THE ADAAA: 10 + YEARS LATER

Unfortunately, technical difficulties resulted in the failure to capture all of this March 29, 2019 symposium panel, including the remarks of:

- Kevin Barry, Professor of Law, Quinnipiac University (moderator);
- Samuel Bagenstos, Professor of Law, University of Michigan; and
- Dr. Rabia Belt, Professor of Law, Stanford University.

The video started recording part-way through the remarks of Dr. Peter Blanck.

The rest of this document is a verbatim transcript of the available video section of the March 29, 2019 symposium panel at: http://bit.ly/ADAAA_10_years.

Speaker names are in bold, followed by the minute and second marks in parenthesis to indicate the location at which the remarks begin on the corresponding video.

Peter Blanck[1] (00:00)

So it turns out that Syracuse had a, has a long history in this area, from Burton Blatt and the then chancellor Nancy Cantor, who's now the president of Rutgers, had a son, has a son named Archie with autism and her mission was to infuse disability into every aspect of Syracuse University.

So she reached out to me. We got some terrific support and now almost 100 million dollars later based on our partnerships with people around the globe. We have offices in Syracuse, New York City, Atlanta and 25 people to be in Washington D.C. here. California is opening and we look at the interface of disability law and policy.

So the last part of the talk. So about a year and a half ago I was approached by the American Bar Association, and the ABA had a project on implicit bias which was a, which is a hot thing, of course, both politically and as a concept in social science. There are detractors; there are proponents of it. The Obama Administration. Sam was probably trained, trained probably 20,000 attorneys in implicit bias training or something while he was there.

So the ABA said, “We've done a lot of work on implicit bias involving race and gender. What do you think of doing implicit bias studies in the area of disability and in the area of sexual orientation and gender identity?” And I said, in my usual social

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science self, talking to Claudia Center and others, “Implicit bias. What about explicit bias? What about structural bias? What about other sorts of things?”

So, long story short, the ABA commissioned our institute, and we put in a lot of funding to it as well because we were committed to it, to do the first [*sneeze*] longitudinal cross-sectional, God bless you, study of [*laughter*] people with disabilities and people in the LGBTQ community longitudinally. However, because of our focus from a very intersectional and fluid point of view, intersectional simply means that we are finding, I can tell you our findings--the experiences of African-American women with disabilities is markedly different, than the experience just of white men with disabilities. Fluidity. We're looking over the whole life course--the pipeline, the so-called pipeline and now I was with, I was at this place in Baltimore yesterday, the TenBroek symposium. The law schools are going to start with us.

So what happened? Since a year ago or so we have about 3,000 people who've responded to this survey. I think it's the largest survey of its kind ever.

And we over sampled on disability, we over sample on sexual orientation and gender identity. What are we finding? What are we looking at? We're looking at a whole range of experiences from the beginning of a legal career, to what you're paid, to the types of accommodations, to terrific issues associated with disclosure. What disclosure means, what bias means, how you identify yourself, how you are perceived by your peers, your colleagues. It's, it's, it's really an extraordinary team effort. It was a 15 minute survey online in a fully accessible format. But the reality was as people drill down deeper they spent a lot of time on it.

We've got quantitative and qualitative data coming out the wazhoo. Some of the. This is the first group by the way that's hearing some preliminary findings. Yesterday, I just mentioned it very briefly. We're going to publish some of this stuff, of course, coming up. The most important thing to me will be the longitudinal part, which will look at next year, the follow up, and because of our scientific mumbo jumbo without we went through our human subjects without violating privacy and security and so forth.

Depending upon how you answer certain questions. We have an algorithm whether you have a brother or sister, and age and so forth. We can identify people who have consented to follow up, people in the next year. So five hundred longitudinal follow up would be very good, out of 3,000 people.

What are we finding? Well, we're finding terrific issues. First of all, on the basis of gender, gender seems to be swamping a lot of the other issues. For example, if you could imagine a wage curve involving women and men over the course of a legal career--women start very high and do really well to about two hundred thousand dollars then they drop significantly, while men start lower at the, at the lower levels of wages and remarkably flip with the women as the wages get higher.

In other words there's an interaction effect with gender and wage. We're finding terrifically high levels of reported discrimination. Amazingly in the legal profession of the post AD Amendments Act- ADA Amendments Act where about 75 percent of our respondents--again this is self-selecting, we over sampled in certain areas--report to have experienced some form of subtle what they call unintentional bias. About 50 percent report experiencing intentional bias, 30 percent discrimination, bullying, harassment so forth, go down.

