vigorous debate, not only in the courts, but in the public realm as well. In enacting what has been regarded as the most important civil rights law of the past 25 years, Congress wrote in very broad and general language, leaving much uncertainty about who should be covered by the statute and how the law would apply in the real world of the workplace (Mook, 2002).

When the ADA was before Congress, some members predicted a flood of lawsuits that would bankrupt or at least overburden business. Many authors also warned of lawsuits. For example, Nancy Fulco (1989) wrote that "leaving reasonableness to the discretion of the courts is scary, and it's a mistake to think it's not going to cause litigation. We're going to see litigation all over the place. It's a certainty, a given" (p. 50). Studies have shown, however, that businesses have adapted to the ADA much more easily and inexpensively than predicted.

The floods of lawsuits have not materialized. Studies indicate that businesses have adapted and some businesses have prospered because they have made themselves accessible. Law professor Peter Blanck of the University of Iowa has studied business compliance with the ADA and has

found that for many companies compliance was as easy as raising or lowering a desk, installing a ramp, or modifying a dress code. Ninety percent of the lawsuits brought before the Equal Employment Opportunity Commission (EEOC) are dismissed. In the first five years of the ADA, 650 lawsuits were filed; a small number compared to the six million businesses, 666,000 public and private employers and 80,000 units of state and local governments that must comply. Additionally, a survey by the American Bar Association found that of the cases that actually go to court, 98 percent are decided in favor of the defendants, usually businesses (Stothers, n.d.).

IV. RECENT SUPREME COURT DECISIONS

At a recent conference of business lawyers, Justice Sandra Day O'Connor stated that the "high court has been obliged to wrestle with a heavy load of disability rights cases because the 1990 act was drafted too hastily by Congress" and "leaving uncertainties as to what Congress had in mind" (Lane, 2002). To substantiate this claim, O'Connor wrote the opinion for a unanimous court in the *Toyota v Williams's* case in which the court has been characterized as tightening the definition of ADA "Disability" (Cain, 2002).

The *Toyota Motor Manufacturing, Kentucky, Inc. v Williams'* case was argued before the Supreme Court on November 7, 2001 and decided on January 8, 2002. "This case concerned the proper interpretation of the term "disability" and what it means for an individual's impairment to "substantially limit one or more major life activities" in the ADA, when the major life activities of "performing manual tasks" and "working" are involved" (Toyota Motor, 2001).

Ella Williams began working at Toyota's Georgetown, Ky. plant in 1990 on the assembly line operating pneumatic tools. Due to the repetitive motions she developed serious carpal tunnel syndrome and tendonitis in her hands and arms precluding her from continuing that job. Toyota accommodated her by relocating her to the quality control department, into a less demanding position, as a paint inspector. This worked out well until Toyota added another responsibility; one that required a repetitive movement – gripping a tool and holding her arms up for extended periods, creating a painful injury. This aggravated her existing condition and exacerbated the injury to her shoulders and neck. Her request to be accommodated by moving back to the less strenuous job was refused. The petitioner filed a claim against the company under the ADA. Williams' complaint was filed with the EEOC, which issued a right-to sue letter. With the letter in hand she sued Toyota in Kentucky's

federal court. The federal court dismissed the case in 1997 granting a summary judgment on the grounds that Williams did not have a disability as defined by the ADA. The case was appealed and heard by the U.S. Court of Appeals for the 6th Circuit. The Appeals Court examined the question of whether Williams' inability to perform certain manual tasks brought her within the scope of the ADA. The appeals court ruled that to qualify for a reasonable accommodation under the ADA, Williams needed to "show that her manual disability involved a class of manual activities affecting the ability to perform tasks at work." According to the 6th Circuit, Williams satisfied the requirement because her ailments prevented her from doing tasks associated with certain types of manual assembly line jobs (Legal Information Institute, 2002).

