1993

Symposium: The Americans with Disabilities Act - Introductory Comments

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SYMPOSIUM: THE AMERICANS WITH DISABILITIES ACT—INTRODUCTORY COMMENTS

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I. INTRODUCTION

A. Background

The Americans with Disabilities Act (hereinafter, the "ADA") was enacted "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] It is hailed as "the most comprehensive piece of disability civil rights legislation ever enacted, and the most important piece of civil rights legislation since the 1964 Civil Rights Act."[3]

The ADA is not the first piece of federal legislation enacted to protect persons with disabilities. The Rehabilitation Act of 1973[4] protects "handicapped individuals" from discrimination by entities which receive federal funding. However, until the implementation of the ADA, entities which existed entirely in the private sector were free to discriminate against persons with disabilities. The ADA remedied this anomaly by prohibiting discrimination by employers (private, as well as state and local), employment agencies, joint labor-manage-

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[2] 42 U.S.C. § 12101(b)(1) (Supp. V 1993).

[3] Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 THE LAB. LAW. 1, 1 (The Disability Rights Education and Defense Fund, Inc., 1991).

[4] 29 U.S.C. §§ 701-796 (1988 and Supp. 1991).

ment committees,[5] and entities which provide goods and services to the public including, but not limited to, transportation and telecommunications.[6]

In the ADA's statement of "Findings and Purpose," Congress found that 43,000,000 Americans have one or more physical or mental disabilities, and that this number is increasing.[7] Historically, persons with disabilities have been isolated, segregated, and otherwise discriminated against in the areas of employment, housing, education, transportation, communication, recreation, health services and access to public services, and even in the pursuit of guaranteed constitutional rights such as the right to vote.[8] This discrimination was often intentional[9] due to stereotypical assumptions about persons with disabilities *"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."[10] Congress recognized that additional, unintentional barriers, in the form of architecture, transportation, communication methods, and "overprotective" rules and policies, also prohibit the full participation of persons with disabilities in American society.[11]

Congress determined that persons with disabilities constitute a "discrete and insular minority" in American society,[12] but that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[13] The cost of this discrimination, and its resulting "dependency and nonproductivity," has resulted in billions of dollars of unnecessary expenses to support persons with disabilities.[14] Based on these findings, Congress invoked the powers of the Commerce Clause and the Fourteenth Amendment of the

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[5] 42 U.S.C. § 12111(2).

[6] Amendments to the Communications Act of 1934, 47 U.S.C. § 225, and the Cable Communication Policy Act of 1984, 47 U.S.C. § 611, enacted as part of the ADA, require providers of telecommunications services to adapt and/or modify certain facilities and services to give greater access to persons with disabilities.

[7] 42 U.S.C. § 12101(a)(1).

[8] 42 U.S.C. § 12101(a)(2),(3).

[9] 42 U.S.C. § 12101(a)(5).

[10] 42 U.S.C. § 12101(a)(7) (emphasis added). This language is important in understanding the intent behind the exclusions of certain categories of persons from ADA coverage.

[11] 42 U.S.C. § 12101 (a)(5).

[12] 42 U.S.C. § 12101(a)(7). *Cf.* United States v. Caroline Products Co., 304 U.S. 144, 153 n. 4 (1938) (introducing the concept of discrete and insular minorities into American law as well as recognizing the need to provide heightened protection for such groups).

[13] 42 U.S.C. § 12101(a)(4).

[14] 42 U.S.C. § 12101(a)(9).

Constitution to enact the ADA as a means of eradicating day-to-day discrimination faced by persons with disabilities.[15]

Each of the articles included in this symposium summarizes the ADA and details the particular provisions of the Act which pertain to its thesis. Therefore, I will only briefly outline the Act's major provisions and implications for the purposes of this introductory discussion.