We have about 800 people who identified as having an impairment. We have specific, you know, you can throw up levels of what you have from diabetes to hearing and levels of that and so forth. Two hundred people of that 800 who say they have an impairment identify as having a disability.

So as Sam and Rabia were saying, there are self-perceptions with regard to the nature of impairment and whether or not you are a member of the disability, whatever that might mean, community. We look at accommodations very closely. The types of accommodations, when you are given, what you were given, what they cost and so forth. And there's a lot of findings there. But, interestingly, of those people that received accommodations, about two thirds say they were effective.

I said we looked at wages, we looked at discrimination with regard to the LGB community by the way, and we have--I say LGB because I have a whole staff that works closely with us with the National LGBT bar--two minutes. [*Murmering*] We worked very closely in community on this study. So the National LGBT bar is our partner. The Disability Rights Bar Association is our partner. We had focus groups. We had an advisory board.

This was all driven by the community, so it wasn't just “Joe social scientists” pulling stuff out of the air. Claudia Center, maybe Andy Imparato, maybe a couple of these guys were on this focus group. We had telephone calls and so forth and we put together this survey. Allowing me to play with personality and other sorts of variables as well, which I haven't looked at yet.

We have about 550 individuals who identify from the LGB community, about 21 from the trans community, very large sample of trans individuals we work closely with that organization as well. There are less wage differentials on the basis of sexual orientation and gender identity than there are on the basis of disability. Disability wage trends tend to follow gender. And that's probably because, and we haven't done these analyses yet, that of a higher proportion of people who identify as disabled are women. And the highest proportion of people who identify as disabled are African-American women.

So there's a lot of interesting stuff to dive deeper into. I have two minutes. This is about 20 years of work. You know obviously in two minutes. Did I say that I'm now working with Molly Bergdorf? I don't know if I said that or not. So Bob--I didn't say that. Oh so Bob, who is a great friend, and we were in the trenches as many of us were. I

can't say I had a major, at all, affect on the drafting. I was the guy who they went to for social science research or to testify before Congress about certain numbers when we were looking at whether the web was a place of public accommodation. How did people perceive that?

So now I'm working with Molly Bergdorf. Why? Molly's Bob's daughter. Molly was a director at the Administration on Community Living. And as in this whole project of discrimination bias, of course, the goal is pipeline next generation. What have we done? Where are we going? Are we making changes like Sam has written I think? I don't particularly see the success of the ADA and employment rates because there's so much other noise going on in the system, structural noise, welfare benefits noise, a whole host of cultural things.

But through this ABA study, it really has grown quite large and what we're hoping to do is make this very collaborative. The data will all be open source. You know this is not proprietary. We're just beginning our analyses now. And for those of you that participated, I thank you.

For those of you, stop! [*Laughs*]. Oh, one minute. One minute. For those of you that may participate in the future that would be great. We will be starting with law schools pilot testing this because we want to study this from cradle to end of the job cycle. So that's my two cents, I didn't stand up. We'll see if the next person chooses to stand up or not.

Sunu Chandy[2] (10:22)

I'm going to stand. [*Applause*] I think this will help me feel more connected.

Peter Blanck (10:31)

But take this sign, two minutes. [*Laughter*]

Sunu Chandy (10:33)

Pull this back. I can. OK. Hi everyone. This is a very esteemed panel. I was intimidated when I read your bios last night. The work you've done to help craft the amendment, for all the academic work, the social science work that will help drive policy, the highest levels of federal government. I'm really delighted to be among you all. I want to thank the law school especially the students. I was a student organizer. It's a lot of work, a lot of extra work on top of your classes. So thank you. And to Marcy thank you for your leadership.

So I'm here not as an academic but with a background as a litigator in civil rights from EEOC. I was there for 15 years from 1999 to 2014. And so I litigated the ADA

[2] Legal Director, National Women's Law Center.

before and after the amendments. And I will say that in the early years there, when I was a new law lawyer, we would go to Practicing Law Institute and other organizations for trainings that people would say what are we going to do about disability rights? None of the plaintiffs firms are taking these cases. They're too risky. You're going to lose on coverage and the plaintiffs' charges would say we don't take those cases. We will lose those cases.

