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Current Issues Regarding the Americans with Disabilities Act

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SPECIAL PROJECT

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Introduction

President George Bush, noting that "statistics consistently demonstrate that disabled people are the poorest, least educated, and largest minority in America," signed the Americans with Disabilities Act ("ADA") into law in 1990.[1] The ADA prohibits private employers[2] from discriminating against a "qualified individual with a disability"[3] in employment decisions.[4] The Act defines a disability in one of three ways: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) being regarded by others as having such an impairment.[5] The ADA also prohibits employers from inquiring into an applicant's disability during the pre-employment stage, and places restrictions on medical examinations before extending an employment offer.[6] Once the applicant becomes an employee, the employer still cannot require

1. Allen Dudley, *Rights to Reasonable Accommodation under the Americans with Disabilities Act for "Regarded As" Disabled Individuals*, 7 GEO. MASON L. REV. 389, 389 (1999) (quoting President Bush).

2. Covered entities of the ADA actually include private employers with 15 or more employees, employment agencies, labor organizations and joint labor-management committees. *See* 42 U.S.C. § 12111(2), (5) (1994).

3. A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions" of the job. *Id.* § 12111(8).

4. *See id.* § 12112(a). Employment decisions include not only hiring and firing but also such areas as promotions, compensation, job assignments and classifications, fringe benefits, training, and "any other term, condition or privilege of employment." 29 C.F.R. § 1630.4(i) (1998).

5. *See* 42 U.S.C. § 12102(2) (1994).

6. *See id.* § 12112(d)(2), (3).

medical exams unless it can show that the concerns are "job-related and consistent with business necessity."[7]

The ADA followed the legislation of the Civil Rights Act of 1964 and more specifically, the Federal Rehabilitation Act of 1973.[8] The Rehabilitation Act prohibits discrimination against individuals with handicaps by federal contractors, federal agencies, recipients of federal grants, and participants in federal programs.[9] Title I of the ADA parallels most of the substantive provisions from the Rehabilitation Act and applies them to private employers.[10] Thus, when the ADA was signed in 1990, it became the most comprehensive piece of disability civil rights legislation ever enacted in America.[11] Congress noted that the Act would cover more than forty-three million people[12] and would "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[13]

People with disabilities today are still disproportionately poor. Fifty-nine percent of disabled Americans live in households with incomes less than $25,000, and the poverty rate for adults with disabilities triples that of the rest of the population.[14] One commentator argues that inability to gain employment underlies these poverty problems.[15]

Because Congress intended the ADA to cover a wide range of societal problems with disabled Americans, the legislature used broad and vague terms throughout the Act.[16] Many interpretive issues now arise—for example, whether former employees are covered, and whether a disability should be defined with regard to mitigating measures and technical advancements. One commentator has noted

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7. *Id.* § 12112(d)(4); *see also* MARK PARENTI, THREE YEARS OF THE AMERICANS WITH DISABILITIES ACT: LESSONS FOR EMPLOYERS 2-4 (1995) (providing a general overview of the ADA and its regulations).

8. *See* GARY PHELAN & JANET BOND ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE §§ 1.02, 1.03 (1997).

9. *See* 29 U.S.C. §§ 701-794 (1994).

10. *See* Maureen R. Walsh, *What Constitutes a "Disability" under the Americans with Disabilities Act: Should Courts Consider Mitigating Measures?*, 55 WASH. & LEE L. REV. 917, 921 (1998).

11. *See* PHELAN & ARTERTON, *supra* note 8, § 1.01.

12. *See* 42 U.S.C. § 12101(a)(1) (1994). This number reached 54 million Americans (one in five) in 1995, with 26 million (one in ten) reporting a severe level of disability. *See* Barbara A. Petrus & Denice von Gnechten, *A Primer on the Americans with Disabilities Act*, 2 HAW. BAR J. 6 n.1 (1998).

13. 42 U.S.C. § 12102(b)(1) (1994).

14. *See* Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123 (1998).

15. *See id.*

16. *See* Walsh, *supra* note 10, at 918.

that the term "disability" must be defined under social, not legislative, standards.[17] For example, in previous times, reading was not considered an "essential function" and therefore persons with dyslexia were not disabled. In the future, physical disabilities will become less important because machines will do most of the physical labor. Today, however, both physical and mental disabilities make a qualified job candidate less desirable.[18] Thus, because of ever-changing societal standards and the broad language used in the ADA, the following three Notes attempt to identify and provide solutions to three uncertain areas of ADA law.

