Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	Office of Legal Counsel to Chairman Tony E. Gallegos (10 pages)	4/1993	P5
002. letter	Willie J. Epps, Jr. to Claire Gonzales (3 pages)	9/26/1994	Personal Misfile
003. report	Recommendations (partial) (1 page)	nd	P5

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:
[Equal Employment Opportunity Commission Confirmation Briefing Materials] [10]

ds58

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

August 18, 1994

By Hand

The Honorable Hank Brown
United States Senate
Washington, D.C. 20510

Dear Senator Brown:

This is in response to your letter dated July 15, 1994, inquiring about the actions the Commission intends to take with regard to the proposed consolidated Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability (the Proposed Guidelines). Specifically, you express concern about the Commission's failure either to act or to communicate its intended actions in response to the Brown/Heflin Amendment to the Airport and Airways Improvement Act, S. 1491 (Brown/Heflin Amendment), and to the Taylor/Lancaster/Wolf Amendment to the Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act for 1995, H.R. 4603 (Taylor/Lancaster/Wolf Amendment).

First, I must express my sincere regret for the delay in responding to your letter. I certainly would have preferred to respond to your inquiry in a much more timely manner. Unfortunately, the correspondence was not directed to our Office of Communications and Legislative Affairs (OCLA), as is the case with most congressional correspondence, and neither my office nor OCLA was advised to expect your letter. Consequently, when the letter was delivered, the EEOC staff who received it was not alerted to the need for special processing, and it was processed through our Executive Secretariat with all the other public correspondence received on the Proposed Guidelines. The Commission has received literally tens of thousands of letters on this issue from concerned citizens, and I trust that you will understand how such an oversight could inadvertently occur.

With respect to your concern that the Commission has not yet indicated what actions it will take in light of the Brown/Heflin Amendment and the Taylor/Lancaster/Wolf Amendment, please be advised that the Commission has not formally determined as a body how it will proceed with respect to the Proposed Guidelines. However, you may be assured that any final action taken by the EEOC will strictly comply with all restrictions regarding this issue contained in legislation enacted by Congress.

Regarding the Commission's intended action on the Proposed Guidelines, a short explanation of the Commission's policy-making process may help clarify the confusion that continues to surround this matter. As you know, the Commission is a five-member, bipartisan, deliberative body. As a result, the Commission's policy-making process is a lengthy one. To formally adopt enforcement guidance such as the Proposed Guidelines, the

Commission must approve the measure in final form by a majority vote, with a required quorum of three. Only after such a formal vote would any proposed guidance become effective.

When the Commission issued its Notice of Proposed Rulemaking promulgating the Proposed Guidelines, the Commission was voluntarily soliciting input from those members of the public who would be in any way interested in or affected by the Proposed Guidelines should they eventually be adopted by the Commission. (As I am sure you are aware, the Administrative Procedure Act does not require the Commission to provide for public comment when promulgating non-binding guidance like the Proposed Guidelines.)

Much to their credit, a large segment of the public responded to the Notice of Proposed Rulemaking in an overwhelming fashion. Because the greatest response came after the original comment period ended on November 30, 1993, the Commission voted on May 6, 1994, to extend the official comment period an additional thirty days (from May 13 through June 13, 1994) to accommodate this intense public interest. Furthermore, the Commission voted on May 27, 1994, to accept all public comments received during the interim period (December 1, 1993, through May 12, 1994) as official comments.

Now that the comment period has ended, Commission staff is currently trying to finish processing the tens of thousands of letters that were received on the subject, and is studying the many complex issues that were raised by these comments. I am sure you understand the Commission's position that, prior to determining any action on an issue as sensitive as this, we have a responsibility to review and consider all of the comments that have been received.

Once the staff has reviewed all of the comments, I have directed our Office of Legal Counsel to draft an options paper that presents to the Commission the many alternatives available with respect to the Proposed Guidelines. Among the specific options that I have asked the Office of Legal Counsel to consider and present advice on are the following:

- whether the Commission should abandon the project entirely by not proceeding with any consideration of final guidelines on harassment based on race, color, religion, gender, national origin, age or disability;

- whether the Commission should consider adopting separate guidelines on religion; and

- whether the Commission should reissue for public comment revised Proposed Guidelines that, among other things, make it explicitly clear that wearing of religious symbols or expressions of religious belief alone will not be considered harassing conduct.

To assure compliance with the recent legislation addressing this subject, I have also directed the Office of Legal Counsel to inform the Commission of the congressional directives requiring public hearings and an additional comment period and to include such measures in any options presented to the Commission that would entail the issuance of any form of harassment guidelines. It is my opinion that this is the extent to which it is appropriate for me, in my capacity as Acting Chair, to direct the Commission's policy-making process.

This brings me to the remaining point included in the legislation and cited in your letter – the "immediate" withdrawal of the category of religion from the Proposed Guidelines. Again, I note that the issuance of a Notice of Proposed Rulemaking promulgating a proposed guidance of this kind has no legal or binding effect on any parties. A Notice of Proposed Rulemaking is merely a solicitation of public comment. Thus, it is not necessary for an agency to formally withdraw proposed rules published in a Notice of Proposed Rulemaking if the agency decides not to issue a final rule on the subject. Only a rule formally adopted by an agency in final form is effective; proposed rules or guidances have absolutely no effect whatsoever.

Additionally, to withdraw the category of religion from the Proposed Guidelines at this time would require formal consideration of this proposal and a vote by the Commission. Because the Proposed Guidelines, as explained above, have no legal or binding effect (*i.e.*, there are in essence no guidelines in effect at this time), it follows that such action by the Commission is obviously unnecessary.

As part of its deliberative process, the Commission is presently reviewing the thousands of public comments received on this issue. It would, therefore, be premature for the Commission to take such action prior to completion of this review. Once the review is finished and the Office of Legal Counsel submits the options paper to the Commission, the issue will be ripe for all of the Commissioners to determine the appropriate manner in which to proceed. As I am sure you are aware, no one Commissioner, not even the Chair, can act unilaterally on behalf of the Commission on this or any other policy issue. As discussed above, the Commission acts as a body.

As you know, the President's nominees to fill the three open positions on the Commission are currently awaiting the final Senate vote on their confirmations. At the July 21, 1994, confirmation hearing before the Labor and Human Resources Committee, the nominees -- Gilbert Casellas, Paul Igasaki, and Paul Steven Miller -- all expressed their understanding of this complex matter and their shared commitment to thoroughly reviewing the many concerns that have been raised about the inclusion of religion in the Proposed Guidelines in the event they are confirmed. Because of the status of the pending nominations, I firmly believe that no action should be taken on this issue prior to the final resolution of the nominations, whatever that might be. I can, therefore, assure you that Commission action on the Proposed Guidelines is not imminent for this reason, as well as those stated above.

I hope this response adequately addresses your concerns on this matter. Please feel free to contact me or Claire Gonzales, Director of the Office of Communications and Legislative Affairs, if you have any further questions or need any additional information.

Sincerely,

Tony E. Gallegos
Chairman

Congress of the United States
Washington, D.C. 20515

July 15, 1994

Mr. Tony E. Gallegos
Acting Chairman
Equal Employment Opportunity Commission
1801 L Street NW
Washington, D.C. 20507

Dear Acting Chairman Gallegos:

We are writing you again concerning the Equal Employment Opportunity Commission's (EEOC) proposed guidelines on harassment based on race, color, religion, gender, national origin, age or disability (29 CFR Part 1609).

As you are aware, the Senate recently adopted, 94-0, the Brown/Heflin Amendment to the Airport and Airways Improvement Act, S. 1491, which calls for the following actions by the EEOC related to the religion category of the proposed guidelines:

(1) The category of religion should be withdrawn from the proposed guidelines at this time (i.e., immediately);

(2) Any new guidelines for the determination of religious harassment should be drafted so as to make it explicitly clear that symbols or expressions of religious belief consistent with the first amendment and the Religious Freedom Restoration Act of 1993 are not to be restricted and do not constitute proof of harassment;

(3) The Commission should hold public hearings on such new proposed guidelines; and

(4) The Commission should receive additional public comment before issuing similar new regulations.

Additionally, as you know, the House of Representatives also took action concerning the proposed religious harassment guidelines by adopting, 366-37, the Taylor/Lancaster/Wolf amendment to the Commerce, and State, the Judiciary, and Related Agencies Appropriations Act for 1995, H.R. 4063, prohibiting the EEOC from using funds to implement the proposed guidelines as now drafted.

These actions clearly indicate the overwhelming sense of Congress that actions consistent with these provisions should immediately be taken by the EEOC. However, as of this date we have not

received any response from the EEOC indicating actions the Commission intends to take in light of these expressions.

Please inform us as to actions the EEOC is now contemplating consistent with these congressional provisions.

Sincerely,

Hank Brown
United States Senator

Howell Heflin
United States Senator

Charles Taylor
Member of Congress

Martin Lancaster
Member of Congress

Frank Wolf
Member of Congress

cc: Mr. Gilbert Casellas
Designated Chairman of EEOC

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U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912

FAX TRANSMITTAL FORM

DATE: 2/7/95 TIME: _____

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Claire Gonzales

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Tony E. Gallegos
Chair Person Equal
Employment opportiency
commision Washington,
DC 20507

Sellwood Middle Scho
8300 S.E. 15th
Portland, OR, 97202

January 24 1995

Dear Tony E. Gallegos,

My name is Tony Sharp. I'm writing to you for a class project that we are working on. I have five questions that our class has voted on.

1. Does education impact discrimination, if so how?

2. How can we recognize and help prevent discrimination in the work place, schools, community media etc?

3. How do peoples' fears and insecurities influence discrimination?

4.
How will our society be affected by acts of discrimination?

I have chosen the fifth question to ask you.

5.
Why hasn't there been a woman or minority president? If there is one, what might be the reaction if we did have one of these or both?

I hope you will give some insight to this discrimination issue. I feel these are issues that need to be adressed and looked at before our society has to deal with this more than we already are. As an interested citizen of the next generation, I care about what our society will be like in the future.

Sincerely,

Tony Starr

NOTE TO: Steve Warnath

FROM: Marilyn A. Donald
Marilyn A. Donald

DATE: November 15, 1993

SUBJECT: Amendments to Draft Equal Employment Opportunity Executive Order and Presidential Memorandum

I have reviewed the drafts and have several comments, including:

(1) These are "Equal Employment Opportunity" documents, and need EEO references, i.e., Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973, as amended. All Merit principals are inherent in these acts.

(2) The EEO and CR community contributed significantly to the development of the contents for these documents. We should not undermine them and their contributions by leaving out essential portions (as evidenced in the first draft). Please include me in any revisions to these documents since I am the NPR staff person who aggressively worked and continue to work with the EEO and CR community on these items. Having carried this ball from the start, it would be totally inappropriate for me to drop the ball now as we approach the finish line. We must ensure that the documents reflect the invaluable input of the professionals and experts (including Dr. Harriett Jenkins, Senate Office of Fair Employment Practices; Constance Newman, former OPM Director; Dick Whitford of OPM's Affirmative Recruitment and Employment Office; Dr. Yvonne Freeman and Oceola Hall of NASA's EO Office; Ronnie Blumenthal and Jim Troy of EEOC and many others) who helped create the documents.

(3) Although I met with EEOC representatives throughout the development of these documents, we must meet with EEOC now (at least current Chair Tony Gallegos) to ensure that these documents clearly and accurately articulate the actions that are essential to achieving equal opportunity and diversity in all categories and at all levels.

Given the forthcoming management flexibilities, accountability is crucial. I continue to receive many calls from EEO and CR professionals, as well as federal employees, who are concerned about the critical need for substantive EEO directives from this Administration. I understand that we have "deadlines;" but, this Administration can not afford not to handle the revisions of these EEO items properly. We must get it right the first time.

Please contact me at any time as follows: Home P6/(b)(6)
Work (202) 358-1204
FAX (202) 358-3039

Thank you.

cc: Mary Ellen Dix

Handouts
from 6/24
Briefings

Steve

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Washington DC

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RECOMMENDATIONS

1) WE URGE THE EEOC COMMISSIONERS TO MAKE ENFORCING THE ADA FOR PEOPLE WITH MENTAL DISABILITIES A HIGH PRIORITY.

a) Charges involving mental disabilities represent approximately 10% of the ADA charges filed with the EEOC between July 26, 1992 and October of 1993, 1,710 of the 17,355 charges. Mental disabilities are the second highest percentage, exceeded only by back impairments which made up 18.9% of the ADA charges.

b) The Commissioners should make equal employment opportunities for people with psychiatric disabilities a priority and draw attention in speeches and public forums to discrimination against this group of employees.

c) The regulations and technical assistance manuals should address more specifically issues involving mental disability. For example, the EEOC's current list of major life activities in the Title I regulations list activities which are primarily impaired by physical disabilities. This list can be expanded to include others affecting people with mental impairments.

d) The agency should litigate more cases involving discrimination on the basis of psychiatric disability. Of the current docket of 19 cases, only 1 deals specifically with a psychiatric disability.

2) THE EEOC SHOULD TAKE STEPS TO ENSURE THAT THE APPLICATION AND INVESTIGATIVE PROCESSES ARE ACCESSIBLE TO PEOPLE WITH MENTAL DISABILITIES.

a) The Office of Technology Assessment has surveyed EEOC field offices and concluded that the ADA training given to the field personnel did not include sufficient information on mental disability. Field office employees indicated a desire for additional information on the nature of psychiatric disabilities, their impact on functioning and useful accommodations for these disabilities.

b) People with mental disabilities are particularly affected by general problems such as staff shortages because they make not be able to give information quickly and in the manner expected by the receptionist or investigator. Complainants are commonly told that they cannot make a complaint by mail, which disproportionately affects people with mental disabilities who may not drive because of medication.

1101 Fifteenth Street NW, Suite 1212, Washington DC 20005-5002, (202) 467-5730, TDD: (202) 467-4232, Fax: (202) 223-0409

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3) THE EEOC SHOULD INCREASE ITS ENFORCEMENT EFFORTS THROUGH GRANTS FOR TRAINING, INFORMATION, AND TECHNICAL ASSISTANCE TO PEOPLE WITH MENTAL DISABILITIES, EMPLOYERS, AND THE LEGAL COMMUNITY.

4) ISSUES OF PARTICULAR IMPORTANCE TO PEOPLE WITH MENTAL DISABILITIES:

REDACTED
REDACTED
REDACTED

a) Insurance: The EEOC's Health Insurance Guidance misapplies the ADA and undermines its protections for people with mental disabilities. See Comments of the Bazelon Center regarding the EEOC's Guidance on the Application of the ADA to Employer Provided Health Insurance (1/28/94). This Guidance should not be enacted as regulations and should not apply to other forms of insurance such as long term disability and ~~health~~ life insurance. The agency should issue additional guidance prohibiting mental disability based distinctions unless supported by actuarial data.

b) There is need for further guidance on the relationship between collective bargaining agreements and reasonable accommodations mandated by the ADA.

c) Recent cases have questioned the EEOC's guidance on the issue of determining whether an individual is substantially impaired when that individual is taking medication which ameliorates the disability's symptoms. The Agency should reinforce its position that this determination should be made without regard to the medication and should look to the underlying impairment.

d) There is need for additions to the technical assistance manual on the application of the ADA to episodic disorders.

June 24, 1994

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AMERICANS WITH DISABILITIES

FACT SHEETS

A Series of Two-Page Fact Sheets On

The Americans with Disabilities Act

© Chai R. Feldblum
Visiting Professor of Law
Georgetown University Law Center

600 New Jersey Avenue NW Washington DC 20001-2022
202-662-9000 FAX 202-662-9444

ADA: DEFINITION OF DISABILITY

* The Americans with Disabilities Act (ADA) is patterned after Section 504 of the Rehabilitation Act of 1973. Section 504 is a law which prohibits discrimination against people with disabilities in a range of areas (such as employment, social services and education) on the part of entities that receive federal funds. It is a law which has been in effect for over a decade.

* The ADA's definition of disability is identical to the definition under Section 504, with the exception of deletion of coverage for current users of illegal drugs (see below). In addition, the ADA uses the term "disability" rather than "handicap," to reflect the term of choice in the disability community.

* Under Section 504's definition, and hence under the ADA's definition, a person with a disability is defined as:

1) a person with a physical or mental impairment that substantially limits that person in some major life activity; or

2) a person with a record of such a physical or mental impairment; or

3) a person who is regarded as having such an impairment.

* This three-part definition of disability has been in place since 1974 under Section 504. This definition has been amplified in both regulations and caselaw. First, to have a disability, one must have an actual physical or mental impairment -- not simply a physical condition, such as black hair or blue eyes. Second, the disability must be serious enough so as to affect some form of major life activity, such as walking, talking, breathing or working.

* The type of impairments covered under this definition include a wide range of conditions. For example, it covers people who use wheelchairs, people with vision and hearing impairments, people who have such conditions as heart disease, epilepsy, cerebral palsy, or HIV disease, and people with a range of mental impairments.

* The definition also includes someone with a record of an impairment. These include, for example, individuals with a history of mental illness, heart disease or cancer, who no longer have the disease but who are discriminated against because of their record of an impairment.

* The definition also includes individuals who are regarded as having an impairment. This includes individuals who may not have a physical impairment that actually limits a major life activity, but who are nonetheless regarded as being impaired and limited. For example, this would include a person who has a significant physical burn on his or her face which does not actually limit the person in any major life activity, but who is nonetheless discriminated against because of the disfigurement. It also includes individuals who have no impairment but are regarded as having one.

* This three-part definition of disability is a critical component of the coverage of both Section 504 and the ADA. Congress' intent in adopting the definition in 1974 was to establish a broad definition that would ensure adequate protection for individuals experiencing any form of discrimination based on disability, including discrimination based on myths and stereotypes.

* In both the Rehabilitation Act and in the ADA, Congress made an intentional decision not to try to list every possible medical disability that exists, but rather to establish a generic, functional definition that would encompass all types of conditions that Congress wished to protect from discrimination.

* There is one respect in which the ADA's definition of disability is different than that which currently exists under Section 504. Individuals who are addicted to drugs have a medical disability and had been previously covered under Section 504. The ADA, by contrast, excludes a person who is currently illegally using drugs from the definition of an individual with a disability. Thus, employers and others can discriminate against individuals who illegally use drugs, because of that use, without any liability under the ADA. In addition, the ADA explicitly allows employers to engage in drug testing for illegal use of drugs.

* The ADA also covers individuals who associate with people with disabilities, and are discriminated against on the basis of that association.

ADA: EMPLOYMENT PROVISIONS

* The Americans with Disabilities Act (ADA) is patterned after Section 504 of the Rehabilitation Act of 1973. Section 504 is a law which prohibits discrimination against people with disabilities in a range of areas (such as employment, social services and education) on the part of entities that receive federal funds.

* The ADA's employment provisions will ultimately cover all employers who have 15 or more employees. This is the same scope of coverage which exists under Title VII of the Civil Rights Act of 1964 for race and sex employment discrimination.

* The first basic employment provision of the ADA is that an employer may not refuse to hire a person with a disability, because of the person's disability, when that person is qualified to perform the job. This is exactly like the law which exists in race and sex discrimination. As in those areas, an employer can continue to have all types of job qualifications, such as requiring a certain educational level or requiring that the person be able to perform a certain function at a certain competence level. What an employer cannot do is to refuse to hire or to promote a person because of that person's disability, when that person otherwise meets all the qualifications of the job.

* The second basic employment provision of the ADA is that an employer must make reasonable accommodations for a person with a disability, if that accommodation will allow the person to perform the essential functions of the job. This is a requirement that has been in place under Section 504 for 15 years. It is a very simple, yet essential, requirement. What it means is that if there is some modification in a job's requirements or structure that an employer can do, which will not cause the employer undue hardship, but which will allow the employee with the disability to do the job, that modification or change must be made. For example, if placing an amplifier on a telephone, or lowering a desk, or establishing a flexible work schedule will allow a person with a disability to perform a job, that type of accommodation could be required.

* Under the ADA, whether an accommodation is ultimately required depends on two things. First, the accommodation has to really work; that is, it has to result in the employee actually being able to do all the essential

functions of the job. Second, the accommodation may not impose an undue hardship on the employer. This is a long-standing standard under Section 504. It means that the accommodation cannot impose significant difficulty or expense on the employer, taking into account specifically the size of the business, the number of employees, the type of business, and the nature and cost of the accommodation.

* The remaining provisions in the ADA's employment section are essentially subsets of these two main provisions and derive directly from the regulations and caselaw under Section 504. For example, an employer may not segregate or classify persons with disabilities in a way that adversely affects their employment status. An employer may not deny an employment opportunity to an individual because of the individual's need for a reasonable accommodation. And an employer may not have a qualification standard that eliminates persons with disabilities unless the employer can show that the standard is job-related and consistent with business necessity.

* An employer may not ask applicants, early on in the application process, whether the applicant has a disability. The employer may ask whether the applicant can perform the functions of the job. In addition, the employer may condition the applicant's job offer on the results of a medical examination. Again, however, those results may not be used to withdraw the job offer unless the applicant is shown not to be qualified for the job.

* With regard to religious entities, the ADA includes a provision which states that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of the organization.

* The employment provisions of the bill take effect on July 26, 1992. Upon the effective date, employers with 25 or more employees will be covered. Employers with 15 or more employees will be covered two years later, on July 26, 1994.

ADA: PUBLIC ACCOMMODATIONS

* The ADA prohibits public accommodations from discriminating against people with disabilities.

* Public accommodations include the type of businesses and services that are used everyday by all people, including people with disabilities. Examples include: hotels, restaurants, dry cleaners, grocery stores, all rental and sale establishments, schools, parks, and offices of doctors, lawyers, accountants and other service providers..

* The ADA prohibits public accommodations from excluding or refusing to serve a person with a disability because of the person's disability.

* Public accommodations are also required to provide auxiliary aids and services to enable a person with a disability to use the available goods and services. For example, a business may be required to provide large print materials or tape recordings in certain settings.

* Public accommodations are also required to modify their practices and procedures, if doing so would enable a person with a disability to use the goods or services. For example, a business may have to modify a "no pets" rule to allow a person who uses a seeing-eye or service dog to enter the premises.

* A public accommodations is not required to provide an aid or service if it would impose an undue burden on the establishment or if it would fundamentally alter the service or goods provided. The size and nature of the business are taken into account in determining whether providing an aid or service would be an undue burden.

* A public accommodation is not required to modify a practice or procedure if doing so would fundamentally alter the services or goods provided.

* The <u>physical access</u> requirements of public accommodations can be divided into three categories:

Existing Buildings: Public accommodations must make physical access changes in existing buildings if such changes are "readily achievable." The definition of readily achievable is something which is "easily accomplishable," "without much difficulty or expense." An example would be placing a ramp over one or two steps leading into a store.

Buildings Undergoing Renovation: If a public accommodation renovates a building, the renovated area itself must be accessible. If a "primary function area" of the building is renovated (which includes any area in which a primary function of the business takes place), then the business must ensure that the "path of travel" to the area is accessible and that the facilities serving the area (such as restrooms and telephones) are accessible. The path of travel and facilities do not have to be made accessible if the cost of doing so would be disproportionate to the cost of the initial renovation.

New Buildings: All new buildings built by public accommodations, for occupancy after January 1993, must be built "readily accessible to and usable by" people with disabilities. This means that people with disabilities must be able to enter the building, get around the building, and use the building's facilities. What it may not be necessary that every restroom, or in some situations, every room, be fully accessible, the standard requires a very high degree of accessibility throughout the building.

* The public accommodations section is effective for most businesses starting from January 26, 1992. For businesses with fewer than 25 employees, and gross receipts of one million dollars or less, the public accommodation requirements become effective on July 26, 1992. For businesses with fewer than 10 employees, and gross receipts of $500,000 or less, the public accommodation requirements become effective January 26, 1993.

ADA: COVERAGE OF DRUG AND ALCOHOL USERS

* Individuals who are current illegal users of drugs are excluded from the definition of a person with a "disability" in the ADA. This same exclusion was also adopted for the Rehabilitation Act of 1973.

* Under this exception, an individual who currently illegally uses drugs is not entitled to any protection under the ADA, regardless of whether that person is a casual user of drugs or is an addict and regardless of whether his or her illegal drug use has any adverse impact on job performance in the employment sector. Employers may thus refuse to hire and may discipline or fire any person who currently illegally uses drugs without violating the ADA.

* If a person with a disability (e.g., a person with AIDS) is an illegal user of drugs, but is discriminated against because of that person's covered <u>disability</u> (i.e., AIDS), and not because of the drug use, the person <u>is</u> protected under the ADA.

* The following individuals <u>are</u> protected under the ADA:

  a) a person who has successfully completed a drug rehabilitation program and is no longer illegally using drugs;

  b) a person who has otherwise been rehabilitated and is no longer illegally using drugs;

  c) a person who is participating in a rehabilitation program and is no longer illegally using drugs; and

  d) a person who is erroneously regarded as illegally using drugs.

* The "illegal use of drugs" is defined as the use of drugs which is unlawful under the Controlled Substances Act. It does not include the use of drugs taken under supervision by a licensed health care professional. Many people with disabilities, such as people with epilepsy, AIDS and mental illness, take a variety of drugs, including experimental

drugs, under supervision by a health care professional. Discrimination on the basis of use of such drugs remains illegal under the ADA.

* Testing for the illegal use of drugs is not considered a medical examination for purposes of the ADA and is, therefore, not subject to the ADA's restrictions on medical examinations. The ADA thus does not prohibit testing for the illegal use of drugs.

* An applicant or employee may, however, contest the accuracy of a drug test. An individual who does not, in fact, illegally use drugs, but who has been erroneously identified as an illegal drug user by a test would fall into the category of an individual "perceived to be" an illegal user of drugs.

* An employer's allowance to test for the illegal use of drugs is also restricted by the employer's obligation not to identify, through a medical examination, the existence of a disability prior to a conditional job offer. Persons with disabilities often take drugs that may be identified through a drug test. In order to assure compliance with the ADA's pre-employment medical provisions, therefore, employers must either assure that the required drug test identifies strictly the illegal use of drugs or require successful passage of a drug test only of applicants who have received a conditional job offer. An employer could also choose to have an outside laboratory conduct the test and to have the laboratory inform the employer only of results indicating illegal drug use.

* Individuals who are alcoholics remain covered under the ADA. An employer may, however, prohibit the use of alcohol by all employees on the job; require that employees not be under the influence of alcohol at the workplace; and hold an alcoholic to the same performance and behavioral standards to which all employees are held.

ADA: REMEDIES

* Any anti-discrimination law is made up of two basic parts: a statement of what actions are illegal under the law and a provision for the remedies that are available if an entity engages in those illegal actions.

The remedies provided by the ADA are as follows:

* EMPLOYMENT: The ADA adopts the remedies provided by Title VII of the Civil Rights Act of 1964. Under Title VII, and hence under the ADA, a plaintiff has a private right of action (which means that, after going through the mandatory Equal Employment Opportunity Commission process, a plaintiff can bring a lawsuit in a local federal district court) and has the right to get injunctive relief from a judge. Injunctive relief includes such things as reinstatement in a job or an order for backpay.

The EEOC may bring cases on behalf of victims of discrimination as they do under Title VII.

Under the Civil Rights Act of 1991, plaintiffs are also allowed to recover compensatory and punitive damages, such as damages for pain and suffering and for harassment, for intentional employment discrimination. These damages are capped at different levels, depending on the size of the business. An employer may avoid damages for failure to provide a reasonable accommodation if the employer demonstrates that it made a good faith effort to provide the accommodation.

* PUBLIC ACCOMMODATIONS: The remedies available for violations of the public accommodation section are similar to those available under the employment section. The ADA incorporates the remedies available under Title II of the Civil Rights Act of 1964. Thus, plaintiffs have a private right of action and the right to seek injunctive relief from a judge. Private plaintiffs are precluded from seeking general, compensatory damages, including damages for pain and suffering.

Unlike other laws, there is a mandatory injunction process under the ADA for certain violations. For example, if a judge finds that a public accommodation has built a new building which is inaccessible to people with disabilities, in violation of the ADA, the judge must issue an order

requiring the owner to retrofit the building to make it accessible.

Following the pattern of other civil rights laws (such as the Fair Housing Act), the ADA gives the Attorney General the right to bring an action in cases of pattern or practice of discrimination or in suits of general public importance. In such cases, a judge can award the same type of injunctive relief available in private suits. The judge can also assess a civil penalty (not unlimited damages) of not more than $50,000 for the first violation and not more than $100,000 for a subsequent violation, if the judge determines such penalties are necessary "to vindicate the public interest." This standard means that civil penalties will be assessed only when such penalties are called for by the facts of the case. In addition, if the Attorney General requests it, the judge can award monetary damages to a person aggrieved by the discriminatory action. A private party may not, on his or her own, request such damages.

* COMMUNICATIONS: The telecommunications relay services section of the bill amends the Communications Act of 1934 and uses the administrative remedies procedure established under that Act. Thus, in most situations, the Federal Communications Commission will handle complaints in the first instance. The Commission will refer complaints about intrastate telecommunications relay services to state agencies that have received Commission certification to implement those services. Plaintiffs have a private right of action to obtain review of Commission decisions in the federal courts.

* PUBLIC SERVICES: The public services section of the ADA incorporates the remedies available under Section 505 of the Rehabilitation Act of 1973. These are the remedies currently available for violations of Section 504. These include a private right of action and both injunctive relief and damages in certain circumstances.

IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT

Rights and Responsibilities of All Americans

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BROOKES
PUBLISHING Co

Baltimore • London • Toronto • Sydney

Chapter 4

Antidiscrimination Requirements of the ADA

Chai R. Feldblum

The purpose of this chapter is twofold. First, it gives the reader a basic sense of *who* is covered under the Americans with Disabilities Act[1] (ADA) and, generally, *what* is prohibited by the law. Thus it discusses the concept of "person with a disability," as defined by the ADA, and defines in general terms the employment and public accommodation requirements of the law. Other chapters in this book discuss in greater detail the substantive requirements of the ADA in these areas as well as others (see Part II, Key Provisions).

Second, this chapter is intended to introduce the reader to two different concepts of antidiscrimination protection that are embodied in the ADA. The first concept is a traditional one, familiar to many through the antidiscrimination protections established by the Civil Rights Acts of 1964 (PL 88-352) and 1968 (PL 90-284). As a general matter, this concept of antidiscrimination assumes that characteristics such as race, religion, national origin, or sex are either always or often irrelevant to competent performance of a job or enjoyment of a business good or service. I say "always or often" because Title VII of the Civil Rights Act of 1964 presumes that there may be a "bona fide occupational qualification" that will prevent an individual from adequately performing a job because of the person's gender, religion, or national origin (see 42 U.S.C. §2000e-2[e]). In addition, Title VII requires an employer to make affirmative accommodations to a person's religious practices and beliefs (see 42 U.S.C. §2000e[j]). However, the antidiscrimination provisions of such laws, as a general matter, prohibit taking such characteristics into account when making employment decisions or in serving customers (See, e.g., 42 U.S.C. §2000e-2[a][1]: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin"; and 42 U.S.C. §2000a: "All

This article is adapted from Feldblum, C.R. (1991). Employment protections. In J. West (Ed.), *The Americans with Disabilities Act: From policy to practice* (pp. 81–110). New York: Milbank Memorial Fund.

The author thanks Teresa Jakubowski for her excellent research assistance in preparing this chapter.

[1]The Americans with Disabilities Act of 1990 (PL 101-336) is published in *Statutes at Large* (104 Stat. 327) and codified in The *United States Code* (42 U.S.C. §§12101–12213 [Supp. II 1990]). References to various portions of the act within this chapter cite the specific section of the Code.

persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin").

This traditional concept of antidiscrimination underlies much of the ADA's antidiscrimination requirements. It is premised on the same assumption articulated in traditional civil rights discourse that the particular characteristic at issue—here, the characteristic of "disability"—is often irrelevant in an employment or business setting (see Traditional Civil Rights Protection, below).

There is a second concept of antidiscrimination, however, that is equally prominent in the provisions of the ADA. This concept presumes that a person's disability is often *very relevant* to the person's ability or inability to perform a job adequately or to enjoy a particular good or service. The concept further presumes, however, that such inability may not be viewed in a vacuum. Rather, the inability must be viewed in the context of the *interaction* between societal realities and choices and the individual's disability, rather than in the context of the individual's disability per se.

For example, one could probably state with some confidence that a person who is completely blind is not competent to be a truck driver, purely as a result of the physical ramifications of his or her disability. By contrast, one could not state with confidence that a person who uses a wheelchair is not competent to be the vice president of a bank solely because of his or her disability. That person, in fact, may have difficulty performing certain aspects of the vice president's job—because the bank decided 5 years ago to build a building with many steps and inaccessible rest rooms and because other entities in society chose, over the years, to build inaccessible airline terminals and restaurants. The interaction between disability and society is succinctly set forth in a short article entitled "Quality of Our Lives" (1985). In that article, the author notes:

> Average people, who have no disabilities yet, look at our lives and see deprivation. But they misunderstand its cause.
>
> They discover we can't get into their cars to go out in the evenings. They see that we have to be helped up and down curbs, that we can get into only a few nice restaurants without help. They've heard from us that the college we attended held its classes up steps we had to be carried up and down. They notice that we still don't have a job, even though we earned a degree . . . .
>
> We must tell them in a way that will make them see that the problem is not our personal disabilities, but the design of those cars, city sidewalks, restaurants, university classrooms, office buildings and condominiums. When they're not designed for us to use, of course they can't give our lives "quality!" (Anonymous, p. 8)

Under the second concept of antidiscrimination, therefore, the roles that various *societal decisions* play in determining the real-life ramifications of a person's disability are scrutinized and, in a sense, "called to account." That is, the law requires employers and businesses to take affirmative steps that will "undo" the barriers that have been set up by society, often unintentionally, to keep people with disabilities out of employment and out of the enjoyment of goods and services. These requirements are termed making *reasonable accommodations* in the employment area (42 U.S.C. §12112[b][5]) and are termed modifying *policies, practices, and procedures*, providing *auxiliary aids and services*, and making physical access changes in the area of providing goods and services (42 U.S.C. §§12182[b][2][A][ii]–[iv], 12183).

The jurisprudential justification for such affirmative requirements is the same for both employment and public accommodations. The premise is that barriers to people with disabilities have been established because members of society have not historically viewed people with disabilities as part of the *societal norm*. Thus, no effort has been made to ensure that barriers to people with disabilities are not built into the structural frameworks of society. (By the term *structural* I mean both physical structures and policy structures [see, e.g., U.S. Commission on Civil Rights, 1983, pp. 17–27].) The second antidiscrimination concept of the ADA is presumed on the assumption

that people with disabilities have a *civil right* to be considered part of the societal norm. This approach is itself revolutionary because it contrasts sharply with the traditional approach of "doing special things" for people with disabilities based on a charity model. (See, e.g., U.S. Commission on Civil Rights 1983, pp. 17–22, describing the charity approach; compare Hannaford, 1985, rejecting the charity model.) Indeed, one of the striking aspects of the second concept of antidiscrimination is that it requires affirmative activities on the part of employers and businesses *not* as part of a "help the handicapped" program, but rather as a response to the legitimate demands of a group whose civil rights have traditionally been denied.

The judgment was made by those of us seeking to pass the ADA that the most politically feasible manner in which to achieve the civil rights of people with disabilities at this time was to require individual employers and businesses to make the necessary modifications and adjustments at their own expense, and to build in flexibility based on the size and resources of the business. That is, the judgment was made to pattern the ADA after Section 504 of the Rehabilitation Act of 1973, which had already incorporated both concepts of antidiscrimination within its implementing regulations and case law, through placing such affirmative obligations on recipients of federal funds.

The ADA is thus essentially the "offspring" of two preexisting federal civil rights laws (Feldblum, 1991a, pp. 521–531). The substantive provisions of the ADA are drawn primarily from Sections 501, 503, and 504 of the Rehabilitation Act of 1973. These sections of the Rehabilitation Act prohibit discrimination on the basis of handicap by the federal government, by entities that receive federal funds, and by federal contractors. Politically, the goal of the drafters of the ADA was to draw as much as possible from the 15 years of experience under the Rehabilitation Act in order to demonstrate that a workable and understandable law could be achieved (see Feldblum, 1991a, pp. 523–528). Thus issues such as who is a person with a "disability," what constitutes "discrimination" on the basis of disability, and what is required as a "reasonable accommodation" were derived by the drafters of the ADA from similar substantive requirements that had been established under the Rehabilitation Act and its implementing regulations. These regulations had incorporated both concepts of antidiscrimination: first, that disability should not be taken into account in most circumstances, and second, that antidiscrimination requires, in some circumstances, the taking of affirmative steps that acknowledge and accommodate a person's disability.

The procedural requirements of the ADA, by contrast, were drawn primarily from the Civil Rights Act of 1964 (see 42 U.S.C. §§2000e to 2000e-17 [1988]; 42 U.S.C. §§2000a to 2000a-6 [1988]). Title VII of that law prohibits discrimination on the basis of race, sex, religion, or national origin on the part of employers with 15 or more employees (see 42 U.S.C. §§2000e[b], 2000e-2 [1988]). Title II of that law prohibits discrimination on the basis of race, religion, and national origin in selected private businesses (see 42 U.S.C. §2000a[b] [1988]). Thus the procedural requirements of the ADA, such as which entities are covered under the law and what remedies are available, are largely, although not exclusively, drawn from the Civil Rights Act of 1964. This approach was taken because one of the goals of the ADA was finally to establish parity in federal civil rights laws for people with disabilities and other minorities and women.

One significant difference in coverage between the ADA and Title II of the Civil Rights Act of 1964 concerns the type of public accommodations subject to the two laws. Title II of the Civil Rights Act prohibits discrimination on the part of hotels and other places of lodging, restaurants and other places that sell food, and recreational facilities (42 U.S.C. §2000a [b][1]–[2] [1988]) (See Whalen & Whalen, 1985, describing the struggle over coverage of public accommodations in the Civil Rights Act of 1964). By contrast, the ADA covers a wide range of businesses, including all sales and retail establishments and service providers (see 42 U.S.C. §12181[f]; see also Feldblum, 1991a, p. 528, explaining the "deal" between Senate sponsors of the ADA and the Bush administration that resulted in extensive coverage of public accommodations under the ADA).

WHO IS COVERED UNDER THE LAW?

To understand the ADA, one must first understand who is protected under the law. The ADA prohibits discrimination against an "individual with a disability" (see, e.g., 42 U.S.C. §§12112, 12132, 12182). The definition of "disability" under the ADA is derived substantially from the definition of "handicap" under the Rehabilitation Act. Although the Rehabilitation Act protects individuals with *handicaps* against discrimination (see 29 U.S.C. §794 [1988]), people with disabilities and their advocates prefer to use the term *disability* rather than handicap. In recognition of that preference, the term disability is used throughout the ADA. The definition of disability, however, is the same as the definition of handicap under Title V of the Rehabilitation Act with the exception of the exclusion of current users of illegal drugs and certain other individuals (see pp. 41–42 in this chapter; see also Feldblum, 1991b). Under the ADA, a "person with a disability" is someone who: 1) has a physical or mental impairment that substantially limits that person in one or more major life activities, or 2) has a record of such a physical or mental impairment, or 3) is regarded as having such a physical or mental impairment (42 U.S.C. §12102[2]).

First Prong of the Definition

The first prong of the definition of a person with a disability is someone who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual" (42 U.S.C. §12102[2][a]). The regulations issued by the government agencies[2] to implement the ADA explain that a "physical or mental impairment" is:

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine [or] any mental or psychological disorder . . . . (29 C.F.R. §1630.2[h] [EEOC, 1992b], 28 C.F.R. §36.104 [DOJ, 1992a])

The various committee reports accompanying the ADA note the same definition for "physical or mental impairment" (U.S. House of Representatives Committee on Education and Labor, 1990, p. 51; U.S. House of Representatives Committee on the Judiciary, 1990, p. 28; U.S. Senate Committee on Labor and Human Resources, 1989, p. 22).

Neither the Rehabilitation Act regulations nor the ADA regulations attempt to set forth a list of specific diseases or conditions that would make up physical or mental impairments. The reason is simple: it would be impossible to ensure the comprehensiveness of such a list given the variety of possible physical and mental disorders that may exist. The DOJ regulations, however, give some examples of conditions that would be covered, including:

> contagious and noncontagious diseases and conditions such as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction and alcoholism. (28 C.F.R. §36.104[1][iii])

The committee reports accompanying the ADA included a similar list of examples (see U.S. House of Representatives Committee on Education and Labor, 1990, p. 51; U.S. House of Representatives Committee on the Judiciary, 1990, p. 28; U.S. Senate Committee on Labor and Human Resources, 1989, p. 22). The House Judiciary Report correctly notes that, although drug addiction is a recognized physical disorder, the currently illegal use of drugs is not protected under the ADA (see U.S. House of Representatives Committee on the Judiciary, 1990, p. 28, note 17). This illustrative list of

[2]Equal Employment Opportunity Commission (EEOC) and U.S. Department of Justice (DOJ) regulations are codified at 29 C.F.R. part 1630 (1992) and 28 C.F.R. part 36 (1992), respectively. References to various portions of these regulations within this chapter cite the specific section of the regulations.

physical and mental disorders is derived from the U.S. Department of Health and Human Services (DHHS) regulations implementing Section 504 of the Rehabilitation Act (see 45 C.F.R. pt. 84, app. A[3]; DHHS, 1991, pp. 376–377).

An impairment, therefore, is some physiological or mental disorder. It does not include simple physical characteristics such as eye or hair color (29 C.F.R. app. §1630.2[h]; 28 C.F.R. app. §36.102). Having a physical or mental impairment, however, is only the first part of the definition. The impairment must also be one that "substantially limits" the person in a "major life activity." The EEOC and DOJ regulations both set forth an illustrative, nonexhaustive list of "major life activities." These included functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (29 C.F.R. §1630.2[i]; 28 C.F.R. §36.104[2]). These are just examples of significant life activities. For example, the EEOC (1992a) notes that other life activities would include sitting, standing, lifting, and reaching (29 C.F.R. app. §1630.2[i]). The point is that the physiological or mental disorder must be a type that substantially limits the person in a significant life activity.

The meaning of "substantially limits" is also quite broad. A person is substantially limited in a major life activity if: 1) the person cannot do the activity at all; or 2) the person is limited in the "condition, manner, or duration" in which he or she performs the life activity (29 C.F.R. §1630.2[j]). For example, a completely deaf person would be substantially limited in the life activity of hearing because he or she is not able to hear at all. A person who uses artificial legs and is able to walk would also be substantially limited in the life activity of walking because he or she is restricted in the *condition* or *manner* in which he or she engages in that activity (see 29 C.F.R. app. §1630.2[j]). In determining whether a person is "substantially limited" in a life activity, the potential limitation must be analyzed without regard to the existence of mitigating devices or medicines. For example, a person with diabetes who is performing all life activities without difficulty because he or she is taking insulin is covered under the *first* prong of the definition of disability because *without* insulin that person would be limited in various life activities (see 29 C.F.R. app. §1630.2[h], [j]).

Most serious medical conditions do have a substantial impact on basic life activities. For example, someone with emphysema will have substantial difficulty in breathing; someone who is a paraplegic will have substantial difficulty in walking; and someone with dyslexia will have substantial difficulty in learning. As the acting Assistant Attorney General, Office of Legal Counsel, of the Department of Justice pointed out in a legal memo on Section 504, another significant life activity is that of procreation and intimate personal relations, in which people infected with HIV are substantially limited (Kmiec, 1988, p. 9). Both the EEOC and DOJ regulations note that people with HIV infection, asymptomatic and symptomatic, are covered under the first prong of the definition of disability (see 29 C.F.R. app. §1630.2[j]; 28 C.F.R. app. §36.104). The term *people with disabilities*, therefore, is not limited to what has sometimes been termed *traditional disabilities*. The ADA covers a wide range of individuals—from people who use wheelchairs, to people who have vision or hearing impairments, to people with epilepsy or cerebral palsy or HIV disease or lung cancer or manic depression. A relatively exhaustive list of disabilities that have been covered under the Rehabilitation Act and that would similarly be covered under the ADA can be found in *de la Torres v. Bolger* (1986). A list of approximately 50 examples of impairments covered under the Rehabilitation Act and citations to cases can also be found in Burgdorf (1990, pp. 77, 82–83).

Second Prong of the Definition

The second prong of the definition of disability covers a person with a "record" of an impairment (42 U.S.C. §12102[2][B]). A person with a record of an impairment is defined as someone who: 1) had a physiological or mental disorder that substantially limited them in a major life activity but *no longer* has that impairment, or 2) someone who was simply *misclassified* as having such an

impairment (29 C.F.R. §1630.2[k]; 28 C.F.R. §36.104[3]). The EEOC and DOJ regulations explain that frequently occurring examples of the first group are people who have histories of mental or emotional illness, heart disease, or cancer. Such individuals may no longer have the impairment, but *had* the impairment at some point in the past. A frequently occurring example of the second group are people who have been misclassified as having mental retardation or learning disabilities (29 C.F.R. app. §1630.2[k]; 28 C.F.R. app. §36.104).

The point of the second prong of the definition is that people who have *recovered* from a physiological or mental disorder often face discrimination simply because of the stigma or the fear associated with such impairments when an employer or business discovers they have a history of such a disorder. The employer or other entity may discover this fact through educational, medical, or employment records. If any of these records indicates that the individual had a substantially limiting physiological or mental disorder, and the employer discriminates against the person based on that record, that person is covered under the second prong of the definition (29 C.F.R. §1630.2[k]; 28 C.F.R. §36.104[3]).

Third Prong of the Definition

The EEOC and DOJ regulations lay out in detail the individuals who are covered under the third prong of the definition of disability. The regulations explain that a person is regarded as having such an impairment if:

1. The person has a physical or mental impairment that does *not* substantially limit a major life activity, but is *treated* by an entity covered by the law as constituting such limitation.
2. The person has a physical or mental impairment that substantially limits a major life activity *only as the result of* the attitudes of others toward the impairment.
3. The person does *not* have a physical or mental impairment, but is treated by the entity covered by the law as having a physical or mental impairment that substantially limits a major life activity. (29 C.F.R. §1630.2[l]; 28 C.F.R. §36.104[4]).

These three examples are different aspects of the same concept. The underlying common theme is that the law prohibits discrimination against an individual who is treated *as if* he or she has a disability—that is, as if he or she has a physiological or mental disorder that limits him or her in a major life activity.

The first two examples provided in the regulations deal with situations in which an individual has some physiological or mental impairment, but that impairment does not actually limit the person in any life activity. The person's impairment, however, is treated by an employer or business as substantially limiting the person in some major life activity.

This type of treatment may occur, for example, if an employer or business has certain assumptions about what a person with a particular impairment is or is not capable of doing, or if the employer or business is reacting to the fears or concerns of others. For example, assume that a person has slightly high blood pressure that does not actually limit him or her in any life activity. If an employer is nevertheless afraid that the person's blood pressure level will make him or her incapable of performing any stressful jobs, or a business owner believes that the person's high blood pressure makes him or her incapable of enjoying the business's service, and the employer refuses to hire the person or the business owner refuses to serve the person on that basis, that individual is covered under the third prong of the definition (29 C.F.R. app. §1630.2[k]; 28 C.F.R. app. §36.104).

As a second example, assume that a person has a significant physiological cosmetic disorder that does not, in fact, substantially limit the person in any way. If an employer, however, views that disorder as substantially limiting the person's ability to work because of potential adverse reactions from co-workers or customers and refuses to hire the person on that basis, or a business views the

disorder as making other customers uncomfortable and refuses to serve the person on that basis, that person is covered under the third prong of the definition (29 C.F.R. app. §1630.2[k]; 28 C.F.R. app. §36.104).

The third situation referred to in the regulations deals with a person who has *no* impairment at all, but who is treated by an employer or business owner as if he or she has a physiological or mental disorder that substantially limits the person in a life activity. For example, assume that a person does not have either AIDS or HIV infection, but is perceived by an employer or a business owner as having AIDS or HIV infection and is fired or refused services on that basis. That individual would be covered under the third prong of the definition (29 C.F.R. app. §1630.2[l]; 28 C.F.R. app. §36.104).

The scope and purpose of the third prong of the definition of disability may not be intuitively obvious to all (see, e.g., U.S. House of Representatives Committee on the Judiciary, 1989, pp. 70–75). Yet this prong reflects a basic fact of disability discrimination: many instances of discrimination occur not because of any inherent difficulty that an *impairment* causes an individual with regard to a major life activity, but rather because of difficulties created as a result of the *reaction* of others to an actual or perceived physical or mental impairment.

Thus, in all of the examples noted above, it is the discriminatory *action* of an employer or business owner that operates to *create* coverage for individuals who would otherwise not be covered under the law. That is, the third prong of the definition of disability specifically encompasses individuals whose impairments are not particularly severe (i.e., they are not covered under the first prong of the definition because they do not constitute actual limitations in life activities) or who have no impairments at all. It is an action by *another*, based on fears and presumptions, that creates antidiscrimination protection for such individuals.

Specific categories of people with various disabilities received special attention during the passage of the ADA—either to emphasize their inclusion or to establish their exclusion (for a more explicit discussion of the coverage and exclusion of such individuals, see Feldblum, 1991b, pp. 18–25). For example, people who currently illegally use drugs are excluded from the definition of disability under the ADA (42 U.S.C. §12114[a]; 29 C.F.R. §1630.3[a]; 28 C.F.R. §36.209[a][1]). Individuals who have recovered from such use or are erroneously regarded as drug users remain covered under the law (42 U.S.C. §12114[b]; 29 C.F.R. §1630.3[b]; 28 C.F.R. §36.209[a][2]). People with various sexual and behavior disorders are excluded from the definition of disability (42 U.S.C. §12211[b]; 29 C.F.R. §1630.3[d]; 28 C.F.R. §36.104[5]). The excluded disorders are pedophilia, exhibitionism, voyeurism, gender identity disorders that are not the result of physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs. Transvestism and transsexualism, which are still defined as mental impairments by the American Psychiatric Association, are also included in this list of exclusions. (This list of exclusions was added to the ADA by the Senate in the waning hours of the Senate's consideration of the ADA.)

Congress specifically affirmed that homosexuality and bisexuality are not physical or mental impairments and hence not covered under the ADA (42 U.S.C. §12211[a]). However, although sexual orientation is not a disability protected under the ADA, a gay man, lesbian, or bisexual person who has a disability covered under the law is protected from discrimination on the basis of the covered disability. Thus, for example, a homosexual or bisexual person who has HIV disease, uses a wheelchair, or is blind is protected against unjustified discrimination based on those covered disabilities. Moreover, if a gay man, lesbian, or bisexual person is discriminated against by an employer or a business owner because the person is *regarded* as having AIDS or HIV infection, that person is protected under the third prong of the definition of disability. In addition, Congress specifically noted that people with AIDS and asymptomatic HIV infection are covered under the ADA's definition of disability. The term *HIV disease*, which is the term used in the legislative history to the

ADA, includes everything from asymptomatic HIV infection to full-blown AIDS. Thus "HIV disease" is used as a single term to describe the spectrum of manifestations of HIV-related illness covered under the definition of disability (see 29 C.F.R. app. §1630.2[j]; 28 C.F.R. §36.104[1][iii]; see also U.S. House of Representatives Committee on Education and Labor, 1990, p. 52; U.S. House of Representatives Committee on the Judiciary, 1990, p. 28, note 18; U.S. Senate Committee on Labor and Human Resources, 1989, p. 22). For an explanation of the term, see U.S. House of Representatives (1990b, 1990c, 1990d) and U.S. Senate (1990).

The ADA also prohibits discrimination against an individual because the individual *associates* with a person who has a disability (42 U.S.C. §§12112[b][4], 12182[b][1][E]; 29 C.F.R. §1630.8; 28 C.F.R. §36.205). For example, an employer could not refuse to hire an applicant simply because the applicant's wife or husband uses a wheelchair or because the applicant lives with a person who has AIDS (29 C.F.R. §1630.8 & app.). Similarly, a movie theater could not refuse entrance to a person with cerebral palsy and to his or her friends simply because they are accompanying the person with cerebral palsy (28 C.F.R. §36.205 & app.). Although protection for people who associate with people with disabilities does not appear in the Rehabilitation Act, it is not a new concept. When Congress passed the Fair Housing Amendments Act of 1988, in which protection against discrimination was extended to people with disabilities in the sale or rental of private housing, Congress added protection for people who associate with people with disabilities (see 42 U.S.C. §3604[f][1]–[2]). Such protection was added because people who are friends or relatives of people with disabilities are often discriminated against simply because they associate with a person with a disability.

The ADA does not limit the forms in which the "association" with the person with a disability takes place. Thus individuals who associate with a person with a disability through a range of activities—through being a friend, spouse, domestic partner, relative, business associate, advocate, or caregiver—are all covered under the association provision (29 C.F.R. §1630.8; 28 C.F.R. §36.205). Indeed, there were various efforts made during the legislative process to restrict the coverage of this provision to individuals who associate with people with disabilities through marriage, blood, or caregiving relationships. These various restrictive efforts failed (see, e.g., U.S. House of Representatives Committee on the Judiciary, 1990, p. 38).

WHAT IS PROHIBITED UNDER THE LAW?

Traditional Civil Rights Protection

Like most other civil rights laws, the ADA sets forth general prohibitions against discrimination in areas such as employment (42 U.S.C. §12112[a]) and public accommodations (42 U.S.C. §12182[a]). As a basic rule in employment, the ADA provides that no "covered entity" may discriminate against a qualified person with a disability, because of the disability of such individual, in a range of employment decisions: job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms and conditions of employment (42 U.S.C. §12112[a]). The term *covered entity* includes employers, employment agencies, labor organizations, and joint labor–management committees (42 U.S.C. §12111[2]). (The definition of *employer* is drawn from Title VII of the Civil Rights Act of 1964; see 42 U.S.C. §2000e[b].) Essentially, every type of employment decision is covered. The Section 504 regulations, the legislative history to the ADA, and the EEOC regulations include a more detailed list of employment decisions in which disability discrimination is prohibited (29 C.F.R. §1630.4; see also U.S. House of Representatives Committee on Education and Labor, 1990, pp. 54–55; U.S. House of Representatives Committee on the Judiciary, 1990, p. 35; U.S. Senate Committee on Labor and Human Resources, 1989, p. 25). The basic requirement is that a qualified person with a disability

may not be discriminated against on the basis of his or her disability in terms of hiring, firing, promotions, recruitment, conditions of the employment position, or any other aspect of employment.

As a general rule in public accommodations, the ADA similarly provides that no individual shall be discriminated against on the basis of disability "in the full and equal enjoyment" of the "goods, services, facilities, privileges, advantages, or accommodations" of any place of public accommodation (42 U.S.C. §12182[a]). This prohibition applies to any entity that owns, leases, leases to, or operates a place of public accommodation. The DOJ regulations define a place of public accommodation to mean a facility that falls within one of the 12 designated categories in the law. A *public accommodation* is then defined as a private entity that owns, leases (or leases to), or operates a place of public accommodation (see 28 C.F.R. §36.104 [1992]). Thus, for example, a covered entity under the public accommodations section would include the owner of a building in which a restaurant was located, the owner of the restaurant, the operator of the restaurant, and a group that leased the restaurant for a particular function.

The ADA sets forth a list of 12 broad categories of private establishments that are considered public accommodations. The categories include, among others, all sales and rental establishments, all service establishments (from shoe repair services to lawyers' offices to doctors' offices), all places of education, all places selling food or providing lodging, and all places of recreation (42 U.S.C. §12181[7]). All businesses that fall within these 12 categories are covered regardless of the number of employees that work in the business. This parallels the absence of a limit based on employee size in Title II of the Civil Rights Act of 1964. There is a longer phase-in period, however, before the public accommodations section of the ADA becomes effective for small businesses.

Unlike most other civil rights laws, the ADA then sets forth *specific constructions* of what it considers "discrimination" on the basis of disability to encompass. In both employment and public accommodations, the law's constructions of antidiscrimination include the traditional concept of civil rights as well as the newer, more affirmative concept of civil rights (see Affirmative Aspects of Antidiscrimination Protection, below).

For example, in the employment context the ADA states that the prohibition on discrimination means that an employer may not limit, segregate, or classify applicants or employees on the basis of disability in a way that adversely affects the opportunities or status of such individuals (42 U.S.C. §12112[b][1]). This is a relatively straightforward application of the traditional antidiscrimination concept. Under this approach an employer is not permitted to treat a person with a disability differently simply because of the person's disability. For example, an employer may not have all employees with disabilities work in a separate, segregated section of the workplace or pay its employees with disabilities on a lower pay scale for work equivalent to that peformed by other employees (29 C.F.R. app. §1630.5).

Similarly, in the public accommodations arena, the ADA specifies that discrimination includes: denying a person with a disability the *opportunity* to participate in or benefit from a good or service; providing a person with a disability a benefit or service that is *not equal* to that provided others; or providing a person with a disability a *different or separate* benefit or service from that provided others (42 U.S.C. §12182[b][1][A][iii]). Again, these prohibitions represent straightforward applications of the civil rights principle that disability is a characteristic that should not be taken into account in providing services or goods or in providing unequal or separate services or goods.

For example, with regard to denying a person the opportunity to enjoy goods or services, a restaurant could not refuse to serve a person with cerebral palsy; a video store could not refuse to rent videos to a blind person; and an accountant could not refuse to provide services to a person with AIDS (see generally 28 C.F.R. §36.202[a]). With regard to providing unequal goods or services, a hotel could not refuse to rent suites with a good view to people with muscular dystrophy and a beauty shop could not require that deaf people be served only by "junior" beauticians (see generally

28 C.F.R. §36.202[b]). Finally, with regard to providing separate services, a restaurant could not require that people who have amputated limbs sit in only one particular section of the restaurant; a bank could not require that people who are blind be served only by a special designated teller; and a day camp could not require that all children with learning disabilities attend a separate, special section of the camp (see generally 28 C.F.R. §36.202[c]). (See Separate Services under the ADA, below, for qualifications on these requirements.)

In both the employment and public accommodations arenas, the ADA also explicitly provides that the employer or public accommodation may not enter into a contractual arrangement that has the effect of subjecting the employer's employees or the public accommodation's customers to discrimination (42 U.S.C. §§12112[b][2], 12182[b][1][A][i]–[iv]). In other words, an employer or a public accommodation may not do indirectly through a contract or a license what it may not do directly under the ADA. In the employment context, this provision means that, if an employer contracts with another entity to provide training for its employees, the training must be provided in a place and manner that is accessible to any employees with disabilities. Similarly, if the employer holds an annual retreat or convention for its employees, the employer must pick a site that is accessible to its employees with disabilities (see 29 C.F.R. §1630.6); see also U.S. House of Representatives Committee on Education and Labor, 1990, p. 60; U.S. House of Representatives Committee on the Judiciary, 1990, p. 37). These would be the type of reasonable accommodation requirements the employer would bear if it were acting directly. Similarly, in the area of public accommodations, a day camp could not contract with another company to perform its application procedures for the camp and then allow that company to screen out all children with AIDS (28 C.F.R. §36.202). Again, such provisions are a basic application of the traditional civil rights concept—they prohibit an entity from taking disability into account either directly or through the use of contractual or licensing arrangements.