Because of that, EEOC said, well we have to take those cases. And so, in those early years, I had several ADA cases that I litigated. I'm just gonna talk about a couple of them because one actually straddled the time period of the amendment. So some people had facts happening before and after. And so when we talk to claimants that made the difference about if we could include them in that class of harmed people, because whatever happened to them under the new amendment it would be covered, under the older would for sure not be. So that was a very odd way to litigate that case but, that was the *Princeton Hospital* case.

But let me start with the *Home Depot* case. This was a young woman who had a job coach through a state agency and she was working at Home Depot and they knew she had a job coach and they were, they didn't pay for it. The state paid for it and they would have some interactions with the job coach would come by once a week "is everything going OK here?" And the young woman had intellectual disabilities and so she was doing fine. And then, as you know, these retailers separately, we do work on fair scheduling, that schedule changes every week. They call you, they say "Come in don't come in," which is horrible for childcare and all different things. But it's also horrible if that's something that is not so easy for you to figure out week to week.

And so she would get these calls and it would just be like is this even the employer? Who is this? And the dad got some of the calls, which was a really important fact witness. And basically, she got fired for not being able to figure out this ever-changing schedule. And so we said, well why don't you just work with the back go. I mean you have someone coming in once a week to work on this and they were like what job coach? We don't know about the job coach. Of course the discovery showed they knew about the job coach, they call the job coaches saying "we fired your person."

That's how much they knew about the job coach. And so that case resulted in a really good settlement and national policy changes for Home Depot. Workers, some, for some managers were using the job coach policy, some weren't. So they codified it. They gave it to everyone. So that's a sort of systemic change. It was covered in the *New York Times*. Some people call me from all over the country. "My child as a job coach how can we use this for social change?" That was one of our great successes.

We had *Zapala Farms,* which the farm worker who had a prosthetic hand and when they were changing what they were picking the employers said we're going to pay you half. Because we are, you're probably gonna pick half as much lettuce as everyone else. No evidence of that, no discussion about how does this work. We go to the mediation and the and the guy's like, "Well I have a prosthetic hand I didn't use for

picking the other thing but I would use for picking the lettuce cause that's more gentle." They're like, oh, we didn't know you had a prosthetic hand? So that case settled. So those are the kinds of cases we had.

And then *Princeton Hospital* was a case where they continually fired people after their three months of FMLA leave. They did not engage in any analysis about leave as a reasonable accommodation, which is very nuanced and very tricky and if you need indefinite time off, like no employer is going to do that. But we had great clients who had, you know, their doctor's notes that said, "I need two weeks of physical therapy. I'm a nurse." And they were like, "No, no, two weeks of leave, we can't do it," which is ridiculous. So we had large group of claimants again, some under the old ADA, some under the amendments. And then we had relief, basically a policy change for this employer to acknowledge that leave can be a reasonable accommodation.

And how does that work? And what are the factors for that? Which again, very fact intensive. But once you have the coverage piece dealt with, you can then get into is this a job where leave would make sense as an accommodation.

So that's sort of my past history with EEOC and then coming to, Molly Bergdorf was on my team at HHS Civil Rights Division when she moved came over, so that's a nice connection. I learned a lot disability rights being at HHS. Also in terms of our website, also in terms of before we put a document out, can you use it with a screen reader, like things that I really didn't know. Health and Human Services have these practices in place.

Why that's important is because when I came to the National Women's Law Center in #MeToo movement, the Time's Up Legal Defense Fund, we helped set that up. Our intake form didn't say anything when I got there, because we were just working on it, about do you need a reasonable accommodation? What will help you do this? Language access? None of that was on there. So I had a good opportunity to help sort of guide that process to become more inclusive.

And then through that work we started an accessibility working group. I want to mention that because I have been completely dismayed by, well the level of, lack of inclusion by civil rights national organizations and I've said that boldly to their face, so I can say it to anyone here.

And I want to commend Sara Hasmer, raise your hand, one of our legal fellows who's sitting with us today. She has done a lot of work on this as well to be a leader in the national civil rights space around event planning, webinars, language use. I mean just simple things like not saying "stand up for justice" like that's like an email I send every day to a partner colleague. Like this is not the most inclusive language we can be using. And so we, and to sort of boil that down and Sarah was instrumental in this like reading the 20 page document, the 100 page documents about language guidance into a one pager that someone will open and read. With a chart that says try not to use these terms, they're offensive. Here are some suggestions and people put it in their

bulletin board and they make it practical. So that's just a project that we've started because there seemed to be a huge gap. And that is, I think, the first step in making our work more authentic and to have integrity with all of the intertwining identities we've all talked about.

