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THE PAST, PRESENT AND FUTURE OF THE ADA: A CONVERSATION WITH CHAI FELDBLUM

The Work-Life Law and Policy Clinic interviewed Chai Feldblum, then a Commissioner of the Equal Employment Opportunity Commission ("EEOC"), on February 26, 2016. Commissioner Feldblum played a crucial role in the creation and later enforcement of the Americans with Disabilities Act of 1990 (ADA).[1] From 1988 to 1991, Feldblum worked at the AIDS Project of the American Civil Liberties Union (ACLU). While at the ACLU, she served as a legislative lawyer for the disability community, and was part of a team that negotiated and drafted the ADA.[2] Years later, while she was a Law Professor and Director of the Federal Legislation and Administrative Law Clinic at Georgetown University Law Center, she represented the Epilepsy Foundation of America in seeking a legislative response to a series of Supreme Court cases that narrowed the scope of the ADA's coverage.[3] These efforts resulted in the ADA Amendments Act of 2008 (ADAAA), which clarifies the definition of disability, leading to broader coverage of individuals with disabilities.[4]

The goal of the interview was to gain insight into three areas: (1) the events that led to the passage of the ADA, (2) how the present state of the ADA, as amended by the ADAAA, has impacted individuals living with disabilities, and (3) the future potential of the ADA. This document presents an overview of the oral history that was covered during that conversation. It also offers a glimpse into the perspective of one of the advocates behind the movement to create and effectively implement the ADA.[5]

I. LEADING UP TO THE ADA

Every journey begins with a first step; Commissioner Feldblum's first step on her journey as a disability advocate took place at the Supreme Court.

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[1] Chai Feldblum, Kevin Barry & Emily Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. CIV. LIB. & CIV. RTS. 187 (2008).

[2] Chai R. Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L.J. 785 (2003).

[3] Feldblum, Barry & Benfer, *supra* note 1, at 196-97.

[4] The EEOC is responsible for enforcing the ADA, as amended by the ADAAA. *See* 42 U.S.C. § 12117.

[5] Commissioner Feldblum's responses to questions have been paraphrased unless quotation marks are used to indicate a direct quote.

A. *Contagious Diseases, the Rehabilitation Act, and The Supreme Court*

The interview began by asking Commissioner Feldblum what sparked her commitment to working to improve the rights of people living with disabilities. Commissioner Feldblum pointed to her time clerking for Supreme Court Justice Harry A. Blackmun.

During her clerkship, the Supreme Court heard *Arline v. School Board of Nassau County*—a case that involved a teacher who contracted tuberculosis whose contract was not renewed out of a fear of contagion, even though Arline took time off to become non-contagious. At the time, Section 504 of the Rehabilitation Act (Section 504) defined a disability as a physical or mental impairment that substantially limits one or more major life activities. The District Court found in favor of the school board, holding that there was no way Congress intended contagious diseases to be covered as an impairment. The Second Circuit reversed, finding that the text of the statute did not support an exclusion for contagious diseases, but found that the issue of whether a person was contagious related to the question of whether that person was qualified for a job. If the person is contagious, she was not qualified for the job. But if the person had recovered and was no longer contagious, she was qualified. The school board appealed.

In a 7-2 decision, the Supreme Court ruled for Arline, finding that she had a record of a disability (having been in the hospital several years earlier meant she was limited in a major life activity) and hence was covered under Section 504. The Court also held that Arline was regarded as having a disability because the school board fired her because it felt that she was no longer capable of doing her job of being a school teacher because of a contagious disease. Finally, the Court held that there was no language in Section 504's definition of disability that excluded contagious diseases.

The *Arline* decision came down during "the height of fear and panic in the AIDS crisis." Feldblum said, "it was hard for her to describe the fear, panic and hatred for those living with HIV" at the time. As a lesbian, Feldblum believed that she was more conscious than others may have been at the time regarding the importance of the *Arline* decision in prohibiting discrimination against those living with HIV or AIDS. According to Feldblum, "if the ruling had gone the other way, the protection for those living with AIDS would have vanished."

Two days after the decision, a bill was introduced in both the Senate and the House of Representatives to exclude contagious diseases from coverage under Section 504. The bill did not gain any traction in either the Senate or the House, both of which were then controlled by Democrats.