The ADA prohibits discrimination against individuals with disabilities in employment (Title I), public services (Title II), and public accommodations and services operated by private entities (Title III).[16] The Act also contains "Miscellaneous Provisions" (Title V), one of which places Congress and agencies of the legislative branch of the federal government within the purview of the Act.[17] Complementary legislation prohibits discrimination in the field of telecommunications.[18]

The ADA protects an individual who has a disability. A disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[19] The Act also protects an individual who has a record of an impairment,[20] or is "regarded as" having an impairment, irrespective of whether the person has such an impairment.[21]

All possible disabilities are not listed. Courts will have to define "substantially limits" and "major life activity" on a case by case basis. The

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[15] 42 U.S.C. § 12101(b)(4).

[16] 42 U.S.C. § 12111(5)(6). Consistent with Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-(e), private clubs are excluded from coverage.

[17] *See* 42 U.S.C. § 12209. Until passage of the 1991 Civil Rights Act, neither Congress nor agencies of the legislative branch were subject to Title VII of the Civil Rights Act of 1964 and were, therefore, free to discriminate on the basis of race, national origin, gender, and religion.

[18] *See* amendments to Communications Act and Cable Communication Policy Act *supra* note 6.

[19] 42 U.S.C. § 12102(2)(A). The EEOC defines a physical or mental impairment as:

> (1) [a]ny 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 (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (1993).

A major life activity is defined as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

[20] 42 U.S.C. § 12102(2)(B).

[21] 42 U.S.C. § 12102(2)(C).

Rehabilitation Act (as amended by the ADA) will serve as a model[22] and administrative regulations promulgated by the Equal Employment Opportunity Commission (EEOC)[23] will be helpful. However, all disabilities and their effects on an individual's daily life cannot be predicted and incorporated into legislation, regulations, or case law. A disability which substantially limits one person's major life activity may not do so to another, depending on the degree of the disability and particular aspects of the individual's life.

It is of particular significance that Congress specifically exempted from coverage certain conditions which may be diagnosed as disabilities by the medical or psychological communities. The ADA exempts from coverage persons who currently use illegal drugs,[24] whether or not this use is due to an addiction. However, it does protect persons who have undergone or are undergoing drug rehabilitation and are no longer using illegal drugs.[25] In addition, the Act specifically excludes conditions in the following three categories from the definition of disability: (1) homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs.[26] The Act also specifically states that an employer may restrict or prohibit smoking in the work place.[27]

In determining which groups would be protected by the ADA, Congress made judgments with respect to its stated purpose that the Act would prohibit discrimination against persons with disabilities *"based on characteristics that are beyond the control of such individuals."*[28] Distinctions were made to confine coverage to classifications of individuals whom society deems to have been afflicted with a physical or medical condition, but to allow discrimination based on an individual's *behavior*. Congress did not intend to protect voluntary behavior which was criminal, dangerous, unprofessional, discourteous, or otherwise inappropriate to, or undesirable in, the work place; nor did it intend to prohibit employers from rejecting applicants or employees based on

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22S. Jud. Comm. Rep. No. 116, 101st Cong., 1st Sess. at 44-45 (1989); H.R. Labor Comm. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 51 (1990).

23*See* 29 C.F.R. §§ 1630-1630.16 (1993).

2442 U.S.C. § 12114(a); 42 U.S.C. § 11210(a). See also discussion comparing the ADA with the Rehabilitation Act, below, with respect to ADA amendments to the Rehabilitation Act which exclude both persons who currently use illegal drugs and persons whose current use of alcohol interferes with job performance.

2542 U.S.C. § 12114(b); 42 U.S.C. § 12210(b).

2642 U.S.C. § 12211.

2742 U.S.C. § 12201(b).

2842 U.S.C. § 12101(a)(7).

individual personality traits or life-choices. Instead, the Act targeted those persons with the most obvious and severe physical and mental disabilities which were clearly not within the control of the affected individuals. This legislation would have been exceedingly more complicated and controversial if Congress had attempted to resolve questions of whether conditions such as gambling, stealing, child molestation, drug abuse, or homosexuality are voluntary life choices or physical or mental impairments amounting to disabilities.