In a unanimous decision, written by Justice Sandra Day O'Connor, the Supreme Court reversed the appeals court ruling, holding that the appeals court did not apply the proper standard in determining that Williams was disabled under the ADA, because it analyzed a limited class of manual tasks pertinent to her job. They failed to ask if her impairment also prevented or restricted her from performing tasks that are of central importance in a person's daily life. The guidance for this Court's decision is based on the ADA's disability definition, which includes the terms "substantially limits" and "major life activity." "Substantially" in the phrase suggests "considerable" or "to a large extent" and precludes impairments that interfere in only a minor way with performing tasks. Additionally, because "major" means important, "major life activities" addresses those activities that are of central importance to daily life. Finally, the impairment's impact must also be permanent or long term. Moreover, because the manual tasks unique to any particular job are not necessarily important parts of most people's lives, occupation-specific tasks may have only limited relevance to the manual task inquiry. Therefore, the repetitive work that Williams engaged in with her hands and extended arms, at or above shoulder levels for extended periods of time, are manual tasks that are not deemed an important part of a person's daily life. In contrast, household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to a person's daily lives, so the Sixth Circuit should not have disregarded William's ability to perform these activities. The Supreme Court reversed and remanded the case back to the Sixth Circuit for further consideration (Legal Information Institute, 2002).

On June 10, 2002, the U.S. Supreme Court unanimously ruled that employers do not have to hire a person with a disability if they believe that the person's health or safety would be put at risk by performing the job. The case involved Mario Echazabal, who worked for maintenance contractors at a

Chevron refinery in El Segundo, California. Twice during the 1990s, Echazabal applied for maintenance jobs with Chevron, which found him well qualified for the positions. However, Chevron withdrew the offers after required physical examinations showed he had Hepatitis C, a chronic liver disease. Chevron then asked the maintenance contractor to fire or reassign Echazabal, saying he risked further liver damage the longer he worked around the chemicals and toxins at the plant. Subsequently, Echazabal was fired. In 1997, Echazabal filed suit claiming that the ADA protects qualified workers from discrimination based on their disability. Chevron argued that employers should be able to keep people out of jobs where they could become injured or killed. A federal judge dismissed Echazabal's case. The U.S. Court of Appeals for the 9th Circuit sided with Echazabal, calling Chevron's actions "paternalistic." The Supreme Court's decision reversed the Court of Appeals ruling (The Center for an Accessible Society, n.d.).

V. REACTIONS TO RECENT SUPREME COURT DECISIONS

Many ADA supporters feel that the Supreme Court's restricted definition of disability will further restrict persons who can meet the definition of disability, and therefore be covered by the Act (Supreme Court, 2002). While the *Toyota v Williams* opinion does not mean that carpal tunnel syndrome could never be a disability under the ADA, the Courts will require ADA Title I plaintiffs to provide more extensive proof of a condition's overall impact on the activities of daily living (Cain, 2002). This decision allows employers more options when faced with employees' requests for accommodations under the ADA based on asserted impairments that involve limitations of the ability to perform manual tasks (Toyota Motor Mfg, 2002).

The National Council on Disability (NCD), reacting to the Supreme Court's decision supporting Chevron, said "men and women in many different professions freely accept work under hazardous conditions every day for reasons that include higher salaries and personal satisfaction. The Supreme Court took away the right of people with disabilities to exercise that very same right, simply because of their disability." (NCD, n.d.). In its second of a series of recent policy statements about Righting the ADA, the NCD concludes that "Congress went through a laborious, tedious, and intensive process of considering and revising the ADA, including numerous negotiations, compromises, and tweaking of the language prior to passing the statute. Even before Congress began its work on the ADA bills, the proposal had a strong legal and conceptual base, grounded in a quarter century of investigation and analysis by Congress and by a variety of federal and other agencies. The major

provisions of the ADA, including the definition of disability, were almost all derived from practically identical terms in prior legislation, particularly the Rehabilitation Act. The meaning of these provisions was the subject of considerable regulatory language, interpretive guidance, and court precedents at the time the ADA was enacted. The standards and terminology incorporated into the ADA had been field-tested and had proven workable. Any suggestion, by Justice O'Connor or others, that the ADA was thrown together hastily at the last minute without careful consideration and deliberation, or that the ADA includes a lot of novel, hazy, imprecise legislative language is simply wrong" (NCD, 2002, p. 8).

Legal experts are concerned that the justices' narrow interpretation of the law will exclude large numbers of persons with significant disabilities out of the law's protection in a way the people who wrote the law would never have dreamed would happen. Industry and the general business community continue to hail the courts decisions that continue to narrowly sharpen the application of the ADA (Moore, 2002). Proponents for the Disability Rights Education and Defense Fund feel that the Supreme Court has created a "Catch 22" for the persons it is intended to protect. According to them, the court seems determined to set a very strict test for deciding who is disabled – you are either not disabled enough to qualify or you are too disabled to do the job" (Savage, 2002).