B. *Contagious Diseases and The Congressional Response*

A key battle for the disability community happened between 1987 and 1988 when the Civil Rights Restoration Act was working its way through Congress. This bill amended, among other laws, Section 504 of the Rehabilitation Act. In the Senate committee considering the bill, an amendment was offered to exclude people that were living with contagious diseases from protection. The amendment failed in committee, but the proponents of the amendment vowed to offer it again on the Senate floor during consideration of the bill. As the lead lawyer for the disability community, Feldblum drafted a counter amendment (S.AMDT.1396), introduced by Senators Harkin and Humphrey, that provided that people with contagious disease were excluded from protection if they posed a direct threat to health and safety or others. This amendment passed instead of the complete exclusion of people with contagious diseases, thus maintaining protection for people with AIDS and HIV infection. It also served as a model for dealing with this issue in other civil rights legislation such as the Fair Housing Amendments Act of 1989, which added housing protections for people with disabilities for the first time. It also gave Feldblum and others in the disability community the ability to place the direct threat conflict "where it belonged" when it came up during the debate over the ADA. This is why the direct threat language is found in the qualification standard provision of the ADA (42 U.S.C. § 12113(b)), and not in the law's definition of disability (42 U.S.C. § 12102).

C. *The Alliance Between the Disability and Gay Communities*

In response to a question about what was happening with "traditional" disability groups during this time, the Commissioner described the forging of an important alliance between the gay rights and disability rights communities. She painted a picture of the time, when many people living with AIDS were vilified. She explained that people assumed people with AIDS were drug users, gay men, or women who had intercourse with drug users. In order to obtain needed medicine and treatment, the gay community became very politically mobilized; she said they "went from partying to politics." Further, an earlier divide between lesbians and gay men disappeared, and women were becoming active in the leadership of gay rights organizations. Overall, she observed, the community rejected the idea of the existence of an AIDS victim; people were "living with AIDS," not victims of AIDS.

At the time, many people with disabilities held the same prejudices and stigma against people with AIDS who were gay as did the rest of the public. But a few leaders in the disability rights movement, who were themselves gay or lesbian, were in positions to help break down these barriers and bring the communities together. In addition to her role at the ACLU, Feldblum mentioned Jean McGuire and Tom Sheridan. Collectively, they joined together to form the National Organization Responding to AIDS (NORA)—a coalition built around AIDS advocacy. McGuire and Sheridan were also part of the Consortium of Citizens with Disabilities. NORA, CCD, and the Leadership

Conference on Civil Rights (LCCR)[6] formed an important partnership. Ultimately, the change needed to gain disability rights would not have happened without this critical partnership of leadership, change agents, and coalition builders who were able to bring stakeholders together and who had a "convergence of having the right skill sets." It also helped that the stars aligned in the culture outside of these communities as well to enable passage of the ADA.

II. THE LEGISLATIVE HISTORY OF THE ADA

The legislative path the ADA took through Congress in route to becoming law was not without its ups and downs. This section highlights some moments during the legislative process that stood out to Feldblum.

A. The Chapman Amendment

When the ADA was being considered on the floor of the House of Representatives in 1989, Congressman Jim Chapman proposed an amendment to allow employers to refuse to hire people with contagious diseases (such as AIDS or HIV) from jobs that involved handling food. This became known as the Chapman Amendment. Pushed by the National Restaurant Association, the Chapman Amendment was "aiming towards the direct fear of the American public." In fact, the National Restaurant Association had pushed a similar amendment during the debate over the Civil Rights Act of 1964. That amendment would have allowed businesses to refuse to hire African Americans if it would have impacted their customer base—exactly the same argument that was made with respect to hiring people with AIDS.

Feldblum recalled some key moments that played crucial roles in successfully striking the Chapman Amendment from the language of the ADA. First, she spoke of Congressman John Lewis's "incredible" floor statement against the amendment. In his remarks, the Congressman cited how the Chapman Amendment was similar to other racist proposals like the one proposed during the 1964 law. Despite Congressman Lewis' eloquent speech, however, the Chapman Amendment passed the House, which meant it had to be stopped in the Senate somehow.

Second, Feldblum spoke of the commitment of the disability community to stick together. At this point, Commissioner Feldblum opined that she could only imagine what other disability groups were thinking after the Chapman Amendment passed the House; it was a provision they did not like, but they very much wanted the ADA. She is sure that some of the disability groups thought, "let's just give this up (i.e. the Chapman Amendment) and get the rest." But others in the disability community stood up and said, "we have to stick together." Collectively, they did just that and said "we don't want this bill if the Chapman Amendment is in it."

[6] LCCR was the leading civil rights coalition in Washington that was behind every civil rights bill since 1964. Feldblum noted that LLCR had some groups focusing on gay rights as members.

