Promises Kept, Promises Broken, Promises Deferred: The Americans with Disabilities Act

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Twenty-five years ago this coming July, Congress, by wide margins, passed the landmark Americans with Disabilities Act of 1990 (ADA). Congress stated its purpose, in part, as:

(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 in this Act on behalf of individuals with disabilities . . . (ADA §12101(b)).

Buttressed by a set of robust findings that emphasized the pervasive nature of discrimination against people with disabilities in “such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services,” the ADA purported to address discrimination in virtually all areas of the lives of people with disabilities (ADA, §12101(a)(3)).

Has this ringing mandate been met for people with intellectual and developmental disabilities? The answer must be: Yes, No, and To Be Determined. Or, if one prefers, promises kept, promises broken, and promises deferred.

Promises Kept

The ADA has served an important symbolic function in raising the consciousness of the broader society regarding the rights of people with disabilities. Though one could argue that this consciousness-raising relates more to people with physical disabilities than mental disabilities, as reflected in the ubiquitous figure of the person in a wheelchair, it is undeniably true that many people without disabilities have a greater appreciation for the contributions to society that people with IDD make and the discrimination that they have experienced. This symbolic function is not to be gainsaid, even if it is difficult to quantify. Ironically, the very success of the ADA has been used by some politicians to argue against ratification of the United Nations Convention on the Rights of Persons with Disabilities as unnecessary because “we already have the ADA.” The ADA is now part of the public rights discourse in the same way that the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 are for racial minorities and women (Engel & Munger, 2003).

The ADA is more than a symbol, however. Critical cases such as the Supreme Court case of Olmstead v. L.C. have been instrumental (eventually, at least) in encouraging the trend of deinstitutionalizing people with IDD and keeping them out of institutions altogether. Other cases, though not specifically about people with IDD, have increased access to public accommodations by people with disabilities (Bragdon v. Abbott – people who are HIV+), limited the reach of the “fundamental alteration” defense by places of public accommodation (PGA v. Martin), and recognized that Title II of the ADA is a legitimate exercise of congressional power when addressing fundamental issues such as access to courts (Tennessee v. Lane). Many lower-court cases have addressed important issues such as access to the Internet, the viability of sheltered workshops, disability-based harassment, and other matters. And in addition to court cases, the Federal Government, primarily the U.S. Department of Justice, Civil Rights Division, has been active in promulgating regulations and bringing (and often settling) major litigation that has vindicated the rights of people with disabilities.

Promises Broken

But in other respects the ADA has not delivered on its promise. Supreme Court decisions that severely constricted the interpretation of the statute – Sutton v. United Airlines and its two companion cases, as well as Toyota Manufacturing Co. of Kentucky, Inc. v. Williams, and Board of Trustees v. Garrett, to name several – limited the reach of the ADA, especially in the employment area. The Sutton trilogy and Toyota case established an insidious environment in which individuals with disabilities, including people with IDD, could not meet the threshold definition of being a qualified individual with a disability – that is, an individual with a physical or mental impairment that substantially limited a major life activity – and hence could not even raise a claim of substantive discrimination, let alone prevail. For those who could overcome this hurdle, the difficulty of demonstrating a level of impairment that would rise to the level of seriousness that the Supreme Court required while then proving that the individual could perform the essential functions of the job, with or without reasonable accommodations, created a Catch-22 situation that made it difficult to demonstrate substantive
discrimination. In Garrett, the Supreme Court used its 1985 equal protection decision in City of Cleburne, Texas v. Cleburne Living Center, Inc., (in which the Court concluded that classifications based on intellectual disability were not entitled to heightened review, but only rational basis review) to rule that Title I of the ADA was unconstitutional on grounds of sovereign immunity insofar as it purported to authorize private damage actions against State employers because it did not clearly demonstrate that the provisions of the ADA, or the legislative history underlying it, attacked irrational State employment discrimination. The result was that the ADA wound up providing a lot less protection for people with disabilities than people with disabilities, advocates, academics, and even individual Senators and Congress members themselves, expected.

A 2007 case from the U.S. Court of Appeals for the Eleventh Circuit regarding a person with an intellectual disability, Littleton v. Wal-Mart, reflected the absurdity of the jurisprudence in this area. In that case, the appellate court affirmed a lower-court order granting summary judgment to Wal-Mart, concluding that Littleton had not demonstrated that his intellectual disability constituted a mental impairment that substantially limited a major life activity. Littleton argued that his intellectual disability substantially limited him in such major life activities as learning, thinking, communicating, and social interaction (as well as working). In rejecting his argument, the court determined that Littleton’s abilities to drive a car, to be interviewed alone for a job, and to interact verbally with co-workers negated a finding that he was substantially limited in any of these life activities. By definition, anyone with an intellectual disability, even in its mildest form, is within the bottom 3% of the population in terms of intellectual functioning. The court’s lack of understanding about what people with intellectual disabilities can do led it to conclude that the above abilities were inconsistent with a determination that Littleton’s ability to think and learn was substantially limited. The court’s conclusion that “we do not doubt that Littleton has certain limitations because of his mental retardation” seems damning with faint praise.

