



New Mexico Law Review

22 N.M. L. Rev. 1 (Americans with Disabilities Act (Winter 1992) 1992)

Winter 1992

Special Law Review Issue on the Americans with Disabilities Act

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Recommended Citation

Pete V. Domenici, *Special Law Review Issue on the Americans with Disabilities Act*, 22 N.M. L. Rev. 1 (1992).

Available at: <https://digitalrepository.unm.edu/nmlr/vol22/iss1/2>

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PREFACE

SPECIAL LAW REVIEW ISSUE ON THE AMERICANS WITH DISABILITIES ACT

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I am very pleased that the New Mexico Law Review is publishing a special edition on the Americans with Disabilities Act ("ADA").

Since this nation's founding days, independence and self-sufficiency have been valued and encouraged. At the same time, however, we have viewed people with disabilities as citizens in need of charity. The ADA will begin to change this view by relying on the simple premise that people should be measured by what they can achieve and not by focusing upon what they cannot achieve.

The testimony provided by many of the witnesses who testified before the Senate Committee on Labor and Human Resources gives us some understanding of the discrimination experienced on a regular basis by people with disabilities. Specifically, the testimony by Judith Huemann, a former Senate staffer, provides a truly poignant example of this discrimination. Her story not only explains why we need this law, but it is also a testimonial of actions and inactions that discriminate by intent, design, and effect. Her story is the story of millions of Americans with disabilities:

When I was five my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced into home instruction, receiving one hour of education twice a week for 3 1/2 years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.

When I was 19, the house mother of my college dormitory refused me admission into the dorm because I was in a wheelchair and needed assistance. When I was 21 years old, I was denied an elementary school teaching credential because of "paralysis of both lower extremities sequelae of poliomyelitis." At the time I did not know what sequelae meant. I went to the dictionary and looked it up and found out that it was "because of." So it was obviously because of my disability that I was discriminated against.

At the age of 25, I was told to leave a plane on my return trip

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to my job here in the U.S. Senate because I was flying without an attendant. In 1981, an attempt was made to forcibly remove me and another disabled friend from an auction house because we were "disgusting to look at." In 1983, a manager at a movie theater attempted to keep my disabled friend and myself out of his theater because we could not transfer out of our wheelchairs.¹

Ms. Huemann's testimony obviously had a strong effect on the major conclusions of the Senate Labor and Human Resources Committee. In its report, the Committee concluded that:

- (1) Historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;
- (2) Discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation and telecommunications;
- (3) Current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;
- (4) People with disabilities as a group occupy an inferior status socially, economically, vocationally and educationally; and
- (5) Discrimination denies people with disabilities the opportunity to compete on an equal basis and costs the United States, state and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.²

The struggle of people with disabilities to obtain equal rights is analogous to the struggle of other minorities to end discrimination. As Rosa Parks, the young woman who wanted to end segregation taught us,³ and as the United States Supreme Court ruled thirty-eight years ago in *Brown v. Board of Education*,⁴ segregation affects our nation "in a way unlikely ever to be undone."⁵ The opportunities available to people with disabilities are far from equal to those available to the rest of society and, in fact, often contribute to keeping them separate. The overwhelming majority of individuals with disabilities lead separate, isolated lives. They do not

1. *Americans with Disabilities Act of 1989*, S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989) (testimony of Judith Huemann) [hereinafter Senate Committee Report].

2. *Americans with Disabilities Act of 1989: Hearings Before the Commission on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 6 (1989).

3. Mrs. Parks is credited with starting the movement to end segregation. As one author put it:

It was in Montgomery that Mrs. Rosa Parks ignited a spark which began the modern-day revolution. She did this when she would no longer cooperate with the system of segregation on the city buses and refused to obey a white bus driver and give up her seat so that a white man might sit down on the late evening of that first day in December.

R. Abernathy, *The Nonviolent Movement: The Past, the Present, and the Future*, in *BLACK LIFE AND CULTURE IN THE UNITED STATES* 180, 182 (R. Goldstein ed. 1971).

4. 547 U.S. 483 (1954).

5. *Id.* at 494.

have jobs, they do not go to movies, theaters, sports events, restaurants, supermarkets, or churches. People with disabilities often feel unwelcome, self-conscious about their disability, or reluctant to participate in these activities because of degrading experiences they or their friends with disabilities have experienced.⁶ Finally, architectural, communication, and transportation barriers make it impossible for persons with disabilities to get jobs and participate in life. *Brown v. Board of Education* taught us that separate but equal treatment of minorities is inherently unequal.⁷ Now, the ADA gives people with disabilities the opportunity to "overcom[e] not what God wrought but what man imposed by custom and law."⁸

The ADA is designed to address four obstacles or barriers that stand in the way of individuals with disabilities. The four obstacles the ADA speaks to are: employment, accessibility within public accommodations, adaptation of public transportation for easier usage, and conversion of telecommunications equipment.

Employment is probably the issue that most radically alters the lives of people with disabilities. Despite progress in the area of employment for people with disabilities during the past few decades, a 1989 Louis Harris Poll found that two-thirds of Americans with disabilities between the age of sixteen and sixty-four are not working at all; yet, sixty-six percent of those not working say that they want to work.⁹ Further, eighty-two percent of people with disabilities said they would give up their government benefits in favor of a full-time job.¹⁰ This equates to an additional 8.2 million workers in the United States, at a time when our country faces a projected shortage of workers in the near future.¹¹

The Harris Poll also showed that two-thirds of the top managers, equal opportunity officers, and department heads believe that individuals with disabilities encounter job discrimination.¹² Individuals with disabilities are likely to encounter some of the following types of job discrimination: employers using standards and criteria that have the effect of denying opportunities; employers using application forms and making other pre-employment inquiries that focus on the existence of any disability, rather than on the ability to perform the essential functions of a job; employers' failure to provide or make available reasonable accommodations; employers' refusal to hire based on stereotypes about job performance, safety, insurance costs, and absenteeism; co-workers' objections; employers placing persons with disabilities in dead-end jobs; and persons

6. Senate Committee Report, *supra* note 1, at 7.

7. See 547 U.S. at 495.

8. Senate Committee Report, *supra* note 1, at 11 (testimony of Senator Lowell Weicker, a primary cosponsor of the legislation).