And so that, we started accessibility working group and many of your speakers, you know, Joe Shapiro, Mia, people in the #MeToo panel. Those are all people we've brought in to do training internally. Because until all our programs, staff, and education, and workplace justice, and income security, and reproductive rights, until all of them and me have a greater awareness of these issues, there's no way that our work will be in line with our actual mission--which is not to be a good ally to disabled people, but it's to do women's rights correctly. And that shift, I feel like, is so crucial and is one I'm not seeing in the national civil rights space.

So, all that to say in terms of the #MeToo work we are trying to center survivor justice and disability justice and bring those together in terms of Title IX protections in schools and reasonable accommodations in the course of a sexual harassment investigation.

Just because people need an accommodation doesn't mean you drag it out. Those time, those time limits are still really important. And we have a fact sheets and such coming out this spring on Latina girls in schools, and levels of disability, and suspension, and all of those intersections that we're excited to work with disability rights groups on.

And I guess I'll end with the personal story, which is my spouse's 93 year old grandmother lives with us, because her mom died 12 years ago before I even met her. And because of that, I did not grow up with someone with a disability in my family, but in the last 10 plus years, every time we stay at a hotel, every time we want to take her to a meal, I have to call and say, “Is this going to work for us?” And sometimes they just lie to you and say there's no stairs, but there are stairs. And so having that like in my heart as an experience has also helped me to be a better ally and advocate.

I'll just say if anyone wants to sue the Hilton Hotel, I'm here for it. [*Laughter*] Because the last two years on Christmas. Two years ago, they gave away our ADA accessible room so granny just had to suffer that night. And then last year they called a room an ADA accessible room and it did not even have bars near the toilet. What made it an ADA accessible room, on its website was that, wait for it, the tub is big enough so that you can call engineering to bring you a stool that will fit in that tub. That's it. That is what made that room ADA accessible, so, needless to say…

I talked to my friend who knows the person, the general counsel's office, talked to them but they said, “this is so sad. We'll remind our franchisors to do better.” And I'm like we need to sue the corporate office because I know that's hard under public accommodation law. If anyone is into impact litigation, I'm here for it to sue Hilton. [*Laughter*]

In the meantime, we're working with the franchise office and I'm talking to an attorney general because if I have access to the general counsel of Hilton and can't like use that for something, then something's wrong. So I am ready for that work. Public accommodations and hotels and I do have great disability rights attorneys that I'm working with because my, my expertise is in employment law.

So, that's my personal piece. And the last thing I'll say is I am so excited about these conversations about who has a disability, who counts in this movement, the tensions of having it broad. I've been to so many panels where they say we all have disabilities and that seems powerful politically, but then also to dilute sort of all the different identities. And so I think these conversations are so important for strategy, for legal claims, and for building power as a movement. So thank you all for having me and I'm so excited to be here today. [*Applause*]

[*Murmering while powerpoint is set up*]

Nicole Porter[3] (21:56)

All right. All right. Good morning everyone. I feel like I have about two minutes but I'm gonna try and get through all of this and skip some stuff that other people have already covered. So this is the title of the paper that I've written and it's depressing and I'm sorry about that. And I'm not normally a negative person but I was doing a paper on ADA retaliation cases from the time of the amendments up until current time. Read way too many cases.

And I kept finding these cases that were saying that the plaintiff wasn't disabled. So I just started throwing them in a folder on WestLaw, and then decided that maybe I should look at this more broadly. And so that's what started this paper. So we've already, I'm going to skip past the definition of disability because I assume this audience knows that. And we've also talked about the roller coaster ride of the ADA.

The piece that I'm going to mention is, I did a paper in, published a paper in 2014 that looked at the first five years of the amendment. So all the cases deciding the issue of coverage from 2009 to 2013, and I just declared at that time that most courts were reaching the right result. Most courts were getting this right. I only found like seven cases that I thought were incorrectly decided. Maybe another eight cases that I thought the plaintiffs didn't litigate it well, but I really was optimistic at that point.

And so that's what's so surprising about what I have found. I'm going to skip past the ADA highlights because we don't have much time, except for, to bring up the one that I think is really important, is that major life activities include major bodily functions.

[3] Associate Dean for Faculty Research and Development and Professor of Law, University of Toledo College of Law.

I'm sure most of you know that, and this is one of those things that I'm seeing in the case law that people are getting wrong all of the time.