The Supreme Court’s only ADA case dealing with people with IDD was Olmstead. But other cases presented interpretations of the statute that could bode ill for people with IDD. For example, in Chevron USA, Inc. v. Echazabal, the Court held that the statutory defense of “direct threat to others” did not preclude an employer from arguing that an employee should be fired because, in its judgment, exposure to toxins would constitute a “direct threat to self.” This paternalistic judgment was precisely the kind of judgment that Congress had in mind when it noted that “individuals with disabilities continually encounter various forms of discrimination, including . . . overprotective rules and policies” (ADA, 42 USC §12101(a)(5)). In U.S. Airways, Inc. v. Barnett, the Court, in a somewhat fractured opinion, held that the existence of an employer’s seniority system would in most cases trump the ADA requirement that a worker with a disability be assigned to a vacant position as a reasonable accommodation if the worker no longer could perform his or her original job with or without an accommodation. These cases, and those mentioned earlier, create particular barriers for employment of people with disabilities, including those with IDD.

Promises Deferred

In the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Congress attempted to right the ship of ADA interpretation and return Title I of the ADA to its original meaning. It specifically overruled the Sutton and Toyota cases as having been unfaithful to congressional intent in the original ADA by having established a too-demanding test for the threshold determination of disability. Among other things, the ADAAA makes it clear that the Court and the Equal Employment Opportunity Commission (EEOC) had adopted a too-stringent interpretation of “substantial limitation,” adding that the threshold determination of disability should no longer be a demanding one. The ADAAA defines major life activities in the statute itself; adds operation of a major bodily function to the list of major life activities; clarifies that the limitation imposed by the physical or mental impairment should be assessed without consideration of so-called mitigating measures that might ameliorate the effects of the condition; and reinvigorates the definitional prong of “regarded as” having a disability by removing any requirement that the impairment that forms the basis of the perceived disability actually limit a major life activity. Although it is still relatively early, for the most part it appears that lower courts are heeding the ADAAA statutory language and reaching the merits of employment discrimination claims. Case results are mixed, as one would expect, but at least courts are adjudicating claims on their substantive merits.

The deferred promise of the ADA is not merely the result of it being too early to determine if the ADAAA will be effective. In other respects, the promise may be deferred – or at least redefined – not because of what the ADA or ADAAA purport to do, but because some of the expectations that some had for the ADA may not have been reasonable. That is, although many have expressed disappointment that the level of employment of people with disabilities has not increased significantly since the enactment of the ADA – and according to some, has actually decreased – it hardly seems reasonable to blame this fact on the ADA. The reasons for un- and under-employment of people with disabilities (especially, people with IDD) are complex and multi-factored. Over-use of sheltered workshops, educational shortfalls, transportation difficulties, and under-funded supported employment programs are just some of the reasons that unemployment has remained high. Moreover, discrimination, especially in hiring, is increasingly difficult to prove, whether it is based on disability, race or gender. But at least plaintiffs can now have their day in court.

[Dinerstein, continued on page 35]
from other cultures, it changed with the current wars. Now we have people who fought to save our country coming back from war with disabilities and we have to think about them. I think in the future we’ll go back to Washington and we are going to re-tweak the ADA to fit what’s going on right now with housing, technology, transportation, health care, science, all the different people from around the world who come to the United States, the veterans from the war, and people who are aging.

So we have to move our ideas, thoughts, and fighting techniques toward making a better community for all. The ADA has to work for all different kinds of people.

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[Dinerstein, continued from page 7]

Conclusion

We would do well to remember that some of the major issues facing people with IDD – such as problems with overuse of guardianships and other forms of intervention that fail to recognize their capacity – may be more a function of state than federal law (though there are some creative arguments for applying the ADA to guardianship, for example) (Salzman, 2010). Even if the ADA were perfectly enforced, people with IDD would still experience stigma and would still face challenges in integrating fully into society. People with IDD are better off because of the passage of the ADA. But it is up to them and their advocates to continue to fight for judicial interpretations and executive action that will give full meaning to the lofty promises that Congress made 25 years ago.

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an affirmative responsibility to provide community alternatives.

My favorite part of the decision is the Court’s powerful analysis of why isolation is discriminatory:

- Unjustified isolation is properly regarded as discrimination based on disability.
- Institutional placement of a person who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.
- Confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Thus, under _Olmstead_, unnecessary institutional segregation is discrimination and lack of community supports is no excuse.

Before concluding, I want to remind everyone that things have improved since _Olmstead_, partly in response to the case, but mostly in response to the determination of advocates in the years since the decision. Now we can look at crumbling massive State institutions and say, what were we thinking? But we can still look around any state in the country and see segregation in community programs, nursing homes, schools, detention centers, and the list goes on. There is, in other words, much work to be done.

Conclusion

In closing, I want to explain that our Supreme Court adventure was never imagined. We were thrilled but also terrified when the Court granted Cert at the State’s request. Happily, that is when the entire national community of civil rights advocates rallied round our legal aid program. This ad hoc coalition of amici and grassroots organizations in every state working together convinced the Supreme Court that Lois and Elaine should not be institutionalized, that they deserved the opportunity to live in neighborhoods and communities like anyone else. If the public system needs improving or expanding then the State needs to get busy because a lack of alternatives does not excuse discrimination.

Ultimately, back at legal aid, we learned that freedom from segregation is not measured by one case. Instead, the case is part of a complex, heroic fabric woven by the efforts of those who went before and those who continue the struggle now.

Reference


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References


_Americans with Disabilities Act of 1990 (ADA),_ 42 USC §12101 (a)(3).

_Americans with Disabilities Act of 1990 (ADA),_ 42 USC §12101 (a)(5).

_Americans with Disabilities Act of 1990 (ADA),_ 42 USC §12101 (b).


