

# THE ADA: A MODEL FOR EUROPE WITH “SHARPER TEETH?”

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*I wish . . . for the passionate sense of  
the potential, for the eye which . . .  
sees the possible. . . .*

*Soren Kierkegaard, 19th century Danish philosopher*

I.	INTRODUCTION . . . . .	105
II.	SOME EUROPEAN LAW BASICS . . . . .	106
III.	EUROPEAN CONVENTION OF HUMAN RIGHTS . . . . .	109
IV.	THE FRAMEWORK DIRECTIVE AND RIGHTS FOR THE DISABLED WORKER . . . . .	109
	<i>A. Pre-Framework Directive Domestic Legislation . . . . .</i>	111
	<i>B. Panel of Expert’s Areas of Focus . . . . .</i>	114
V.	HOSTILE ENVIRONMENT, HARASSMENT, AND DISPARATE TREATMENT/IMPACT ENVIRONMENT . . . . .	115
VI.	ASPECTS OF THE ADA THE PANEL OF EXPERTS APPEARS DESIROUS OF AVOIDING . . . . .	117
VII.	CONCLUSION . . . . .	118

## I. INTRODUCTION

Kierkegaard’s wish might be regarded as a prescient view of a new European legal emphasis on persons with disabilities as human subjects rather than as objects, persons who have the potential and the possibilities to contribute to marketplace productivity. For lawyers representing clients engaging in business in Europe, particularly clients actually establishing European branches, keeping current on work setting discrimination laws is critical. Two major European Commission (EC) Directives announced in 2000 fundamentally expanded anti-discrimination protections for workers.

The first, the so-called Race Directive,<sup>1</sup> is the broader of the two in one respect, since it applies across the spectrum. That is, its provisions address not

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1. Council Directive 2000/43, art. 3(1), 2000 O.J. (L 180).

only employment discrimination, but also discrimination in other areas, such as housing, transportation, and education.

The second, the Framework Directive,<sup>2</sup> although limited to employment law, protects workers from discrimination based upon religion or belief, disability, age, and/or sexual orientation.<sup>3</sup> The year 2003 was the European Year of the Disabled, probably a direct response to this second mandate from the EC. Unarguably, revisions to workplace discrimination laws for persons with disabilities are now on the agenda of domestic legislation in all European Union countries.

This article focuses on developments in the area of discrimination on the ground of disability. It is not a discourse on the Americans with Disabilities Act; reference is made to that statute only in a comparative sense. The EC has looked to the American statute as a beginning point, and its relevance when analyzing the responses to the directive cannot be over-estimated.

## II. SOME EUROPEAN LAW BASICS

There is frequent confusion among Americans with regard to the terms "European Communities" or EC (originally "European Community") and "European Union" (EU). Some legal professionals wrongly believe the EC to be defunct and the EU to be the only correct term. "European Union" is the goal pronounced in the Single Europe Act of 1987, but the European Community is the collective body with law-making powers. Thus, one might speak of "EU law," designating law applicable to those countries in the European Union, or "EC law," the more official term that refers to the actual source of law. The EU, then, is a geographical entity, whereas, "EC" is the reference to the body with law-making powers.

European law takes either of two forms: the regulation; or the directive. A regulation is a primary source of law and is directly effective in all EU member states, without any need for domestic legislation. The directive, on the other hand, is a mandate from the EC that states an intended result. The means by which each member state attains this result via the enactment of domestic law is left to the individual member state. The directive has no counterpart in American law. As a practical matter, the directive has been the more frequently used form, particularly with regard to law relating to the establishment of a single market.<sup>4</sup>

Currently, the adoption of a European Constitution is a topic of considerable controversy, although passage of the draft was actually anticipated for early

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2. Council Directive 2000/78, art. 3, 2000 O.J. (L 303) [hereinafter Framework Directive].

3. Prior European Commission Directives have prohibited discrimination based on sex. See, e.g., Council Directive 76/207, 1976 O.J. (L 39).