Nevertheless, courts will have to determine whether certain types of socially unacceptable behavior are protected when this behavior is caused by a physical or mental disability which is not specifically exempt from ADA coverage. Most notably, how does one distinguish socially unacceptable behavior from a mental disability? Some of these issues are discussed in the following articles, particularly those focusing on "sanism" and problems in accommodating persons with mental disabilities.

B. Title I: Employment

It is anticipated that Title I, regulating employment, will be the most litigated provision of the ADA because of its widespread implications for employers, the disability community, the general work force, consumers, and the economy. It will change the way workers interact in the work place. In some instances, it will alter job descriptions, duties, and even the way that employers conduct their businesses. As workers with disabilities are seen performing duties which they were previously presumed incapable of performing, attitudes will necessarily change. Yet, in some cases, attitudes must first change in order to accommodate some of these workers in particular positions.

There must be a realistic, reasonable, and fair balance of interests. The ADA requires that a person with a disability be "qualified"[29] for the position in question. A person with a disability must be able to perform the "essential functions" of the job, either with or without a reasonable accommodation in order to be covered by the ADA.[30] These accommodations may include providing additional equipment, changing or reducing work hours, allowing for work-at-home or additional sick leave, reassigning duties to other employees, restructuring the job and perhaps the jobs of co-workers, and, in some instances, hiring additional employees to perform tasks (such as a reader for a blind person or a "signing" interpreter for a deaf person) for persons with disabilities.[31]

The Saideman, Daly-Rooney, and Dorfman articles focus on Title I of the ADA and offer insightful analyses of anticipated problems to be addressed by courts under the Act. Each article raises important legal and social questions which must be answered by the courts and the public. If the courts cannot

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[29] 42 U.S.C. § 12111(8).

[30] *Id.*

[31] 42 U.S.C. § 12111(9)(B).

effectively answer these questions, it may be necessary for Congress to reconsider and amend the ADA.

C. *Title II: Public Services*

Another controversial and crucial area of implementation of the ADA is in the area of public services. How will the court system deal with persons with disabilities in the courtroom? How can we ensure that persons with communication disabilities, diminished mental capacities, or mental disabilities which result in inappropriate behavior, are adequately accommodated in court, the prison system, and in their interactions with their own representatives? Both the Gould and Simon articles address many of these concerns.

II. THE ADA AND THE CIVIL RIGHTS ACT OF 1964

The purpose and findings of the ADA are clearly analogous to those which served as the motivation for the enactment of the Civil Rights Act of 1964.[32] Both the language and concepts in the ADA are modeled after the 1964 Act.[33] Therefore, as indicated in its statement of Findings and Purpose, the ADA can be viewed as the legislation which does for persons with disabilities what the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, did for racial, ethnic and religious minorities, and women.[34]

Despite the parallels in the Acts, there are differences. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "*because of*"[35] or "*on the basis of*"[36] race, color, sex, national origin or religion, while Title I of the ADA prohibits discrimination *against* persons with disabilities.[37] In the Title VII context, it is not only the discrete and insular minority which is protected against discrimination, but also members of the majority group.[38] Preferential treatment of minorities is not permitted under Title VII unless

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[32]Both were enacted under authority of the Fourteenth Amendment and the Commerce Clause.

[33]The ADA was also modeled after Section 504 of the Rehabilitation Act which prohibits discrimination against "handicapped individuals" in programs receiving public funds. Section 504 was also grounded in language and concepts of the 1964 Civil Rights Act.

[34]The statement of Findings and Purpose also indicates that persons are protected from discrimination on the basis of age. *See* 42 U.S.C. § 12101(a)(4). This protection is derived from the Age Discrimination in Employment Act of 1975, 29 U.S.C. §§ 621-634 (1982).

[35]42 U.S.C. §§ 2000e-2(a)-(d) (Supp. III 1991).

[36]42 U.S.C. § 2000e-2(k)(1)(A)(i).

