

Understanding the ADA: Ways Forward from Disability Backlash

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Disability Backlash

- Politics of resentment
 - People are getting ahead when others are falling behind
 - People are claiming independence rather than dependence
- For disability
 - False claims to be disabled
 - Responsibility for condition such as addiction
 - Special privileges
 - Costs imposed on others



Ways forward

- See the ADA as a civil rights statute
- Understand disability rights as non-categorical
- Distinguish between modifications and accommodations



The ADA as a Civil Rights Statute

- Civil rights: rights to receive equal treatment in the sense of being free from discrimination in important aspects of life
- ADA non-discrimination rights:
 - Meaningful access to employment, public services, public transportation, public accommodation
- IDEA non-discrimination: meaningful access to education
- Meaningful access to important aspects of life enjoyed by others for those who are qualified/eligible, not privileges or welfare



Example: *Andrew F* (US 2017)

- Student with autism sought reimbursement for private school tuition after alleged failure to provide adequate IEP
- School district approach: all that is necessary is to provide an IEP that allows a student to make progress that is more than *de minimus*
- Court: a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. This means: “A child's IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”



Disability Rights as Non-categorical

- Categorical rights: need to meet a special qualification
 - Places focus on whether someone can meet this qualification
 - Hence, the increasingly straitened understanding of “disability” and the ADAAA as a response
- ADA as non-categorical: aimed to address a kind of discrimination, discrimination on the basis of disability, rather than providing benefits to members of a group that is narrowly-defined



Example: *Bush v. Donahoe* (W.D. Pa. 2013)

- Postal Service employee with an ankle injury had to wear an open-toed walking boot for approximately 5 months; not permitted on the work floor for safety reasons.
- Court: “The ADAAA and the regulations promulgated by the EEOC make clear that the primary focus in cases brought pursuant to the ADA (and the Rehabilitation Act) should be whether the employer has complied with its obligations, and not whether the individual meets the definition of disability.”
- But court ignored this point, granting summary judgment for defendant:
 - (1) P not actually disabled because the injury was temporary, non-chronic impairment that did not substantially limit a MLA. Mistake: reading the RA language into the definition of actual disability
 - (2) P not regarded as disabled because her impairment could not be expected to last for longer than six months. Mistake: what if D mistakenly thought that her impairment was more serious than it was? On the court’s reading, no one with an actual short-term injury could qualify as RA



Accommodation or Modification?

- Accommodations are adjustments to individual differences: auxiliary aids and services, different ways of performing jobs: e.g. sign interpretation
 - When accommodations are confused with modifications, the result may be the misperception of inappropriate requests for changes in standards
- Modifications are changes in the built world or in policies or practices that can be used by anyone
 - When modifications are confused with accommodations, the result may be the perception of special privileging



Example: Accommodation misperceived as modification

- *Southeastern Community College v. Davis* (US 1979)
- Davis hearing impaired, sought admission to nursing program. Because the case was litigated on whether her qualifications should be considered apart from or in light of her disability, she never presented evidence on her capabilities with accommodations
- Court confused her accommodation request with a modification
 - Credited the College's assertion that it would not provide accommodations because she would be unable to participate even with accommodations
 - Instead, constructed Davis as needing a modification that would be a fundamental alteration of the program, eliminating the clinical portion



Example: Modification Misperceived as Accommodation

- *Alexander v. Choate* (US 1985)
- Tennessee Medicaid cut back the number of annual hospital days to 14, differentially affecting people with disabilities
- Court: test for non-discrimination is meaningful access to the benefit
 - Here, meaningful access because everyone had the same benefit, 14 days; this has been interpreted as the access/content distinction
 - But Court saw the plaintiffs not as asking for a change in the rules that would give everyone meaningful access to hospital care—a modification—but as a request for an individualized benefit that would give them more than others
 - In the words of the Court: “Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, *i.e.*, those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization.”



To Summarize Ways Forward

- See disability rights as civil rights
- Focus on discrimination that must be remedied, not on who can qualify
- Carefully consider whether in particular circumstances non-discrimination requires accommodation of an individual's differences or changes in structures or policies



In memoriam Anita Silvers—and references

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