4. RALPH G. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 35 (3rd ed. 1999).

2004. The purpose of the 1999 Cologne Council was to draft a Charter and Constitution, and the dilemma of how a country once admitted to the EU might later withdraw has finally been addressed in Article 59, Title IX, of the draft. This Charter is incorporated into the proposed constitution as Part II of that document.

Two lingering points of dissension remain: First, the proposed revamping of voting weights;<sup>5</sup> and second, the insistence of countries such as Ireland and Italy that the document contain a reference to the Christian foundation of the European Union.

A revised version was published in June 2004, shortly before the six-month term of Irish *Taoiseach* (Prime Minister) Bertie Ahern as President of the EU expired. Thus, a European constitution is still in the “wait-and-see” stages.

The fifteen member states prior to May 1, 2004, were Belgium, Luxembourg, the Netherlands, Germany, France, and Italy (the charter members at the adoption of the Treaty of Paris in 1952); Denmark, Ireland, and the United Kingdom (added in 1973); Greece (1981); Portugal and Spain (1986); and Austria, Finland, and Sweden (1995). As of May 1, 2004, ten new countries are now members of the EU: Estonia, Latvia, and Lithuania (the Baltic states); the Czech Republic and Slovakia (the former Czechoslovakia); Slovenia (part of former Yugoslavia); Hungary, Poland, Malta, and Cyprus. Romania has been approved for member status, and Bulgaria and Turkey are hopefuls. The sheer size of the EU should be viewed as an entity with which any transnational business must be prepared to reckon.

The original European Community (the European Coal and Steel Community) became the European Communities at the adoption of the 1957 Treaty of Rome, which created the European Economic Community and the European Atomic Energy Community (EURATOM).<sup>6</sup> Subsequent treaties include the Single European Act of 1987, the Maastricht Treaty (Treaty on European Union) of 1992, the Treaty of Amsterdam of 1997, and the Treaty of Nice of 2000.

Interestingly, the conceptual purpose of the EC was to create a geographical entity comprised of signatory member countries for economic consistency and harmonization. Indeed, the goal of the Treaty of Rome was to extend the Europa-wide communal regulation of the coal and steel industries effectuated by the earlier Treaty of Paris to European economy as a whole. This

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5. Currently, votes from those member states with the largest population, such as Germany, France, and Italy, are more heavily weighted than are those from the less populated states, and this lessening of power has not been acceptable to the larger members. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (providing the objective and goal of establishing a common European market).

6. The latter was actually added via a separate treaty executed simultaneously with the Treaty of Rome.

economic basis has undergone a metamorphosis, or at the least, an augmentation. In recent years (particularly since the Amsterdam Treaty), an additional aim of the EC has been human rights. The European Convention of Human Rights has been incorporated into EC law; all fifteen of the pre-2004 enlargement member states have enacted the terms of that Convention into their domestic laws. Professor Gerard Quinn of the law faculty at National University of Ireland Galway has called this human rights direction a “pragmatic goal of interlinking the national economics into a common market so that armed conflict in [post-World War II] Europe was unthinkable and energies were instead diverted into peaceful economic competition.”<sup>7</sup> He has termed this a recognition of the premise that “naked power is dangerous and requiring taming” and an effort to “convert the [European] Union into more than just an engine for economic growth and integration.”<sup>8</sup> This human rights orientation has much significance for employment law, especially employment discrimination law.

Indeed, in 1969 the European Court of Justice held that European Communities law incorporated through its “general principles” doctrine those fundamental rights modeled on constitutions and common law of member states.<sup>9</sup> Five years later, in *Nold Kohlen- und Baustoffsgrosshandlung v. Commission*,<sup>10</sup> the Court extended this view to include in the same general principles international treaties and the European Convention of Human Rights.<sup>11</sup>

The principal organs of the EC are the European Commission (the true law-making body located in Brussels),<sup>12</sup> the Council of Ministers (Brussels), the Parliament (Strasbourg), and the European Court of Justice (Luxembourg). The function of the first three is legislative. It is somewhat of an anomaly to the American jurist that, although only in the United Kingdom and Ireland among member nations is the common law system used, applying the doctrine of precedent (other members are civil law countries), the European Court of Justice functions under common law principles.