Affirmative Aspects of Antidiscrimination Protection

Apart from the traditional antidiscrimination prohibitions, the ADA also sets forth constructions of antidiscrimination that embody the second concept of antidiscrimination. That is, the law explicitly provides that discrimination includes *not* taking certain *affirmative steps* to make changes and modifications.

Employment In the employment arena, the ADA provides that discrimination includes a failure to provide "reasonable accommodations" to the known physical or mental limitations of a person with a disability who is otherwise qualified to perform a particular job (42 U.S.C. §12112[b][5][A]–[B]). A person with a disability is often perfectly able to perform a job—*if* some adjustment is first made in the job structure, job schedule, physical layout of the job, or job equipment. For example, a person who uses a wheelchair may need a table adjusted for height or may need a ramp built to allow access. Persons with varying degrees of hearing impairments may need a telephone amplifier or an interpreter. Someone with a chronic physical condition may need some time off each week for medical treatments. If these adjustments or modifications—which are called reasonable accommodations—are made, a person with a disability might *then* be qualified for the particular job he or she seeks.

Reasonable Accommodations The ADA mandates that employers provide these reasonable accommodations to both applicants and employees with disabilities. The ADA requires that employers provide reasonable accommodations to a person with a disability who is "otherwise qualified" to perform a particular job. What this means is that an applicant or employee must *first* show that he or she meets all of the employer's job-related selection criteria *except* those criteria that he or she cannot meet because of the disability but that could be met if a reasonable accommodation were provided. An initial job-related criterion would be, for example, possessing a certain educational degree. If the individual meets these job-related criteria and is thus "otherwise qualified" for

the job, the employer must then provide a reasonable accommodation to allow the person to be fully qualified for the job (42 U.S.C. §12112[b][5][A]; 29 C.F.R. §1630.9 & app.; U.S. House of Representatives Committee on Education and Labor, 1990, pp. 64–65).

The law provides examples of modifications that fall within the framework of reasonable accommodations (42 U.S.C. §12111[9]). These include:

1. Making modifications to the physical layout of a job facility so as to make it accessible to individuals who use wheelchairs or who have other impairments that make access difficult (29 C.F.R. §1630.2[o][2][i]).
2. Restructuring a job so as to enable the person with a disability to perform the essential functions of the job. Job restructuring may include eliminating nonessential elements of the job, exchanging assignments with other employees or redesigning procedures for task performance (29 C.F.R. app. §1630.2[o]; U.S. House of Representatives Committee on Education and Labor, 1990, p. 62).
3. Establishing a part-time or modified work schedule (e.g., to accommodate people with disabilities who have treatment needs or fatigue problems) (29 C.F.R. §1630.2[o][2][ii]; U.S. House of Representatives 1990b, 1990c; U.S. House of Representatives Committee on Education and Labor, 1990, p. 62).
4. Reassigning a person with a disability to a vacant job. An employer is not required to create a new job for an employee with a disability who is no longer able to perform his or her present job. However, if a vacant job exists that the person is qualified to perform, reassignment to that job would be a required reasonable accommodation (29 C.F.R. §1630.2[o][2][ii] & app.; see also U.S. House of Representatives Committee on Education and Labor, 1990, p. 63).
5. Acquiring or modifying equipment or devices (such as buying a telephone amplifier for a person with a hearing impairment) (29 C.F.R. §1630.2[o][2][ii] & app.).
6. Adjusting or modifying exams, training materials, or policies (such as giving an application examination orally to a person with dyslexia or modifying a policy against dogs in the workplace for a person with a service dog) (29 C.F.R. §1630.2[o][2][ii] & app.).
7. Providing qualified readers or interpreters for people with vision or hearing impairments (28 C.F.R. §1630.2[o][2][ii] & app.). Personal assistants for people with disabilities is another possible from of reasonable accommodation (see 29 C.F.R. §1630.2[o] & app., noting coverage of travel attendants as a reasonable accommodation; U.S. House of Representatives Committee on Education and Labor, 1990, p. 64; U.S. Senate Committee on Labor and Human Resources, 1989; p. 33).

These are simply examples of types of accommodations that might be required. The basic characteristic of a reasonable accommodation is that it is designed to address the particular, unique needs of a person with a particular disability. Thus the accommodation needed by the person might be one that falls within one of the above categories, or it might be a different type of accommodation personally identified by the person with a disability or by the employer. The underlying goal is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job and then to determine if there are any modifications or adjustments to the job environment or structure that will enable the person to be qualified to perform the job (42 U.S.C. §12111[9]; 29 C.F.R. app. §1630.2[a]). It should be noted that discrimination also includes refusing to hire a person with a disability simply because the person will require a reasonable accommodation (42 U.S.C. §12112[b][5][B]).

Undue Hardship As can be imagined, some accommodations are quite inexpensive and are easy to institute, whereas others are quite costly and are difficult to implement. In light of that fact, the ADA set a limitation on the employer's obligation to provide a reasonable accommodation. Under the law, an employer need not provide an accommodation if doing so would impose an

"undue hardship" on the employer. An accommodation is considered to rise to the level of an undue hardship if providing it would result in a "significant difficulty or expense" for the employer (see 42 U.S.C. §§12111[10], 12112[b][5][A]). This limitation on an employer's responsibilities is similar to the limitation that exists under Section 504 of the Rehabilitation Act of 1973 (45 C.F.R. §84.12).

Whether an accommodation is considered to impose a "significant difficulty or expense" on the employer depends on a series of factors about the particular business. The ADA sets forth the following factors that must be weighed:

1. What is the nature of the needed accommodation and how much will it cost?
2. What are the financial resources available to the employer, how big is the employer (i.e., how many individuals are employed), and what effect will the accommodation have on the employer's expenses, resources, or other areas?
3. What is the type of operation and type of work force run by the employer and what impact will the accommodation have on that operation and work force?

The factors for undue hardship in the ADA were taken primarily from those set forth in the DHHS regulations implementing Section 504 (45 C.F.R. §84.12[c]). The EEOC regulations explicate the factors for undue hardship (29 C.F.R. §1630.2[p]). One modification made, however, was to take into account "site-specific" concerns.

There were extensive negotiations surrounding the ADA during its consideration by a Senate Committee and four separate House Committees, including the House Education and Labor Committee and the House Judiciary Committee (see Feldblum, 1991a, pp. 523–531, detailing the political chronology of the development of the ADA). During negotiations on the ADA in both the House Education and Labor Committee and the House Judiciary Committee, those representing business owners raised the concern that the unique needs of a facility that was operating on the margin or at a loss but was part of a larger parent company might not be taken into account with regard to the provision of reasonable accommodations. The specific fear expressed was that a parent company might choose to close a marginally profitable facility, rather than have the facility provide an expensive accommodation (see U.S. House of Representatives Committee on Education and Labor, 1990, p. 68; U.S. House of Representatives Committee on the Judiciary, 1990, pp. 40–41). These were termed *site-specific concerns*.

To address these concerns, the undue hardship factors were modified to clarify that, if a large entity operated several facilities, a court was to weigh the financial resources of *both* the small facility *and* the parent company and was to analyze the relationship between the two. In other words, a court was to examine the regular practices of the parent company in providing services and resources to its facilities in the area of employee benefits, services, and hiring in order to determine what resources were reasonably available to the local facility from the parent company (see U.S. House of Representatives Committee on Education and Labor, 1990, pp. 68–69; U.S. House of Representatives Committee on the Judiciary, 1990, p. 40; see also 29 C.F.R. §1630.2[p][2][ii]–[iii] & app.). Thus the small facility of a large company would not be treated like an independent small business because the parent company's resources would be taken into account—but hardships unique to the small facility would be considered as well.

As reflected in the statutory language, the ADA's approach to undue hardship was to require that the nature and cost of the accommodation be assessed in light of an employer's financial resources, workplace, and operations. The undue hardship standard is thus a *relative* standard. An accommodation that would rise to the level of an undue hardship for one employer in light of that employer's size, financial resources, or structure would not necessarily be an undue hardship for another employer (see U.S. House of Representatives Committee on the Judiciary, 1990, p. 41 ["Only those accommodations which would require significant difficulty or expense when considered in light of the size, resources, and structure of the employer would be considered an undue

hardship"]; U.S. House of Representatives Committee on Education and Labor, 1990, p. 67; U.S. Senate Committee on Labor and Human Resources, 1989, pp. 35–36; 29 C.F.R. app. §1630.2[p]: "The 'undue hardship' provision takes into account the financial realities of the particular employer or other covered entity"; see also the individualized approach in determining undue hardship in the case of *Nelson v. Thornburgh* [1983]).

The fact that the ADA's undue hardship standard is a flexible one caused some concern to representatives of the business community during passage of the ADA. Understandably, businesses want certainty; it is hard for an employer to imagine providing reasonable accommodations if the employer can never be "sure" whether a particular accommodation would ultimately be required under the law or not.

Although this desire for certainty is understandable, various alternatives to the flexible approach could severely undermine the civil rights aspect of the reasonable accommodation requirement without aiding employers in any significant manner. For example, a requirement that employers spend up to 10% of their gross income on reasonable accommodations would not take into account the employer's other expenses or whether those expenses have been particularly heavy in a specific year. A requirement that employers spend up to 10% of their net income on accommodations would allow employers to allocate all of their income to other expenses (including discretionary expenses) before any resources would be considered for accommodations for people with disabilities. An approach that tied the accommodation limit to a certain percentage of an employee's salary would mean that a wide range of accommodations that would be reasonable to expect large employers to provide as a matter of civil rights would not be required simply because the person with a disability was in a low-paying job. Indeed, the House of Representatives rejected an amendment that would have created a presumption of undue hardship if a reasonable accommodation cost more than 10% of the annual salary of the employee requesting it (House of Representatives, 1990a).

In the final analysis, therefore, Congress chose to continue the flexible "undue hardship" approach that had been used under the Rehabilitation Act for over 15 years. This approach ensures that the different resources and needs of small companies, as compared to large companies, are taken into account in each individual case while still providing the essential protection of reasonable accommodations to people with disabilities.

Public Accommodations In the area of public accommodations, the ADA lists three categories of affirmative steps that must be undertaken by private businesses to ensure that people with disabilities are effectively able to enjoy the goods and services being offered. Failure to take such steps constitutes discrimination against people with disabilities. These three requirement areas, covering modifications, auxiliary aids and services, and accessibility, are basically identical to the reasonable accommodation requirement in the employment arena, but the decision was made by those drafting the ADA to divide the requirement into three separate categories.

Modifications The ADA provides that a public accommodation must modify its policies, practices, and procedures if such modifications are necessary for a person with a disability to enjoy the goods and services being offered (42 U.S.C. §12182[b][2][A][ii]). For example, a restaurant that has a "no pets" rule must modify that policy to allow a person who uses a guide dog to keep the dog with him or her while eating at the restaurant (28 C.F.R. §36.302[c] & app.).

Auxiliary Aids and Services A public accommodation must provide "auxiliary aids and services" to a person with a disability if doing so would enable the person to benefit from the goods or services (42 U.S.C. §12182[b][2][A][iii]). For example, a doctor's office may have to provide an interpreter for a patient who is deaf, and a bank may have to ensure either that its written materials are available in braille for blind individuals or that a person is available to read the materials to blind customers (28 C.F.R. §36.303). The DOJ regulations make clear that the provision regarding auxiliary aids and services applies solely to making goods and services available to individuals with disabilities affecting hearing, vision, or speech (28 C.F.R. app. §36.303). As the DOJ guidance

explains, a business is required to ensure that individuals with other disabilities can effectively enjoy the business's goods and services through its obligations regarding modifications of policies and practices and physical barrier removal.

Again, there are limits to the requirements placed by the ADA. For example, a modification of a policy or practice need not be undertaken if doing so would "fundamentally alter the nature" of the goods or services being offered (42 U.S.C. §12182[b][2][ii]). For example, assume that a person with a vision impairment needs bright lights in order to see. A night club that kept its lights down low for ambience purposes would not have to change that policy because doing so would fundamentally alter the nature of the service being provided (28 C.F.R. §36.303[a]). (It is interesting to note that there is no *financial limit* placed on this obligation, although such limits are placed on most other obligations of businesses under the law.)

Similarly, a public accommodation need not provide an auxiliary aid or service if doing so would either fundamentally alter the nature of the goods or services being offered or impose an "undue burden" on the accommodation (42 U.S.C. §12182[b][2][A][iii]). Like undue hardship in employment, an undue burden is defined in the DOJ regulations as an action requiring "significant difficulty or expense" on the part of the public accommodation (28 C.F.R. §36.303[a]). Again, like undue hardship in employment, whether provision of an auxiliary aid would impose a significant difficulty or expense will depend on a range of factors, including the size and financial resources of the business (28 C.F.R. §36.104).

Accessibility Public accommodations are also required to take various affirmative steps to make their facilities accessible to people with disabilities. The limitations on these requirements vary depending on the *status* of the building—that is, whether the building is an existing one, is undergoing renovations, or is newly constructed.

In an existing building the law places a relatively low burden on a public accommodation in order to achieve nondiscrimination: the public accommodation must make physical access changes that are "readily achievable" (42 U.S.C. §12182[b][2][A][iv]). The ADA defines readily achievable as an action that is "easily accomplishable . . . without much difficulty or expense (42 U.S.C. §12181[9]). Examples would include installing ramps; making curb cuts in sidewalks and entrances; repositioning shelves; rearranging tables, vending machines, display racks, and other furniture; repositioning telephones; widening doors; eliminating a turnstile or providing an alternative accessible path; repositioning the paper towel dispenser in a bathroom and installing a full-length mirror; and creating designated accessible parking spaces (28 C.F.R. §36.304[b]).

The standard for determining whether an action is readily achievable is again a relative one, depending on the size and financial resources of the business. (42 U.S.C. §12181[9] lists factors to weigh in determining whether an action is readily achievable.) The *factors* listed in the law (such as the cost of the action, the financial resources of the business, and site-specific concerns) are identical to those set forth in the law to determine whether a reasonable accommodation in the employment setting represents an undue hardship and those set forth in the DOJ regulations to determine whether providing an auxiliary aid in a public accommodation setting represents an undue burden. The difference lies in the *standard* against which those factors are applied. That is, the standard for undue hardship and undue burden is "significant difficulty or expense." By contrast, the standard for readily achievable is "easily accomplishable and able to be carried out without much difficulty or expense."

If a public accommodation chooses to renovate a building, it must ensure that the renovated area is fully accessible. For example, the public accommodation may not build steps into the newly renovated area and would have to remove any steps that existed prior to the renovation in the area (42 U.S.C. §12183[a][2]). The only limitation in this regard is that the renovated area must be made accessible "to the maximum extent feasible (42 U.S.C. §12183[a][2]). Almost all accessibility changes will meet this standard. The DOJ regulations provide that, in circumstances in which the

nature of an existing facility makes it "virtually impossible" to comply fully with applicable accessibility standards, the alteration shall provide the maximum physical accessibility feasible (28 C.F.R. §36.402[c]).

If a public accommodation renovates a "primary function area" of its building, it incurs more extensive access requirements. A primary function area includes any area in which a primary function of the business takes place (28 C.F.R. §36.403[b]). For example, the customer service area of a bank is a primary function area, as is the dining area of a cafeteria, the meeting rooms in a conference center, and the offices and other work areas in which the activities of the public accommodation using the facility are carried out. Most major service or employment areas in a building will meet the definition of a primary function area. Areas that would not be covered include such places as mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, and rest rooms. In renovating a primary function area, the public accommodation must ensure that not only the renovated area itself but also the "path of travel" to the area is accessible (42 U.S.C. §12183[a][2]). In other words, the path that a person would travel from the *entrance* of the building *to the renovated area* must be made barrier free (28 C.F.R. §36.403[e]). In addition, the facilities serving the area, such as rest rooms, telephones, and water fountains, must be made accessible as well (42 U.S.C. §12183[a][2]).

An explicit financial limit, however, is afforded public accommodations in this area. That is, the path of travel and facilities serving the area do not have to be made accessible if the cost of doing so would be disproportionate to the cost of the initial renovation (42 U.S.C. §12183[a][2]). The DOJ has decided that "disproportionate" means any amount greater than 20 percent of the cost of the initial renovation (28 C.F.R. §36.403[f]). Thus if a public accommodation spends $100,000 on a renovation, it is required to spend up to, but not more than, $20,000 in making the path of travel to the renovated area and the facilities serving the area accessible (28 C.F.R. §36.403[g]). There is also an exemption that elevators need not be installed in buildings with fewer than three stories or less than 3,000 square feet per floor (42 U.S.C. §12183[b]; 28 C.F.R. §36.404).

Finally, if a public accommodation builds a new building, it must meet stringent requirements of accessibility: the building must be "readily accessible to and usable by" people with disabilities (42 U.S.C. §12183[a][1]). This means that people with disabilities must be able to enter the building, get around in the building, and use the building's facilities. Although it is not necessary that every rest room or, in some situations, every room be fully accessible, this standard requires a very high degree of accessibility throughout the building (U.S. House of Representatives Committee on Education and Labor, 1990, p. 118; U.S. House of Representatives Committee on the Judiciary, 1990, p. 60). In addition, there is no financial limitation on this requirement. Rather, a new building must be built accessible unless doing so would be "structurally impracticable" (42 U.S.C. §12183[a][1]; 28 C.F.R. §36.401[c]). Full compliance is structurally impracticable solely when the "unique characteristics of the terrain *prevent* the incorporation of accessibility features" (emphasis added).

Affirmative Requirements and Concomitant Limitations In the areas of both employment and public accommodations, the ADA thus places affirmative obligations on employers and businesses to remove barriers to the employment of people with disabilities or to the ability of people with disabilities to enjoy goods or services—whether those barriers are caused by physical impediments or by policy impediments. In each case, however, the civil right of the individual with the disability to encounter a society free of barriers is not carried to its logical conclusion. That is, in each case, a *limit* is placed on the employer's or public accommodation's obligation to make changes or modifications. These limits take into account both financial and operational concerns of the employer or business.

Some might say the incorporation of financial and operational limitations in the law ensures that the civil rights of people with disabilities are not carried to their "extreme conclusion." I believe that the second concept of antidiscrimination, which rests on the premise that people with

disabilities have a civil right to be *included* within the *societal norm*, does not inherently (nor should it) include a limitation based on cost or operational difficulty. Thus I believe that the civil rights of people with disabilities have not been taken to their "logical" conclusion in the ADA.

I also believe, however, that as a practical and political matter, Congress would not have passed the ADA without these particular limitations (see, e.g., Feldblum, 1991a, pp. 523–531). That is, I believe that *Congress* viewed establishing affirmative requirements on businesses and employers without including concomitant limitations based on cost and operational difficulty as taking the civil rights concept for people with disabilities to an "extreme" rather than a "logical" conclusion. Accepting this premise within the law was thus a necessary precondition to ensure that the bill actually became a law.

Qualification Standards and Eligibility Criteria: A Combination of the Civil Rights Concepts

The ADA sets forth explicit requirements regarding qualification standards in employment and eligibility criteria in public accommodations that incorporate both concepts of antidiscrimination. In employment the ADA provides that discrimination includes having qualification standards, employment tests, or other job selection criteria that "screen out or tend to screen out" people with disabilities (42 U.S.C. §12112[b][6]). For example, an employer may not have as a qualification standard for a job the requirement that applicants must be able to stand for 5 hours at a time or must have a driver's license, because such standards would screen out, or tend to screen out, people whose disabilities preclude them from standing for long periods of time (e.g., people with various medical conditions) or from obtaining drivers' licenses (e.g., some people who use wheelchairs or who have epilepsy).

This requirement is an application of the traditional concept of civil rights. That is, just as an employer may not directly deny employment to a protected group of individuals (e.g., have a policy that says: "no people with any hearing impairments need apply"), the employer also may not have a qualification standard that screens out, or tends to screen out, people with certain disabilities. This is analogous to the "disparate impact" discrimination prohibited under Title VII of the Civil Rights Act of 1964, initially through judicial interpretation and now codified in statute (see, e.g., Civil Rights Act of 1991 [PL 102-166]; *Griggs v. Duke Power Company*, 1971). Section 102(b)(3)(A) of the ADA also refers to this aspect of discrimination by prohibiting the use of "standards, criteria or methods of administration that have the *effect of discrimination* on the basis of disability" (emphasis added).

There is also a necessary and logical limitation to this prohibition. Under the ADA, an employer *may* have a qualification standard, test, or criterion that directly screens out, or that tends to screen out, people with disabilities if that standard or criterion is "job-related and consistent with business necessity" (42 U.S.C. §12113[a]). (For a brief political history of the motivation for adoption of these particular words, see Feldblum, 1991a, pp. 538–540.) In other words, an employer may apply a physical or mental qualification standard that precludes a person with a disability from obtaining a job if the employer demonstrates that the standard is, in fact, necessary for the person's performance of the job.

This allowance for the employer recognizes that a person's disability sometimes *is* relevant to performance of a job. In other words, the concept of civil rights for people with disabilities does not mean that a person with a disability has the *right* to *any* job he or she seeks. Rather, it means that the person has the right to be judged on his or her *merits* and not to be judged on the basis of myths or stereotypes regarding the person's particular disability.

However, the concept of civil rights also means something more for the person with a disability. The allowance for the employer is not open ended: it comes with an *obligation* that reflects the second concept of antidiscrimination. That is, an employer must prove not only that a qualification standard that screens out a person with a disability is job related but also that it is "consistent with

business necessity" and that performance of the job by the applicant or employee "cannot be accomplished with reasonable accommodation" (42 U.S.C. §12113[a]; see also 29 C.F.R. §1630.15[b][1]). In other words, the employer must scrutinize its standard to see if there are lesser discriminatory alternatives than the one it has chosen (see, e.g., *Davis v. Frank*, 1989; *Prewitt v. United States Postal Service*, 1983) and whether there are societal barriers that the employer can remove through *reasonable accommodations* that will enable the person with a disability to perform the job (see, e.g., *Davis v. Frank*, 1989; *Hall v. United States Postal Service*, 1988; *Nelson v. Thornburgh*, 1983).

The same concepts of antidiscrimination appear in an analogous requirement in the public accommodations section of the ADA. Under the law a public accommodation may not have an "eligibility criterion" that screens out, or that tends to screen out, a person with a disability (42 U.S.C. §12182[b][2][A][i]). This is basically a straightforward explication of the prohibition that goods and services may not be denied to people with disabilities. It is based on the premise that disability is a characteristic that should be irrelevant to the provision of goods or services. For example, a fitness club may not require that all clients be able to hear the spoken word because that would directly screen out deaf people from the club's facilities. Similarly, a business could not have a "neutral" requirement that all customers must display a valid driver's license in order to make purchases because that would tend to screen out people with certain disabilities.

As can be expected, there is an "unless" to this prohibition as well. That is, a public accommodation *may* have an eligibility criterion that screens out persons with disabilities *if* the business proves that the criterion is "necessary" for the provision of the goods or services (42 U.S.C. §12182[b][2][a][i]; 28 C.F.R. §36.301). For example, a rental car company may require that customers show valid driver's licenses because that would be necessary for the business's provision of the service. In other words, if disability *is* directly relevant to the provision of goods or services, it may be taken into account.

Again, however, the second concept of antidiscrimination is interwoven within this requirement. Although a business may impose legitimate eligibility criteria, it must also first ensure that there are no modifications of policies or procedures and no provision of auxiliary aids or services that would enable the person with a disability to meet the criteria and enjoy the goods and services (28 C.F.R. §36.301–303). That is, the business owner must examine whether there are any *societal* barriers that prevent a customer or client from meeting a particular eligibility criterion before imposing the criterion to exclude the individual.

These requirements are explicitly spelled out in the area of health or safety threats to others. The ADA recognizes that a business may require that a customer or client not pose a "direct threat" to the health or safety of others. Such a requirement is explicitly recognized as a valid eligibility criterion (42 U.S.C. §12182[b][3]). There is an analogous requirement in the employment arena (42 U.S.C. §12111[3]). The law in such situations explicitly defines direct threat to mean: "a significant risk to the health or safety of others that cannot be eliminated by *a modification of policies*, practices, or procedures, or by the *provision of auxiliary aids* or services" (42 U.S.C. §12182[b][3], emphasis added; see also 28 C.F.R. §36.208). In other words, if a customer's disability would cause a significant threat to the health or safety of others, that is a relevant concern that can justify the denial of services to that individual. However, *before* services may be denied, the business owner must ensure that there are no affirmative steps that can be taken by the business to eliminate the harm or reduce it to an acceptable level. The same requirement exists in the employment setting (42 U.S.C. §12111[3]), where a direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."

Separate Services under the ADA

As can be discerned from the two previous sections, three conceptual premises operate simultaneously within the ADA: 1) that disability is irrelevant in most cases, 2) that disability *is* relevant

in certain circumstances, and 3) that the relevance of a disability may not be evaluated in a social vacuum and that employers and business owners have an affirmative obligation to "undo" barriers caused by society (what I have called the "second concept of antidiscrimination" embodies these latter two conceptual premises). The interplay between these premises is graphically displayed in the ADA's requirement regarding "separate" services for people with disabilities in the area of public accommodations.

As noted above, the ADA prohibits offering goods and services to people with disabilities in a special or separate format (42 U.S.C. §12182[b][1][a][iii]). The law also provides, however, that it is not discriminatory for a public accommodation to offer different or separate services if doing so would be "necessary" to provide the individual with a good or service that is as "effective" as that provided to others. For example, a day camp could legitimately set up a special section in the camp for emotionally disturbed children if specially trained counselors and special accommodations in the programs were necessary to provide the children with a day camp experience that was effective for them.

The ADA also emphasizes that, if a public accommodation sets up a separate program (which meets the requirements of a legitimate separate program) for people with certain disabilities, that does not allow the public accommodation to *preclude* a person with a disability from participating in the mainstream, nonseparate programs (42 U.S.C. §12182[b][1][C]). The public accommodation may require, of course, that the individual meet the necessary eligibility criteria for the mainstream, integrated program (28 C.F.R. §36.301[a]). The business, however, bears the responsibility for providing any necessary modification of policies or provisions of auxiliary aids that will enable the person to enjoy the mainstream services, up to the limits established by the law (see Affirmative Aspects of Antidiscrimination Protection, above).

The ADA's treatment of separate services thus graphically illustrates the interdependency among the three conceptual premises of the ADA. The law precludes treating a person with a disability as if the disability were relevant to the person's enjoyment of goods and services by offering the person a different or separate service—*except* when the person's disability *is* relevant. In that case, a separate good or service that enables the person to enjoy the good or service in a more effective manner may be offered. The public accommodation, however, may not foist this separate good or service on the person; the individual must be allowed to participate in the integrated good or service. The business retains the right, however, to ensure that the person meets necessary and legitimate eligibility criteria—albeit with modifications of policies or provisions of auxiliary aids if necessary.

CONCLUSION

In setting forth detailed, explicit forms of prohibited discrimination, the ADA differs from most other civil rights laws. The majority of civil rights laws simply set forth a general prohibition on discrimination. The regulations issued to implement such laws and the cases brought under such laws subsequently fill out the types of action that are considered to be "discrimination" (see, e.g., Title II, Title VII, and Title VIII of the Civil Rights Act of 1964 [42 U.S.C. §§2000a, 2000e, 2000f (1988)], which cover public accommodations, employment, and housing, respectively).

Section 504 of the Rehabilitation Act follows this classic civil rights law model. It has a general prohibition that states, "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . " (29 U.S.C. §794[a] [1988]). The regulations to Section 504 and the subsequent case law then set forth specific examples of the prohibited discrimination (see, e.g., 45 C.F.R. pt. 84).

The detailed form of the ADA, by contrast, is critical in that it sets forth explicitly within the

law the second concept of antidiscrimination. The detailed form of the ADA can be traced to two separate factors. First, it took significant time and effort for regulations to be issued by the relevant federal agencies, in the mid-1970s, to implement Section 504 of the Rehabilitation Act of 1973 (Burgdorf, 1990, pp. 22–23; Scotch, 1984). Those regulations, when they were finally issued, represented strong requirements and incorporated the concept of affirmative obligations as part of Section 504's antidiscrimination principle (see, e.g., 45 C.F.R. pt. 84). This principle was then further explicated in a series of judicial cases brought under Section 504 (see, e.g., *Davis v. Frank*, 1989; *Hall v. United States Postal Service*, 1988; *Nelson v. Thornburgh*, 1983; *Prewitt v. United States Postal Service*, 1981).

Those of us working on the ADA were thus interested in having the law be as explicit as possible with regard to the prohibited forms of discrimination (Feldblum, 1991a, p. 524). We expected this explicitness to be beneficial on two levels. First, it would ensure that implementation of the ADA would not be excessively dependent on the issuance of new regulations by various federal agencies. Second, it would ensure that the antidiscrimination principle of the law would explicitly include the second concept of antidiscrimination—that of affirmative obligations on the part of employers and businesses.