So major life activities now include major bodily functions or immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, etc. And that's really important because some of the things that courts were saying were not disabilities: diabetes, high blood pressure, heart disease, etc. Pre-amendments if you rely on the major bodily functions, it doesn't matter if you have any outward manifestation of the impairment on your other major life activities, as long as inside your body, there is a limitation. Okay, and that also changes to the “regarded as” provision that Sam had already addressed.

So my research was all federal cases published and unpublished. Definition within two of disability and ADA from January 1, 2014 through December 31, 2018. That resulted in 976 cases, and yes, I had to read through 976 cases, and I found 210 that I thought the plaintiff was erroneously found not disabled.

So this was shocking to me. And I realized that compared to pre-amendment, this is great right. So the, you know, this is much better than it was pre-amendment. So I don't want to belittle the progress that we've made, but finding 210, especially after that first 5 years, I had come to a more optimistic conclusion.

This was really disheartening to me. And so this is a little harsh, right, how I label these errors. It's a little bit provocative: ignorance, incompetence, and possibly animus.

So here's the ignorance piece of this. Fifty four cases, where the courts presumably were unaware that the ADAAA existed at all, did not cite to a single provision, only cited to the old statute. Fifty-four from 2014 to 2018. That was shocking, and some of these were were very significant disabilities, so someone who walked with a walker, someone who had multiple sclerosis, seizure disorder, kidney transplant, lupus, and lots of mental illness cases. In all of those, the court, 54, did not cite to any amendments.

There were 11 cases that, on top of those 54, that the only provision they cited to was the major life activities, which is now in the statute itself, used to just be in the regulations. So that was, it was almost like, well they didn't really know the amendments existed, but that was something easy for them to find and so they cited to it.

And then there were another 34 cases where courts failed to cite to the new “regarded as” rule, which has dramatically changed from pre-amendments. So this, this is probably to me the most disheartening piece, because it's also the piece that is sort of the least excusable. These are federal judges. They have clerks who are supposed to do research and know that this law has been significantly amended.

OK, so, attorneys, I'm assuming that in those 54 plus 34 cases that the attorneys probably didn't cite to the ADAAA either. If they did and the court's ignoring it, then we have an even bigger problem right. So there's that problem.

There was other pleading failures. I've identified 19, many relied on working, which is not now the most straightforward way to prove disability. They claim major life activities that were not, that are not on the list, which is quite broad, now, such as quickness on his feet, going to church, skipping. I love skip, but I would not necessarily call that a major life activity, and some courts criticized conclusory allegations.

And then the big one that I'm focused on is that failure to use major bodily functions or the provision that says if an impairment, an episodic or impairment that's in remission, would substantially limit a major life activity when it's active, it's still going to be considered a disability even when inactive. There were 34 cases that fell into that category, and a lot of those cases would have been much better off, right? So you know diabetes, pointing to the endocrine system. You know cancer, pointing to normal cell growth, etc. So lots of those cases would have been much more straightforward to claim the major bodily function and the plaintiffs failed to do that.

OK. And then with regard to cases that I, they cited to the right law but then in my mind came to the wrong conclusion. I don't know whether this is incompetence or animus or something else entirely. I don't want to be too critical, but I have found some significant problems. So eight cases required a long term impairment, even though that's technically not supposed to be part of the actual disability prong. In one case this person had, I can't remember the exact impairment they had, but they were on leave for eleven months and the court said that that wasn't long enough. I found eight cases that were still using the old *Sutton* mitigating measures rule. So hypertension or depression that was being controlled by medication, ADHD that was being controlled by medication. And so that was a little bit frustrating because, again, they were citing in these cases to the correct rules, but then getting it wrong.

And then, six cases involve the improper application of major bodily functions provision, and or the episodic provision, and I'm going to highlight a couple of them. Because one of them, I was reading these cases at home. My husband's also a law professor we tend to work in the morning, and are done together, and I'm screaming at my computer, and he's like, "what is going on?" I'm like "these cases are so frustrating." So this one was brain cancer and the court acknowledged the major bod--major bodily functions provision and acknowledged the regulations, which state that cancer will virtually always limit normal cell growth. And then said plaintiff has not indicated whether she experiences any symptoms from her brain can--tumor or allege such symptoms impact her ability to work, which the latter part is completely irrelevant. Right?