[37]42 U.S.C. §§ 12101(b)(1), (2); 42 U.S.C. § 12112(a).

[38]Johnson v. Transportation Agency, 480 U.S. 616 (1987); Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); United Steel Workers of America v. Weber, 443 U.S. 193 (1979).

specific criteria are met to justify affirmative action.[39] In contrast, under the ADA, an employer is free to extend preferential treatment to a job applicant with a disability without the fear that an applicant without a disability will bring a "reverse discrimination" lawsuit.

The ADA also differs from Title VII in that, except in some cases of religious accommodation,[40] Title VII does not impose upon the employer an affirmative duty to accommodate the employee by altering the job in question, expending any additional money, or "rethinking" the position or the business in any way. Title VII requires only that the employer include all protected persons in the employment process and *not* treat them differently on the basis of race, color, national origin, sex, or religion. Racial and ethnic minorities are not entitled to any special treatment in the workplace, but are expected to perform the job in the same way as a majority member would perform it.[41] Conversely, the ADA specifically requires the employer to provide a "reasonable accommodation"[42] to an individual with a disability which will allow that person to effectively perform the job.

"Reasonable accommodation" can only be defined in a specific context. Similarly, the related defense of "undue hardship" must be examined on a case by case basis. An accommodation which constitutes an undue hardship for one employer may be easily accomplished by another. The cost of the accommodation must be assessed in relation to the budget of the particular employer, the salary or economic worth of the employee to be accommodated, and other economic factors. Personnel changes and reassignments are considered in relation to the number, assignment, and duties of the particular employees involved. The nature of the business may also be relevant to this determination.

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[39] *See* cases cited *supra*, note 38.

[40] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); United States v. Board of Educ., 911 F.2d 882 (3d Cir. 1990); EEOC v. University of Detroit, 904 F.2d 331 (6th Cir. 1990).

[41] Under an adverse impact analysis, a hiring criterion may be eliminated where it disproportionately eliminates members of protected groups and cannot be justified by business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (modified *Griggs*, but was itself modified by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k), with respect to burdens of proof). *See also* Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979) (physical criteria modified to eliminate adverse impact on women). Although elimination of the discriminatory criterion does not generally change the duties of the position, there are some instances in which duties have been modified in the Title VII context to accommodate women. For example, some courts have required prison officials to alter the duties of female deputies and/or prison guards in male facilities in order to protect the privacy rights of inmates. Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980); Harden v. Dayton Human Rehabilitation Ctr., 520 F. Supp. 769 (S.D. Ohio 1981).

[42] 42 U.S.C. § 12112(b)(5)(A).

III. THE ADA AND THE REHABILITATION ACT

Although the concept of reasonable accommodation was not part of the statutory language of the Civil Rights Act of 1964 and only developed in limited circumstances in Title VII case law pertaining to religion and sex, courts have had a wealth of experience with the phenomenon of reasonably accommodating persons with disabilities in the context of Sections 503 and 504 of the Rehabilitation Act of 1973.[43] Section 504 of the Rehabilitation Act, which covers public entities, was the model for the ADA. Section 503 of the Act prohibits discrimination in employment by federal contractors.[44] Much of the ADA's language is taken verbatim from the Rehabilitation Act, except that the term "disability" is used in the ADA in place of "handicap" in the Rehabilitation Act. The legislative history of the ADA directs courts to case law decided under The Rehabilitation Act for interpretive guidance.[45] Case law under the Rehabilitation Act has already provided us with variations on fact patterns which can serve as a "blueprint" for determining what accommodations are reasonable under various circumstances and what constitutes undue hardship.[46]

Nevertheless, some of the case law decided under the Rehabilitation Act will be invalid under the ADA and, in fact, will no longer serve as precedent for interpretation of the Rehabilitation Act. The ADA specifically amended the Rehabilitation Act by excluding from coverage: (1) persons who *currently* use illegal drugs; and (2) persons whose current use of alcohol interferes with their performance of the essential functions of the job or poses a "direct threat" of harm to others in the work place. Again, these exclusions reflect Congress' stated purpose to protect persons whose disabilities are beyond their own control.