7. Professor Gerard Quinn, Remarks at the National Forum on Europe, National University of Ireland Galway (Jan. 21, 2004).

8. *Id.* Arguably, this linkage of market economics and human values has also been used on many occasions by the U.S. Congress under its powers under the U.S. Constitution. U.S. CONST. art. I, § 8. cl. 3. One prime example is the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) (1990) (citing the Commerce Clause as one of Congress’ sources of power in this legislation).

9. Case 29/69, *Stauder v. City of Ulm - Sozialamt*, 1969 E.C.R. 419.

10. Case 4/73, *J. Nold v. Comm’n of the European Union*, 1974 E.C.R. 491.

11. The author is grateful to Laurence Pech of the Law faculty at NUI Galway for assistance in locating these sources.

12. The Commission is currently comprised of two members each from these five larger member states, and one each for other member states.

### III. EUROPEAN CONVENTION OF HUMAN RIGHTS

This post-World War II (1950) treaty<sup>13</sup> created a legislative body, the Council of Europe and the European Court of Human Rights (ECHR), both located in Strasbourg, France. The forty original signatory countries later adopted the 1961 European Social Charter,<sup>14</sup> which expanded the ECHR's power into the areas of health and safety (including that in the workplace), education and vocational training, protection of children and adolescents, and right to social security.

The significance of the EC's official incorporation of the ECHR into European law by approval of the Amsterdam Treaty in 1997<sup>15</sup> cannot be over-emphasized. Additionally, in 2003, Ireland became the last member state in the EU to have enacted the ECHR into domestic law. Such domestic statutes are significant in that they empower the courts of each country to hear and determine charges of breach. This inclusion in domestic law not only negates the necessity for the charging party to travel to the ECHR court in Strasbourg, but also subjects employers to an additional possible forum in which it must respond to alleged breaches of these laws.

### IV. THE FRAMEWORK DIRECTIVE AND RIGHTS FOR THE DISABLED WORKER

The deadline for compliance with this directive for each country was December 2, 2003,<sup>16</sup> but few, if any, have satisfactorily implemented its provisions. Failure to comply with a directive or regulation is a violation of EC law for which the Commission might bring the member state before the Court in Luxembourg. Nonetheless, the Commission has proved to be a patient parent, so no sanctions have been imposed. Indeed, Article 28, Paragraph 2 of the directive expressly provided for an extension of up to three years for compliance with provisions addressing disability and age, and most member states have taken advantage of this grace period.

The directive addresses the "need to take appropriate action for the social and economic integration of elderly and disabled people."<sup>17</sup> Although "person

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13. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 213 U.N.T.S. 221.

14. See KNUT IPSEN & VOLKER EPPING, *VOLKERRECHT* 698 (C.H. Beck ed., 4d ed. 1999) for a discussion of the underlying principles of this agreement, which encompasses workers' health and safety, working conditions, vocational training, protection of children and adolescents, and rights to social security.

15. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997).

16. Framework Directive, *supra* note 2, art. 18.

17. *Id.* art. 6. The Framework Directive has been referred to as the "Article 13 Directive," in reference to the anti-discrimination provision in the Treaty of Amsterdam.

with a disability” is not defined, much of the language in the directive is drawn from the Americans with Disabilities Act.<sup>18</sup> The ADA’s “reasonable accommodation” provision<sup>19</sup> is mirrored by the directive’s call for the “provision of measures to accommodate the needs of disabled people at the workplace” and the “obligation to provide reasonable accommodation for people with disabilities.”<sup>20</sup> The ADA’s “undue hardship”<sup>21</sup> defense is reflected by the directive’s assurance that an employer need not assume a “disproportionate burden”<sup>22</sup> in its accommodation for an applicant or worker’s disability. The Framework Directive takes into account costs, organizational resources and possibility of public funding to make any necessary accommodation, and the ADA’s “undue hardship” section lists these same factors.<sup>23</sup>