The second major factor dictating the detailed structure of the law came from what could be perceived as "the opposite corner." There were extensive negotiations over the ADA with a range of interested parties—including Democratic and Republican members of both the Senate and the House of Representatives, the Bush administration, the business community, and the disability and civil rights communities (see Feldblum, 1991a, pp. 525–531). Members of the Bush administration were key players in these early negotiations. As reflected in testimony to the Senate Labor and Human Resources Committee delivered by then–Attorney General Richard Thornburgh, the administration's stance was to support legislation that would simply extend the requirements of Section 504 of the Rehabilitation Act of 1973 to the private sector (U.S. Senate Committee on Labor and Human Resources Subcommittee on the Handicapped, 1989; see also Feldblum, 1991a, pp. 527–528). This position accommodated the political goal of reassuring members of the business community that the new law would not be any more radical or sweeping than what had already been in place for over 15 years (Feldblum, 1991a, pp. 522, 527).

Thus a major principle guiding the negotiations between administration officials and Senate sponsors of the ADA during the early stages of the ADA's progress was to draw on existing Section 504 regulations and case law for guidance and direction. As part of the negotiations, many detailed Section 504 regulations were transported, almost verbatim, into the ADA (see Feldblum, 1991a, pp. 527–528, describing the political process of the negotiations, and pp. 541–548, explicating how that process affected the development of specific statutory language). The result was to enhance the specific, detailed requirements that already existed in the law. This focus on using the detailed Section 504 regulations as a basis for the ADA's statutory language remained a constant factor throughout the various negotiations on the ADA (Feldblum, 1991a, 529–530, noting negotiations with four different House Committees). (A weakening of reliance on Section 504 case law occurred during negotiations between disability advocates and members of the House Energy and Commerce Committee, when both parties to the negotiation developed a new approach to accessibility in rail transportation.)

Thus concerns on the part of the disability community on the one hand and on the part of the business community on the other resulted in a form of statutory explicitness that has not traditionally been present in civil rights laws. The result is that affirmative obligations on the part of employers and business owners, which represent a newer and more radical aspect of civil rights, have become clearly explicated in a federal statute. The long-term ramifications—for other minority groups as well as for people with disabilities—of imposing such obligations as a matter of *civil rights* is something to be followed and analyzed as the courts begin to implement the ADA across this country.

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Chapter from

The Americans With Disabilities Act: From Policy to Practice

Edited by Jane West

For the Milbank Memorial Fund

1991

Employment Protections

Chai R. Feldblum

EDITOR'S NOTE

The orientation of many disability policies requires people with disabilities to spend their energy proving that they cannot work (or learn, or care for themselves . . .) so they can qualify for the support of public dollars. One of the great contributions of the Americans with Disabilities Act (ADA) to disability policy is its mandated change of focus—from asking people what they cannot do to asking them what they can do, and then providing them with the necessary supports to use their skills and proceed.

At the heart of this disability-policy orientation is the equal-employment-opportunity mandate in ADA. The employment provisions are remarkably precise and at the same time flexible, reflecting an understanding of the wide range and complex nature of disabilities and the necessity of individualization. Building on the 17-year history of section 504 of the Rehabilitation Act, the ADA equal-employment-opportunity mandate is not so much new as it is refined and revisited. Chai R. Feldblum examines the requirements of the law, paying particular attention to how employers can use the flexibility of the law to maximize opportunities for employees with disabilities and business effectiveness.

Feldblum is legislative counsel with the American Civil Liberties Union. She helped draft the original ADA introduced in the 101st Congress and was principal legal advisor to the disability and civil-

rights communities during the two-year legislative consideration of the ADA. Feldblum clerked for Justice Harry A. Blackmun during the Supreme Court term in which the landmark School Board of Nassau County v. Arline *case was decided and served as director of legislative research at AIDS Action Council. She was a participant in shaping two pieces of legislation that served as building blocks for the ADA: the Civil Rights Restoration Act and the Fair Housing Amendments Act.*

A graduate of Harvard Law School, Feldblum has spoken and written widely on disability issues. Her articles include "The Americans with Disabilities Act: Definition of Disability," published in the American Bar Association Labor Lawyer, *and "Workplace Issues: HIV and Discrimination," which appeared in* AIDS Policy for the 1990's. *She is working with Robert L. Burgdorf Jr. on a legal treatise,* Disability Discrimination Law, *to be published by the Bureau of National Affairs in 1992.*

Having a stable and fulfilling job is a basic component of the American dream. Every one of us would like to have a job that is enjoyable and stimulating and that provides us with sufficient income to meet our needs. People with disabilities are no different. People with disabilities would like to obtain jobs that meet their needs and are suited to their talents, and, like everyone else, they would like to secure promotions and advance in their careers.

The difficulty faced by many people with disabilities, however, is that they are often not given the opportunity to demonstrate their talents and abilities to perform certain jobs. Instead, myths and stereotypes regarding the person's inability to perform a job, or simply fears about hiring a person with a disability for a particular job, preclude the individual from receiving offers of employment or promotion.

Title I of the Americans with Disabilities Act (ADA) addresses the employment of people with disabilities. It establishes a general prohibition against discrimination in employment on the basis of disability and sets forth, in some detail, what constitutes "discrimination" in the context of employment.

The employment title of the ADA can be best understood as deriving from two distinct laws. The substantive provisions of the title stem from the Rehabilitation Act of 1973, which is examined by Nancy Jones in her article in this volume. The Rehabilitation Act prohibits discrimination, including employment discrimination, on the basis of handicap by the federal government, federal contractors, and entities that receive

federal funds.[1] Thus, decisions such as who is a person with a "disability," what constitutes "discrimination" on the basis of disability, or what is required as a "reasonable accommodation," are derived from similar substantive requirements established under the Rehabilitation Act. The goal of the drafters of the ADA was to draw as much as possible from 15 years of experience under the Rehabilitation Act in order to create a workable and understandable law.

The procedural requirements of the ADA's employment title, by contrast, are drawn from title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination on the basis of race, sex, religion, or national origin by employers with 15 or more employees.[2] One of the purposes of the ADA was to establish long-awaited parity in federal civil-rights laws between people with disabilities and other minorities and women. Thus, the procedural requirements of the ADA—which employers are covered under the ADA and which remedies are provided by the law—are drawn from and are essentially equal to those in title VII.

PERSON WITH A DISABILITY[3]

A "person with a disability" under the ADA, as derived substantially from the Rehabilitation Act, is defined as someone who

1. Has a physical or mental impairment that substantially limits that person in one or more major life activities, or
2. Has a record of such a physical or mental impairment, or
3. Is regarded as having such a physical or mental impairment.[4]

This three-prong definition of disability in the ADA dates back to 1974. In 1973, when Congress passed the Rehabilitation Act and included within it the affirmative action and anti-discrimination protections of sections 501, 503, and 504, a person with a handicap was defined as someone whose disability limited his or her employability and who could therefore be expected to benefit from vocational rehabilitation.[5]

One year later, after reviewing attempts by the Department of Health, Education and Welfare (DHEW) to devise regulations to implement the Act, Congress concluded that this definition—although

appropriate for the vocational rehabilitation sections of the Rehabilitation Act—was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs covered by section 504. Congress, therefore, amended the definition in 1974, broadening it to include the three prongs that have remained the basis of the section 504 definition ever since.[6]

The first prong of the definition of a person with a disability is someone who has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[7] The various committee reports to the ADA, as well as the regulations issued by DHEW in 1977 to implement section 504 of the Rehabilitation Act, explain that a "physical or mental impairment" is

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; [or] any mental or psychological disorder . . .[8]

Neither the regulations issued to implement the Rehabilitation Act nor the ADA legislative reports attempt to set forth a list of specific diseases or conditions that would make up physical or mental impairments. The reason is straightforward: it would be impossible to ensure the comprehensiveness of such a list given the variety of possible physical and mental impairments that may exist.[9] The ADA legislative reports, however, give examples of some of the diseases and conditions that would be covered:

> orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction and alcoholism.[10]

An impairment, therefore, is some physiological or mental disorder. It does not include simple physical characteristics, such as eye or hair color.

Having a physical or mental impairment, however, is only the first part of the definition. The impairment must also be one that "substantially limits" the person in a "major life activity." The legislative reports to the ADA set forth an illustrative list of major life activities: "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[11]

Most serious medical conditions do have a substantial impact on basic life activities. For example, someone with emphysema will have substantial difficulty in breathing; someone who is a paraplegic will have substantial difficulty in walking; and someone with dyslexia will have substantial difficulty in learning.[12]

The term "people with disabilities," therefore, is not limited to what has sometimes been termed "traditional disabilities." The ADA covers a wide range of individuals—from people who use wheelchairs, to people who have vision or hearing impairments, to people with epilepsy or cerebral palsy or HIV disease or lung cancer or manic depression.

The second prong of the definition of disability covers a person with a "record" of an impairment. This prong is designed to extend protection to an individual who had a physical or mental impairment at some point in the past, who has recovered from that impairment, but who nevertheless experiences discrimination based on the *record* of having the impairment. Examples of such discrimination would include individuals who have recovered from cancer or from a mental illness, but who experience discrimination because of the stigma or the fear associated with such disabilities.[13]

The third prong of the definition covers people who are "regarded as" having an impairment. This prong is designed to extend protection to a person who may not have any impairment at all, or to a person who has some relatively minor impairment, but who is regarded by others as having a physical or mental disorder serious enough to limit him or her in some major life activity. For example, a person may have a significant physiological cosmetic disorder, such as a large birthmark on a cheek, that does not, in fact, substantially limit the person in any way. An employer, however, may view that disorder as substantially limiting that person's ability to work and to interact with others, and may discriminate against the person on that basis. Similarly, a person may not have any disorder at all, but may be erroneously perceived by an employer as having a mental or physical illness and may be discriminated against on that basis.[14]

As can be seen, the definition of disability under the ADA—as under the Rehabilitation Act—is a broad and comprehensive one.

However, it is important to keep in mind that it is the responsibility of the person alleging discrimination to prove that he or she is covered under the law. In other words, the individual who alleges that discrimination has occurred must prove either that he or she has a physical or mental impairment that substantially limits him or her in a major life activity, or that he or she has a record of such an impairment, or that he or she was regarded by the person who engaged in the discriminatory act as having such an impairment. This burden of proof always rests with the individual who alleges the discrimination.[15]

Specific categories of people with various disabilities received special attention during the passage of the ADA—either to emphasize their inclusion or to establish their exclusion:

PEOPLE WITH AIDS

People with HIV disease (which includes individuals who have any form of Human Immunodeficiency Virus [HIV] illness, from asymptomatic HIV infection to full-blown AIDS) are included within the first prong of the definition of "disability."[16] People with HIV disease have been covered under the Rehabilitation Act for years.[17] In order to receive protection under the law, such individuals, just like people with any other disability, may not pose a "direct threat" to the health or safety of others.[18]

PEOPLE WITH ALCOHOL DEPENDENCY

A person who is dependent on alcohol is covered under the ADA as a person with a disability.[19] Such individuals are covered under title V of the Rehabilitation Act as well.[20] By contrast, a person who simply uses alcohol on a casual basis, and is not dependent on alcohol, would not be considered to have an "impairment" and therefore would not be covered under the first prong of the definition of disability.[21]

PEOPLE WHO ILLEGALLY USE DRUGS

Individuals who are current illegal users of drugs are not covered under the ADA.[22] Although such individuals had previously been covered under the Rehabilitation Act, the ADA amends that Act as well to provide for the same exclusion of current illegal drug users.[23] Under this exclusion, an employer may take adverse actions against an individual who currently illegally uses drugs, because of the use of such drugs, regardless of whether the drug use has any adverse impact on the person's job performance.

Although individuals who currently illegally use drugs are not protected under the ADA, individuals who have overcome drug problems are protected. For example, individuals who have successfully completed (or are successfully enrolled in) a supervised rehabilitation program and are no longer using drugs, or individuals who have been successfully rehabilitated through other means and are no longer using drugs, are considered as individuals with a "record" of a disability and are protected from discrimination. In addition, individuals who are erroneously perceived as being illegal drug users are covered as well.[24]

PEOPLE WITH SELECTED MENTAL AND SEXUAL DISORDERS

Most individuals with mental impairments are covered under the ADA. Such individuals have been covered under the Rehabilitation Act for years.[25] There is a long history of discrimination against people with mental disabilities in this country, often based on ungrounded myths and fears regarding such disabilities. Of course, such individuals, just like people with any other disability, must be qualified for the jobs they desire in order to seek redress for discrimination under the ADA.[26]

Despite the fact that the qualification requirements of the ADA protect employers against individuals with mental disabilities who would not be able to perform a job, or would pose a threat to others, the ADA also removes, as a blanket matter, a select group of mental and sexual disorders from the list of impairments covered under the Act. The excluded impairments are: pedophilia, exhibitionism, voyeurism, gender identity disorders that are not the result of physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from the current illegal use of drugs. Transvestism and transsexualism, which are officially defined as mental impairments by the American Psychiatric Association, are also listed among the exclusions.[27]

PEOPLE WHO ARE GAY

A person who is gay or bisexual is not considered, under current medical or psychological diagnoses, to have either a mental or physical impairment.[28] Thus, such individuals were never covered, solely by

virtue of their sexual orientation, under the Rehabilitation Act, and are not covered under the ADA. Section 511(a) of the ADA explicitly states that "homosexuality and bisexuality are not impairments and as such are not disabilities under this Act."

PEOPLE WHO ASSOCIATE WITH PEOPLE WITH DISABILITIES

The ADA also extends antidiscrimination protection to a class of individuals not covered under the Rehabilitation Act. The ADA prohibits an employer from discriminating against a qualified applicant or employee who does not have a disability because the employer knows that the applicant or employee associates with a person who has a disability.[29] For example, an employer could not refuse to hire an applicant simply because the applicant's wife or husband uses a wheelchair. Similarly, an employer could not fire an employee simply because the employee lives with a person who has AIDS.[30]

The ADA does not limit the forms in which the association with the person with a disability must take place. Thus, individuals who associate with persons with disabilities through a range of activities—being their friend, spouse, domestic partner, relative, business associate, advocate or caregiver—are covered under the association provision. The individual alleging discrimination, however, bears the burden of proving that the discrimination occurred because of his or her known association with a person with a known disability.[31]

QUALIFIED PERSON WITH A DISABILITY

The fact that an individual has a disability establishes the initial coverage for that person under the ADA. The law also requires, however, that the person be a "qualified person with a disability."[32] The requirement that a person with a disability be "qualified" was placed in the ADA, as Congress had previously placed it in the Rehabilitation Act, essentially to address (often misplaced) fears that the laws' antidiscrimination provisions would mandate the hiring or retention of people with disabilities, even when those disabilities made the individuals unable to perform particular jobs.

A qualified person with a disability is defined, in the ADA, as a person who, "with or without reasonable accommodation, can perform

the essential functions of the employment position that such individual holds or desires."[33]

This requirement consists of two basic components. The first component deals with "essential functions." It is not the purpose of the ADA, just as it is not the purpose of other civil-rights laws, to force employers to hire individuals who cannot actually perform the particular jobs under consideration. Often, however, employers may list among a job's functions certain activities that are not necessary for the performance of the job. For example, an employer might require—perhaps for ease of identification—that all employees have a driver's license, even though driving is not a basic requirement for the job. Or an employer may require that a clerical person be able to answer the telephone, even though the basic job is one of filing.

Many times these additional nonbasic job requirements have no impact on people with disabilities. However, sometimes a person with a disability is perfectly qualified to perform all the essential functions of a job, but is unable to perform one marginal or nonbasic job requirement. If the person with a disability is denied the job because of inability to perform that requirement, the person's employment opportunities have been unjustifiably limited because of his or her disability.

To address this concern, the ADA establishes that employers may refuse to hire or to retain individuals who cannot perform the "essential functions" of a job. "Essential functions" mean basically what they sound like: functions that are not marginal or tangential to the job in question. Thus, an employer is allowed to refuse to hire or retain a person with a disability who, because of the disability, truly cannot perform an essential function of the job. It is not legitimate, however, for the employer to refuse to hire or to retain a person with a disability who cannot perform some job task that is marginal to the job."[34]

The second component of a "qualified person with a disability" is that of reasonable accommodation. A person with a disability is often qualified to perform a job—if some adjustment is first made in the structure, schedule, physical layout, or equipment. For example, a person who uses a wheelchair may need a table adjusted for height or may need a ramp built to allow access. Persons with varying degrees of hearing impairments may need a telephone amplifier or an interpreter. Someone with a chronic physical condition may need some time off each week for medical treatments. If these adjustments or modifications—which are called "reasonable accommodations"—are

made, a person with a disability might then be qualified for the particular job he or she seeks.[35]

As described in greater detail below, the ADA requires that employers provide such reasonable accommodations to their applicants and employees. Moreover, in assessing whether an individual is qualified to perform the essential functions of a job, an employer must first take into account whether there are any reasonable accommodations that will enable the individual to perform those functions.[36]

FORMS OF DISCRIMINATION PROHIBITED

Like most other civil-rights laws, the ADA sets forth a general prohibition against employment discrimination. Unlike most other civil-rights laws, however, the ADA also sets forth specific examples of what constitutes such discrimination.

As a general rule, the ADA provides that no "covered entity"[37] shall discriminate against a qualified person with a disability because of the disability of such individual in a range of employment decisions: in job-application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms and conditions of employment.[38] Essentially, every type of employment decision is covered. The basic requirement is that a qualified person with a disability may not be discriminated against—simply on the basis of his or her disability—in terms of hiring, firing, promotions, recruitment, conditions of the employment position, or any other aspect of employment.

The ADA then lists specific examples of what discrimination "on the basis of disability" includes. First, an employer may not limit, segregate, or classify applicants or employees on the basis of disability in a way that adversely affects the opportunities or status of such individuals.[39] This is a relatively straightforward application of the antidiscrimination provision. An employer could not, for example, have all employees with disabilities work in a separate, segregated section of the workplace, or pay employees with disabilities on a lower pay scale for work equivalent to that performed by other employees.

Second, an employer may not enter into a contractual arrangement that has the effect of subjecting the employer's employees to discrimination.[40] In other words, an employer may not do indirectly, through a

contract or a license, what he or she may not do directly under the ADA. Although this is a logical requirement, employers will need to reflect on its ramifications. For example, this provision means that if an employer contracts with another entity to provide training for employees of the business, the training must be given in a place and manner that is accessible to any employees with disabilities. Similarly, if the employer holds an annual retreat or convention for its employees, the employer must pick a site that is accessible to its employees with disabilities.[41] These would be the types of reasonable accommodation requirements the employer would have if it were acting directly. Just as there is an "undue hardship" limitation on reasonable accommodations that must be offered by the employer, however, there is also an identical "undue hardship" limitation that applies when the employer contracts with other entities.[42]

Third, an employer must provide reasonable accommodations to the known physical or mental limitations of a person with a disability who is otherwise qualified to perform a particular job, unless providing such accommodations would impose an "undue hardship" on the employer. In addition, an employer may not refuse to hire a person with a disability simply because the person will require a reasonable accommodation.[43] This area is discussed in greater detail below.

Fourth, an employer may not have a qualification standard, employment test, or other job-selection criterion that "screens out" people with disabilities.[44] For example, an employer may not have, as a qualification standard for a job, that applicants may not depend on physical devices in order to walk. Such qualification standards would directly "screen out" people with certain disabilities—for example, people who use wheelchairs or crutches.

An employer may also not have a qualification standard, employment test, or other job-selection criterion that "tends to screen out" people with disabilities.[45] For example, an employer may not have, as a qualification standard for a job, that applicants possess a driver's license. Although this standard appears neutral on its face, because it does not refer directly to any disability, in application this standard will "tend to screen out" people with disabilities—for example, some people with epilepsy and some people who use wheelchairs who cannot drive.

There is also a necessary and logical limitation to this prohibition. An employer *may* have a qualification standard, test, or criterion that directly screens out, or that tends to screen out, people with disabilities,

if that standard or criterion is in fact *necessary* for the individual to meet in order to perform a particular job. In the words of the ADA, the standard or criterion must be "job-related and consistent with business necessity."[46]

Fifth, there are a series of requirements regarding medical exams and inquiries, as well as requirements regarding general testing, that fall within the antidiscrimination prohibition. These are discussed separately in a later section, "Medical Exams and Inquiries."

In setting forth these specified forms of prohibited action, the ADA is different from most other civil-rights laws. The majority of civil-rights laws simply set forth a general prohibition on discrimination. The regulations issued to implement such laws, and the subsequent cases brought under such laws, then fill out the types of action that are considered to be "discrimination."[47]

The detailed form of the ADA is primarily the result of three factors. First, it took significant time and effort for the first section 504 regulations to be issued by the relevant federal agencies. Supporters of the ADA were therefore interested in having the ADA be as explicit and detailed as possible so as to ensure that implementation of the ADA would not be excessively dependent on the issuance and content of regulations.

Second, existing section 504 regulations and case law acted as a guiding principle for the extensive negotiations that took place on the ADA. As a result, many detailed section 504 regulations were transported, almost verbatim, into the ADA.[48]

Third, and perhaps of key importance, there are aspects of discrimination against people with disabilities that often are not readily apparent to many individuals. By having the ADA address these issues explicitly in the statute, Congress ensured that it would review those areas directly—and would provide direction and/or limitations in these areas if it chose to do so. The following three sections, which explain the reasonable accommodation requirements, the prohibitions on medical exams and inquiries, and the available defenses for employers, form a good example of areas that benefited from explication in the statute and in the accompanying legislative reports.

REASONABLE ACCOMMODATION

Reasonable accommodation is a key aspect of antidiscrimination protection for people with disabilities. As explained above, a person with a disability may often be perfectly qualified to perform a job—if some modification or adjustment is first made in the job structure or environment. The ADA mandates that employers provide these modifications and adjustments, called "reasonable accommodations," to applicants and employees with disabilities.[49]

The ADA lists a number of modifications that fall within the framework of reasonable accommodations:

1. Modifying the physical layout of a job facility so as to make it accessible to individuals who use wheelchairs or who have other impairments that make access difficult
2. Restructuring a job to enable the person with a disability to perform the essential functions of the job[50]
3. Establishing a part-time or modified work schedule (for example, to accommodate people with disabilities who have treatment needs or fatigue problems)[51]
4. Reassigning a person with a disability to a vacant job[52]
5. Acquiring or modifying equipment or devices (such as buying a hearing telephone amplifier for a person with a hearing impairment)
6. Adjusting or modifying exams, training materials, or policies (for example, giving an application examination orally to a person with dyslexia or modifying a policy against dogs in the workplace for a person with a service dog)
7. Providing qualified readers or interpreters for people with vision or hearing impairments[53]

These are simply examples of types of accommodations that could be required. The basic characteristic of a reasonable accommodation is that it is designed to address the unique needs of a person with a particular disability. Thus, an accommodation for one person might be one that falls within one of the above categories, or it might be a different type of accommodation personally identified by the person with a disability or by the employer. The underlying goal is to identify aspects of the disability that make it difficult or impossible for the person with a disability to perform certain aspects of a job, and then to determine if

there are any modifications or adjustments to the job environment or structure that will enable the person to perform the job.

As can be imagined, some accommodations are inexpensive and easy to institute, whereas others are costly and difficult to implement. In light of that fact, the ADA sets a limitation on the employer's obligation to provide a reasonable accommodation. Under the law, an employer need not provide an accommodation if doing so would impose an "undue hardship" on the employer. An accommodation is considered to rise to the level of an undue hardship if providing it would result in a "significant difficulty or expense" for the employer.[14]

Whether an accommodation is considered to be a significant difficulty or expense for the employer depends on a series of factors about the particular business. The ADA sets forth the following factors to be weighed:

1. What is the nature of the needed accommodation and how much will it cost?
2. What are the financial resources available to the employer, how big is the employer (i.e., how many individuals are employed), and what effect will the accommodation have on the employer's expenses, resources, or other areas?
3. What type of operation does the employer run, and what impact will the accommodation have on it and on the work force?[15]

The ADA's approach to undue hardship, therefore, is to require an assessment of the nature and cost of the accommodation in light of the employer's financial resources, workplace, and operations. As the legislative reports to the ADA emphasize, the undue-hardship standard is thus a *relative* standard. An accommodation that would constitute an undue hardship for one employer would not necessarily be so for another.[16]

This flexible approach in determining undue hardship is well illustrated in the section 504 case of *Nelson v. Thornburgh*.[17] In that case, a court ordered the Pennsylvania Department of Public Welfare to provide several accommodations, including the use of readers, computers, and braille forms, for a number of workers who were blind. Although the costs of the accommodations were substantial, the court concluded that they did not rise to the level of an undue hardship because they were only a small fraction of the state agency's personnel budget.[18]

The fact that the ADA's undue-hardship standard is a flexible one caused some concern to representatives of the business community during passage of the ADA. Understandably, businesses want certainty; it is hard for an employer to imagine providing reasonable accommodations if the employer can never be sure whether a particular accommodation would ultimately be required under the law or not.

Although this desire for certainty is understandable, the various alternatives to the flexible approach would in all likelihood restrict the opportunities available to people with disabilities and would restrict needed flexibility for employers as well. For example, a requirement that employers spend up to 10 percent of their gross income on reasonable accommodations would not take into account the employer's other expenses or whether those expenses have been particularly heavy in a specific year. A requirement that employers spend up to 10 percent of their net income on accommodations would allow employers to allocate all of their income to other expenses (including discretionary expenses) before any resources would be considered for accommodations. An approach that tied the accommodation limit to a certain percentage of an employee's salary would mean that a wide range of accommodations, which would be perfectly reasonable to expect large employers to provide, would not be required simply because the person with a disability was in a low-paying job.

In the final analysis, therefore, Congress chose to continue the flexible undue-hardship approach that had been used successfully under the Rehabilitation Act for over 15 years. This approach ensures that the different resources and needs of small companies, compared with large ones, are appropriately taken into account in each individual case, while still providing the essential protection of reasonable accommodations for people with disabilities.

Although the undue-hardship standard is a flexible one, there is a specific process for determining whether a reasonable accommodation is necessary and what is the best reasonable accommodation to adopt. This process is spelled out in the legislative reports to the ADA and may provide useful guidance to employers.

First, an employer's duty to provide a reasonable accommodation is triggered by a request from an employee or applicant.[19] Employers do not have to speculate about what particular disability a person might have or about what particular accommodation might be useful for that person. Rather, if a person with a disability needs some accommodation in order to perform the essential functions of a job, it is the responsibil-

ity of that person to identify for the employer the general nature of his or her disability and the type of accommodation needed.

Second, the employer—through consultation with the individual with a disability—should identify what the barriers are to the individual's performance of particular job functions. There are two components to this analysis. The employer and the individual should first identify the abilities and limitations of the individual and should then identify those job tasks or work-environment factors that limit the individual's effectiveness or performance in light of the disability.[60]

Third, the employer should identify possible accommodations that will address the problematic work-environment factors or job tasks and will allow the individual to perform the job. The first source of information should be the person with the disability. As the legislative reports to the ADA recognize, people with disabilities often have significant life experience in ways to accomplish tasks differently and may have suggestions for accommodations that are substantially cheaper or easier to implement than an employer might devise independently.[61] Other resources to consult include state vocational rehabilitation agencies, the Job Accommodation Network of the President's Committee on the Employment of People with Disabilities, private rehabilitation centers, private disability organizations, and employer networks.[62] See Appendix B in this book for a list of resources.

Fourth, having identified various possible accommodations, the employer should assess the potential effectiveness of each accommodation—that is, the employer should assess which accommodation will best achieve the goal of giving the employee the maximum opportunity to perform the job functions.[63]

Finally, the employer should implement the most appropriate accommodation that does not impose a significant difficulty or expense for the employer. As the legislative reports make clear, if there are two equally effective accommodations, which cost essentially the same and are equally easy to implement, the expressed choice of the person with a disability should be given primary consideration.[64] Nevertheless, as a bottom line, the employer can decide which accommodation to choose—as long as the chosen accommodation meets the requirement of giving the individual a meaningful opportunity to perform the job.[65]

The provision of reasonable accommodations is a key component for ensuring real and effective employment opportunity for people with disabilities. Although some people with disabilities do not need any reasonable accommodations at all, others do require reasonable accommodations as an integral aspect for ensuring their effective performance of job functions.

MEDICAL EXAMS AND INQUIRIES

The ADA includes detailed requirements for medical examinations and inquiries. These requirements are designed to accommodate two necessary and legitimate concerns—one on the part of people with disabilities and the other on the part of employers. The concern of people with disabilities is to get a fair chance to demonstrate their abilities for a particular job before an employer is informed about a disability that is irrelevant to a job. The concern of employers is to be allowed to assess whether an applicant or employee is qualified for, or remains qualified for a particular job.

JOB APPLICANTS

In order to understand the ADA's requirements for medical exams and inquiries of job applicants, it is useful to first contemplate the following common scenario. A person with a disability, such as epilepsy, or diabetes, or Hodgkin's cancer in remission, applies for a job. One of the first steps in the application process is to fill out a medical questionnaire, which asks, "What medical conditions do you have or have you ever had?" The person with the disability truthfully fills out the questionnaire. The person then completes various other steps in the application process, including an interview, submission of a writing sample, and listing of references. At the end of the process, the applicant is denied the job.

At this point, the applicant has no firm knowledge of why he or she was denied the job. It could be that the prospective employer, seeing that the person had a disability, such as diabetes, epilepsy, or a slight hearing impairment, decided not to offer the person the job. In that case, the other steps in the process were basically irrelevant. On the other hand, it could be that the employer was not affected at all by the applicant's disability, but that the applicant's references or writing sample did not meet the employer's standards. The problem for the person with a disability, however, is that although the discrimination *may* have occurred because of his or her disability, that person can never

definitively know the truth. In fact, many people with disabilities are often denied jobs because their disability is identified early in the application process and that fact taints the remainder of the application process.[66]

To address this problem, the ADA, following the precedent of section 504 of the Rehabilitation Act,[67] establishes a two-step process for medical examinations and inquiries of job applicants.