And so this was a very frustrating case, but by far the most frustrating one that I read was this one where the plaintiff had rheumatoid arthritis. It was a jury trial. The court refused plaintiff's request to instruct the jury on the major bodily functions provision. The plaintiff was arguing immune and musculoskeletal functions. And at trial

her doctor testified how her rheumatoid arthritis was an autoimmune disorder, explained how it attacks the joints causing pain, stiffness, swelling, and fatigue. And the court said the doctor's testimony was just about the general progression of the disease and not specific to the plaintiff, even though there was no indication that the plaintiff's progression was any different than anyone else's or the normal progression of the disease.

And then the court, the 10th Circuit affirmed the lower court's instruction noting that plaintiff's testimony was more individualized, but only focused on her daily activities and not on her major bodily functions. Well, of course, the plaintiff is not a doctor. She cannot testify as to what's going on, medically, inside of her body. So I found this case to be hugely frustrating, because the court was willing to recognize that this major bodily functions provision existed, but then got it wrong.

OK. Several courts are incorrectly applying the “regarded as” provision. I found 23 of those cases. In this one woman had M.S. and seizures. The employer, the court said the employer knew about her M.S. but not aware of the specific problem it was causing. All you have to show is that you have an impairment under the new “regarded as” provision and that there was an adverse employment action.

And then in another one, these are just a couple of examples, the supervisor said you've got some anxiety issues that you need to deal with. It's not going to be here. And the court, said yes the employer was aware of anxiety but not aware of how significant it was, which again is not the point under the new “regarded as” provision.

And then lots of cases where there was an incorrect application of that transitory and minor exception to the “regard as” prong. So the regulations make clear that it is--*and* transitory *and* minor, as an exception to the “regard as.” And what most courts are doing is only looking at the transitory, and so I've seen a lot, I shouldn’t say most courts, but these in these cases what courts are doing is only looking at the transitory.

So someone with a nodule on their lung that they had to have removed and they were out of work for six months, and the court said, well they came back in six months. So, therefore, the transitory and minor exception applies. No. Does, doesn't fall into the “regard as” prong.

And another one where the employee had seizures, which I think is we would all agree is not minor. Right? But because it was transitory, the court said not “regard as.”

OK. Two minutes! That's good because I'm on my last slide.

All right. So implications. So obviously more educated, more education is needed for judges, their clerks, attorneys. I teach a standalone disability law course. When I looked at this in 2013, I looked at all law schools and their curriculum and the labor and employment area more generally. There were about 75 schools that were teaching a standalone disability law course. I also teach employment discrimination. We cover

disability law, but we do it in two weeks. And I don't know whether that's sufficient for my students to really understand how this definition works. I'd like to think it is, but I don't know.

So more education is needed. I'd like to see more CLEs. I love the new ADA Project that Marcy and Kevin launched last night at the reception. But I would love to figure out how I can get into judges conferences, and start presenting this work there because I think that's what needs to happen.

Are we heading towards another backlash? I don't want to be overly negative. I am a little bit concerned. I saw some hostility language in some of these cases especially with regard to the expanded “regarded as” prong.

So. I'm not going to, I'm not going to leave on a negative note. But some areas of further exploration that I'm looking at: lots of cases said no medical evidence, and the regulations make clear you shouldn't have to have medical evidence, so that was frustrating. A lot of cases use plaintiff's testimony to conclude that the plaintiff was not disabled. And this is interesting because, especially compared to some of our speakers who were saying people seem to be more willing to identify as disabled.

I think we are talking about a generational shift to some extent, because a lot of these employees, especially because they have to prove that they're qualified, they downplayed their disability. And so they see things in deposition and this person who had a seizure disorder couldn't drive and was asked, well you don't really have a *real* disability right? You just can't drive. And he said “Yes that's right,” you know. And then the court used that against him to say that he wasn't disabled. And I find this really troubling and problematic.

And so that's going to be the subject of future work for mine. Lots of focus on plaintiffs ability to do the job, which again is not, not especially if they're not even claiming working as their major life activity. The court said well, they can perform their job; therefore, they're not disabled. And that gets it completely backwards, because they have to show that they're qualified to perform their essential functions with or without a reasonable accommodation.

And then I would like to someday look at, you know, are some courts getting it more wrong than other courts and are some impairments faring worse than others? I think--newsflash--that's probably mental illness. And so that will be the subject of future work.

So I'd like to think that when I look at this again in five years, which I probably will do because now I'm on this trend of doing this every five years, that we will see some positive progress from where we are right now. So thank you very much. And I forgot to thank all the organizers, this has been agreat panel and I’m looking forward to the rest. [*Applause*]

Kevin Barry (Moderator)[4] (35:32)

OK. So with that I think we get a little bit of a late start, but I want to be respectful of the next panel. So I guess I'll look to the UDC students. Questions are OK. All right. So with that, do folks have any questions for our panelists? Marcy would you suggest I walk around with a microphone? OK. OK. So got a hand right here.