Feldblum then described a moment from a meeting the disability community had with officials from the H.W. Bush Administration in the White House that she will never forget, as it was key not only to getting the Chapman Amendment stricken from the ADA but also had a profound effect on the understanding of the law itself. Bob Williams—a "giant in the disability community"—was living with cerebral palsy and used a letter board to communicate. He would point to letters on the board to form the words he wanted to use. She recalled Tom Sheridan reading the letters that Mr. Williams was pointing to on the letter board at the meeting. He read, "the ADA is a civil rights law; the Chapman Amendment is neither civil nor right." Feldblum believed that this statement not only helped spell the end of the Chapman Amendment, but also eloquently encapsulated what the ADA was all about.

Ultimately, the way the Chapman Amendment was removed from the ADA was by convincing Senator Orrin Hatch to introduce a substitute amendment that required the Secretary of Health and Human Services to develop a list of contagious diseases that could be communicated through food handling. Given how HIV infection was communicated, it would obviously not be included on such a list. However, it provided Senators cover for rejecting the Chapman Amendment. Feldblum described this as a great example of "legislative lawyering, "You may have that commitment from the disability community and the Administration, but then you need a creative way of getting the Chapman Amendment out."

Finally, Feldblum recalled a protest campaign that the disability community planned for a week before the alternative Hatch amendment was offered. She said the campaign involved a lunch bag that said "The Restaurant Association is 'out to lunch' when it comes to the Chapman Amendment." It went on to say that "Congress should 'bag' the Chapman Amendment and quickly pass the Conference Report on the ADA." The scene of people from the Disabled Veterans of America rolling down the halls of the Senate with these paper bags was not one to be forgotten.

In a moment of reflection, Feldblum recalled how "two communities (the disability and AIDS communities) that did not see what they had in common" had invested a year and a half of working towards the ADA; she felt that "the disability community stood completely behind the AIDS community and we really were all in it together."

A. *Moving the Bill Through The 101st Congress*

Commissioner Feldblum credited a number of things when asked why Congress moved to act on the ADA during the 101st Congress. First, she felt that "the disability community had essentially paid its dues by working with the civil rights community, and done what they needed to have the civil rights community stand behind them in terms of media and grassroots organizing." By helping civil rights organizations pass the Civil Rights Restoration Act and the Fair Housing Amendments Act, the disability community had become an ally of the civil rights community. Second, there was the right combination of stakeholders at the right time. There was the coming together of strategists, media, lobbyists and grassroots organizations. She also mentioned that having LCCR's support was "huge." Finally, she said "the stars had to align." Here,

Republicans and Democrats were on the same page when it came to "caring about disability rights." The reality is "anyone can have a disability; it cuts across party lines."

As a result, she feels that "disability rights have not really been an ideological issue like other civil rights issues" have been at times. She also mentioned that there were people in the Bush Administration and on the Hill that had disabilities themselves or had loved ones with disabilities. For example, she mentioned that Bob Dole was living with a war injury he sustained during World War II and Jim Sensenbrenner's wife was living with a disability. She also commented that Orrin Hatch was "sympathetic." She believed that this led to a good faith effort on both sides of the aisle to make the ADA a reality. Indeed, she said that even a skilled negotiator cannot do anything unless "there is someone on the other side of the table willing to negotiate." Both the Bush Administration and some members of the business community were willing to come to the table here.

B. *Celebrating the ADA's Enactment*

On July 26, 1990, President George H.W. Bush signed the ADA into law. The President invited hundreds of stakeholders who were a part of the legislative process and advocacy efforts leading up to the law to a signing ceremony at the White House.

Despite originally being on the VIP list, when she arrived to pick up her ticket, Commissioner Feldblum was told "actually, there isn't a ticket for you." As it turned out, President Bush "Snubb[ed] the ACLU."[7] At the time, President Bush was running for reelection and recently had attacked people in the media for being "card carrying members of the ACLU." The optics of having staff from the ACLU at the signing ceremony would not have looked good for the President; and Commissioner Feldblum was denied entry as a result. In response, the ACLU issued a press release saying that what really mattered was that the law was passed. Then in a "very unusual" move, the WASHINGTON POST's editorial board said that "this is totally outrageous that this person who basically led the work on the legal and drafting side was excluded."

Instead of being on the White House lawn, Feldblum stood outside the White House gate. She said she celebrated "with the very people and their families that the ADA was intended to help." In her words, "it was actually perfect. As people came through I would hug them so it was like a receiving line" at a "picnic party." According to Feldblum, "it was a great day, July 26, 1990."