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[43] 29 U.S.C. §§ 701-796.

[44] Section 501 of the Rehabilitation Act regulates public services provided by the federal government.

[45] H. Labor Report, *supra* note 22, at 77; S. Judiciary Report, *supra* note 22, at 44-45; Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs, No. 94-1003-CV-W-1, 1995 U.S. Dist. LEXIS 88 (W.D. Mo. Jan. 5, 1995); Peoples v. Nix, No. 93-5892, 1994 U.S. Dist. LEXIS 11321 (E.D. Pa. Aug. 12, 1994); Medical Society v. Jacobs, No. 93-3670 (WGB), 1993 U.S. Dist. LEXIS 14294 (D. N.J. Oct. 5, 1993); Easley v. Snider, 841 F. Supp. 668, 672 (E.D. Pa. 1993); Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993).

[46] *See* sources cited *supra* note 45. *See also, e.g.*, School Bd. v. Arline, 480 U.S. 273 (1987); Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Strathie v. Department of Transp., 716 F.2d 227, 234 (3d Cir. 1983); Bentivegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982); Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y.), *aff'd mem.*, 888 F.2d 126 (2d Cir. 1989); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989); Crane v. Dole, 617 F. Supp. 156 (D.D.C. 1985); Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).

IV. OVERVIEW OF ARTICLES INCLUDED IN THIS SYMPOSIUM

This collection of articles examines the ADA from various perspectives. Each gives its own summary of the Act and then focuses on an issue of major concern with respect to implementation of the Act. The articles of Michael Perlin, Keri Gould, and Deborah Dorfman were originally presented at the Disability Rights Conference held at Hofstra University School of Law in October, 1992.

Professor Michael L. Perlin's article, *The ADA and Persons with Mental Disablities: Can Sanist Attitudes Be Undone?* focuses on the need for public education against "sanism," or prejudice against persons with mental disabilities. Perlin's thesis applies to the entire Act and refers to specific problems in both the employment and public accommodations contexts. The author contends that the ADA cannot be fully implemented unless and until the general population discards the unfounded fears, myths, and stereotypes surrounding persons with mental disabilities. Much like the arguments made with respect to racism and sexism, the author contends that attitudes cannot be legislated, and that attitudes will largely determine how the ADA is interpreted and applied. This is particularly important in the context of defining "an individual with a disability" and in determining what type of "reasonable accommodation" is appropriate in a specific case. When an adverse employment decision is made based on admittedly inappropriate or undesirable behavior, courts will have to determine whether the behavior was knowing and voluntary, thus not covered by the ADA, or whether the behavior is a symptom of a mental disability and therefore covered under the Act. Where ADA coverage is established, a court will then have to determine whether such behavior can be reasonably accommodated or will present an undue hardship.

A Strategy for Fighting Employment Discrimination Against People with Disabilities, by Ellen M. Saideman, is a comprehensive examination of Title I of the ADA. The article systematically discusses and defines the major provisions of Title I of the ADA and instructs attorneys on aggressive litigation tactics when representing members of the disability community in employment discrimination cases. Saideman focuses on some of the most difficult questions that courts will address in interpreting the ADA, including who is covered as a "qualified" individual with a disability. This is particularly controversial in positions which include physical and/or psychological qualifications as part of the stated hiring criteria. The article notes that the ADA is rooted in Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. Consequently, when determining whether an individual with a disability is "qualified" for a position within the meaning of the ADA, Saideman instructs attorneys to refer to case law permitting discrimination on the basis of national origin, sex, religion, and age under the analogous bona-fide occupational qualification ("BFOQ") analysis. Although the BFOQ defense is construed narrowly, it is applicable where the discriminatory qualification is "reasonably

necessary to the normal operation of that particular business or enterprise. . . ."[47]

If a person with a disability poses a "direct threat" to the health and/or safety of others, the employer may exclude that person from the work force.[48] As discussed in the Saideman article, this is particularly relevant for persons involved in public safety positions such as a police officer, firefighter, bus driver, or airline pilot.