Nancy Langworthy (36:09)

Hi. I am Nancy Langworthy with the U.S. Department of Justice, Civil Rights Division. And I again I direct this to Professor Porter or anybody else who would like to jump in. In terms of the provision of medical records and medical support for disability, could you talk about that briefly? Especially like post-suit. All right. I should say pre-suit. If somebody is requesting a reasonable accommodation, what sort of medical documentation is expected? And how that differs after somebody has had to file suit, for example, you know, if a reasonable accommodation is denied and they go to court just the medical records support.

Nicole Porter (36:52)

This is not my area of expertise, I mean I know that employers, obviously you are requesting an accommodation, have the right to have documentation that supports why you need that accommodation. And as far as post-filing of a lawsuit, obviously any discovery is really broad. Anything that's relevant is gonna be discoverable, but I don't know if any of our other panelists have sort of more insight on that someone who litigates these cases.

Sunu Chandy (37:19)

Well what I'm curious, sort of, what angle are you getting at is that sort of the amount of records. This comes up in civil rights litigation where it is used to harass plaintiffs in other contexts when they bring emotional distress claims. So putting that aside, I think if it's related to the condition, I think that some discovery is appropriate. And it's just really what we litigate is the scope of that. And if it's more than required, it can be seen as harassing. But is there a particular angle you're curious about?

Nancy Langworthy (37:52)

I was just curious because we saw a case in which the defendant was able to subpoena medical records directly from providers. And in my view that was essentially a waiver of relevance objections. So, you know, I've seen a little bit. The court's leaning toward a broad, you know, saying that that medical records should be produced without going to determining whether or not they're all relevant.

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[4] Professor of Law and Co-Director of the Civil Justice Clinic, Quinnipiac University School of Law.

I had a case myself in which medical records were subpoenaed directly by the defendant without the consent and without knowledge of the plaintiff. And providers unfortunately produced the records despite HIPAA, despite the Privacy Act.

And there was a lot of irrelevant information in those records and I had a hard time persuading the judge of that. Finally, we were able to look at the records and try to reach an understanding with the defendant about what was wrong with what wasn't. But I'm finding that the courts are broadly, you know, allowing records to be reviewed without regard to relevance.

Sunu Chandy (39:13)

Yeah. I mean this is a huge area of litigation and civil rights generally. But I would also say that, you know, the federal rules provide that the other side should be given a chance, should give, get, I don't think there's an exact number of days the last time I researched it. But there should be enough notice for other parties to object to the subpoena before that third party response to it.

And if there is and that would be my angle of trying to get a remedy, because that. And putting aside also health privacy laws, there seems like there's a lot of things that went wrong in that situation that could have been handled ahead of time, before they were released. But also some providers just do that. And then you're sort of fighting it on the back end and I have had that happen to me as well.

Peter Blanck (39:58)

Just settled the case this week with co-counsel--amazing guy, Matt Dates in Florida--involving a veteran with PTSD and former alcoholism and mental health disputes. He was being hassled by the Florida Bar Association, not being admitted on character and fitness because years-old alcohol, PTSD treatment and we settled that case this week. You can read about it in the newspaper, but there was a lot of fight and discussion over the release, particularly through the V.A., of old medical records and their relevance. Ultimately, they were not released and the court was very cognizant of that issue.

I would add one thing that's not related to your question, which I forgot to say by far a factor of three, the most commonly mentioned disability in our survey was by far mental disability. By far. So this is what the lawyers in this room, the anxiety, depression, mental health disorders, substance abuse disorders, not related to your question, but the level of that representation was, was really food, food for great thought. You can read about that case.

Nancy Langworthy (41:15)

A quick follow up question, once the medical records are produced, is there is a limitation on who can use them?

Peter Blanck (41:29)

Yeah we had it. We also had a motion with regard in camera review and limitations for privacy. We didn't get that far. Yeah.

Nicole Porter (41:31)

Yeah. You can have, you can negotiate confidentiality orders for, for documents decimated in that way absolutely.

Peter Blanck (41:38)

But these guys can speak about it. The problem in the ADA is on the one--some courts say the plaintiff is obligated to prove as part of his or her prima facie case that the accommodation is reasonable. So you often need medical testimony for that.