Typical for EC directives, the language is broad rather than particularized, leaving the specifics of implementation to the parliaments of each member state. The method of tracking members’ progress in implementation is through a panel of experts, equal in number of member states, with each country having a designated expert in the area of disability law. This panel was created by way of a bidding process, with legal academic institutions’ submission of proposals to chair and form the panel. The law faculty at National University of Ireland Galway prevailed, and its current dean, Professor Gerard Quinn, is chair of the panel. After its proposal was selected, Professor Quinn and his assisting faculty from the Galway law faculty then selected the persons to represent each member state.<sup>24</sup>

Currently, there are similar panels on the grounds of gender, sexual orientation, and religion, but none on age. Traditionally, EU member states have not adopted statutory protections against age discrimination. One exception has been Ireland, which has legislation quite different from the United States’ Age Discrimination in Employment Act<sup>25</sup> in which protection is afforded to those aged forty and older, and there is no general maximum age for its coverage. Ireland’s 1998 Employment Discrimination Act is a comprehensive statute that covers workplace discrimination on nine grounds, including age. The age protection provisions in the Irish statute begin protection at age

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18. Framework Directive, *supra* note 2, at pmbl. ¶ 6.

19. 42 U.S.C. §§ 12101-12213 (1990).

20. 42 U.S.C. § 12111(9); Framework Directive, *supra* note 2, at pmbl. ¶ 16.

21. 42 U.S.C. § 12111(10).

22. Framework Directive, *supra* note 2, art. 2.

23. 42 U.S.C. §§ 12111(10)(A)-(B); Framework Directive, *supra* note 2, at pmbl. ¶ 21.

24. The author is grateful to Shivaun Quinlivan, Lecturer in Law at NUI Galway, for this explanation. Ms. Quinlivan, who has considerable expertise in the area of disability law, is a member of the group that drafted the proposal selected by the EU to assemble the monitoring panel and a panel participant.

25. 29 U.S.C. §§ 621-634.

eighteen and end at age sixty-five.<sup>26</sup> Thus, current EC plans are to disband existing panels and replace them with a “super-panel” that will address compliance on all grounds.

The disability panel’s most recent meeting was held on November 14, 2003, in Brussels. Until reports from that conference have not yet been filed, particulars will not be available to the general public. However, as an invited guest at this session, the author is permitted to convey general information to serve as some guidance to the American lawyer with business clients who must adhere to domestic laws implementing the Framework Directive.

In general, European disability law experts have aspired to approval of a model of the American statutes addressing legislation for the disabled from a civil rights perspective, contrary to the typical European welfare approach.<sup>27</sup> Generally, the 1997 Treaty of Amsterdam is credited with requiring that the issue of improving opportunities for persons with disabilities be addressed from a human rights, rather than a social law, perspective. The traditional American approach has been advocated for non-discrimination European mandates in general.<sup>28</sup> Moreover, at the panel’s November 2003, meeting, comments clearly indicated that the experts viewed the ADA as a model statute. This was primarily because legislation vested protected persons with enforceable rights, as had the earlier Civil Rights Act of 1964, particularly, Title VII, with its provisions relevant to the employment setting.<sup>29</sup> Notably, one of the invited speakers at the November 2003, meeting was Robert Bergdorf, an American legal academic who had participated in the drafting of the ADA.

#### *A. Pre-Framework Directive Domestic Legislation*

The panel of expert’s most recently published report was its Baseline Study of March 2003.<sup>30</sup> One tangent of the EU plan that is common to the United States Congress’ approach is the remedial nature of proposed legislation, stressing rights of the individual’s merit, rather than following the prior social-medical model based on a “handout” or compensation approach.

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26. Employment Equality Act, No. 21, 1998, § (6)(3)(a)-(b) (Ir.).

27. See, e.g., Gesetz zur Bekämpfung der Arbeitslosigkeit Schwerbehinderter (SchwbBAG) [Law Fighting Unemployment of the Handicapped], v. 29 Sept. 2003 (BGB1. I S. 1394) (F.R.G) (imposing a civil penalty on a company for its failure to meet a statutory quota of workers who are disabled).

28. See, e.g., BOB HEPPLE, *The Principles of Equal Treatment in Article 119 EC and the Possibilities for Reform*, in *THE PRINCIPLE OF EQUAL TREATMENT IN EC LAW 137-52* (Alan Dashwood & Siofra O’Leary eds., Sweet & Maxwell 1997).