The first step is the initial application stage. At that point, an employer may not require an applicant to submit to any medical examination, or to respond to any medical inquiries, such as filling out medical history questionnaires.[68] The employer may, however, ask the applicant whether the applicant can perform job-related functions.[69] Thus, for example, an employer may ask, in the initial application stage, whether the person has the educational and professional qualifications necessary for the job. The employer may also ask whether the applicant can do specific job functions, such as drive a car, lift 50 pounds, or answer the telephone, if these are essential functions of the job. The employer may not, however, ask generally whether the applicant has a disability that would prevent the person from doing the essential functions of the job.

After an employer has determined that the applicant possesses the necessary qualifications for a particular job, and decides (for whatever other reasons) to hire this person, the employer must extend to that applicant a conditional job offer, which then triggers the second step of the process. At this point, the employer may require the applicant to undergo a medical examination or respond to medical inquiries, and may condition the final offer of employment on the results of those medical tests or inquiries.[70]

Certain conditions, however, are placed on the use of such examinations or inquiries. First, if an employer wishes to require a medical examination, the examination must be required of *all* applicants for a particular job category, not simply of selected applicants. For example, an employer may not require that only applicants who "look weak" must fill out a medical questionnaire. Rather, the requirement of filling out a medical questionnaire must be a routine one requested of all applicants for a particular job category.[71]

Second, the information obtained as a result of the medical examinations must be kept strictly confidential. This information must be maintained on forms separated from the general application forms, in separate medical files that are treated as confidential medical records. Only a limited number of individuals may gain access to these records.[72]

This confidentiality requirement represents an important protection for applicants with disabilities. Although there is no general federal confidentiality law for medical records, the ADA creates a cause of action for breaches of confidentiality of medical records obtained by the employer through testing of job applicants. This protection supplements whatever other causes of action an individual may have under state laws for breaches of confidentiality (e.g., through medical records or privacy laws).

Third, and of key importance, the results of the medical examination may not be used to withdraw the conditional job offer from an applicant unless the results indicate that the applicant is no longer qualified to perform the job.[73] Thus, assume for example, that a necessary qualification for a job was to lift 50 pounds on a regular basis. If the examination or inquiry revealed that the applicant, even with reasonable accommodation, could not fulfill this necessary requirement of the job, then the results of the exam could legitimately be used to withdraw the conditional job offer. By contrast, if the exam revealed that the person had Hodgkin's cancer in remission, or some other disability that did not affect the person's lifting ability, the conditional job offer could not legitimately be withdrawn.

This two-step process addresses the two concerns outlined above. On the one hand, it protects applicants with disabilities by allowing them to isolate the occurrence of a discriminatory hiring practice. On the other hand, it protects employers by allowing them to discover possible disabilities that will, in fact, limit an applicant's ability to perform a job prior to the applicant's receiving a final job offer.

ON-THE-JOB EMPLOYEES

The ADA's restrictions on medical exams and inquiries of employees are different from those for applicants. As the legislative reports to the ADA explain, once an employee is on the job, the person's *actual* performance is the best measure of that person's ability to do the job. Thus, under the ADA, the only medical exams or inquiries that an employer may require of employees are those that are "job-related and consistent with business necessity."[74]

The reasoning for this requirement is straightforward. Under the ADA, an employer does not have the right to pry into an employee's

medical condition simply for the sake of curiosity. As the legislative reports explain, "An inquiry or examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability."[75]

By contrast, an examination or inquiry that is necessary to ascertain the person's actual ability to continue to perform an essential function of the job would be valid under the ADA as "job-related and consistent with business necessity."[76] The employer could demand that an employee undergo such a valid examination. Moreover, unlike medical examinations for job applicants, such examinations can be required of a specific employee if the need arises to question his or her continued ability to do the job.

The ADA makes clear that employers may continue to offer voluntary medical examinations to their employees—for example, as part of "corporate wellness" programs. Results of such examinations, however, are subject to the same confidentiality requirements that govern preemployment tests and similarly may not be used to discriminate against an individual who remains qualified for a job.[77]

HEALTH INSURANCE BENEFITS

The ADA provides some protection to people with disabilities in the area of health insurance benefits, although final resolution in this area will probably come only in court decisions.

The ADA provides that a covered entity may not discriminate against an employee in the "terms or conditions of employment."[78] The legislative reports note that these terms and conditions include "fringe benefits available by virtue of employment, whether or not administered by the covered entity."[79] A covered entity may also not participate in a contractual relationship that has the effect of subjecting the employees of the covered entity to discrimination, including a contractual relationship with "an organization providing fringe benefits to an employee of the covered entity."[80]

The ADA, therefore, does seem to contemplate that certain practices in the provision of fringe benefits, including presumably health insurance, would be illegal under the Act. The ADA, however, does include a general provision for insurance: An insurer cannot be prohibited or restricted from underwriting or classifying risks in a way that complies

with or is not inconsistent with state law; nor can a covered entity, such as an employer, be restricted in establishing a benefit plan that underwrites or classifies risks in a manner that is based on, or not inconsistent with, state law.[81]

This provision, however, also has its own exception built into it. According to the provision, these insurance exceptions may not be used as a "subterfuge" to evade the purposes of the ADA.[82]

The various legislative reports, and some members of Congress, attempted to provide guidance in this area.[83] Various principles may be derived from this legislative guidance:

1. Employers may not refuse to hire an individual because the individual will cost the employer more in terms of insurance premiums (or, in the case of self-insured plans, in terms of health-care costs). Thus, an employer could not refuse to hire a person with diabetes because such an individual might cost more in terms of health insurance coverage.[84]
2. Employers and insurance companies may continue to include preexisting-condition clauses in their health plans, even though such clauses eliminate benefits for a specified time period for people with disabilities. Thus, an employer could have a health plan that does not cover treatment for diabetes for a specified time period, if the employee had diabetes upon entering the health plan.[85]
3. Employers and insurance companies may limit coverage for certain *procedures* or *treatments*. For example, a health plan presumably may place a limit on the amount of kidney dialysis it will cover or the number of blood tranfusions it will reimburse.[86]
4. An employer may not, however, have a health plan that denies coverage "completely" to an individual based on diagnosis. For example, although a plan may include certain limitations for people with kidney disease (e.g., a limit on the amount of kidney dialysis), the plan cannot deny coverage to that person with kidney disease for conditions not connected to the permissible procedure limitations—for example, coverage for treatment of a broken leg.[87] Moreover, the plan could also not deny coverage to that individual for *other* procedures or treatments connected with the kidney disease itself.[88]

The overall thrust of the ADA's legislative history appears to be that insurance companies, and employers buying insurance plans, should be allowed to continue offering such plans as long as exclusions or limitations in the plan are based on sound actuarial principles. Obviously, however, it may make some sense, as an actuarial matter, to try to deny coverage completely for people with kidney or heart disease. Such an attempt, however, may well be seen as a subterfuge for evading the purposes of the law, if in practice it will prevent people with such diseases from being employed. Thus, it is quite possible that it would not be permissible to deny coverage completely, as a blanket matter, for one disability—such as kidney or heart disease.

DEFENSES

There are a number of defenses to a charge of discrimination under the ADA. Some of these defenses are similar to those existing under general civil-rights law; other defenses are specific to the ADA.

First, the ADA prohibits discrimination on the basis of *disability*, not on any other ground. Thus, a general defense for the refusal to hire a person with a disability might be that there was no longer money to fund the desired position or that the company was moving into a different area of emphasis than that offered by the person with a disability. These reasons may result in refusal to hire a particular person (including a person with a disability) that has nothing to do with disability per se. Even reasons that may appear completely irrational—for example, a policy of hiring only graduates of Northwestern University for particular jobs—are not invalid as long as they are not based on disability and do not result in a disparate impact on people with disabilities.

Second, the framework for proving intentional discrimination is essentially the same under the ADA as it is for other employment antidiscrimination laws. The person alleging discrimination bears the initial burden of proving the facts of discrimination: (1) the person is a member of the protected class (i.e., the person has a disability or associates with someone with a disability); (2) the person possesses the necessary qualifications, apart from the disability, to do the desired job; and (3) the person was rejected for (or fired from) the job under

circumstances that give rise to an inference that the decision was based on the person's disability.[89]

Once the person alleging discrimination establishes this prima facie case of discrimination, the burden shifts to the employer. At that point, the employer could prove that the employment decision was made for reasons *other* than the applicant's or employee's disability. Or the employer could admit that the employment decision *was* based on the person's disability, but could prove that the plaintiff's disability made him or her *not* "qualified" for the job. For example, the employer could prove that the person's disability prevented him or her from doing the job, that there was no reasonable accommodation that would allow the person to do the job, or that the only possible reasonable accommodation would impose an undue hardship on the employer.

At that stage, the burden shifts back to the person alleging discrimination. If the employer has produced evidence to prove that the employment decision was made for reasons other than disability, the applicant or employee could produce evidence to prove that this was a pretext and that, in fact, the decision *was* based on disability. Conversely, if the employer has produced evidence to prove that the person was not qualified for the job, the applicant or employee could produce evidence to show that he or she was qualified for the job, that there was an available reasonable accommodation, and/or that the available reasonable accommodation was not an undue hardship.[90]

The ADA also sets forth some specific defenses of qualification standards. For example, an employer may have, as a qualification standard, that a person with a disability not pose a "direct threat to the health or safety of other individuals in the workplace."[91] "Direct threat" is defined in the ADA as posing "a significant risk to the health or safety of others which cannot be eliminated by reasonable accommodation."[92]

This direct-threat qualification standard is a long-standing requirement under the Rehabilitation Act. It is a logical requirement: in order for a person with a disability to be qualified for a particular job, that person cannot pose a direct threat to the health or safety of others in the workplace. The definition of direct threat in the ADA is taken directly from a case decided under section 504 of the Rehabilitation Act—the Supreme Court decision in *School Board of Nassau County v. Arline*.[93] The essential requirement for this defense is that the perceived health

or safety threat posed by the person with a disability must be based on solid facts and not on speculation or generalizations.[94]

The ADA also provides that religious entities may require that all applicants and employees "conform to the religious tenets" of the religious entity.[95] In other words, a valid qualification standard for a religious entity may be that all individuals conform with that entity's religious tenets and requirements. Even if it is an individual's disability that makes him or her incapable of fulfilling those tenets, the ADA allows religious entities to apply those requirements and to refuse to hire or retain such an individual.

In general, the defenses allowed under the ADA comport with the basic principles underlying the law: to ensure that people with disabilities are given full and meaningful opportunities for employment, while protecting the right of employers to hire individuals who can appropriately perform the essential functions of particular jobs.

COVERAGE AND ENFORCEMENT

The employment title of the ADA adopts the same scope of coverage of employers, and the same administrative and judicial remedies, that are provided under title VII of the Civil Rights Act of 1964 for individuals who are discriminated against on the basis of race, sex, religion, or national origin.[96] This parity was specifically adopted by the sponsors of the ADA in order to ensure that people with disabilities were granted the same rights and remedies that are available to other minorities and to women.

Like title VII, therefore, the employment title of the ADA will ultimately cover all businesses that employ 15 or more employees. However, the ADA also includes a significant phase-in period. In July 1992, the employment title becomes effective for employers with 25 or more employees. Two years later, in July 1994, the employment title becomes effective for employers with 15 or more employees.[97]

The employment title of the ADA also adopts the same enforcement mechanism and remedies provided under title VII of the Civil Rights Act of 1964. As under title VII, a person charging discrimination must first go through the administrative process established under the Equal Employment Opportunity Commission (EEOC). The EEOC has well-established procedures that individuals who allege discrimination on

the basis of race, sex, religion, or national origin have used for years under title VII and these same procedures will apply to people with disabilities.[98]

Apart from the administrative procedures available through the EEOC, a person charging discrimination also has the right to bring a private lawsuit in court.[99] The rules that apply to title VII lawsuits will apply to the ADA as well. Thus, for example, if a person alleging discrimination wins his or her case, the relief available will be "injunctive relief." This may include a judicial order reinstating the person in a job, an order requiring the person to be granted a specific job, and/or an order requiring that money be paid to compensate the person for lost wages (known as "backpay" and, at times, "frontpay").[100] The relief currently available under title VII does not, however, include the right to receive compensatory or punitive damages.[101]

Finally, the ADA explicitly provides that the law should not be construed to invalidate or limit the remedies or rights of any federal law or state law that provides greater or equal protection to people with disabilities.[102] This "antipreemption" provision is designed to ensure explicitly that other federal laws (such as the Rehabilitation Act of 1973) and other state laws will continue to provide protection to people with disabilities. This also includes the remedies, such as compensatory and punitive damages, that may be available under state laws.[103]

CONCLUSION

The ADA is a remarkably comprehensive law, addressing the broad-ranging areas of employment, public services, transportation, public accommodations, and communications. The decision to pursue a comprehensive law was a very deliberate one on the part of its sponsors. Each of these areas is interdependent. In order for people with disabilities to enter the mainstream of America, they must have meaningful opportunities to obtain employment; access to public services and to goods and services offered by private businesses; accessible transportation to reach these jobs, goods, and services; and a means of communicating with employers, businesses, and others.

The employment section of the ADA addresses the employment piece of this interdependent picture. The basic principle underlying this section is that qualified persons with disabilities must be judged on

their merits and abilities for particular jobs and must not have employment opportunities unjustly foreclosed to them because of myths or stereotypes regarding their disabilities. At the same time, the employment section is designed to be workable for the thousands of employers who will be required to abide by its requirements.

The two- to four-year phase-in period before the ADA fully applies to private employers will be most effective if it is used for comprehensive education. With such education and understanding, the ADA can be a source of support for both employers and for people with disabilities.

NOTES

1. See 29 U.S.C. §791, 793, 794 (1985 & Supp.).
2. 42 U.S.C. §2000e et seq. (1981 & Supp.).
3. Parts of this section are based on C.R. Feldblum (1991): The Americans with Disabilities Act: The Definition of Disability, 7 *ABA Labor Lawyer* 1:11–27.
4. ADA §3(2). This is the same definition of a "person with a handicap" that Congress adopted for purposes of title V of the Rehabilitation Act of 1973. People with disabilities, and their advocates, prefer to use the term "disability" rather than "handicap." In recognition of that preference, the term "disability" is used throughout the ADA.
5. 29 U.S.C. §706(8)(A) (1985 & Supp.).
6. See S. Rep. No. 1297, 93rd Cong., 2d. Sess., 16, 37–38, 50 (1974).
7. ADA §3(2)(A).
8. See Report of the Senate Committee on Labor and Human Resources, 101st Cong., 1st Sess., S. Rep. No. 101–116 at 22 (henceforth Senate Report); Report of the House Committee on Education and Labor, 101st Cong., 2d. Sess., H. Rep. No. 101–485, Part 2 at 51 (henceforth Education and Labor Report); Report of the House Committee on the Judiciary, 101st Cong., 2d. Sess., H. Rep. No. 101–485, Part 3 at 28 (henceforth Judiciary Report). See also 45 C.F.R. §84.3(j) and Appendix A, No. 3 (1985).
9. Another reason it is difficult to develop a comprehensive list is that there is no way of knowing what specific physiological disorders may develop in the future. See Senate Report at 22; Education and Labor Report at 51; Judiciary Report at 28 (noting the advent of new disabilities, such as AIDS).
10. Education and Labor Report at 51; see also Senate Report at 22; Judiciary Report at 28. Although drug addiction is a recognized physical disorder, the current illegal use of drugs is not protected under the ADA. See Judiciary Report at 28, note 17.
11. See Senate Report at 22; Education and Labor Report at 52; Judiciary Report at 28.
12. These are all examples of major life activities. As the Department of Justice has pointed out, another significant life activity is that of procreation and intimate personal relations, in which people infected with the human immunodeficiency virus are substantially limited. See Memorandum of Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, September 27, 1988 at 9.
13. See Senate Report at 23; Education and Labor Report at 52–53; Judiciary Report at 29.
14. See Senate Report at 23; Education and Labor Report at 53; and Judiciary Report at 29.
15. See, e.g., *Prewitt v. United States Postal Service*, 662 F.2d 292, 309 (5th Cir. 1981); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).
16. See Education and Labor Report at 52; Judiciary Report at 28, note 18; Senate Report at 22; statement of Rep. Edwards, 136 Cong. Rec. H 4624 (July 12, 1990).
17. See, e.g., *Ray v. School District of DeSoto County*, 666 F.Supp. 1524 (M.D.Fla. 1987); *Thomas v. Atascadero Unified School District*, 662 F.Supp. 376 (C.D.Cal. 1986); *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988).
18. See discussion under section on defenses for explication of the "direct threat" qualification standard.
19. See, e.g., Education and Labor Report at 78.
20. See, e.g., 45 C.F.R. Part 84, Appendix A, No.3 (1985); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Crew v. OPM*, 834 F.2d 140 (8th Cir. 1987).
21. The person, however, could be covered under the third prong of the definition if he or she were regarded as being an alcoholic.
22. ADA §104(a), §510.
23. ADA §512.
24. ADA §104(b)
25. See, e.g., *Gardner v. Morris*, 752 F.2d 1271 (8th Cir. 1985); *Doe v. New York University*, 666 F.2d 761 (2nd Cir. 1981).
26. See discussion of qualification requirements under the ADA in the section entitled "Qualified Person with a Disability."
27. ADA §511(b).
28. Homosexuality was removed in 1973 by the American Psychiatric Association from the list of mental disorders set forth in the *Diagnostic and Statistical Manual III*.
29. ADA §102(b)(4).
30. Although protection for people who associate with people with disabilities does not appear in the Rehabilitation Act, it is not a new concept. Such protection was also included in the Fair Housing Act when Congress passed a series of amendments to that law in 1988. See 42 U.S.C. §3604(f)(1)–(2) (1977 & Supp.).
31. See Judiciary Report at 38.
32. ADA §102(a).
33. ADA §101(8).

34. This concept of "essential functions" comes directly from the 1977 DHEW regulations issued to implement Section 504. See 45 C.F.R. §84.3(k) (1985).
35. See Senate Report at 34–35; Education and Labor Report at 33–34; Judiciary Report at 31–32.
36. ADA §102(b)(5)(A)–(B). See also Education and Labor Report, at 62–67.
37. The term "covered entity" includes employers, employment agencies, labor organizations, and joint labor-management committees. ADA §101(2).
38. ADA §102(a).
39. ADA §102(b)(1).
40. ADA §102(b)(2).
41. See Education and Labor Report at 60; Judiciary Report at 37.
42. See Education and Labor Report at 60–61; Judiciary Report at 37–38.
43. ADA §102(b)(5)(A)–(B).
44. ADA §102(b)(6).
45. Id.
46. ADA §102(b)(6).
47. See, e.g., title II, title VII, and title VIII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000e, 2000f. See also section 504 of the Rehabilitation Act, 29 U.S.C. §794(a) (1985 & Supp.).
48. See C.R. Feldblum: Medical Exams and Inquiries under the Americans with Disabilities Act: A View from the Inside—Symposium on the Americans with Disabilities Law, *Temple Law Review* (summer 1991).
49. ADA §102(b)(5)(A).
50. Job restructuring may include eliminating nonessential elements of the job, exchanging assignments with other employees, or redesigning procedures for task performance. See Education and Labor Report at 62.
51. See Education and Labor Report, at 62. See also statement of Rep. Edwards, 136 Cong. Rec. H 4624 (July 12, 1990); statement of Rep. Owens, 136 Cong. Rec. H 4623 (July 12, 1990).
52. An employer is not required to create a new job for an employee with a disability who is no longer able to perform his or her present job. However, if a vacant job exists that the person is qualified to perform, reassignment to that job would be a required reasonable accommodation. See Education and Labor Report at 63.
53. ADA §101(9). A reasonable accommodation could also include providing an attendant. See Education and Labor Report at 64.
54. ADA §101(10) (definition of undue hardship); §102(b)(5)(A) (requirement to provide a reasonable accommodation unless it imposes an undue hardship).
55. ADA §101(10). The factors regarding the type of operation and work force of the employer (category three) are probably best understood as simply a subset, or an application, of the factors in category two.
56. See Judiciary Report at 41; Senate Report at 35–36; Education and Labor Report at 67.
57. 567 F.Supp. 369 (E.D.Pa. 1983)
58. Id., at 380. As one legislative report noted, after summarizing the *Nelson v. Thornburgh* case: "[T]he same accommodations may be an undue hardship for a small employer because they would require expending significant proportions of available resources." Judiciary Report at 41.

59. See Senate Report at 34; Education and Labor Report at 64.
60. Senate Report at 35; Education and Labor Report at 66.
61. Senate Report at 34; Education and Labor Report at 65.
62. The Education and Labor Report included the "800 number" for the Job Accommodation Network in its report. Education and Labor Report at 64 (1-800-526-7234). Some private rehabilitation agencies, such as Allied Services in Scranton, Pennsylvania, are taking a strong role in offering technical assistance to employers. As employers recognize the usefulness of having trained consultants to turn to in the reasonable accommodation area, one hopes that more companies trained in the latest technology and sensitive to disability issues will be available for use by employers.
63. Senate Report at 35; Education and Labor Report at 66.
64. Senate Report at 35; Education and Labor Report at 66–67. In fact, if the accommodations are equal to that extent, most employers would probably take into account the preference of the individual with the disability.
65. Senate Report at 35; Education and Labor Report at 66–67; Judiciary Report at 40.
66. See Senate Report at 39; Education and Labor Report at 72.
67. See 45 C.F.R. §84.11 (1985).
68. ADA §102(c)(2)(A).
69. ADA §102(c)(2)(B).
70. ADA §102(c)(2)(B). There is no requirement for the employer to "job validate" these medical exams or inquiries.
71. ADA §102(c)(3)(A). The requirement of a "particular job category" is an important one for employers. In other words, an employer can give a test to check lifting strength to all its construction employees, without having to require that the same test be given to all its management and clerical employees. See Education and Labor Report at 73.
72. ADA §102(c)(3)(B).
73. ADA §102(c)(3)(C).
74. ADA §102(c)(4)(A). See Education and Labor Report at 75; Senate Report at 39.
75. Education and Labor Report at 75; see also Senate Report at 39.
76. ADA §102(c)(4)(A).
77. ADA §102(c)(4)(B)–(C).
78. ADA §102(a)
79. See Judiciary Report at 35; Education and Labor Report at 55.
80. ADA §102(b)(2).
81. ADA §501(c). The provision also provides that a covered entity *may* establish or administer a bona fide benefit plan that is not subject to state laws that regulate insurance.
82. ADA §501 (c).
83. See Senate Report at 29 and 84–86; Education and Labor Report at 59 and 136–138; Judiciary Report at 37–38 and 70–71. See also statement of Rep. Owens, 136 Cong. Rec. H4623 (July 12, 1990); statement of Rep. Edwards,

136 Cong. Rec. H4624 (July 12, 1990); statement of Rep. Waxman, 136 Cong. Rec. H4626 (July 12, 1990); statement of Sen. Kennedy, 136 Cong. Rec. S9697 (July 13, 1990).

84. See, e.g., Education and Labor Report at 136; statement of Rep. Owens, supra note 83 at 4623; statement of Rep. Edwards, supra note 83 at 4624.
85. See, e.g., Education & Labor Report at 59; Judiciary Report at 38.
86. See, e.g., Education and Labor Report at 59; Judiciary Report at 38.
87. See Education and Labor Report at 59; Judiciary Report at 38.
88. See Judiciary Report at 38. See also statement of Rep. Waxman, supra note 83 at 4626; statement of Rep. Edwards, supra note 83 at 4624. This last example seems to indicate that it would not be legitimate to have a blanket exclusion of a particular disability.
89. See *Pushkin v. Board of Regents of the U. of Colorado*, 658 F.2d 1372, 1385–1387 (10th Cir. 1981); see also *Prewitt v. United States Postal Service*, 662 F.2d 292, 309–310 (5th Cir. 1981).
90. See, e.g., *Prewitt*, 662 F.2d, at 307–310.
91. ADA §103(b).
92. ADA §101(3).
93. 480 U.S. 273 (1987).
94. See, e.g., Judiciary Report at 45.
95. ADA §103(c).
96. ADA §101(5) and §102(a) (coverage); §107(a) (enforcement).
97. ADA §101(5)(A).
98. ADA §107(a) (incorporating by reference the administrative procedures of title VII, 42 U.S.C. §2000e-5).
99. ADA §107(a) (incorporating by reference the private right of action available under title VII, 42 U.S.C. §2000e-5[f]).
100. See 42 U.S.C. §2000e-5(g) (incorporated in ADA §107[a]).
101. See, e.g., *Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).
102. ADA §501(b).
103. See Education and Labor Report at 135; Judiciary Report at 69–70; statement of Rep. Hoyer, 136 Cong. Rec. E1920–21 (June 13, 1990).

WOMEN'S LEGAL DEFENSE FUND

WHAT THE CLINTON ADMINISTRATION CAN DO TO IMPROVE THE EEOC: TOP FIVE PRIORITIES
(in no particular order)

1) Appointments and Leadership. Nearly all of the current Commissioners and the General Counsel should be replaced as soon as possible by individuals who have demonstrated their commitment to vigorous enforcement of EEO law. Under new leadership, EEOC Commissioners should abandon their practice of closed-door meetings, instead returning to a policy of regular and open Commission meetings, and should take the lead in coordinating federal antidiscrimination efforts.

2) Equal pay. Given the critical importance of pay equity to women and people of color, the EEOC should fulfill its mandate to enforce the Equal Pay Act and Title VII's prohibitions on wage discrimination by investing in targeted litigation and the development of tough, effective policy guidance.

3) Enforcing the Civil Rights Act of 1991 to ensure meaningful remedies to victims of invidious discrimination. Under the Civil Rights Act of 1991, the EEOC should affirmatively negotiate (and, where necessary, litigate) for compensatory and, where appropriate, punitive damages on behalf of victims of intentional discrimination. The EEOC should interpret and implement the Act in a manner consistent with its mission to vigorously enforce antidiscrimination law -- e.g., by reversing its policy opposing retroactive application of the 1991 Act.

4) Attacking systemic discrimination. To combat systemic discrimination, the EEOC should substantially increase its investment in class action suits and should implement an effective system for identifying and litigating class-wide charges, including the use of its own testers to uncover discriminatory employment practices.

5) Improving EEOC complaint processing. The EEOC should restructure its complaint processing system to reduce its considerable backlog and to improve the quality of attention given to investigating and resolving charges.

We discuss these recommendations in greater detail below.

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APPOINTMENTS AND LEADERSHIP

Timing: Immediately

Clearly, the key to resurrecting the EEOC's effectiveness and credibility as the nation's lead EEO enforcement agency is committed, activist leadership -- which has been sorely lacking over the past 12 years. Nearly all of the current Commissioners and the General Counsel should be replaced as soon as possible by individuals who have demonstrated their commitment to vigorous enforcement of EEO law.

In general, the EEOC should assert leadership in coordinating federal antidiscrimination efforts. The EEOC, OFCCP, and other key enforcement agencies should coordinate their interpretive policy to ensure consistent enforcement of antidiscrimination law. For example, the EEOC and OFCCP should develop a joint rule in light of the Civil Rights Act of 1991 to enable the OFCCP to negotiate and conciliate for compensatory and punitive damages when intentional discrimination by federal contractors is discovered by compliance reviews.

In addition, EEOC Commissioners should abandon their practice of closed-door meetings and decision-making by memo and notation, and should instead return to an open-door policy of open and regular Commission meetings, where policy decisions are discussed and determined with input from the public.

EQUAL PAY

Timing: Continuing

Despite the promise of the Equal Pay Act of 1963, women still earn on average only 70% of men's earnings. People of color often fare even worse, earning on average 55-72% of the earnings of white men. A 1992 bipartisan poll of women found that, along with health care reform, equal pay was their top priority -- across race and party lines. The effectiveness of measures like the Equal Pay Act is largely determined by the vigor with which the EEOC interprets and implements such laws.

Before 1982, the EEOC took the initiative in the area of wage discrimination by filing amicus briefs in important cases,[1]

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[1] The EEOC was amicus in Gunther v. County of Washington, 452 U.S. 161 (1981) (holding that Title VII forbids intentional gender-based wage discrimination in jobs that may not be substantially equal) and IUE v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981) (holding that women in predominantly female job classifications could still compare

by conducting hearings on wage discrimination in the workplace, and by commissioning a National Academy of Sciences Study on wage discrimination.[2] Since 1982, however, the EEOC has done little on wage discrimination. Indeed, it allowed hundreds of cases to languish without resolution and it restrictively interpreted Gunther to preclude disparate impact claims of wage discrimination, thus guaranteeing that many potential cases were never investigated.

EEOC enforcement of the Equal Pay Act's requirements of equal pay for equal work has been particularly dismal over the last 12 years. While the agency filed 79 Equal Pay Act cases in 1980 under Eleanor Holmes Norton, it filed only six in 1991. And, in 1992, the EEOC filed only two Equal Pay Act cases.

Given the critical importance of pay equity for women and people of color, the Administration should take leadership in aggressively enforcing and implementing these laws. The EEOC should fulfill its mandate to enforce the Equal Pay Act and Title VII's prohibitions on wage discrimination through targeted litigation. (The EEOC can reach out to women's groups and other civil rights advocates to help identify industries infected by systemic wage discrimination.) The EEOC should review its Equal Pay Act regulations in light of case law developments over the last 12 years to ensure that they're tough, effective, and up-to-date. The EEOC should also consider developing a clearinghouse to provide technical assistance to employers on implementing compensation systems free from wage discrimination and pay inequities.