III. **Reflecting on the ADA's Impact and Future**

In response to a question about whether the ADA was successful in meeting its goals, Commissioner Feldblum responded that it was "very successful" in a lot of ways, even if it still needed some additional policy changes."

[7] *See* Editorial, *Snubbing the ACLU*, WASH. POST (July 29, 1990). Commissioner Feldblum has a copy of this editorial framed in her office.

In her opinion, the ADA solidified that disability rights are civil rights. Previously, "that had always been an issue." With the ADA, however, "new people came into a movement to say that even though the type of discrimination you experience is not the same as some other group, that doesn't mean that you're not part of the civil rights movement." Commissioner Feldblum recalled a common refrain from the time, "don't give us your dimes; give us our rights." The ADA really communicated that, and symbolically sent a message that the U.S. government felt that people with disabilities deserved the right to be fully integrated into society. "It was not a matter of pity; it was a matter of entitlement." The ADA demonstrated that this was about civil rights; this inclusion was critical. It also was a lasting impact of the law.

She also referenced the importance of Title III (the Public Accommodations Title) in terms of helping people with disabilities be a full part of society. It helped people with disabilities access buildings; to get around the same way others take for granted. Even though basic physical access had already been required since the Rehabilitation Act was passed in 1973, the ADA was a reset button on these protections. It also extended it to so many more people and offered the promise of "complete accessibility." Plus, it meant that some significant money would go toward renovating for access. She also observed the impact the law had on increasing access to interpreters. Further, it led to the *Olmstead* decision, which said that people need to be allowed to live in the most integrated setting possible. This is "what has allowed people to move out of nursing homes and institutions and into the community," and was "absolutely huge."

Although she did not work on Title IV (the provisions related to communications), she mentioned that it "has been huge" especially "in terms of making changes to allow deaf people to participate in society."

With respect to Title I (the employment provisions), Feldblum described the law as having had "some success." But, she lamented, it has not helped enough with increasing the employment rate of people with disabilities.

Commissioner Feldblum observed two problems that prevented the employment title from fully meeting its goal. One was the constricted judicial interpretation of the definition of disability. Soon after the law was enacted, courts began to limit who was considered to have a disability. Judges were saying, "I had a heart attack and I'm not disabled;" instead of interpreting the text to consider what conditions constituted a disability. The other problem Commissioner Feldblum mentioned was a sort-of default reality that the person without a disability gets hired. "It just happens, and then it happens over and over again to that person with a disability who is looking for a job." Of course, "there is no smoking gun" or evidence of why the person did not get the job." In this way, a non-discrimination mandate has not worked fully as it does not increase the employment of people with disabilities. It is not that "people are mean; it's just that some people feel like it is easier to hire someone without a manifest disability."

Without some sort of affirmative action obligation, Commissioner Feldblum observed, this will not change. Unlike Sections 501 (which applies to the federal government) and 503 (which applies to federal contractors) of the Rehabilitation Act, it

was not politically possible to get an affirmative action provision in the ADA. Finally, 25 years after the ADA and some 45 years after the Rehabilitation Act, she noted that during the Obama Administration, the Office of Federal Contract Compliance Programs in the Department of Labor, and the EEOC, have added target numbers for the hiring of people with disabilities under Section 503 and Section 501 respectively. Commissioner Feldblum observed, "that is what will finish out the loop, in at least creating some incentive to hire people with disabilities. Then we'll see more and better results in terms of employment."

A. THE ADAAA

The ADAAA was passed in 2008 to respond to the judicial interpretations restricting what constituted a disability. According to Commissioner Feldblum, "if you can't even get into the court room door" it does not matter if you have a case where someone can actually show some discrimination. You never get to the questions about whether there was discrimination in the initial hiring ("the hardest cases to prove"); nor do you get to the question of whether someone would have been promoted, or were improperly denied an accommodation that was needed. If someone is not "a person with a disability in the first place, [they are] out of luck." Not surprisingly, then, in response to a question about whether the ADAAA fixed any of the problems with Title I of the ADA, Commissioner Feldblum responded "absolutely."

In her words, the ADAAA "finally opened the full potential of the ADA for cases in which we can prove discrimination." Essentially, people can move past the coverage question and get to the other ones at hand. Today, just such a trend has happened. 29% of charges and about a 1/3 of the EEOC's litigation docket involve disability discrimination cases. According to Feldblum, "[t]here is no way we could have done any of that without the ADAAA."