Where public safety is involved, the court may examine the issue in terms of the individual's ability to perform the essential functions of the job and/or whether placing that person in that position would pose a "direct threat" to the public, co-workers, or the person with a disability.[49] Safety issues arise not only from questions of whether a person can be relied upon to perform an essential function of a public safety position, but also whether a person who can physically perform the job will create an additional threat, such as contagion. In the Supreme Court's decision in *School Board v. Arline*,[50] which examined whether a school teacher with tuberculosis was "otherwise qualified" under Section 504 of the Rehabilitation Act, there was no question that the plaintiff could perform all the tasks necessary to teach children. The Court remanded the case for a determination as to whether she could do so without posing the threat of contagion to her students. As in *Arline*, under the ADA, interests must be balanced so that persons with disabilities are integrated as fully as possible into the mainstream of American life without endangering other members of society.

Saideman recommends that where the person with the disability cannot perform the essential functions of the job description as written, the position should be "modified" or "restructured" as a "reasonable accommodation."[51] For example, Saideman argues that a person with a disability who applies for the position of police officer, but cannot affect forceful arrests due to a disability, should be accommodated by being placed in an office position within that department.[52]

Saideman provides a good foundation for examining questions regarding the structure of police departments, fire departments, corrections agencies, and other public safety positions. In addition, her position provokes questions which are beyond the scope of her article. For example, a police department

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[47] 42 U.S.C. § 2000e-(e).

[48] EEOC Regulations include the requirement that the person with a disability not pose a threat to him/herself while performing the essential functions of the job. 29 C.F.R. § 1630.2(r). Although this language is not included in the statute, its inclusion in the Regulations is supported by the legislative history. It is yet to be seen whether the EEOC interpretation will be accepted by the courts.

[49] *Id.*

[50] 480 U.S. 273.

[51] Saideman, *infra* at 62-63.

[52] *Id.*

would face numerous operational dilemmas. How would this policy affect a law enforcement agency's ability to rely on the transferability of sworn personnel?[53] How many persons with disabilities should a police department be required to permanently assign to desk jobs while paying them the wages of uniformed, full duty officers? At what point does hiring persons who will never be full duty police officers become an "undue hardship" (for the department and/or the public)? Is the new position, in effect, a civilian position, which should be paid at a civilian, rather than a uniformed salary/wage?[54] If the department is required to substitute lower paying civilian positions for uniformed positions to accommodate applicants with disabilities, would the payment of lower wages arguably constitute discrimination against persons with disabilities in the terms and conditions of employment?

Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act, by Rose A. Daly-Rooney, focuses on the reasonable accommodations aspect of Title I of the ADA. The author offers new, innovative ways of incorporating co-workers into the process of accommodating persons with disabilities in the work place using theories of "therapeutic jurisprudence." Therapeutic jurisprudence is defined as "the study of the role of law (rules, procedure and legal roles) as a therapeutic agent."[55] This analysis proposes sensitivity to the therapeutic and anti-therapeutic consequences of the law. Daly-Rooney contends that involving co-workers in the decisions necessary to effect the accommodation, which may involve assignments or reassignments to those co-workers, increases their level of sensitivity to the needs of the worker with a disability as well as their willingness to assist that person. Operating in opposition to this concept is the ADA provision which requires that an employer keep any information related to an applicant's disability confidential.[56]

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[53]A police department is a para-military organization which depends upon the transferability of personnel. Mahoney v. Trabucco, 738 F.2d 35, 37 (1st Cir. 1984). In an emergency situation, any member may be called upon to perform the duties of another (particularly when the other member may be killed or injured). The ability to affect forceful arrests is a national standard for police officers and has been held to be a reasonable and necessary requirement for the position. Simon v. St. Louis County, 497 F. Supp. 141 (E.D. Mo. 1980), *rev'd in part, aff'd in part*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), *on remand*, 563 F. Supp. 76 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984).