ENFORCING THE CIVIL RIGHTS ACT OF 1991 TO ENSURE MEANINGFUL REMEDIES FOR VICTIMS OF INVIDIOUS DISCRIMINATION.

Timing: First 30 days and continuing

The enactment of the Civil Rights Act of 1991 provides new opportunities for strengthening workplace rights of women and people of color. In particular, it provides -- for the first time -- compensatory and punitive damages for victims of intentional discrimination on the basis of gender, religion, and disability. However, the Act's effectiveness depends largely on how it is interpreted and implemented by the Equal Employment Opportunity Commission (EEOC) and other enforcement agencies.

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their wages to wages paid to males in predominantly male job classifications, even though the job classifications were not substantially equal).

[2] Women, Work and Wages: Equal Pay for Jobs of Equal Value, (H. Hartman & D. Treiman ed. 1981).

Just weeks after the Civil Rights Act of 1991 went into effect, the EEOC announced that it would not apply the damages provision of the Act retroactively to ensure meaningful remedies for discrimination victims -- i.e., it would not seek compensatory and punitive damages in cases filed prior to the Act, or in cases filed after enactment that challenged pre-Act conduct. This is an unnecessarily rigid and crabbed interpretation of the Act inconsistent with Supreme Court case law, and certainly inconsistent with the EEOC's mission of leadership in vigorous law enforcement. Even more remarkably, the Office of General Counsel has instructed regional attorneys in the Ninth Circuit not to seek damages with respect to pre-Act discrimination, despite the Ninth Circuit's holding that the Civil Rights Act should be applied retroactively! The EEOC should immediately reverse its policy opposing retroactive application of the Civil Rights Act of 1991.

In addition, many report that the EEOC is not even advising complainants charging post-Act discrimination about the availability of compensatory and punitive damages as part of the relief to which they are entitled. The EEOC should immediately inform complainants of their right to damages and should affirmatively negotiate for compensatory and, where appropriate, punitive damages on behalf of aggrieved plaintiffs.

Despite the significant impact of the Civil Rights Act of 1991 on federal antidiscrimination law, the EEOC has yet to issue interpretive regulations. The EEOC should immediately develop regulatory guidance for the Civil Rights Act of 1991.

ATTACKING SYSTEMIC DISCRIMINATION

Timing: First ninety days and continuing

In many contexts, discrimination is system-wide, infiltrating an entire institution or industry. Strategic class-based legal action is thus required to attack effectively practices that harm large numbers of women and people of color. Such systemic litigation not only provides meaningful remedies for the victims of discrimination, but also deters continued discrimination by employers. Because such litigation is often beyond the resources of most private individuals and attorneys, Congress has authorized the EEOC to attack broad institutional patterns and practices of discrimination through systemic litigation.

Even though class actions have been proven effective in attacking systemic discrimination and in maximizing limited resources for greatest effect, the EEOC, as a matter of policy since the early 1980s, has concentrated almost exclusively on

litigating individual complaints at the expense of class actions. As an example of this concerted retreat, the EEOC in 1991 filed only 42 class action suits, just 8.6% of all cases filed. This is a dramatic decrease from 1980 efforts under Eleanor Holmes Norton, when two-thirds of all cases filed by the agency -- 218 in all -- were class actions. Moreover, the EEOC currently makes no effort to seek out systemic violators; it simply waits for complaints to come through the door.

The EEOC should substantially increase its investment in class action suits. In particular, it should implement a system for identifying and litigating class-wide charges to combat systemic discrimination. For example, the EEOC should launch "strike forces" to target offending employers and industries, conducting pro-active and highly visible compliance reviews. (Such strike forces were developed by the EEOC and OFCCP under the Carter Administration; they haven't been used since.) In addition, the EEOC should work with constituency groups to identify likely targets for compliance reviews.

As another tool in identifying and eradicating systemic discrimination, the EEOC should use its own testers to uncover discriminatory employment practices, and to litigate when discrimination is discovered. Although the EEOC issued a 1990 policy guidance announcing that it intended to used information from "testers" as a means of detecting illegal discrimination, the Commission has filed no charges or lawsuits involving the use of testers. Nor has it taken any action to develop its own employees as testers as part of strike forces to target industry-wide discriminatory practices. (Other government agencies, such as HUD, HHS, and the Department of Justice, have used testers with great success.)

IMPROVING THE EEOC'S COMPLAINT PROCESSING SYSTEM

Timing: First 90 days and continuing

Even as the EEOC under Reagan and Bush retreated from systemic litigation, inidividual victims of discrimination became increasingly unlikely to receive any remedy at all. After the first three quarters of 1992, the EEOC's backlog of cases stands at 53,742 -- the second highest level ever. Average processing time for complaints has increased to nine months -- up from 3 to 6.5 months in 1980.

At the same time, the EEOC's record for resolving complaints has dramatically worsened. Its settlement rate has been cut in half -- from 32.1% in 1980 to 14.2% in 1992. And the rate at which charges have been dismissed with no remedy at all for the

individual claimant (classified as no-cause findings) has doubled -- from 28.5% in 1980 to 60% in 1992.

Some urge the EEOC to explore some sort of Alternative Dispute Resolution scheme to resolve charges expeditiously and to reduce its enormous backlog. The size of the current backlog means that many charges have been languishing without investigation or resolution for years -- and, too often, such justice delayed is justice denied. While reducing the backlog is key to the EEOC's success, however, any ADR processes must guard against biases that adversely impact complainants, who often are not represented by counsel and who may be urged to accept settlements short of full relief despite having suffered serious inequities.

Critics of the EEOC's complaint processing system also point out that the EEOC fails to accept charges for 70-80% of those who come to EEOC offices. Some point to investigators' quota requirements as incentives for incomplete investigations. For example, they urge that intake staff be separate from investigative staff since investigators have an incentive to ignore or turn away complex systemic cases in order to meet strict performance quotas. They also advocate that extra credit be granted personnel investigating systemic cases to encourage investigation of complex cases that may involve industry-wide discriminatory practices.

Gil - This is the assn. of TTs lawyers I mentioned that would like to meet with you. The name circled below, Jan Goodman, is a v-p. I also work with Wayne Outten & Cliff Palefsky.

Lynn Hess Schofman
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THE AARP PUBLIC POLICY AGENDA--1994

AMERICAN ASSOCIATION OF RETIRED PERSONS

AARP

CHAPTER 4
EMPLOYMENT AND WORKER EQUITY

FEDERAL PUBLIC POLICY

I. INTRODUCTION

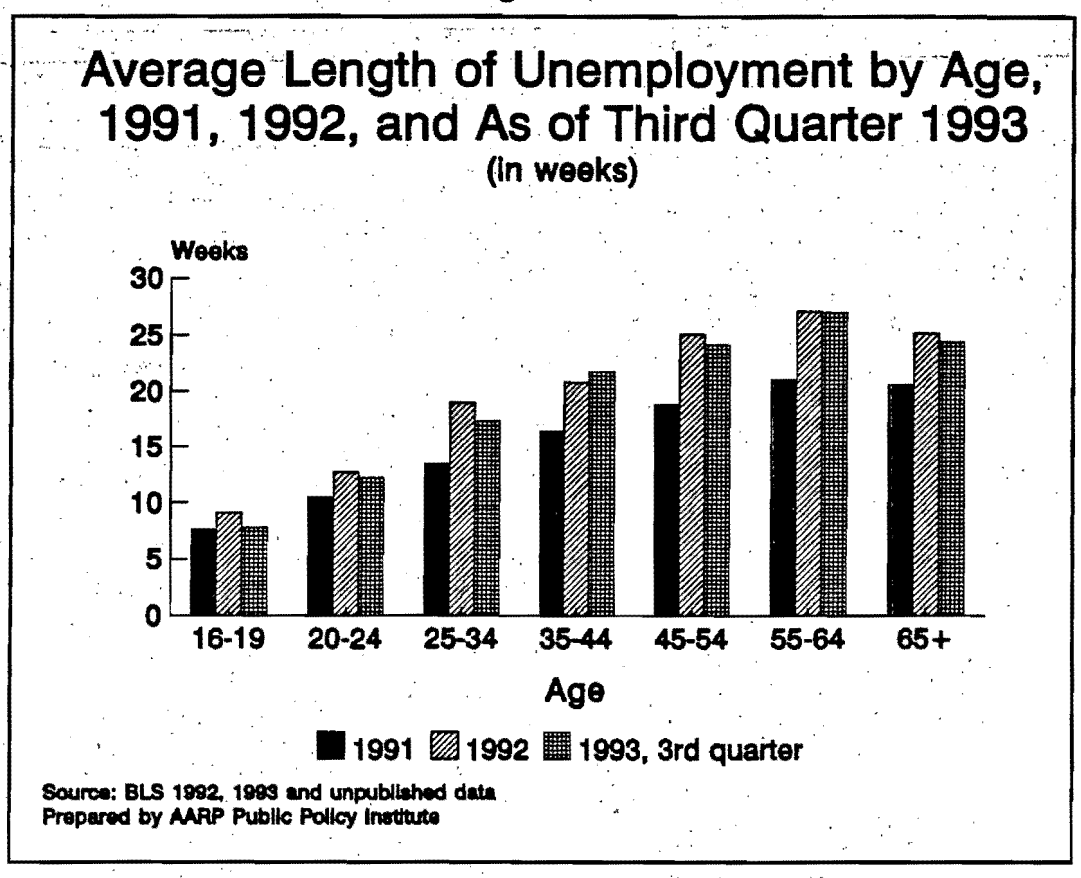
America's work environment is undergoing profound changes as a result of an increasingly competitive and global market, downsizing and restructuring by American businesses, growth of the contingent workforce, and a decline in corporate paternalism. While the long-term impact of these developments may be beneficial, over the short-term, employment opportunities, as well as the benefits and job security of large numbers of workers, are at risk. Given the link between employment and retirement income, the well-being of millions of future elderly may also be threatened by some of these changes.

More than one-third of the Association's members work full- or part-time. A large proportion of these workers are women or minorities. The Association is committed to expanding employment opportunities for workers of all ages, and to helping remove economic, legal, and social barriers to equal employment opportunity for anyone wishing to work, as part of a national employment policy. This policy would include increasing employment opportunities through training and retraining and other programs designed to encourage older workers to remain in the labor force, and improving job security of all working Americans.

II. AGE DISCRIMINATION IN EMPLOYMENT

The right to work free of age discrimination is a fundamental right. However, age-based employment discrimination remains prevalent, despite the Age Discrimination in Employment Act (ADEA). Age discrimination can be blatant or subtle, and can include such practices as refusing to hire or promote older workers, encouraging their retirement, or limiting their training opportunities, job responsibilities, and duties. The problem is particularly severe for persons who have lost jobs in declining industries, such as heavy manufacturing, and for individuals such as "displaced homemakers" who have little or no work experience outside the home. Once unemployed, older workers face sharply limited employment opportunities. Persons aged 45 to 64 are unemployed longer, on average, than are younger workers (see Figure 4-1), and some become "discouraged workers" who give up the job search when it appears futile.

Figure 4-1



A. Restoring the Full Force and Effect of the Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964 are both intended to eliminate employment discrimination. Because of their similar purpose, and because historically the two statutes have had virtually identical language, they have been interpreted in like fashion. Any differences in language have been highlighted as evidence of different congressional intentions.

For this reason, many recent, adverse Supreme Court decisions interpreting Title VII have been applied to the ADEA, with unfortunate consequences for victims of age discrimination. The Civil Rights Act of 1991 amended Title VII to substantially reverse these Supreme Court decisions and restored the effectiveness of Title VII in many of the areas adversely affected. However, these same amendments were not made to the ADEA, creating language differences between the two statutes that permit the continued application of the Court's decisions to age discrimination cases. New decisions by the Supreme Court since the passage of the Civil Rights Act of 1991 have further eroded the ADEA.

In addition, the ADEA lacks any provision for compensatory and punitive damages, as now exists in Title VII. The possibility of obtaining such damages is necessary not only to make plaintiffs whole, but to encourage private attorneys to represent lower-income victims of age discrimination.

ASSOCIATION POSITION

The Association urges Congress to speedily pass legislation that restores the full force and effect of the Age Discrimination in Employment Act (ADEA) and restores its parity with Title VII of the Civil Rights Act, where appropriate. Further, legislation should be passed to provide compensatory damages in ADEA cases. Congress should expand the ADEA jurisdiction to cover employers with 15 or more employees, not only those with 20 or more employees.

B. Discrimination in Older Workers' Benefits

From its passage in 1967 up until 1989, the ADEA had consistently been interpreted by the courts and the federal agencies charged with upholding the law as prohibiting arbitrary discrimination by employers against older workers in employee-benefit plans. Because of concern that certain benefits (such as life insurance) cost more to provide for older workers than for younger workers, the ADEA has never required employers to provide absolutely equal benefits to older workers. Instead, an employer had to expend equal money to provide the benefit to older and younger workers. This is the "equal benefit or equal cost" rule.

The Older Workers' Benefit Protection Act, passed in 1990, makes clear that employee benefits are among the "terms, conditions, compensation and privileges of employment" protected under the ADEA and codifies the regulations embodying the equal benefit or equal cost rule. However, the legislation contains new exceptions to this rule with regard to certain early retirement incentive programs, disability benefits, severance pay, and retiree health benefits. Also, although state and local governments have been required to comply with the ADEA since 1974, some have refused to change discriminatory plans.

The legislation also establishes clear standards and information requirements for employers seeking waivers by employees of their ADEA rights. Some employers have questioned whether retired employees can be rehired without being paid benefits if they waive rights to those benefits. Such practices violate both the ADEA's requirement of nondiscrimination in benefits and Title II of the Older Workers' Benefit Protection Act, which prohibits such waivers.

The Americans with Disabilities Act (ADA), enacted in 1990, also contains prohibitions against discrimination in employee benefits, including health insurance plans. This legislation is likely to have a profound effect on older workers and their benefits. The

effect of the ADA on employer-provided health insurance plans was recently addressed in interim regulations issued by the Equal Employment Opportunity Commission (EEOC) and is the subject of a number of pending lawsuits.

ASSOCIATION POSITION:

The Association endorses the traditional interpretation of the Age Discrimination in Employment Act (ADEA) embodied in the "equal benefit or equal cost" rule. The new exceptions to the rule provided for in the Older Workers' Benefit Protection Act must be carefully monitored to determine their effects on older workers and their rights. Employers previously not in compliance, including many state and local governments, must be forced to bring their plans into compliance. Vigorous enforcement of the ADEA, as amended, is critical to the success of this legislation. AARP will work for the promulgation of regulations interpreting the new law to insure that such regulations make clear that the rights of older workers to fair and nondiscriminatory benefits under the ADEA are paramount.

AARP supports a broad interpretation of the Americans with Disabilities Act's (ADA) coverage and its prohibitions against discrimination in employee benefit plans. AARP endorses the Equal Employment Opportunity Commission's (EEOC) position that, with regard to employee benefit plans, the ADA applies not only to employers but also to certain insurance providers (such as those brought into existence for the sole purpose of providing insurance benefits for specific employers) and prohibits employers from reducing or denying benefits on the basis of disability.

C. Mandatory Retirement

The Age Discrimination in Employment Act Amendments of 1986 extended ADEA protections to most Americans aged 40 and older (the law had previously protected only workers between the ages of 40 and 70) and abolished age-based mandatory retirement for most workers in the private sector as well as employees of state and local governments (mandatory retirement for most federal workers had already been abolished). Some exemptions remain, however, and some were added. For example, a seven-year exemption from the provisions eliminating mandatory retirement, to expire in 1993, was provided for state and local police, firefighters, prison guards, and tenured university professors; the Federal Aviation Administration retains the rule requiring commercial pilots to retire at age 60; state judges may be subject to mandatory retirement at various ages pursuant to state laws; and certain public safety officials may also be subject to mandatory retirement.

After lengthy study, the Committee on Mandatory Retirement in Higher Education of the National Academy of Sciences found no evidence of significant declines in teaching or research ability among faculty members and concluded that the tenured-faculty exemption should be allowed to expire. Similarly, after reviewing more than 2,000 studies, an interdisciplinary study team at Pennsylvania State University likewise recommended allowing the mandatory retirement for public safety officers to expire. The study found no basis for the belief that public safety would be jeopardized by the continued employment of older public safety workers; nor was there evidence of increased risk for sudden, incapacitating events among older public safety workers. Retirement decisions, the study concluded, should be based on ability rather than chronological age.

A recent study prepared for the Civil Aeromedical Institute of the Federal Aviation Administration (FAA) found no evidence of increased accident rates among pilots of scheduled air carriers as they approached age 60. Because of FAA retirement rules, data for pilots over age 60 were lacking. Accident data on other commercial as well as private pilots, however, indicated that the accident rates of pilots in their early 60s were comparable to those of pilots in their mid- to late-50s.

The FBI Academy, in association with the Major City Chiefs of Police Association, issued a report on physical fitness testing for police officers in the summer of 1993. The conclusion in this study comports with that of Pennsylvania State University—physical fitness testing of all employees is a feasible, safe, efficient, and desirable mechanism for protecting the public safety.

Despite pending legislation that would expand and make permanent the temporary exemption, Congress has allowed the exemption to lapse. State and local public safety employees are now entitled to all the protections of the ADEA; state and local governments must immediately discontinue the use of maximum hiring and retirement ages for these employees.

ASSOCIATION POSITION:

The Association supports the complete elimination of mandatory retirement for all employees. AARP opposes any effort to reinstate an exemption for state and local governments that allows them to discriminate against public-safety employees by establishing maximum hiring and retirement ages. The Federal Aviation Administration's (FAA) "age 60" rule should be eliminated and replaced with regulations or laws that determine each individual pilot's competency and fitness based on factors related to safety.

D. Actions by the Equal Employment Opportunity Commission (EEOC)

The success or failure of the Age Discrimination in Employment Act (ADEA) in eradicating age-based employment discrimination is largely dependent on the actions of the EEOC, the federal agency charged with interpreting, implementing, and enforcing the law. Unfortunately, in recent years the EEOC has failed to interpret or enforce the law in a way that protects the rights of older workers.

1. Enforcement. Adequate guidance to employees and employers concerning EEOC policies and practices, prompt and fair processing of charges, and aggressive litigation are all crucial to the protection of the rights of both charging parties and employers.

The EEOC's failure to process charges in a timely manner has been a special concern in recent years. The Civil Rights Act of 1991 amended the statute of limitations for filing a lawsuit under the ADEA by eliminating the requirement that a lawsuit be filed within two years. The statute of limitations is now similar to Title VII and provides that an ADEA plaintiff has until 90 days after the EEOC closes the charge to file a court complaint. However, a plaintiff retains the right to file the lawsuit 60 days after filing a charge with the EEOC.

The effectiveness of the ADEA has also been eroded by the EEOC's practice of issuing "no cause" findings in the overwhelming majority of ADEA charges. Not only is this practice unauthorized by the statute and unsupported by full investigations, but "no cause" findings dissuade potential plaintiffs from pursuing their rights in court, make it difficult for them to retain legal counsel, and are often used as a defense by employers in litigation. Congress clearly did not intend for the EEOC to exercise its enforcement authority in a manner so prejudicial to older workers' rights under the ADEA.

Broad-based policy litigation is one of the best ways to enforce and broaden employment discrimination laws. However, this type of litigation has been neglected by the EEOC in recent years.

ASSOCIATION POSITION:

The Equal Employment Opportunity Commission (EEOC) must change its positions, policies, and practices on a broad range of issues. Specifically, the EEOC must ensure that age discrimination charges are investigated and processed thoroughly and quickly. Charging parties must receive complete information about their rights and the status of their charges. The Association supports legislation that would ensure that the rights of federal employees, and the manner in which their charges are processed, are enforced more vigorously and equitably than they have been.

The EEOC must vigorously exercise its authority both to conduct "directed" investigations and to pay particular attention to circumstances in which there may have been systemic and class-wide discrimination.

The EEOC should cease issuing "no cause" determinations on the Age Discrimination in Employment Act (ADEA) charges unless there has been thorough investigation of the charges and the facts to support such a determination are documented.

Congress should continue to closely monitor the EEOC's ADEA investigation and litigation practices to ensure full enforcement of the Act.

The Association supports the EEOC's efforts to explore alternative methods other than litigation for the voluntary resolution of charges of age discrimination in employment. If properly developed and administered, voluntary alternative dispute resolution may prove to be fair and beneficial to employers and employees. However, in all circumstances, the rights of charging parties under the ADEA must be fully protected.

2. Regulations and Policy. Equal Employment Opportunity Commission (EEOC) interpretations of the law, particularly with regard to establishing guidelines for the affirmative defenses relied upon by employers, carry great weight in the courts and in the development by employers of compliance programs.

The Age Discrimination in Employment Act (ADEA) requires the EEOC not only to enforce the law but also to "promote the employment of older persons." Accomplishing that goal requires the EEOC to define discriminatory conduct broadly, maximize the protections and rights provided to workers under the law, and narrowly interpret any exceptions to the requirements of the ADEA. Exceptions to the law should be limited to individual circumstances in which age is a bona fide job qualification, such as the age of a character in a theatrical production. Unfortunately, the EEOC has not established policies designed to maximize the rights of older workers under the ADEA.

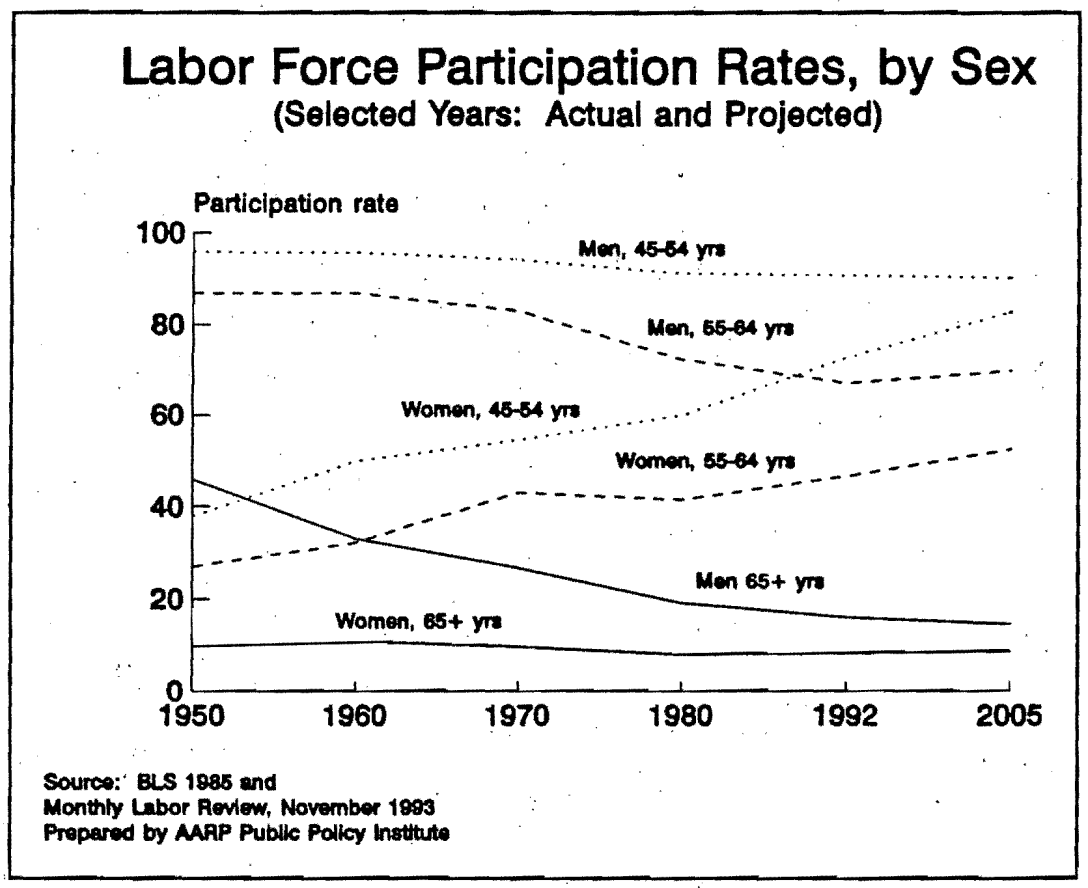
ASSOCIATION POSITION:

The Equal Employment Opportunity Commission (EEOC) must utilize its regulatory authority to maximize the protections afforded to older workers under the Age Discrimination in Employment Act (ADEA) and to ensure that EEOC policies have the benefit of public comment. This is particularly important with regard to its activities in the area of employee benefits, waivers, and ADEA coverage of apprenticeship programs.

E. Early Retirement Incentives

Over the past decade, use of early retirement incentive programs, particularly by large employers, the federal government, and state governments, has increased. Overall, the increased incidence of "voluntary" early retirements, coupled with involuntary terminations of pension-eligible employees, has contributed to the decline in labor force participation rates, particularly among men (see Figure 4-2 for participation rates by sex).

Figure 4-2



The Older Workers' Benefit Protection Act of 1990 amends the Age Discrimination in Employment Act (ADEA) and establishes guidelines for employers structuring early-retirement incentive plans. Some commonly used early-retirement incentives—subsidized early-retirement benefits and Social Security "bridge" payments—are made legal. All other types of early-retirement incentives must be shown to further the "relevant purpose or purposes of the [ADEA]," if challenged as discriminatory. No early-retirement incentive program may "permit or encourage involuntary retirement." Finally, if an employer wishes to obtain waivers of rights under the ADEA from participants in early-retirement incentive programs, the employer must provide information as to the ages and jobs filled by the

persons eligible and ineligible for the program, and meet strict standards for the content, form, and circumstances of the waiver.

ASSOCIATION POSITION:

The Association believes that early-retirement incentives may be attractive to employees and employers, and can easily be designed to accomplish corporate goals and comply with the Age Discrimination in Employment Act (ADEA). However, the Association is concerned that the pervasive use of early-retirement incentives may coerce older workers to retire prematurely. It may also reinforce a stereotype of older workers as the most dispensable in the workforce. The Association questions the legality of early-retirement incentives that are denied to workers above a certain age. Such programs violate the ADEA and are also inconsistent with national policy discouraging policies and practices that limit older workers' continuing labor-force participation.

The new standards for early-retirement incentive programs provided for in the Older Workers' Benefit Protection Act must be carefully interpreted and monitored to determine their effects on older workers and their rights. AARP will work for the promulgation of regulations to ensure that they make clear that the rights of older workers to fair and nondiscriminatory benefits and participation in early-retirement incentive plans are paramount.

Employers who must reduce their workforces should be encouraged to do so in ways that do not implicate age. This would include "exit incentives" for employees of all ages, and nondiscriminatory, cost-saving options other than layoffs or terminations, such as flexible or part-time employment and job-sharing.

III. TITLE VII AND DISABILITY ISSUES AND OTHER FORMS OF EMPLOYMENT DISCRIMINATION AND INEQUITIES

The major federal laws designed to eliminate employment discrimination—the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990—are worded and applied in similar fashion. A weakening of the protections provided by any of these laws has a commensurate impact on the others. Older women workers, minority workers, and workers with disabilities require a high level of protection, since these individuals are subject to "double" or "multiple" discrimination. In addition to facing inequities in hiring and promotion, they are often excluded from training, apprenticeship, and internship programs that provide critical job

skills and may be the key to entry into a profession. Upon retirement, they suffer the consequence of low wages and occupational segregation: low Social Security benefits, small pensions or none at all, and limited personal savings.

The Civil Rights Act of 1991 substantially reversed a series of recent Supreme Court decisions that had weakened Title VII and other civil rights laws. This legislation also expanded the rights of women and workers with disabilities to recover additional damages for discrimination, but limited the amount available based on the employer's size.

The enactment of the Americans with Disabilities Act in 1990 grants older workers with disabilities new rights in employment and remedies against discrimination. Recent Supreme Court decisions have made it more difficult to prove discrimination under these statutes.

ASSOCIATION POSITION:

The Association supports a broad interpretation and vigorous enforcement of the protections afforded by the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, and the Americans with Disabilities Act (ADA); and opposes any administrative or executive action, legislation, or judicial interpretation that would weaken such protections. Accordingly, the Association supports restoration of the full force and effect of Title VII of the Civil Rights Act of 1991 by the courts and regulatory agencies, and urges Congress to pass additional legislation needed to bring ADEA to parity with Title VII. In addition, the Association supports careful monitoring to ensure the implementation and enforcement of the ADA. (Services for and rights of persons with disabilities are discussed more fully in Chapters 3 and 11.)

