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The ADA Turns 25

by Kristin L. Aiello

July 26, 2015 marked the 25th anniversary of the Americans with Disabilities Act. On the day of its enactment in 1990, the ADA was hailed as historic legislation that held great promise for people with disabilities. At the signing ceremony on the front lawn of the White House, President George H.W. Bush remarked that the ADA would “take a sledgehammer to [a] wall, one which has for too many generations separated Americans with

disabilities from the freedom they could glimpse, but not grasp.”¹ It was, for sure, an Independence Day for people with disabilities.

But almost two decades after its passage, the great expectations held for the ADA had not come to pass. With a staggering 97 percent loss rate for Title I (employment) ADA claims,² the ADA was anything but a “clear and comprehensive national mandate for the elimination of discrimination.”³ The ADA

had been modeled on the Rehabilitation Act of 1973, which prohibits disability discrimination by federal agencies and entities that receive federal funding.⁴ Yet unlike the Rehabilitation Act, the reach of the ADA often fell short. What went wrong?

The ADA is the most comprehensive civil rights law for people with disabilities, prohibiting discrimination in employment, by governmental entities, by private business and in telecommuni-

cations. As the United States Supreme Court has recognized, “the ADA was passed by large majorities in both houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities.”⁵ Central among its findings was that

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁶

The ADA prohibits discrimination in virtually every aspect of community life and in every city and town across the nation. Accessible parking and wheelchair ramps have become a regular part of the landscape, the deaf have equal access to telephone service, and architects and builders must follow the mandates of the ADA. The universal symbol of access has become ubiquitous and recognizable to all.

But despite these positive changes, with some exceptions,⁷ congressional intent to eradicate discrimination has been often frustrated. Until Congress passed the ADA Amendments Act (ADAAA) in 2008, individuals with disabilities seeking their day in court commonly lost on summary judgment without ever having the merits of their discrimination claim heard. Why? This was largely due to highly restrictive judicial interpretations of the definition of disability, which greatly narrowed coverage for individuals under the Act. Plaintiffs were often found “not disabled enough” to meet the exacting definition of disability, or conversely, they were found “too disabled” to do the job at issue. Proving disability dis-

crimination was like threading a needle; one false move and you’re out. Nowhere was this more evident than in Title I employment discrimination cases.

U.S. Supreme Court Limits Reach of the ADA

Nine years after the passage of the ADA, the U.S. Supreme Court decided a trio of cases, known as the “*Sutton* trilogy,” that drastically narrowed coverage for plaintiffs.⁸ In *Sutton v. United Airlines*, the Court held that, contrary to the decisions of eight of the nine circuit courts, the legislative history of the ADA, and the interpretation of the



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Equal Employment Opportunity Commission, courts must evaluate an individual’s disability in light of beneficial measures used to ameliorate the effects of their disability, such as medication or prosthetic devices.⁹ For example, an individual with diabetes who successfully kept her condition under control with insulin would not be substantially limited in a major life activity, therefore, would not have the protections of the ADA. Nor would a person with an amputated leg be substantially limited in walking, provided they could walk with a prosthetic. A few years after the *Sutton* trilogy, the U.S. Supreme Court further narrowed the ADA’s reach in *Toyota v. Williams*, holding that courts must in-

terpret disability “strictly to create a demanding standard for qualifying as disabled.”¹⁰

In the aftermath of the *Sutton* trilogy and *Toyota*, courts routinely granted summary judgment against plaintiffs with disabilities such as epilepsy, diabetes, multiple sclerosis, muscular dystrophy, post-traumatic stress disorder, depression, and arthritis, without even hearing the merits of the discrimination claim.¹¹ Individuals seeking relief were simply found not disabled under the exacting standards set by the U.S. Supreme Court.

The independent National Disability Council, which had played an instrumental role in the original drafting of the ADA, took note. By 2004, the Council published an extensive report, *Righting the ADA*, which called Congress to action to restore the protections of the ADA.¹² This comprehensive report contained numerous case summaries illustrating how the courts failed to interpret the ADA as Congress had intended, and recommended the introduction of legislation to restore Congress’ original intent in passing the ADA. Following the publication of the report, Congress began to hold hearings on the ADA¹³ that laid the groundwork for the introduction of the ADA Restoration Act on Sept. 29, 2006.¹⁴

Maine Human Rights Act and the ADA: Mutual Influence

As Congress and stakeholders considered the future of the ADA, change was brewing in Maine. The Maine plaintiffs’ employment bar, well aware of the limitations of the ADA after *Sutton* and its aftermath, turned to the Maine Human Rights Act (MHRA) to bring claims on behalf of individuals with disability discrimination claims. However, relief under the MHRA was far from certain because its interpreting rule contained the same restrictive ADA definition of disability. This uncertainty was resolved when the Law Court issued its decision *Whitney v. Wal-Mart*.¹⁵

The *Whitney* court held that the Maine Human Rights Act does not re-

quire a showing of substantial limitation on a major life activity and invalidated the Commission's rule which adopted the restrictive ADA definition of disability. *Whitney* was a sea change for Maine employment lawyers, most of whom could probably recall where they were when they heard about the decision. The restrictive definition of disability in the MHRA rule was invalidated, leaving in place Maine's very broad statutory definition. As the plaintiffs' lawyers celebrated, the defense bar and business community responded less than a year later with a legislative fix.