The first Note discusses the applicability of the ADA to former employees.[19] Before May 1998, most federal courts interpreted the "essential functions" requirement of the ADA to bar lawsuits brought by completely disabled former employees, who by their own admission are unable to perform essential employment functions. The Second and Third Circuits, however, recently have held that the "essential functions" requirement is inconsistent with Congress' stated mandate to eliminate discrimination against individuals with disabilities. Thus, these two circuits applied ADA protection to individuals unable to perform essential job functions. This Note argues that the Second and Third Circuits found ambiguity in the statute where none existed and misinterpreted the legislative history of the Act. The Note concludes that the essential functions requirement should not be ignored, and completely disabled former employees should not be given protection under the ADA.[20]

The ADA is constitutionally analyzed in the second Note of this Special Project issue. This Note argues that the Seventh Amendment requires a right to a jury trial in claims brought under the ADA even when back pay is the only remedy sought.[21] The Seventh Amendment provides the right to a jury trial in all actions deemed legal rather than equitable. Parties currently have a statutory right to a jury trial when a plaintiff seeks compensatory or punitive damages. When the plaintiff seeks only injunctive relief and back pay, however, the ADA does not expressly provide a right to a jury trial. District courts have

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17. *See* Weber, *supra* note 14, at 123.

18. *See id.*

19. *See* Austin L. McMullen, Note, *Disabled Former Employees Under the ADA: Unprincipled Decisions and Unpalatable Results*, 52 VAND. L. REV. 769 (1999).

20. *See id.* at 792-93.

21. *See* Robert L. Strayer, II, Note, *Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial When Only Back Pay Is Sought Under the Americans with Disabilities Act*, 52 VAND. L. REV. 795 (1999).

deferred to Congress's apparent intention not to provide a jury trial in these cases, and to dicta from Supreme Court cases that characterize back pay as an equitable remedy under the ADA. This Note argues that the Supreme Court has never held that back pay is an equitable remedy and has, to the contrary, held that back pay is a legal remedy under other statutory schemes. The Note continues by showing that back pay would be classified as a legal remedy under a two-part test adopted by the Court to determine whether a remedy is legal or equitable. The Note concludes by proposing either that Congress amend the ADA to provide a right to a jury trial for ADA claims asking only for back pay, or that lower courts follow Supreme Court reasoning and require the right to a jury trial.[22]

The final Note shows the difficulty of defining "disability" in a society with rapidly increasing technology.[23] Specifically, this Note examines the issue of preguancy-related problems and whether these should be defined as disabilities with regard to mitigating measures that lessen the effect of the disability. Courts currently tend to classify pregnancy-related problems as disabilities if the underlying effect is more than just a preguancy-related side effect. Courts divide pregnancies into two categories: normal and abnormal. If the pregnancy is defined as normal, then any problems resulting will just be considered side effects. If the preguancy is abnormal, however, the woman may seek protection under the ADA. Courts utilizing this approach uniformly assert that the distinction between normal and abnormal preguancies depends on the advancement of medical knowledge and technology. This Note argues that these courts should not assess disabilities with regard to mitigating measures. When one examines the alarming rate of technological advancement in our society, it becomes increasingly clear that the definition of a disability should not hinge upon the continuous change of technology. Instead, the ADA's definition of disability should rely upon more stable characteristics such as how the disability affects the life of the person in question. Therefore, the Note argues, mitigating measures should not be taken into account if technology is not to be the core of the analysis.[24]

As these Notes demonstrate, after seven years the ADA still has many unresolved issues. Unlike other civil rights laws, the ADA

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22. *See id.* at 828-29.

23. *See* Jessica Lynne Wilson, Note, *Technology As a Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA*, 52 VAND. L. REV. 831 (1999).

24. *See id.* at 867-68.

must define a "person with a disability" more specifically than the Civil Rights Act has to define race, religion, or sex. And although the Civil Rights Act imposes affirmative action programs, the ADA often requires a more costly burden through its requirement of "reasonable accommodations." Finally, who is protected under the ADA relates back to how our society addresses the stereotypes of people with disabilities. Therefore, the ADA concerns all of us, from the disabled to employers to society in general. Hopefully these three Notes will lead te an increased debate over these uncertain issues.

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