29. 42 U.S.C. § 2000(e) (2004).

30. EU NETWORK OF INDEPENDENT EXPERTS ON DISABILITY DISCRIMINATION, *BASELINE STUDY, SYNTHESIS REPORT, DRAFT #4* (March, 2003) [hereinafter *BASELINE STUDY*].

Contrary to the United States, three EU countries, Austria,<sup>31</sup> Germany,<sup>32</sup> and Finland,<sup>33</sup> have constitutional provisions that address protections for the disabled. Additionally, several European constitutions insure general social rights without specifying disadvantaged groups.<sup>34</sup>

As of 2003, five of the then fifteen EU countries had enacted civil legislation for disabled persons in the employment setting: Belgium,<sup>35</sup> Germany,<sup>36</sup> Ireland,<sup>37</sup> Sweden,<sup>38</sup> and the United Kingdom.<sup>39</sup> The Austrian Federal Legislature had considered a bill on Equal Treatment of People with Disabilities, but it was rejected on second reading in July 2000. This bill was reintroduced on November 1999; it has not passed the committee stage.<sup>40</sup> Portugal's 1989 Basic Law on Prevention, Rehabilitation, and Integration of People with Disabilities Law<sup>41</sup> is not regarded as anti-discrimination legislation because of the absence of rights conferred on individuals. Rather, violators are subject to civil penalties. The Netherlands' Bill on Equal Treatment on the Ground of Disability and Chronic Disease<sup>42</sup> has been introduced into the Dutch parliament, but has not been enacted. Belgium's Legislature has taken the approach of deferring to the major collective bargaining agreement. A collective agreement which evolved

31. BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art. 7(1) (Aus.).

32. GRUNDGESETZ [GG] [Constitution] art. 3 (3) (F.R.G.).

33. SUOMEN PERUSTUSLAKI [Constitution] ch. 2 § 6(2) (1999) (Fin.).

34. See, e.g., COSTITUZIONE [Constitution] art. 3 (2) (1947) (Italy); CONSTITUIÇÃO [Constitution] art. 71 (1997) (Port.); STATUUT NED. [Constitution] ch. 1 art. 22 (2000) (Neth.). Similarly, article 21, subsections 2 and 3, of the Greek Constitution insure that the state will "care for" disabled veterans. SYNTAGMA (SYNTAGMA) [Constitution] art. 21(2), (3) (2001) (Greece).

35. Convention Collective de Travail No. 38 du 6 Decembre 1983 Concernant le Recrutement et la Selection de Travailleurs [Collective Agreement No. 38 of December 6, 1983 Concerning the Recruitment and the Selection of Workers], ch. 3 (Belg.) [hereinafter Collective Agreement].

36. Schwerbehindertengesetz (SchwbG) [Law Concerning the Handicapped], v. 9 June 2001 (BGBl. I S. 1046) (F.R.G.), *most recently amended by Gesetz zur Bekämpfung der Arbeitslosigkeit Schwerbehinderter* (SchwbBAG) [Law Fighting Unemployment of the Handicapped], art. 3, v. 29 Sept. 2003 (BGBl. I S. 1394) (F.R.G.).

37. Employment Equality Act, *supra* note 26.

38. Lag om Förbud mot Diskriminering i Arbetlivet på Grund av Personer Med Funktionshinder [Prohibition of Discrimination in Working Life of People with Disabilities Act], art. 132 (SFS 1999) (Swed.); Lag om Handikappombudsmannen [The Disability Ombudsman Act], art. 749 (SFS 1994) (Swed.).

39. Disability Discrimination Act, 1995, c. 50 (Eng.).

40. Gleichstellungsgesetz [EQUAL TREATMENT OF PEOPLE WITH DISABILITIES] *has been proposed to amend the law Behinderteneinstellungsgesetz* (BeinstG) [Law Concerning the Employment of Handicapped Workers], art. 2 § 8A (1969) (Aus.).