On Mar. 14, 2007, LD 1027, "An Act to Clarify the Definition of Physical or Mental Disability in the Maine Human Rights Act" was introduced, which proposed to adopt the ADA definition of disability, making state and federal law consistent. Civil rights advocates organized opposition, arguing that the measure would drastically "roll back" civil rights and set Maine on the same faulty course as the ADA had set the nation.

Following a standing room only hearing on LD 1027 in April 2007 where both sides testified with equal vigor, the Joint Committee on Judiciary appointed a small group of stakeholders to draft a new definition of disability for the Committee to consider.¹⁶ The stakeholders met over the course of weeks and ultimately successfully negotiated a new, multi-prong definition of disability. The new definition incorporated the existing ADA definition of disability with the caveat that it is to be "interpreted broadly to create greater coverage than the federal Americans with Disabilities Act of 1990."¹⁷ It also included a list of *per se* disabilities that would have automatic coverage, and it made conditions that require special education, vocational rehabilitation or related services automatic qualifiers for protection.¹⁸ The Judiciary Committee passed the new definition of disability unanimously, followed by full enactment by the Maine Legislature as an emergency measure, effective June 21, 2007.¹⁹

While the ADA shaped discussion of the new definition of disability in the MHRA, the MHRA in turn influenced dialogue in Washington, DC regarding

the soon to be amended ADA. After Maine's new definition of disability took effect in June 2007, Congress continued to hold hearings on the ADAAA, and a similar scenario of stakeholder negotiation played out on the federal scene. Business and employer representatives and civil rights and employee representatives sat at the table in Washington to negotiate a new definition of disability in federal law, just as stakeholders in Maine had done for the MHRA. During this time, ADA negotiators actually placed the newly enacted Maine Human Rights Act on the table and viewed it as helpful precedent.²⁰ Indeed, Maine's definition of disability is the basis for the language in the ADAAA referring to six-month duration in "regarded as" claims.²¹

Passage of the ADAAA: Dawn of a New Day

On July 26, 2007, U.S. Senators Tom Harkin (D) and Arlen Specter (R) introduced S. 1881, the ADAAA, in the Senate, and Rep. Steny Hoyer (D) and Rep. James Sensenbrenner (R) introduced the House version, H.R. 3195.²² Hearings were held throughout 2007 and 2008, and Congress unanimously passed the ADAAA in both the Senate²³ and in the House.²⁴ President George W. Bush signed the ADAAA on September 25, 2008, 18 years after his father had signed the original ADA on July 26, 1990, and the ADAAA took effect on Jan. 1, 2009.²⁵

The ADAAA did not alter the original wording of the ADA definition of disability, which has remained (1) a physical or mental impairment that substantially limits one or more major life activities of the individual; (2) a record of such an impairment or (3) being regarded as having such an impairment.²⁶ Rather, the ADAAA employs rules of construction to direct the judiciary that it must construe the definition of disability "in favor of broad coverage of individuals ... to the maximum extent permitted."²⁷

The Amendments Act also makes clear that the primary focus in ADA cases must be "whether entities covered under the ADA have complied with their obligations," and "the question of

whether an individual's impairment is a disability should not demand extensive analysis."²⁸ The ADAAA rejected *Toyota* and *Sutton* and made clear that courts must not consider mitigating measures when assessing disability.²⁹ The Act also explicitly rejected precedent that held that disability must be "narrowly construed."³⁰ The ADAAA also significantly expanded the "regarded as" prong, to simply require an individual to show that they have been subjected to discrimination because of an impairment; a showing regarding substantial limitation and major life activity is no longer required.³¹

The ADA 25 Years Later

While the ADA and the ADAAA have opened doors for many, much remains to be done. In Maine, 32.1 percent of working age adults with one or more disabilities are employed while 81 percent of working age adults without a disability are employed.³² Disability discrimination complaints in employment represented 37.1 percent of complaints filed at the Maine Human Rights Commission in 2014, by far the largest number of complaints of any protected class.³³ Beyond employment, people with disabilities still face physical and attitudinal barriers everywhere in their communities, including schools, daycares, restaurants, grocery stores, sporting events, voting, hospitals and doctor's offices. Last year, the federal Office of Civil Rights received more than 9,500 complaints alleging violations of disability laws related to education.³⁴

Disability is the one protected class that any one of us is subject to join at any moment, regardless of class, race, gender, sexual orientation, religion, political affiliation or any other designation. Disability is a normal part of the human condition; some are born with physical or mental disabilities and many will acquire disabilities through the normal process of aging. Indeed, President George Bush signed the law which now provides him with protections today. Given the breadth of individuals that the ADA impacts, it is small wonder that support for the ADA and the ADAAA was completely bipartisan

and nearly unanimous; indeed, disability regards no political affiliations and knows no boundaries. Twenty five years after the ADA's passage and restoration, it is clear that having the ADA on the books is merely a start. As we head into the ADA's next 25 years, it is incumbent upon us on the bench and bar to enforce the law, making the ADA's promise of full inclusion of people with disabilities a reality.