Others, Sam, might read it differently. I tend to think that the burden in that regard should be, that's the whole point of the undue burden is for them to show it's not reasonable. But that's a problem in courts that I've seen in post-ADA cases, the shifting of the burden. I don't know, Sam, maybe you can speak to that. It's a stemic thing.

Samuel Bagenstos[5] (42:18)

I think that. I don't know that I have anything particularly to add about that.

Kevin Barry (42:24)

Thanks. I think I saw another, sorry right up here. I'm sorry. Woman in white. Person in white.

Audience Member # 1 (42:39)

Hi. I have a very quick question. So at my organization, I'm part of an Inclusive Workspace Group and I'm also a part of creating some new policies, for example, a telework policy. And I was just wondering, are there any resources out there to help me and my groups ensure that we're encompassing as many necessary accommodations as possible?

[5] Frank G. Millard Professor of Law, University of Michigan Law School.

Peter Blanck (43:06)

I can give you a list of all the accommodations--and telework and computing was among The highest types of accomodatios requested--that we, we saw.

Audience Member # 1 (43:19)

So should I ask you one on one or?

Peter Blanck (43:22)

You can ask me one on one if you like. I just give you my two cents, but that's a very prevalent accommodation that's asked, particularly regard to flexible work schedules and telecommuting.

Audience Member # 1 (43:34)

Okay. I'm asking mostly because it feels like we're starting from scratch. We definitely care about being inclusive and creating these accommodations but it's not always clear where to start.

Peter Blanck (43:45)

Yeah, these guys can tell you there are also cases which say you have to have your butt in the seat in the office, and that's an essential function of a particular job. But that's very case, that can be very case specific.

Kevin Barry (43:57)

Peter, is something that this person can go to your website or should we looked at the DOJ? Some technical assistance.

Peter Blanck (44:08)

So I just have one slice of information based on this survey. But I know DOJ and many other, EEOC has a lot of information on, that from a legal point of view it tends to be very case specific. If you're litigating that. From a policy point of view, there are other justifications for that that many companies think that works well for them.

Kevin Barry (44:23)

So in direct answer to the question maybe come check us out right after the panel. Yeah. Great, great question. All right excellent. Somebody else. We've got Andy over here and it'll come back.

Andy Imparato (44:42)

Hi. Andy Imparato with AUCD, the Association of University Centers on Disabilities. I just had a question for Professor Porter. When we were working on the ADA Amendments, I felt like part of the reason there were so many cases that were thrown out, the employment cases on the definition, was because the judges were lazy and it was easier to dispose of a case if you didn't have to reach the merits. So do you think that could also, I know you had some other good motivations, but do you think laziness maybe part of the reason--they just want to move on and not have to deal with the messy facts?

Nicole Porter (45:17)

Yeah, that's interesting. So pre-amendment, the courts were saying no coverage and then not deciding the merits at all. So I agree with you pre-amendments. What's interesting in this post-amendment period is that, even in the cases where they're saying not disabled, they are going on because they know that they may be, they might get overturned on that issue.

So they're going on to decide the merits, which is really frustrating because if they're going to dismiss on the merits alone, why put that bad precedent about the coverage issue out there into the world for other people to rely on? So I actually think that there in some ways, they're doing more work by deciding both issues instead of just saying all right this coverage broad interpretation, et cetera, et cetera. Let's just move on to the merits.

Sunu Chandy (46:04)

And if you say this, I say if you see these cases going up to the circuit, I mean that's what kills me. The circuit court then affirming that. So I think it's right for amicus briefs are sort of pulling together advocates to make a point about this. If you see an opportunity, please let us know.

Nicole Porter (46:20)

Yeah, I mean, I will say most of the cases obviously were district court. But there was a fair amount that were you know.

Kevin Barry (46:25)

Nicole, if I can just, a quick follow up. In how many, I mean some bad cases, bad law, how many were motion to dismiss versus summary judgment. Do you have a sense? You don't have to answer that if...

Nicole Porter (46:36)

If it was a motion to dismiss that they were allowing the plaintiff to amend, I generally didn't include that. Some of them seeped in because it was such a frustrating analysis that I couldn't help it by including them. But I would. I think probably more, but just maybe slightly over half were summary judgment.

Kevin Barry (46:58)

OK. That's it. OK. I'm getting the-so this person should come up afterwards after our time, but our time is up. Thank you everybody. [*Applause*] Thank you to the panelists.