41. Lei Fundamental para a Prevenção e Para a Reabilitação e Integração das Pessoas com uma Inaptação [Basic Law for the Prevention and for the Rehabilitation and Integration of People with a Disability], Law No. 9/89 of May 2, 1989, (Port.).

42. Wet gelijke behandeling op ground van handicap of chronische ziekte [The Netherlands' Bill on Equal Treatment on the Ground of Disability and Chronic Disease] (Neth.) (proposed) [hereinafter Disability & Chronic Disease Equal Treatment Bill].



into statutory status<sup>43</sup> prohibits workplace discrimination, a manner often used in Europe's smaller countries.<sup>44</sup>

Different from the American approach is the enactment by several EU states of criminal laws prohibiting discrimination on the ground of disability. Finland,<sup>45</sup> France,<sup>46</sup> Luxembourg,<sup>47</sup> and Spain<sup>48</sup> are examples of this method. It is submitted that the higher burden of proof, the absence of remedial measures for the person who has sustained a loss, and the effect only upon intentional discrimination would limit any utility of this approach.

Italian law does permit an employer to request governmental reimbursement for costs incurred in making "adjustments," or "accommodations," for a worker's disability.<sup>49</sup> In Luxembourg, a judicial decision rather than statutory law requires that a business make those alterations or accommodations which, in a physician's opinion, are necessary for an individual to perform the duties of a position.<sup>50</sup> Dutch law imposes on an employer a duty to provide "reasonable accommodations" unless it would result in a "disproportionate burden,"<sup>51</sup> a clause similar, but not identical, to the ADA's undue hardship" provision. The Netherlands' "disproportionate burden" appears to weigh the interests of the disabled worker against the monetary cost to the employer, while the "undue hardship" concept imposes a significant burden of proof on the employer to show that its hardship would be an "undue," or inequitable, one without regard to the degree of the worker's disability.

Austria, Finland, France, Greece, Italy, the Netherlands, Luxembourg, and Spain are several European countries that have comprehensive anti-discrimination legislation, but some do not expressly include disability among the

43. Collective Agreement, *supra* note 35.

44. A comment about Belgium's unique legal structure is instructive: Although smaller than the American state of South Carolina, Belgium has two official languages, French and Dutch/Flemish, and four distinct governmental regions, each with a different official language: Brussels (French and Dutch/Flemish), Flanders (Dutch/Flemish), Wallonia (French), and eastern Belgium (German). B-2 WORLD BOOK ENCYCLOPEDIA 227 (2003). Since much legislative authority is subordinated to the regional level, it will be necessary for the federal law-making body in Belgium to enact a comprehensive statute in order to comply with the Framework Directive. Baseline Study, *supra* note 30, at 28-31.

45. RIKOSLAKI [PENAL CODE] ch. 11, 9 § Syrjintä (578/1995) (Fin.). This is a criminal provision for discrimination in general, with the underlying assumption that this includes the ground of disability. See *id.*

46. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 225-1 (Fr).

47. CODE PÉNAL [PENAL CODE] arts. 454, 455, 456, 457(1)-(2), (Lux.).

48. CÓDIGO PENAL [C.P.] [PENAL CODE] (Spain).

49. Note that there is no positive obligation on the part of the employer to provide such accommodation. See Baseline Study, *supra* note 30, at 53.

50. Loi du 12 novembre 1991 sur les travailleurs handicapés [Law of Nov. 12, 1991 on handicapped workers], Recueil de Legislation Memorial A, Nov. 18, 1991, N° 76, p. 1444 (Lux.).

51. Disability & Chronic Disease Equal Treatment Bill, *supra* note 42, art. 2.

prohibited grounds. This is the current status in Austria,<sup>52</sup> Finland,<sup>53</sup> France,<sup>54</sup> Greece,<sup>55</sup> Italy,<sup>56</sup> the Netherlands,<sup>57</sup> and Spain.<sup>58</sup> Denmark has a Disability Ombudsman,<sup>59</sup> but no statutory provision prohibiting discrimination on the ground of disability.