B. New Perspectives from Enforcing the Law

As noted above, Feldblum became an EEOC Commissioner in 2010. We asked whether her view of the ADA changed after assuming this role. She responded:

> For something like 20 years, my client was the disability community, and if there was some ambiguity in the law, I was always looking for the way that would best serve my client, that was my role.

Once she became a commissioner, she "quickly adopted" a different role. Her new job was to "apply the law as [she] felt it most should be applied, based on the statute and legislative history." She continued that she is not sure if her "view of the law changed as much as [her] view of [her] role in relationship to the law." If the law does not permit a reading, she does not go there "[s]ometimes to the consternation of [her] Democratic colleagues. She also observed that she is enjoying "just seeing much more of the implementation of the law" than she ever had from the "outside, as a legislative lawyer/advocate."

C. The Future of the ADA

After mentioning that the ADA recently celebrated its 25th anniversary, Commissioner Feldblum was asked if she thought the law would still be relevant 25 years from now. Her response was that she's "an optimist" who would "love to believe that" there would be no need for the ADA in 25 years. But she's also "realistic." She acknowledges that the overt prejudice against people with disabilities is not as bad as it once was, but "there is still racism…and sexism….and prejudice against Muslims" even if it is of "a different kind" than it was when the laws to prevent those types of discrimination were enacted. The same is true for the disability community. She continued, some "people will always be afraid of people with disabilities because they'll just be feeling like, "I'm so glad that is not me" and not wanting a reminder of that by having that person around." Unfortunately, she commented, "I don't know that we're going to be able to change that."

In response, we asked what changes she would make if she could strengthen the ADA. Her wish list included "all things [that] are not politically possible" in the current environment. One of those things being an affirmative action obligation where a target of a certain number or percentage of people with disabilities would be set in a way that would provide incentives to employers to better reflect the diversity of the communities in which they operate.

She also spoke of a centralized fund from which small to mid-sized businesses could draw to make reasonable accommodations. This type of fund, she opined, could be funded by levying a small tax. With a fund like this, she thought that perhaps when someone with hiring authority has a deaf person sitting before them in the interview, the cost of an interpreter would no longer be a factor. Or an employer could just hire the person who is blind; rather than thinking that about how the company cannot pay for special computer equipment. Having a fund like that "would be so helpful."

The third change she would make is to remove the gender identity exception from the ADA's definition of disability. (*See* 42 U.S.C. § 12211). Keeping the exceptions for gender dysphoria, pyromaniacs, kleptomaniacs and are others are "just stigmatizing." She then observed that gender identity discrimination is a form of sex discrimination according to the EEOC. Also, these conditions are now in the DSM5, even they were excluded from prior versions.

Fourth, she would alter the "very broad exception for religious organizations in public accommodations." (*See* 42 U.S.C. § 12187). As an example, she pointed out that, unlike other businesses, synagogues, churches and the like do not have to have interpreters.

Finally, she opined that the distinction between essential functions and qualification standards could be clearer. (*See* 42 U.S.C. §§ 12111(8) & 12113(b)). In addition, she commented, "I'd love to make it clear that the reasonable in "reasonable accommodation" means effective."

IV. Concluding Reflections on Her "Life's Work"

We ended the interview by asking Commissioner Feldblum why it is important for law students and lawyers to learn about the ADA. This is how she responded:

> "I have trained so many people in the law that I feel like that is literally my contribution in my life. This is what I have been able to give to people in the next generation, which is so important to me.
>
> I think our job here as human beings is to make the world a better place, make it better than how we found it. To me that is what living is about, it's about love, whether to an individual person, which is really something amazing, or the people closest around you, and the people outside that circle, and that extends to the community, both as love and responsibility.
>
> I think any law student should have some different passions about how they want to make the world a better place. It might not be disability advocacy; it might be something else. But if we don't have some firm footing about disability, we're not going to make the world a better place in terms of disability.
>
> I believe we need a convergence of law, policy, practice on the ground, and social norms to work together to create social change. Any one of those on its own is not enough.
>
> People don't always do the right thing on their own, which is why you need a law. And having a law doesn't do much if it is not implemented and practiced on the ground.
>
> Neither the law nor those practices are really going to work if generally, the majority of people in society don't think it's a good idea, whatever it is the law is trying to do.
>
> Lawyers have a special, unique role in making social change because they are the ones that can help pass the law and then implement the law in terms of policy and practice. And they should be the leaders in their community in helping to shape social norms."

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The Work-Life Law and Policy Clinic thanks Commissioner Feldblum for participating in this interview. The Clinic also appreciates that she allowed this document to be created to tell a small number of the stories she shared about her life-long journey with the ADA.