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1. Remarks of President George H.W. Bush at the signing of the Americans with Disabilities Act of 1990 (July 26, 1990), available at <http://www.eeoc.gov/ada/bush-speech.html>

2. Chai R. Feldblum, Kevin Barry, Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 Tex. J. on C.L. and C.R. 187, 203 (2008), citing 31 Mental & Physical Disability L. Rep. 328, 328 (July/August 2007) (stating that in 2006, "of the 218 employment discrimination decisions that resolved the claim, 97.2% resulted in employer wins and 2.8% in employee wins").

3. 42 U.S.C. § 12101(b)(1)(2).

4. 29 U.S.C. § 701 et seq.

5. *Tennessee v. Lane*, 541 U.S. 509, 516 (2004) (citing 42 U.S.C. § 12101(a)(7)).

6. *Id.*

7. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624 (1998) (individual with asymptomatic HIV covered under the ADA); *Olmstead v.*

L.C., 527 U.S. 581 (1999) (unwarranted institutionalization of people with disabilities is a form of discrimination under the ADA); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Congress properly abrogated state sovereign immunity and plaintiffs can bring ADA damage cases for denial of court access); *Doe v. Rowe*, 156 F. Supp. 2d 35 (2001) (Maine's disenfranchisement of individuals under guardianship because of mental illness violated the ADA, Rehabilitation Act, MHRA and Equal Protection Clause).

8. *Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. UPS, Inc.*, 527 U.S. 516 (1999), and *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999).

9. *Sutton v. United Airlines*, 527 U.S. 471, 496-497 (1999).

10. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

11. *Feldblum et al.*, *supra* note 2, at 193.

12. *See* report, *Righting the ADA*, dated December 1, 2004 at www.ncd.gov.

13. Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Constitution of H. Comm. on the Judiciary, 109th Cong. (Sept. 13, 2006).

14. *See* H.R. 6258, 109th Cong. (2006).

15. 895 A.2d 309 (2006).

16. Employee/disability rights representatives included David Webbert, Esq. of Johnson & Webbert, Augusta, Jeffrey Neil Young, Esq. of McTeague Higbee, Topsham and Kristin Aiello, Esq. of Disability Rights Center, Augusta. Employer representatives included Jim Erwin, Esq. of Pierce Atwood, Portland, Jon Fitzgerald, Esq. of Bath Iron Works and Jeff Austin of Maine Municipal Association, Augusta. Other stakeholders included John Gause, Esq., Counsel for the Maine Human Rights Commission, Michael Mahoney, Chief Counsel for Governor Baldacci, Sen. Peter Mills (R), Sen. Barry Hobbins (D), Rep. Cynthia Dill (D), and Sen. David Hastings (R).

17. 5 M.R.S.A. § 4554(4).

18. 5 M.R.S.A. § 4553-A.

19. LD 1027 was enacted as emergency legislation based on the Legislature's finding that "the Maine Supreme Judicial Court's ruling in *Whitney v. Wal-Mart* ... invalidated rules providing guidance for interpretation of "physical or mental disability" and this created confusion in the application of the existing statutory definition." Emergency Preamble to PL 385, 123rd Maine State Legislature, 2007.

20. Maine's importance is reflected in the Congressional record reference to David Webbert. 154 Cong. Rec. H8295 (Sept. 17, 2008).

21. 42 U.S.C. § 12102(3)(B).

22. H.R. 3195, 110th Cong. (July 26, 2007) and S.1881, 110th Cong. (July 26, 2007).

23. 154 Cong. Rec. S8342 (Sept. 11, 2008).

24. Cong. Rec. S8945-8946 (Sept. 17, 2008).

25. Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008).

26. 42 U.S.C. § 12102(1).

27. *Id.* § 12102(4)(A).

28. *Id.* § 12101.

29. *Id.* § 12102(4)(E)(i).

30. *Id.* § 12101(4)(A).

31. *Id.* § 12102(3)(A).

32. American Community Survey; https://www.disabilitystatistics.org/reports/2013/English/HTML/report2013.cfm?fips=2023000&html_year=2013&subButton=Get+HTML

33. Maine Human Rights Commission Annual Report FY 2014, <http://www.maine.gov/mhrc/about/annualreport2014.pdf>

34. Annual Report, Office of Civil Rights, Dept. of Education, <https://www2.ed.gov/about/reports/annual/ocr-report-to-president-and-secretary-of-education-2013-14.pdf>