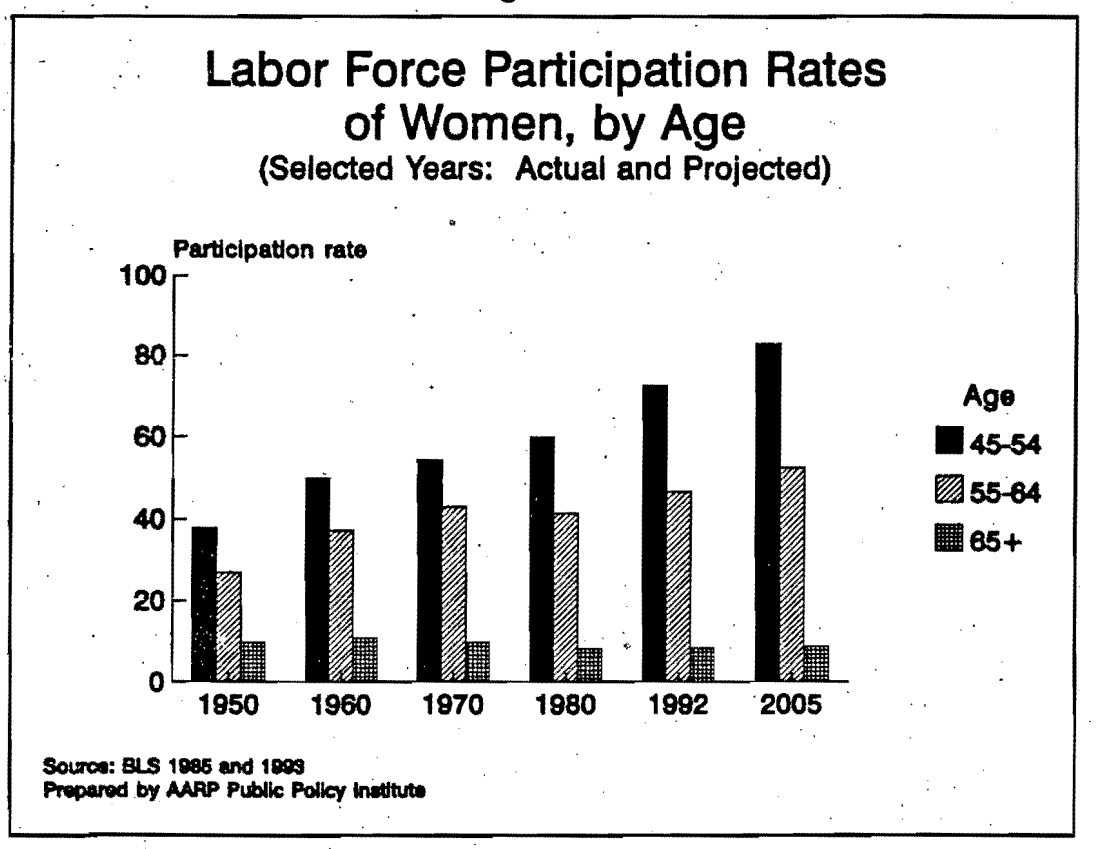
The Association also recommends that the Equal Employment Opportunity Commission (EEOC) be especially sensitive to the possibility of multiple discrimination: whenever a complaint of discrimination on any protected basis is filed, it should determine whether there has also been discrimination on other protected grounds.

The EEOC should ensure that training and apprenticeship programs, including those funded and administered by the federal government, fully comply with the ADEA, Title VII, and the ADA.

IV. ECONOMIC EQUITY FOR WOMEN

In the past four decades the number of women in the workforce has nearly tripled; the rates of labor force participation of midlife women, in particular, have risen dramatically (see Figure 4-3 for participation rates of women by age). Yet women's participation has been largely confined to certain occupations; nearly three-fourths of working women are in nonprofessional jobs, including clerical, sales, and service positions in factories and plants. A common characteristic of these predominantly female positions is their relatively low rate of pay.

Figure 4-3



Women workers of all ages encounter attitudes, business practices, and laws that arbitrarily limit their employment opportunities and earning power, and hence their ability to provide for their own financial security. Despite barriers that inhibit their equitable participation in the labor force, 68 percent of women aged 45 through 59 are in the labor force. (The comparable figure for all women is 58 percent.) The 16 million working women aged 45 and over account for 28 percent of female labor force participants. The number of employed midlife and older women is increasing rapidly, and many are the sole or primary economic support for their families.

Two-thirds of the part-time labor force is made up of women, often working at low wages with no job security and little or no access to employer-provided benefits. However, it is not only part-time women whose earnings are low. As of 1991, full-time working women had a median weekly wage of just $368, which amounted to 74 percent of the $497 earned by their male counterparts. Responsibility for family care usually falls to women, causing some women to work part-time, with potentially adverse effects on employment status and retirement income and savings. (See the following discussion of Family and Medical Leave.)

Barriers to equal employment opportunities are not only costly to working women in the short-term. Such job characteristics as duration and continuity of employment, type of job, average earnings, and benefit packages determine subsequent work-related retirement income. Thus, even women who have worked most of their adult lives receive far less pension income than men. The same holds true for women's Social Security benefits based on their own earnings. (Chapter 3 describes in greater detail the connection between pension benefits and job characteristics.)

ASSOCIATION POSITION:

The Association strongly supports legislation and other action, including private initiatives, to eliminate all barriers to equal employment opportunities for women and to promote their economic, social, and legal equality with men.

Improvements are needed in employment and compensation practices through legislation, public education, regulation, and improved enforcement of existing laws. Increased attention must be paid to counseling, training and retraining programs, and other initiatives designed to address the special employment needs of midlife and older women workers, including "displaced homemakers" who have lost their source of financial support. Improvements are also needed in retirement income and in insurance, tax, and family laws.

The Association supports efforts to improve compensation in jobs held predominantly by women, including efforts to disseminate information on pay equity in the private and public sectors.

V. EMPLOYEE NONPENSION BENEFITS

A. Family and Medical Leave Policies

In February 1993, the President signed into law the Family and Medical Leave Act of 1993, a bill whose passage AARP had strongly and actively supported.

The new law provides workers in firms of 50 or more employees with up to 12 weeks of unpaid, job-protected leave to care for a newborn or newly adopted child or for one's own illness or that of a spouse, child, or parent. During the period of leave, health benefits, if provided, must be continued.

The Family and Medical Leave Act provides important protections to workers of all ages, including those who are middle aged or older. An estimated seven million Americans are functioning as caregivers, providing unpaid personal care in the home for older, chronically ill, or disabled family members or friends. About 75 percent of the caregiver population are women. More than half of women caregivers (55 percent) are employed either full-time or part-time outside the home. About one-third of employed caregivers lose time from work to meet caregiving responsibilities, and 12 percent of women who care for aging parents quit their jobs to do so. This jeopardizes their economic security before and during retirement. Further, a growing body of research links employees' caregiving concerns to stresses on the job, absenteeism, and foregone productivity.

ASSOCIATION POSITION:

The Association urges the Department of Labor to adopt a broad interpretation of the protections provided by the Family and Medical Leave Act and to vigorously enforce its provisions.

B. Employee Health Benefits

Employers often provide health insurance to their employees under the age of 65 and their dependents. For this group, continuous health insurance coverage is related to stable, full-time employment. However, fewer than two-thirds of working Americans under age 65 are covered by employer-sponsored health insurance. Most often lacking health insurance are workers employed in small businesses, the self-employed, part-time workers, and those with episodic work histories. Unfortunately, however, about 70 percent of the nation's uninsured are full-time, steadily employed workers and members of their families. For some employers, e.g., small businesses, insurance costs may be a problem—one that needs to be addressed. (See Chapter 3 for a discussion of health benefits for retirees and Chapter 5 for a broad discussion of health coverage.)

ASSOCIATION POSITION:

Given the structure of the existing health care system, employers should make health insurance coverage available to all their employees. To encourage them to purchase health insurance for themselves and for their dependents, the self-employed should be provided with the same tax incentives or other subsidies that non-self-employed workers receive.

Retirees, persons with disabilities and spouses should have the opportunity to continue with their employer's health plan until the age of Medicare entitlement.

C. State/Federal Unemployment Insurance

Federal legislation requires that the states reduce at least part of the state unemployment insurance (UI) benefit amount for a claimant receiving a pension or Social Security benefit. Thus, the unemployed person who is receiving a pension and/or Social Security benefit will have his or her UI compensation reduced or eliminated. In contrast, persons with other forms of income, regardless of amount, receive unreduced UI. Furthermore, a UI recipient may not be officially enrolled in some job training programs while collecting benefits.

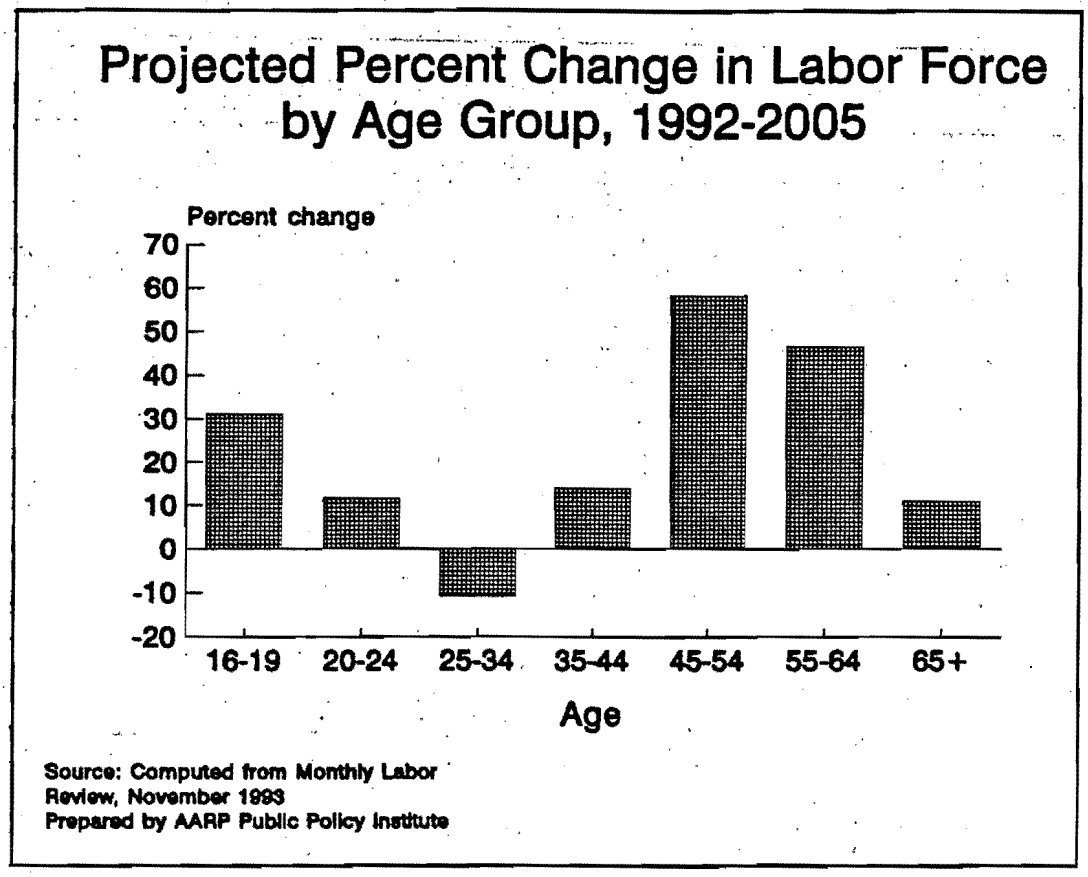
ASSOCIATION POSITION:

Federal and state unemployment insurance (UI) laws may be inequitable. Older workers who have earned both pension and UI coverage deserve to receive both while they search for new employment. The Association believes that workers of any age should be encouraged to pursue training for another job, not discouraged as they often are under present policy. The Association urges repeal of these portions of the federal and state UI laws.

VI. TRAINING, RETRAINING, AND JOB PLACEMENT

The young adult labor market is dwindling while the older population is growing rapidly (see Figure 4-4 for projected changes in the labor force participation by age). This development should encourage employers to find innovative ways of encouraging older workers to continue working, such as offering retraining programs, flexible work schedules, and job-sharing. Such programs will be increasingly necessary to access and develop the employment potential of an aging workforce.

Figure 4-4



A. Job Training Partnership Act (JTPA), Vocational Education, Displaced Homemakers, and Senior Community Service Employment Program (SCSEP)

The Job Training Partnership Act (JTPA) is the primary public sector program for providing training assistance for older workers at the local level. Overhaul of the JTPA in 1992 eliminated the 3 percent set-aside for older workers and established a new set-aside that is 5 percent of Title IIA, adult worker, funds. This formula will make essentially the same amount of money available at the state level as had been available under the 3 percent set-aside, which had been based on the total adult worker and youth allotment.

The JTPA Amendments of 1986 added a new section to the law giving special consideration to "displaced homemakers," typically midlife women seeking to enter the labor force after years of working in the home. These individuals need a broad array of job training services, yet experience under JTPA suggests that their needs are not being met. In 1990, Congress passed the Displaced Homemakers Self-Sufficiency Act to assist states in providing greater opportunities for displaced homemakers by expanding and coordinating existing training programs and support services. The Act is still awaiting an appropriation of funds.

The Senior Community Service Employment Program (SCSEP) is funded under Title V of the Older Americans Act. It provides part-time public service employment and job placement assistance for low-income persons aged 55 and above. About two out of three enrollees are women, and over one in three participants is a minority. The SCSEP has been highly successful; participants receive income as well as job experience while providing valuable community services. The 1992 reauthorization of the Older Americans Act extended the program and increased authorization levels.

ASSOCIATION POSITION:

The Association supports, at a minimum, levels of training services and funding for older persons proportional to their representation in the workforce. In addition, while AARP feels that economically disadvantaged older workers should remain a priority, the federal government should encourage the states to utilize the Job Training Partnership Act (JTPA) funds to serve the "near-poor."

Participants in federal employment or training programs should not be forced into predetermined occupational categories. It is particularly harmful to steer low-income participants into low-skill, low-wage, limited mobility occupations. Retaining the option of appropriate job choice is critical to any successful employment or training program.

The Department of Labor should develop innovative programs under the 1986 JTPA Amendments serving displaced homemakers. Closer coordination is needed among the federal government, the states, service providers, and private employers to ensure that funds authorized by the Perkins Vocational and Applied Technology Act of 1990 are fully utilized for training and support services to benefit displaced homemakers. Congress should appropriate sufficient funds to fully implement the Displaced Homemakers Self-Sufficiency Act.

The Association supports full funding of the Senior Community Service Employment Program (SCSEP) as a separate categorical program. The basis for funding the program—average cost per enrollee—should be automatically adjusted according to an indexing formula.

B. Dislocated Workers

Midlife and older workers have represented a disproportionate percentage of layoffs and terminations in industries affected by plant closings or significant downsizings. Moreover, these older workers are unemployed for significantly longer periods of time than younger workers.

The success of employee adjustment programs depends in large part on adequate notice of pending dislocation. Since 1989, the Worker Adjustment and Retraining Notification Act (WARN) has generally required employers with 100 or more workers to provide employees with 60 days' notice before a major layoff or closing of an enterprise. However, the U.S. General Accounting Office has found that employers are not providing advance notice in a large number of closures and layoffs.

ASSOCIATION POSITION:

The Association supports policies and programs that reduce periods of unemployment while providing worker adjustment services and an opportunity for employees to plan for their reemployment. The active participation of employers in making such services available is critical to the success of these programs. Programs designed to assist dislocated workers should be made available to employees regardless of age who lose their jobs, and regardless of the reason for dislocation.

VII. WORK INCENTIVES

Alternative work options can help older workers remain employed while helping employers retain their skills and experience. Flex-time, part-time employment, flex-place, and job sharing are examples of options that especially appeal to older workers. Time off for education and training enables older workers to enhance and update their professional skills, thereby making their continued employment more rewarding.

Although analysts are predicting widespread shortages of skilled labor in the decades ahead, surveys reveal that most employers are doing little more than paying lip-service to the importance of adopting workplace flexibility to attract and keep older workers.

The availability of prorated fringe benefits for employees working less than full-time facilitates older individuals' ability to continue working in accordance with their particular needs and circumstances. Such options may be particularly important to midlife and older women, who often have difficulty juggling employment and care-giving responsibilities. These women frequently can accept only part-time jobs, which generally do not provide any benefits. Increasingly, employers are turning full-time jobs into part-time jobs to avoid paying benefits.

In addition, there has been a dramatic change during the past decade in the way employers staff their operations, particularly in lines of business that are subject to substantial seasonal and cyclical variations. A two-tier workforce has developed in many industries. One tier is the "core" employee group that receives benefits, pension credits,

regular promotions, relatively good pay, and an employment contract that requires advance notice of layoffs.

The other more flexible tier is the "contingent" workforce, made up of part-timers, temporaries, and consultants. While some contingent workers are highly compensated, contingent workers typically receive lower pay and few or no benefits, are ineligible for promotions, and have virtually no job security. The vulnerable groups most likely to fall into this latter category are women, minorities, older workers, and youth. However, men are also affected by the growth of the contingent workforce. Male part-time workers are, for example, nearly twice as likely as female part-time workers to be working part-time because they cannot find full-time employment. Older minority workers are also disproportionately represented among the involuntary part-time population.

The growth in contingent work in part reflects the increasing flexibility of employment arrangements. Yet many persons remain in an involuntary contingent employment status for long periods, often at multiple jobs, without benefit of health insurance or the opportunity to build pension credits. These individuals are the most vulnerable of the employed population. (See Chapter 3 for a discussion of part-time employees and pension coverage.)

ASSOCIATION POSITION:

The Association encourages employers' use of alternative work options that enable people to continue working if they wish to do so. Employees working part-time or in their homes should receive prorated benefits, putting them on a more equitable footing with full-time workers.

The Association also supports providing certain types of benefits to all workers, regardless of their status, including prorated pensions, health insurance, sick leave and disability leave, as well as employer-paid Social Security taxes; contingent workers should also be eligible for worker's compensation and unemployment compensation.

STATE PUBLIC POLICY

The opportunity to work at a rewarding job, either full-time or part-time, can significantly affect the financial well-being of many older Americans. Numerous surveys document the need or desire of older workers to remain employed or return to the workforce. Workers dislocated by plant closings and layoffs, and displaced homemakers who have lost their home-based occupations, are among those requiring special assistance in obtaining reemployment. Through legislative, administrative, and regulatory actions, the states can play a vital role in expanding the options and opportunities for midlife and older workers. Specifically, the Association recommends these steps:

1. **Job training and retraining programs established through the Perkins Vocational and Applied Technology Act and the Job Training Partnership Act (JTPA) should be developed and coordinated to ensure that older persons, including displaced homemakers, are adequately served. States should also enact legislation expanding related services (e.g., transportation, dependent care) that enable displaced homemakers and other older persons to participate in such programs.**

2. **States should involve older persons in planning the use of JTPA Title II funds and include them on local and state advisory boards; states should use these funds to train, retrain, counsel, and place both low-income and non-low-income workers.**

3. **States should enact, strengthen, and enforce statutes prohibiting age discrimination in employment, to ensure that the right to work free of age discrimination is on a par with other civil rights. With regard to public service employment, states must amend benefit plans to bring them into compliance with the Age Discrimination in Employment Act (ADEA) and the Older Workers' Benefit Protection Act.**

4. **States should eliminate mandatory retirement for judges.**

5. **State age discrimination in employment laws should at least complement the federal ADEA (see Federal Public Policy, above) and play an important role in the fight against discrimination; state laws that do not already do so should protect workers whose employers have fewer than 20 employees and should cover both private and government employees.**

6. States should have in place adequate statutory provisions to prohibit wrongful discharge.

7. States should modify their unemployment insurance (UI) compensation programs to devise more effective mechanisms for assisting the unemployed; this would include allowing recipients of UI to be officially enrolled in job training programs while collecting benefits. Employment counselors in Employment Service offices should have knowledge of and sensitivity to the needs of older workers to provide better job development and referral assistance at the local level.

8. States should introduce and monitor the success of preretirement planning programs for public employees so they can be familiar with issues and options well in advance of retirement.

9. Public and private employers should consider providing phased preretirement programs whereby employees nearing retirement age may shift or gradually reduce job responsibilities, at reduced or prorated compensation.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

May 13, 1994

Donsia Strong
White House Domestic Policy
Eric Senunas
White House Legislative Affairs

Dear Donsia and Eric:

This package includes a variety of pieces that I thought might be helpful to you both. The pieces produced by my office are in draft form and will be revised as needed. I wanted to give you an idea of how we are proceeding in pulling together briefing material for the nominees.

Included in this package are the following:

- EEOC's FY 1995 Budget Request -- this has a lot of basic background information about the agency.
- Office of Legal Counsel's April 1993 Report to the Chairman -- Thomasina Rogers prepared this for the Interim Chair; it outlines some of the fundamental structural problems within the agency.
- July 1993 GAO Testimony on the EEOC's performance presented to Chairman Owen's Subcommittee.
- OCLA Draft of working plan for confirmation preparation.
- OCLA Draft of Pending Legislative Issues -- summarizes the active and pending legislative matters in which the EEOC is involved.
- OCLA Draft of current agency workload profile. This should give you some idea of the significant backlog and resource problems the agency is facing.
- List of SES slots at the EEOC with important vacancies noted.

I hope this information is helpful. Donsia, I will look forward to your call to discuss the agenda for Monday's meeting.

Sincerely,

Claire

Claire Gonzales

DRAFT

CONFIRMATION PLAN

I. SUBSTANTIVE BRIEFING

The substantive briefing should include an overview of current and upcoming legislative and policy matters facing the EEOC, as well as information on internal organizational matters that directly affect the ability of the EEOC to perform its statutory missions. A review of the Transition Report and recent communications with key Congressional figures make it abundantly clear that current complex policy issues are only a portion of the many problems which the agency must address in order to function effectively.

The oversight committees, and interested parties in the civil rights community, are extremely interested in the agency's many institutional problems that now severely impair its ability to serve the public. These problems include a wide range of issues related to structure, management, operations, and programs/strategic planning.

The following plan is the first step in identifying and gathering pertinent information about the EEOC to prepare the nominees for their courtesy calls and for hearings, if any. At this point the plan is quite detailed. This was done for two reasons. First, it is important for the nominees and their handlers to have a thorough understanding of the complex problems facing the EEOC because the principal House and Senate oversight subcommittees are very involved with the agency, to the point of micro-managing at times. This is particularly important because of the length of time that the agency has functioned without leadership selected by this administration. Second, this initial detail is intended to provide some background and context to assist in the development of both a confirmation strategy for the current and future nominees and a long-term plan for the agency.

A. *External Evaluations*

1. Formal Reports on Agency - Prepare short summaries of formal reports on the EEOC, including:

- Transition Report
  - summary of pertinent issues found in appendices
- 1992 Senate Oversight Hearing Testimony (Kristina Zahorik of Simon's staff sending copies) (JP)*
- Review House Oversight Hearings for last five years

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* JP and JD denote Julie Pershan and John Dean, Schedule C's in OCLA/EEOC; SA is Sylvia Anderson, career legislative affairs specialist in OCLA/EEOC.

- GAO reports & testimony from last five years
  - ***EEOC: An Overview***, Testimony before Subcommittee on Select Education and Civil Rights July 27, 1993 (JP and JD)

- ***Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges***, Oct. 11, 1988 (Owens/Cuprill interested in this one)
- JP to collect other pertinent GAO reports

- U.S. Commission on Civil Rights reports from last five years
  - ***EEO Rights for Federal Employees***
  - JP to collect other pertinent USCCR reports

2. Group Surveys - Develop comprehensive list of constituency groups to survey - Solicit input on principal issues of concern to communities/groups affected. Contact list should be representative of communities and interests served.

a. Contact List to include (in alpha):

- African American
- Asian/Pacific American
- Business/Employers
- Hispanic/Latino
- Labor
- Native American
- People with disabilities
- Religious Community - (Catholic, Jewish, Moslem, Protestant)
- Women

b. Survey Protocol - Develop questions to ask and format for response (2-3 page limit); assign contacts to team members.

c. Summarize Responses - Prepare short summaries of principal issues by communities/groups.

B. Internal Issues - Structural, Administrative, Programmatic & Operational

The status of the agency's management and operations will be a critical part of any discussion about the future of the agency and the fulfillment of its mission. Nominees need to have a very good idea of the current problems facing the agency, which may call for the very structure of the agency to be re-examined and redesigned.

1. Summarize agency's structure, enforcement responsibilities, and administrative processes

a. Organizational Structure

- Role of the Commissioners -- Suggest that this issue be addressed by the Administration, rather than leaving it to the incoming Chair,

particularly because of the timing and importance of other Commissioner nominations.

- Critical personnel issues --

i. Vacant SES slots in critical positions that can be filled with political appointees

Key Positions:

- Director, Office of Management
- Associate General Counsel for Systemic Litigation
  (also vacant - Information Resources Management, Office of Management)

ii. Received unconfirmed report of extremely high SES bonuses given recently (e.g., $15,000); based on performance reviews which are tied to charge processing record; rubber stamped by Performance Review Board. This is a problem because the agency is routinely criticized for the inordinately high "no cause" finding/closure rates, but this practice indicates that the agency's leadership emphasizes quantity rather than quality of investigations/charge processing.

- This personnel information is not confidential; talk to Emily Sheketoff at OPM about gather specific data. ? bonuses

iii. Liberal use of non-reimbursable outside "details"; this is a very questionable practice because of the severe staffing shortages in the most important areas of the agencies (investigators); also, some reports of burrowing. ??

b. Statutory Enforcement Responsibilities

c. Administrative Processes

- Private Sector -- note differences by statute (Title VII v. ADEA)
- Federal Sector

d. Additional Agency Responsibilities

- EEO Surveys - reexamine collection methods and use of data compiled

- Executive Order 12067 - EEOC to coordinate development of federal EEO policy (see Legal Counsel report discussing the need for EEOC to reclaim its primary role)

e. Identify miscellaneous administrative policy issues affecting performance.

- Continuation of Thomas' policy of full investigation -- this is critical because many interested parties attribute ever-increasing backlog to this enforcement policy. What does this mean?

- Lack of coordinated policy development plan or process -- policy made on *ad hoc* basis, usually from the ground (field) up, rather than top down

- Lack of systemic litigation strategy -- would affect charge processing from intake forward

2. Compile current performance data

a. Review existing quarterly and annual reports -- Summarize status of charge caseload, current and projected problems related to charge processing; OGC - litigation issues; federal sector inventory and issues; management, budget, and planning issues.

b. Current data on charge and litigation caseload -- Summarize recent data on receipts, cause/no cause determinations, closures, litigation caseload, systemic litigation caseload, litigation programs or plans (if any).

C. Pending or Upcoming Legislative and Policy Issues

The nominees should be briefed on all legislative issues involving EEOC that are either currently under active consideration by Congress (*e.g.*, the Federal Employees Fairness Act) or that are pending without much activity, but are still important (*e.g.*, Justice for Wards Cove Workers Act and Equal Remedies). Additionally, the nominees should be aware of all pending policy issues within the Commission such as the Consolidated Workplace Harassment Guidelines (that the religious right is mobilizing around because of the inclusion of religion).

1. Preparation of Legislative Update, including current status, EEOC response, available sources of information. SA and JP to prepare.

D. Applicable Administration Directives (Executive Orders, National Performance Review Directives, etc.)

Some activity has occurred within the agency to respond to the various Administration directives that apply to or affect the agency. A summary of applicable items with any agency activity related thereto will be compiled for the nominees.

II. HILL STRATEGY

A. Senate

1. Past Confirmations --

- Review files of past EEOC confirmations -- hearing testimony
- Review Deval Patrick's confirmation for tips (Trasviña)
- Prepare bios for each Senator of the committee -- identify issues of concern from recent inquiries and requests

2. Labor & Human Resources Committee Staff -- Ongoing consultation about their preference for confirmation format, etc.

3. Identify Key Visits

a. Labor & Human Resources Committee Members

- Kennedy
- Kassebaum
- Simon, Chair, Employment and Productivity Subcommittee (Oversight)
- Thurmond, Ranking Minority Member, Employment and Productivity Subcommittee (Oversight)

b. Non-L&HR committee contacts

- Governmental Affairs -- Glen/Roth [Federal Sector Oversight]
- Appropriations/Commerce, Justice, State, The Judiciary & Related Agencies -- Hollings/Domenici

c. Others - (Leadership?)

B. House

1. Identify Key Contacts

- **Major Owens**, Chairman, House Select Subcommittee on Civil Rights and Education, Committee on Education and Labor
  - **Maria Cuprill**, Staff Director of Select Subcommittee (and Owens' wife)

- **Caucuses**
  - Hispanic Caucus
  - Black Caucus
  - Womens' Caucus

- **Other Committees/Subcommittees of Jurisdiction?**
  - Judiciary (Brooks)/Civil & Constitutional Rights (Edwards)
  - Post Office & Civil Service (Clay)/Civil Service (McCloskey) -- [Federal Sector]
  - Appropriations (Obey)/Commerce, Justice, State and Judiciary (Mollohan)

"plan"
5/12/94 - 8:45/cg

United States General Accounting Office

GAO

Testimony

Subcommittee on Select Education and Civil Rights, Committee on Education and Labor, House of Representatives

For Release on Delivery
Expected at 10:00 a.m.
EST
Tuesday
July 27, 1993

EEOC

An Overview

Statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division

Transition Report for Donna

CLINTON LIBRARY PHOTOCOPY

GAO/T-HRD-93-30

SUMMARY

EEOC upholds a basic right of Americans: the right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability. How well EEOC performs this mission has been the subject of congressional hearings and a number of GAO reports. In these times of shrinking resources, government agencies are rethinking their roles and how they do business. EEOC may also need to change.

HOW EEOC OPERATES. EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of employment discrimination in the private sector; it coordinates these activities in the public sector. In fiscal year 1993, EEOC's budget was $220 million and it was authorized 2,793 full-time equivalent positions by the Congress.