9. Louis Harris & Associates, Inc., Study No. 854009, the ICD Survey: Employing Disabled Americans 47 (1989) [hereinafter Harris Poll].

10. *Id.* at 101.

11. Senate Committee Report, *supra* note 1, at 9.

12. Harris Poll, *supra* note 9, at 78.

with disabilities experiencing under-employment and lack of promotion opportunities.

Job discrimination against the mentally ill was one of the most difficult areas the Congress had to address, and yet one of the most important. Individuals who are mentally ill are often some of the most gifted and talented individuals. In addition to improving life's quality for the mentally ill, encouraging them to participate in society enriches civilization. For example, Winston Churchill, Abraham Lincoln, Michelangelo, Isaac Newton, and Vincent Van Gogh have all been diagnosed as mentally ill, yet it is hard to imagine the world without their remarkable contributions.¹³ The ADA will encourage the modern-day Churchills and Van Goghs to make the most of their talents.

Without the adaptation of public accommodations, many of the routine and mundane aspects of every day life become a never-ending battle for people with disabilities.¹⁴ Public accommodations are private entities that affect commerce under the law and make modern life livable. Examples of public accommodations include restaurants, hotels, doctors' offices, pharmacies, retail stores, museums, libraries, parks, and private schools. Private clubs and religious organizations are exempt from the ADA mandate, but nothing would preclude them from voluntarily creating a barrier-free environment.

For those public accommodations covered by the ADA, barrier removal is only required when it is "readily achievable," which is further defined as "easily accomplishable and able to be carried out without much difficulty or expense."¹⁵ The ADA requires that all new construction of places of public accommodation, as well as "commercial facilities" such as office buildings, be accessible. For example, elevators are required in buildings with three stories or more and 3,000 square feet or more per floor, or where the building is a shopping center, mall, or a health care provider's office.

The availability of transportation is an essential aspect of life in the United States. Transportation is not, however, readily available for all Americans. Witnesses on behalf of the National Council on Disability testified that "accessible transportation is a critical component of a national policy that promotes the self-reliance and self-sufficiency of people with disabilities."¹⁶

People cannot get or keep jobs if they cannot get to work every day. It is senseless to make modifications to public accommodations and employment regulations if essential modes of transportation are inaccessible. While transportation is a critical part of this legislation, it may create problems for bus manufacturers and small bus companies.

13. Biographies compiled by The National Alliance for the Mentally Ill (on file with The National Alliance for the Mentally Ill).

14. The public accommodations provisions of the ADA generally became effective on January 26, 1992.

15. 42 U.S.C.A. § 12181(9) (West Supp. 1991).

16. Senate Committee Report, *supra* note 1, at 13.

We often we take for granted the ease with which we can communicate with people throughout the world. Modern technology has provided us with the capability of staying in continual contact with the rest of the world. The simplest task, however, often becomes a major burden when a person cannot use a telephone. To understand the difficulty that persons with hearing impairments or other disabilities have because they cannot use a regular telephone, try making an appointment, reservation, or letting your boss know that you will not be coming to work because you are ill, without using the telephone. This simple experiment should make everyone understand why the Americans with Disabilities Act includes provisions requiring the establishment of telephone relay services for individuals who use telecommunications for the deaf or similar devices.¹⁷

Congress recognized that all of these mandates cost money. In an effort to help the private sector meet some of the obligations incurred under this legislation, Congress also amended the tax code. Amendments allow a deduction of up to \$15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The Internal Revenue Code permits eligible small businesses to receive a tax credit for certain costs incident to complying with the ADA. An eligible small business is one whose gross receipts do not exceed \$1,000,000 or whose work force does not consist of more than thirty full-time workers. Qualifying businesses may claim a credit of up to fifty percent of eligible access expenditures that exceed \$250 but do not exceed \$10,250.¹⁸ Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

The ADA incontestably has a good, fair, moral, and just premise. But civil rights statutes are notoriously difficult to craft. They are replete with difficult standards to apply: "discrimination," "reasonable accommodation," "undue hardship," "reasonable belief," barrier removal that is "readily achievable" or "easily accomplishable," and able to be "carried out without much difficulty or expense."

Civil Rights statutes bring about litigation, but they are also a powerful tool for education. I hope we maximize the educational potential of the ADA and not the proliferation of law suits as some have suggested.

I am pleased that Congress enacted the Americans with Disabilities Act. When it was under consideration on the Senate floor, the gallery was filled with Americans with disabilities. It was evident that this was definitely a vitally important piece of legislation.

I was fortunate enough to be included among a large crowd of Americans at the signing ceremony in the White House Rose Garden whose lives have been affected by disabilities. As I looked through the audience,

17. 47 U.S.C.A. § 64.604 (West Supp. 1991).

18. 26 U.S.C.A. § 44 (West Supp. 1991).

I was struck by how radically different the lives of many of these Americans may become. Under the ADA individuals with disabilities will have access to the opportunities many of us have taken for granted but were never before available to them. The ADA represents a chance for Americans with disabilities to belong to and contribute to a society in which they were once only spectators. I am confident there will be achievements, successes, and joy that would not have been possible if the Americans with Disabilities Act had not been signed into law. This is one law that will truly make a difference.