Robert L. Burgdorf, who drafted the original version of the ADA, states that the law has become so widely misunderstood and misinterpreted, particularly by the body meant to protect the rights guaranteed by the law. He believes that the Supreme Court drastically narrowed the persons who are protected by the ADA. He feels that the Supreme Court has made the same mistake that lower courts make in treating the definition of disability under the ADA, as analogous to eligibility criteria under the Social Security disability programs and special education programs. The Court's basic misconception is that there are two distinct groups in society, those with disabilities and those without. Just as the point of the Civil Rights Act is not race, but discrimination; the point of the ADA is not disability, it is discrimination (Burgdorf, n.d.).

VI. RECOMMENDATIONS AND CONCLUDING REMARKS

Lee (2003) states "that filing an ADA lawsuit is not a productive strategy for most workers with disabilities" (p. 26) and suggests several implications of the outcomes of ADA litigation for employers and employees. Employers who

are able to demonstrate that they have responded to a request for accommodation and are able to show that the accommodation is unreasonable or that the accommodation did not enable the individual to perform the essential functions of their job should be able to avoid litigation or defend against it with little difficulty. Offering to accommodate an individual or transferring them to another position is viewed favorably by courts. Such offers are sometimes viewed as evidence that the employer did not regard the individual as disabled. Employers who can avoid actions that suggest they perceive a disability should also be able to avoid litigation or easily defend against it (Lee, 2003).

According to Lee, courts have been virtually unanimous in backing employers who discipline or discharge employees for misconduct or poor attendance, even if those behaviors are related to a disorder of which the employer is aware. On the other hand, employees who have presented evidence that suggests ways in which they can perform essential functions of a job have been more successful than those who have argued that the employer should be required to eliminate elements of the job they are unable to perform.

Job descriptions need to reflect actual job requirements and should include the essential functions of the position because employers cannot discriminate against a disabled individual on any other basis than that they cannot perform the essential functions of the job. Of course, these essential functions must be necessary. Functions cannot be included that would serve to discriminate against disabled individuals. Other recommendations offered by Hein and VanZante (1993) are still valid today and include implementing an internal, systematic method for dealing with potential complaints and discrimination. The employer needs a well-defined plan to deal with employee grievances. Employee handbooks should be revised if necessary to remove any references that may tend to discriminate against disabled individuals. Promotions must not be tied to physical or mental disabilities. Make certain that any physical requirements are really essential. Even with present technology you might not hire a completely deaf person as a telephone operator, but could you reject a blind person with good hearing? Application forms and interview checklists should be reviewed to remove any questions relating to disabilities (Hein & VanZante, 1993). "If you remember one simple rule, you'll be in good shape: You can ask people about their abilities, but you can't ask people about their disabilities. This means that you can ask an applicant how they plan to perform each function of the job, but you can't ask them whether they have any disabilities that will prevent them from performing

each function of the job” (NOLO, 2003). According to the EEOC, questions that you should never ask of job applicants include:

- Have you ever had or been treated for any of the following conditions or diseases?
- List any conditions or diseases for which you have been treated in the past three years.
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated for a mental condition?
- Do you suffer from any health-related condition that might prevent you from performing this job?
- How many days were you absent from work last year?
- Do you have any physical or mental defects that preclude you from doing certain types of things?
- Do you have any disabilities or impairments that might affect your ability to do the job?
- Are you taking any prescribed drugs?
- Have you ever filed a worker’s compensation claim?

According to the EEOC, you may ask the following questions in a job interview:

- Can you perform all of the job functions?
- How would you perform the job functions?
- Can you meet my attendance requirements?
- What are your professional certifications and licenses?
- Do you currently use illegal drugs?

All of the forgoing questions should be asked of all applicants. You should avoid asking certain questions of only those you believe may be disabled. However, if you have reason to believe that an individual has a disability because the disability is obvious or the individual has informed you of their disability, then you may ask if they will need an accommodation from you to perform the job (NOLO, 2003).

Numerous studies have been conducted and will continue to be conducted to determine how effective the ADA has been in achieving its original objectives. These studies will undoubtedly include the impact of the New Freedom Initiative. However, we should be mindful that one benefit to be derived from employing disabled individuals is that people on welfare, but basically willing

workers, have an opportunity to become productive members of society. An observation made by the authors of an early paper about the ADA is worth repeating: “The improved integration of disabled individuals which the ADA seeks to bring about will no doubt serve to benefit American Society” (VanZante & Hein, 1992).

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