EEOC'S INCREASING RESPONSIBILITIES AND WORKLOAD. EEOC's responsibilities and workload have generally been increasing over the years. In 1964, when EEOC was established, it was responsible for investigating employment discrimination charges relating to race, color, religion, sex, or national origin. Since that time, EEOC has become responsible for administering additional laws: (1) the Equal Pay Act of 1963, (2) the Age Discrimination in Employment Act of 1967, (3) the Equal Employment Act of 1972, (4) Section 501 of the Rehabilitation Act of 1973, (5) the Americans With Disabilities Act (ADA) of 1990, and (6) the Civil Rights Act of 1991.

CONCERNS ABOUT EEOC'S OPERATIONS. In addition to general concerns about EEOC's ability to fulfill its increased responsibilities and greater workload, GAO--as well as civil rights organizations--have raised specific concerns about EEOC's operations. These concerns include (1) the increasing time it takes EEOC to investigate and process charges, the increasing inventory of charges awaiting investigation, and the adequacy of investigations; (2) the high proportion of "no cause" findings, that is, determinations that the evidence does not sufficiently support the discrimination charge; (3) the limited number of litigation actions and systemic investigations initiated by EEOC; and (4) the usefulness of the data collected from some state and local Fair Employment Practices Agencies.

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to (1) present an overview of the Equal Employment Opportunity Commission (EEOC) and (2) discuss some concerns about EEOC operations that have been raised over the years.

EEOC upholds a basic right of Americans: the right to equal employment opportunity regardless of race, color, religion, sex, national origin, age, or disability. How well EEOC performs this mission has been the subject of congressional hearings and several GAO reports (see attachment I). Within the next few months, we will be reporting on EEOC's enforcement of the Age Discrimination in Employment Act to the Chairman of the Senate Special Committee on Aging.

Mr. Chairman, EEOC's world has changed drastically since the Commission was established by the Civil Rights Act of 1964. A key question arises: With substantial increases in staff unlikely, does EEOC have the processes in place that will allow it to respond effectively to the demands of its new environment--increasing responsibility and workload? In these times of shrinking resources, government agencies are rethinking their roles and how they do business. EEOC may also need to change.

Let me proceed by focusing on (1) a brief description of how EEOC operates, (2) its increasing responsibilities and workload, and (3) concerns about its operations.

BACKGROUND

EEOC carries out its mission through 50 field offices that receive, investigate, and resolve charges of employment discrimination in the private sector, and it coordinates these activities in the public sector. In fiscal year 1993, EEOC's appropriation of $220 million budgeted for 2,793 full-time equivalent positions.

EEOC is one of several federal agencies responsible for enforcing equal employment opportunity laws and regulations. Other agencies include, for example,

-- the Department of Justice, which is authorized to file suit in federal district court against state and local government employers charged with discrimination, but only after EEOC has processed the case and failed in conciliation efforts;

-- the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which enforces laws against discrimination by federal government contractors and subcontractors; and

-- the Merit Systems Protection Board, which serves as an avenue of appeal for federal employees with employment discrimination complaints related to various personnel actions.

By law, a five-member commission heads EEOC. The President appoints the members, with the consent of the Senate, for rotating 5-year terms. No more than three members can be in the same political party. The President designates one member to serve as Chairman and another as Vice Chairman. As of July 1993, EEOC lacked one commissioner, and the President had not appointed a Chairman.

About 90 percent of EEOC's annual budget is used for enforcement, mainly in the private sector. By law, each charge, except those involving age discrimination, is to be "fully investigated." By policy, EEOC fully investigates age discrimination charges in the same way. In effect, EEOC emphasizes that all charges should receive equal treatment. At a minimum, EEOC's full investigation procedures require EEOC staff to obtain pertinent evidence, interview relevant witnesses, and verify the accuracy and completeness of evidence obtained. The remaining portion of EEOC's budget is used to develop and provide the policy and program directives EEOC needs

to carry out its mission, to help employers in complying with the laws, and to help employees understand their rights.

EEOC has work-sharing agreements with state and local Fair Employment Practices Agencies (FEPAs). Under these agreements, EEOC agrees to pay for the processing of employment discrimination charges filed with, or deferred to, the FEPAs. For fiscal year 1992, the FEPAs conducted about 43 percent of the investigations of discrimination charges. EEOC monitors the FEPAs through reviews of individual investigation results to ensure that they meet EEOC's standards.

Most of EEOC's efforts to combat employment discrimination take place as a result of discrimination charges being filed. EEOC initiates some efforts by educating employers and employees through seminars; providing technical assistance to employers, employees, and state agencies; and coordinating federal agency efforts. On behalf of groups, EEOC also initiates investigations of possible discriminatory practices. Charges related to group discriminatory practices are called "class actions" when individuals in the private sector initiate them and "systemic" when EEOC initiates them.

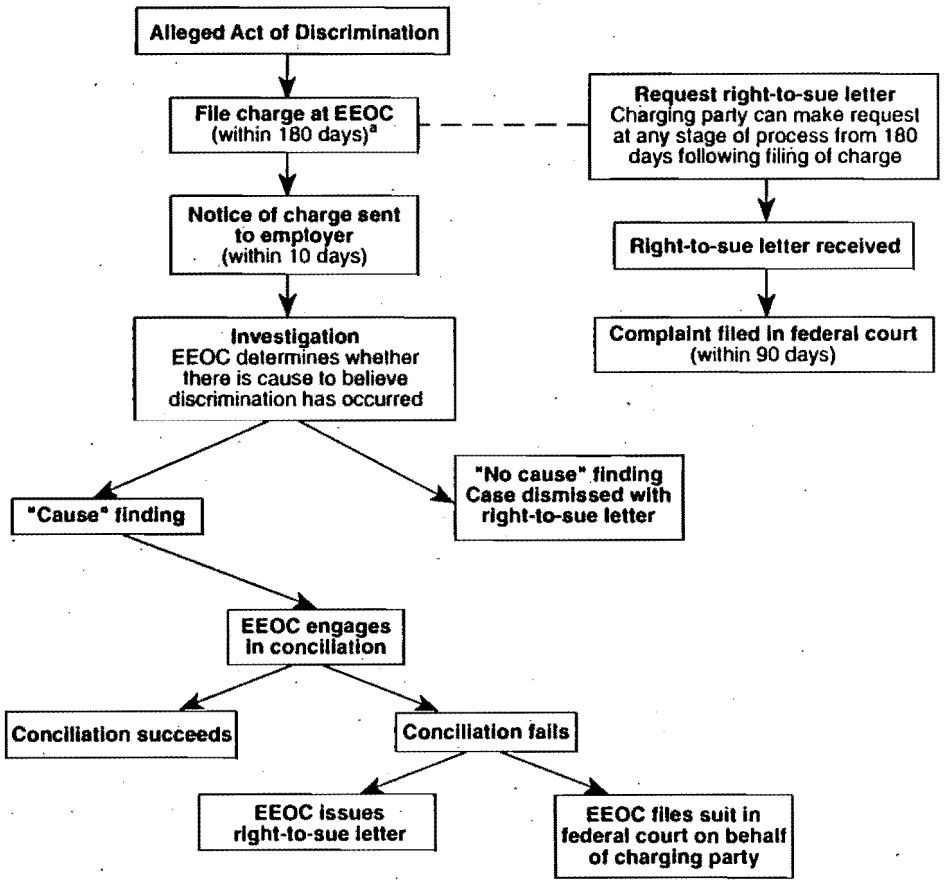
In addition, EEOC collects and maintains minority profile data from private employers with (1) 100 or more employees and (2) 50 or more employees, if the employers are awarded federal contracts totaling $50,000 or more. It shares this information with other federal agencies working on discrimination issues, such as the OFCCP in the Department of Labor. EEOC uses the profile data to monitor discrimination patterns by employers and to help develop the cases in systemic investigations.

What Happens When a Charge Is Filed

As shown in the flow chart on the next page (see fig. 1), EEOC's procedures begin with the investigation of a discrimination charge that an individual has filed, at no

Figure 1

GAO EEOC Procedures in Private Sector Cases



[a]In jurisdictions where there are state or local laws prohibiting employment discrimination, this period will be 300 days.

Source: This figure is based on an EEOC chart that describes the procedures for processing charges brought under Title VII of the Civil Rights Act. These procedures generally apply to the processing of charges brought under the other statutes for which EEOC has responsibility.

cost, with either EEOC or a FEPA. The alleged discrimination may have occurred while the individual--that is, the charging party (I'll call her Ms. Smith)--was applying for a job or while she was employed. Ms. Smith needs only to allege that some act of discrimination has occurred. First, Ms. Smith files the charge--specifying the act, date of alleged discrimination, and the law that was violated. EEOC staff interview her to obtain as much information as possible about the alleged discriminatory act. EEOC notifies the employer about Ms. Smith's charge and requests relevant information from the employer. EEOC also interviews any witnesses who have direct knowledge of the alleged discriminatory act. If the evidence shows there is no reasonable cause to believe that discrimination occurred, Ms. Smith and the employer are notified. Nevertheless, EEOC gives Ms. Smith a right-to-sue letter--a document that allows her to take private court action if she is dissatisfied with EEOC's resolution of the determination charge. (Ms. Smith may not take her case to court without the right-to-sue letter.)

If the evidence shows that Ms. Smith has reasonable cause to believe that discrimination occurred, EEOC conciliates, that is, attempts to persuade the employer to voluntarily eliminate and remedy the discrimination. Remedies may include Ms. Smith's placement in the job she previously sought, reinstatement to the job she had lost, back pay, restoration of lost benefits, or damages to compensate for actual monetary loss.

EEOC would consider filing a lawsuit in federal district court on Ms. Smith's behalf if conciliation fails. Because of resource limitations, EEOC cannot litigate all such cases. In place of EEOC litigation, Ms. Smith may initiate private court action.

EEOC'S INCREASING RESPONSIBILITIES AND WORKLOAD

EEOC's responsibilities and workload have generally been increasing over the years. From 1989 to 1992, the number of charges received to process increased 26 percent,

while staffing decreased 6 percent. EEOC anticipates an additional increase of about 18 percent in charges received in fiscal year 1993 over fiscal year 1992, with no additional increase in staffing (see fig. 2).

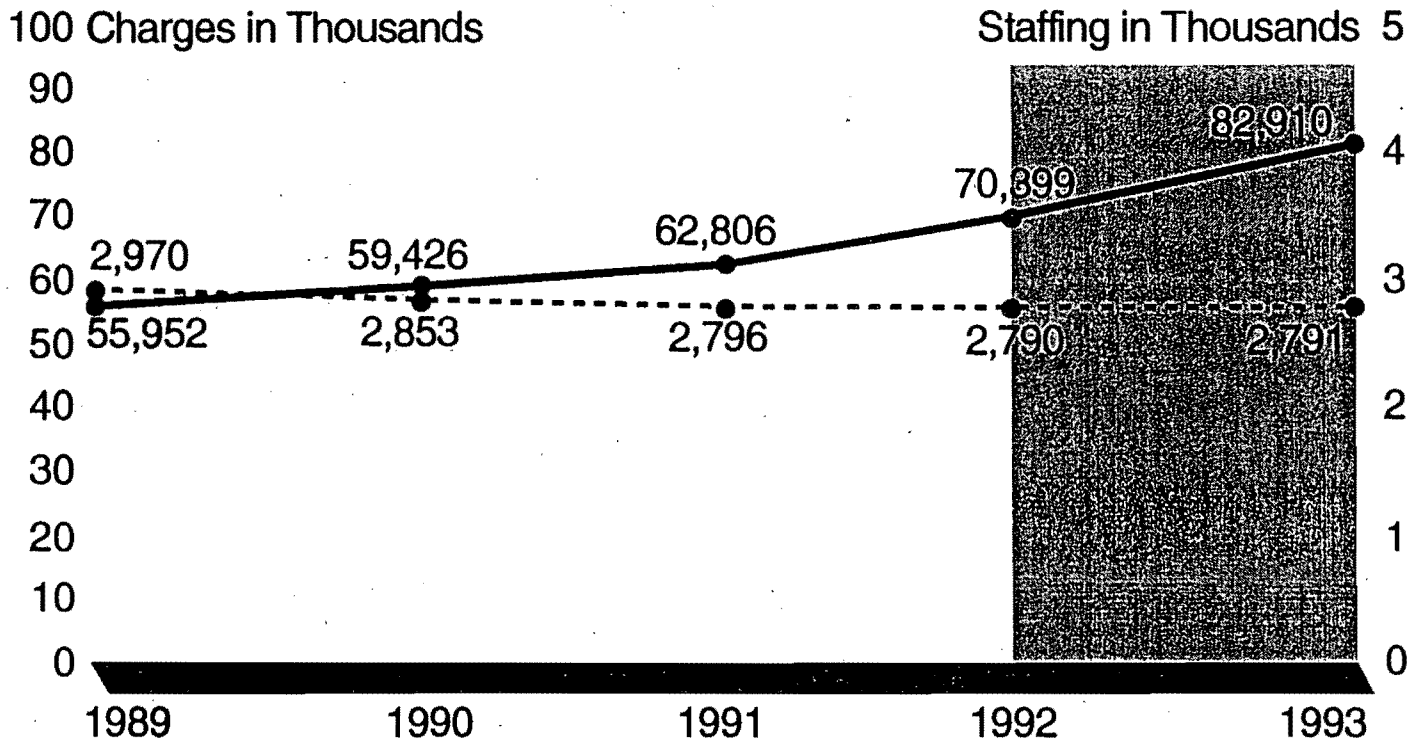
In 1964, EEOC was responsible for investigating employment discrimination charges relating to race, color, religion, sex, or national origin. In 1978 and 1979, EEOC assumed responsibility for administering additional laws: (1) the Equal Pay Act of 1963, which prohibits payment of different wages to men and women doing the same work; (2) the Age Discrimination in Employment Act of 1967, which prohibits employment discrimination against workers aged 40 and over; (3) the Equal Employment Act of 1972, which gave EEOC the right to file suit in federal district court to achieve compliance with Title VII; and (4) Section 501 of the Rehabilitation Act of 1973, which bars federal agencies from discrimination on the basis of disability. Before EEOC assumed these additional responsibilities, these laws were administered by the Department of Labor. Also in 1978, Executive Order 12067 gave EEOC the responsibility to provide leadership for, and coordination among, the other federal agencies that enforce equal employment opportunity.

More recently, EEOC became responsible for enforcing the Americans With Disabilities Act (ADA) of 1990. This law, covering some 43 million Americans with one or more physical or mental disabilities, provides a clear and comprehensive mandate for eliminating employment discrimination against those with disabilities. Finally, EEOC's responsibility was increased further with the passage of the Civil Rights Act of 1991; a key provision of this law allows employees who think they have been discriminated against to file for compensatory and punitive damages.

The passage of ADA and the Civil Rights Act of 1991 is adding to EEOC's workload in two ways: (1) more charges are being filed and (2) because they are often complex, these charges take longer to process.

Figure 2

GAO Charges EEOC Received to Process Increasing and Staff Decreasing



Note: Fiscal year charges received are projected, based on second-quarter fiscal year 1993 data for charges received.

To meet this increased workload, EEOC has argued that it needs more staff. In a 1988 report, we raised concerns over how EEOC determines staffing needs and recommended that the Chairman conduct a study to determine (1) the number of charges an individual investigator should be able to "fully investigate" annually and (2) the resources EEOC would need to fully investigate all charges filed.[1] This information would provide a better basis for EEOC to determine its staffing needs and develop a budget to carry out its investigative work. It would also provide a better basis for establishing realistic goals and expectations for staff in EEOC district offices. EEOC disagreed with our assessment of the need for such a study and none has been done.

CONCERNS ABOUT EEOC OPERATIONS

In addition to our general concerns about EEOC's ability to fulfill its increased responsibilities and greater workload, we--as well as civil rights organizations--have raised specific concerns about EEOC's operations. These concerns include (1) the increasing time it takes EEOC to investigate and process charges, the increasing inventory of charges awaiting investigation, and the adequacy of investigations; (2) the high proportion of "no cause" findings, that is, determinations that the evidence does not sufficiently support the discrimination charge; (3) the limited number of litigation actions and systemic investigations initiated by EEOC; and (4) the usefulness of the data collected and reported by some FEPAs.

Because about 90 percent of EEOC's efforts are in the private sector, again my statement will focus on this sector.

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[1] Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges (GAO/HRD-89-11, Oct. 11, 1988).

Increasing Time to Investigate Charges, Increasing Inventory, and Adequacy of Investigation

The average time for completing an EEOC investigation of a charge in the private sector increased from 254 days in fiscal year 1991 to 292 days in fiscal year 1992 (a 15 percent increase). EEOC measures average time from the date a charge is filed until the date it apprises the charging party and the employer of the results of the investigation. This increase occurred even though the average number of completed cases per investigator also increased--from 88.5 resolutions in fiscal year 1991 to 92.8 in fiscal year 1992.

EEOC's inventory of cases carried over from previous years also continues to increase and age. From fiscal year 1989 through fiscal year 1992, the inventory rose nearly 15 percent (see fig. 3).

During that period, the average age of cases in the inventory increased from 7.9 months to 10.4 months. EEOC estimates that by fiscal year 1994, the average age of cases in the inventory will more than double, to 21.3 months (see fig. 4).

The full investigation approach, as described in EEOC's manual of compliance standards, requires EEOC to investigate all charges and give all the same degree of attention. In 1988, we reported that our review of a sample of cases, closed as "no cause" determinations by EEOC district offices and state agency FEPAs, showed that from 40 to more than 80 percent of the charges were not fully investigated. Deficiencies included failing to verify critical evidence, interview relevant witnesses, and compare charging parties with similarly situated employees. EEOC's increasing workload, the resultant pressures experienced by EEOC investigators to complete investigations quickly, and the possible effects of both on the adequacy of investigations have been discussed at congressional hearings in recent years.

Figure 3

GAO Charges in EEOC Inventory Increasing

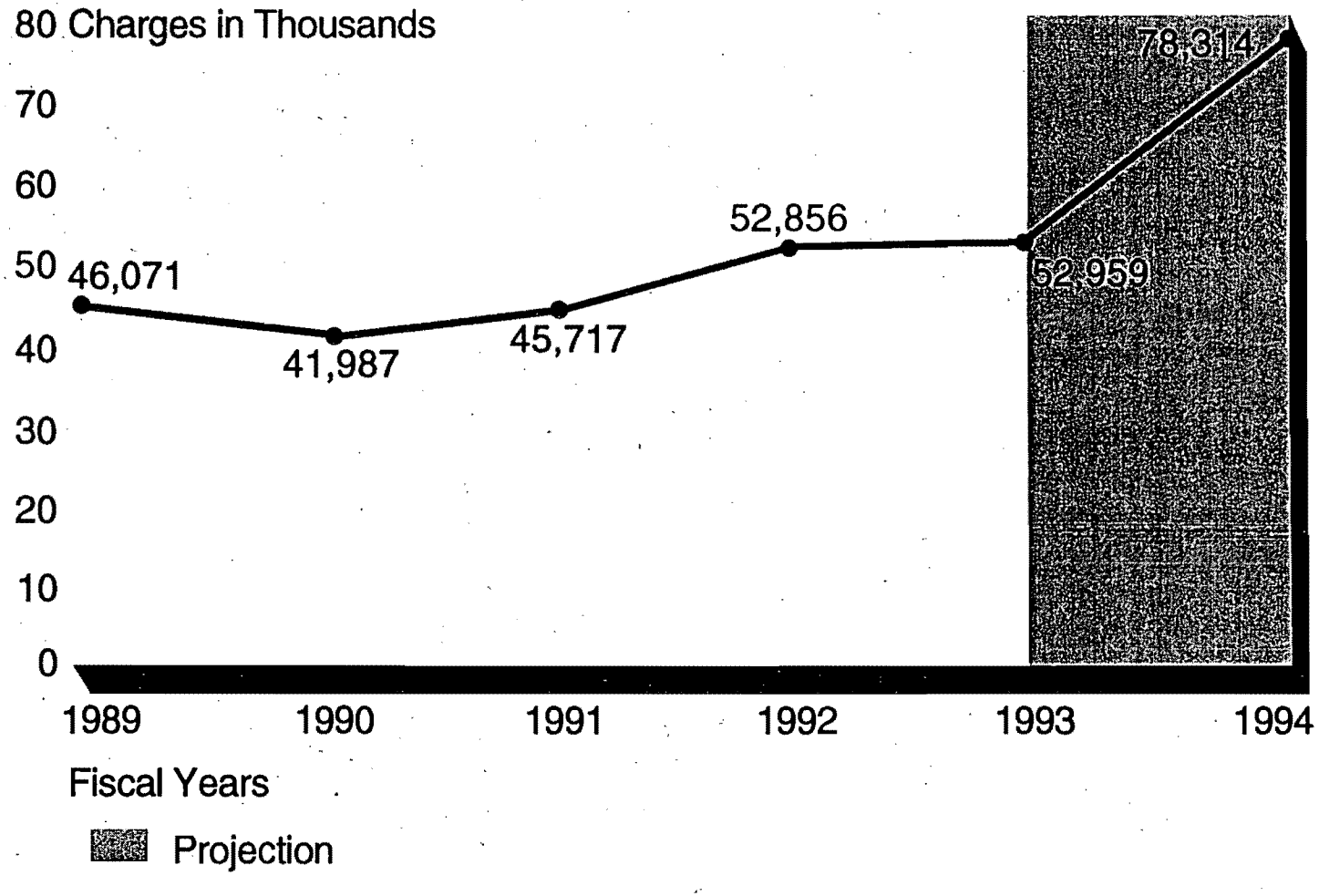
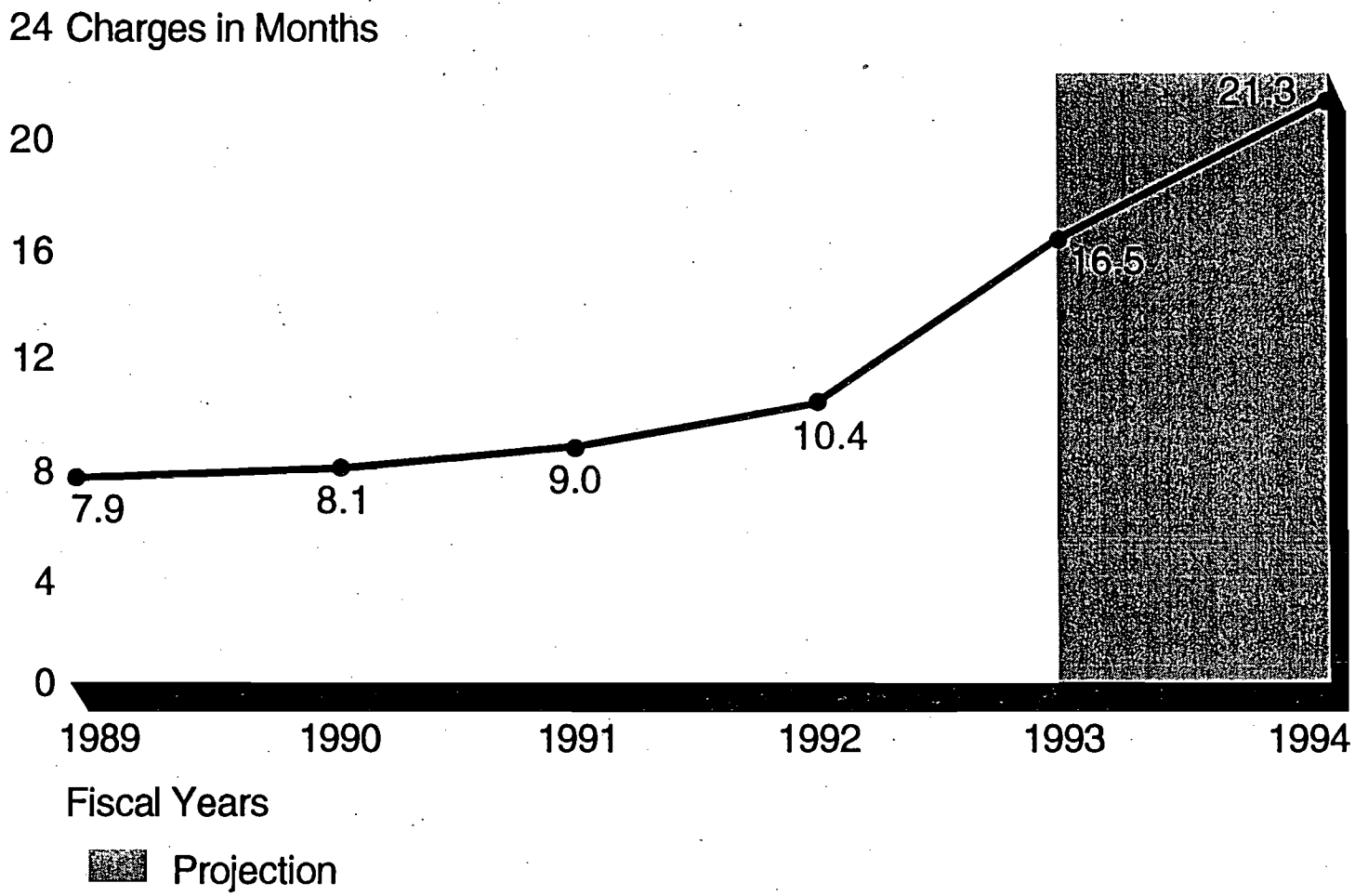


Figure 4

GAO Average Age of Charges in EEOC Inventory Increasing



High Rate of "No Cause" Findings

In fiscal year 1992, EEOC processed more than 68,000 discrimination charges. Only 2.4 percent resulted in "reasonable cause" findings. Of the remaining charges, 6.4 percent were settled through conciliation and 6.8 percent were settled through withdrawal and included monetary benefits. An additional 23.4 percent of the charges was closed administratively for various reasons, such as the charges were withdrawn or the charging party did not cooperate with the investigation. About 61 percent were closed with no reasonable cause since EEOC determined the evidence did not support the discrimination charge.

EEOC's rate of "no cause" determinations has been high for many years. We noted, in our 1988 report, that several investigators said that some "no cause" determinations were cases closed prematurely to avoid investigators' receiving a lower performance rating for failing to meet deadlines for case closures. In recent years, two legal service organizations have voiced similar concerns over the possible unwanted effect of this rating system on the number of "no cause" determinations.

EEOC Initiates Few Litigation Actions and Systemic Investigations

EEOC has been criticized for failing to litigate more cases and initiate more systemic investigations (which are, as mentioned earlier, like class actions, but EEOC-initiated). Arguments for more EEOC litigation stem from the belief that court decisions have a far-reaching effect on eliminating discrimination in the workplace and, in a sense, are more cost-effective than individual investigations. However, of the total charges received each year, EEOC litigates less than 1 percent on behalf of charging parties. In fiscal year 1992, EEOC litigated 447 charges. EEOC has no plans to increase either staff in the Office of General Counsel or litigation efforts, an EEOC official said in July 1993.

In fiscal year 1992, special units in EEOC initiated 50 systemic investigations. EEOC officials say that they cannot initiate more systemic investigations because they are labor intensive. The officials also believe that if more EEOC staff were assigned to systemic investigations, there would be less staff to work on the individual charges that EEOC must, by law, investigate. A contrary view holds that if EEOC initiated more systemic investigations and assigned sufficient staff to them, a possible result might be fewer individual charges brought to EEOC.

Usefulness of Data Reported by Some FEPAs Is Questionable

Although EEOC uses the data from its information system to track the age of discrimination charges, answer questions on particular cases, and produce internal and external reports, the usefulness of data collected and reported by some FEPAs is questionable.

We cited several data collection and reporting problems at EEOC district offices and FEPAs in our 1989 report, and recommended that EEOC address these problems.[2] Since that report, EEOC has improved the accuracy and completeness of the data collection activities in its field offices. EEOC officials believe this part of the information system is now operating relatively well. According to EEOC, the FEPAs' cooperation in collecting and reporting data, however, varies from excellent to poor, and the quality and completeness of the data submitted to EEOC also vary. As a result, the usefulness of the data submitted by some FEPAs is questionable. EEOC is continuing to work with the FEPAs to improve the data they collect and provide.

- - - -

[2] ADP Systems: EEOC's Charge Data System Contains Errors, but System Satisfies Users (GAO/HRD-90-5, Dec. 12, 1989).

Given the tension between EEOC's increasing responsibilities and workload and the concerns about EEOC's operations, the Subcommittee is holding this hearing at a most appropriate time. We hope that some of the issues raised today will help the Subcommittee in planning for future EEOC hearings and will help to make EEOC more efficient and effective.

Mr. Chairman, that concludes my prepared statement. I will be happy to answer any questions you or other members of the Subcommittee may have.

RELATED GAO PRODUCTS

Federal Employment: Sexual Harassment at the Department of Veterans Affairs (GAO/T-GGD-93-12, Mar. 30, 1993).

Affirmative Employment: Assessing Progress of EEO Groups in Key Federal Jobs Can Be Improved (GAO/GGD-93-65, Mar. 8, 1993).

Information on EEO Discrimination Complaints (GAO/GGD-93-6RS, Dec. 31, 1992).

Age Employment Discrimination: EEOC's Investigation of Charges Under 1967 Law (GAO/HRD-92-82, Sept. 4, 1992).

Federal Workforce: Continuing Need for Federal Affirmative Employment (GAO/GGD-92-27BR, Nov. 27, 1991).

Federal Affirmative Employment: Status of Women and Minority Representation in the Federal Workforce (GAO/T-GGD-92-2, Oct. 23, 1991).

Federal Affirmative Action: Better EEOC Guidance and Agency Analysis of Underrepresentation Needed (GAO/T-GGD-91-32, May 16, 1991).

Federal Affirmative Action: Better EEOC Guidance and Agency Analysis of Underrepresentation Needed (GAO/GGD-91-86, May 10, 1991).

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