[54]Most police departments also have civilian members who perform non-hazardous duties and are not required to meet the physical requirements of full duty officers. D'Amico v. Willis, 534 A.2d 1248, 1249 (Conn. App. 1987); Danko v. City of Harvey Pension Bd., 608 N.E.2d 333, 343 (Ill. App. 1992).

[55]Daly-Rooney *infra* at 90 n. 8.

[56]42 U.S.C. § 12112(d)(4)(c).

The article uses three hypothetical situations to develop creative accommodations with the assistance of co-workers. The first involves an applicant for dishwasher who has a mental disability which affects learning and causes minor behavior problems. The second involves an applicant for a sales clerk position who is in a wheelchair. The third is a deaf applicant for an associate position in a law firm. The article uses these hypothetical situations to illustrate how co-worker involvement might incorporate these employees into each work place. It offers methods and analyses, utilizing exceptions to the confidentiality provision, which permit co-worker involvement in the process. This article continues the theme of education of the public in conjunction with enforcement of the law as a means for equal participation of persons with disabilities in American society.

Title I of the Americans with Disabilities Act and Reasonable Accommodation, by Deborah Dorfman, is written in the voice of a patients' rights advocate. It focuses on reasonable accommodation, particularly for those with mental disabilities—again, cited as the less sympathetic group as compared to those with physical disabilities, due to the fears associated with mental illness. The author reiterates the need for educating the public and the courts on the needs of the disability community.

Professor Keri A. Gould's article, *And Equal Participation for All ... The Americans with Disabilities Act in the Courtroom*, examines Title II of the ADA as a mechanism for ensuring equal access to the court system for persons with disabilities. In addition to discussing generally familiar accommodations such as providing a sign-language interpreter for a hearing-impaired individual, Gould includes more problematic questions, such as accommodations to be made for persons with mental and/or physical disabilities which involve conduct considered inappropriate, or even contemptuous, for an individual whose conduct is not related to a disability. For example, a defendant with Tourette's Syndrome might involuntarily shriek, use profanity, or make other socially unacceptable sounds or gestures in the courtroom. A person with diminished mental capacity, particularly under stress, might not understand expected courtroom conduct or understand what is being communicated. A person with a sleep disorder may need frequent recesses. Gould also discusses "sanism," citing Professor Perlin's work.

The final article, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the ADA*, by Jo Anne Simon, also interprets Title II of the ADA. Simon focuses on the rights of "deaf persons" and the "hard of hearing"[57] to equal access to the courts and the justice system generally, including the legal community. Simon traces the history of the treatment of deaf persons, noting that, "[i]t was presumed that speech could not develop without hearing, ergo those who could not hear also could not think."[58] Quoting

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[57]"Deaf" and "hearing impaired" are distinguished in the article. Simon *infra* at 157 nn.17-18.

[58]*Id.* at 158.

Aristotle, she observes that, "'those who become deaf from birth also become altogether speechless. Voice is not lacking, but there is no speech.'"[59] The article distinguishes between the "culturally deaf," defined as persons who were deaf prior to the age of learning language and who "sign" as their primary form of communication, and the "culturally hearing," defined as those who use speech and lipreading as their primary forms of communication. The article is rich with information necessary to understand the needs of the deaf and hard of hearing. In addition, it instructs the legal profession in ways to communicate with and accommodate the deaf community and provides specific resources to aid in this endeavor. This article further illustrates that attitudes must be changed through educating the public if equal rights legislation is to be effectively implemented.

V. CONCLUSION

Together, the articles in this symposium provide a comprehensive overview of the ADA. They highlight the Act's most important provisions and discuss the most predictable problems in terms of analyses and litigation. They offer both traditional and innovative legal analyses, while providing historical, statistical, physical, and psychological information which educates us to the needs of various groups within the disability community. This education is not only important because it elevates the disability community, but also because to do so elevates "us" as a people.

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[59] *Id.*