### *B. Panel of Expert's Areas of Focus*

The panel is focusing on three areas and how they intersect: 1) the "reasonable accommodation" requirement, the express working of the ADA; 2) pre-employment physical examinations, also addressed in the ADA;<sup>60</sup> and, 3) health and safety.<sup>61</sup> The inclusion of this third area into anti-workplace discrimination law is typical in Europe, contrary to the United States' separation of such accident and/or disease preventive legislation into statutes such as the Occupational Safety and Health Act.<sup>62</sup>

The Irish experience with the "reasonable accommodation" expectation is of interest. The bill that preceded the current anti-discrimination law (the 1998 Employment Equality Act) was a 1996 bill. In parliamentary forms of government, the prime minister is a member of the legislature. In order to become law, after passage by the law-making body, a bill must be signed by the president, in the case of Ireland or monarch, in the case of Denmark, Luxembourg, Sweden, and the United Kingdom. Then President Mary Robinson, a former barrister, had misgivings about the constitutionality of this provision of the bill as possibly infringing upon employers' property rights in Articles 40.3.2 and 43. In her referral action to the Supreme Court of Ireland, the Court agreed.<sup>63</sup> Consequently, the bill ultimately adopted into law in 1998 requires the employer

52. See, e.g., BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art. 7(1) (Aus.); see also GLEICHSTELLUNGSGESETZ, *supra* note 40, and accompanying text (explaining Austria's general working rights statute).

53. Esiintyä Model after sama Kesken Naisväki ja Ihmiset [Act on Equality Between Women and Men] (8.8.1986/609) (Fin.).

54. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. 122-45 (Fr.).

55. ASTIKOS KODIX (ASTIKOS KODIX) [CIVIL CODE] §§ 281/188 & 666 (Greece).

56. See COSTITUZIONE [Constitution] art. 3, § 2 (1947).

57. Algemeine Wet Gelijike Behandeling [General Equal Treatment Act] (1.9.94) (Neth.).

58. Estatuto de los Trabajadores [Spanish Statute on Workers' Rights, Royal Legislative Decree] (B.O.E., 1995).

59. Deense Arbeidsongeschiktheid Politiek Gelijke Behandelingen Door de Dialoog [Danish Disability Policy Equal Opportunities through Dialogue] (April 2002) (Den.).

60. 42 U.S.C. §§ 12112(d)(3)(A)-(B).

61. Email from Olivier de Schutter, panel expert, Belgium, to panel participants (November 13, 2003) (on file with author).

62. 29 U.S.C. §§ 651-678.

63. In the Matter of Article 26 of the Constitution and in the Matter of the Employment Equality Bill 1996, [1997] 2 I.R. 321 (Ir. S.C.).

to bear only a “nominal cost.”<sup>64</sup> Note the distinction in this regard between current Irish law and the ADA. Although the United States Supreme Court has determined that the Title VII<sup>65</sup> requirement for an employer to make “reasonable accommodation” for a worker’s religious practices and/or belief reaches on the least extent necessary, *i.e.*, *de minimus*,<sup>66</sup> the United States Congress expressly rejected this lower standard when it enacted the ADA.<sup>67</sup> This peculiarity in Irish statutory law must change in order to comply with the Framework Directive, so the necessary accommodation for a worker’s or job applicant’s disability will approximate that required under the ADA.

Olivier De Schutter, the Belgian panel expert, is the overseer of researching domestic laws that might address mandatory pre-employment medical examinations. He has classified the purpose of such examinations as two-fold: first, protective of the worker himself and of his colleagues similar to the ADA’s “direct-threat” defense;<sup>68</sup> and, second, “selective” rationale of using the examination results to void economic costs on the employer because of a job applicant’s impairment or condition. The ADA permits pre-employment medical examinations provided they are carried out after a job offer has been made, they are consistently required of all workers in the same job category, and they relate to actual duties required by one in this position.<sup>69</sup>

The sense of the experts is that any permissible pre-employment medical examinations must be limited to the first purpose and that any “selective” testing is to be prohibited. This inquiry into the purpose is a distinction from the ADA, provided only that the outward characteristics required by the statute are met.

#### V. HOSTILE ENVIRONMENT, HARASSMENT, AND DISPARATE TREATMENT/IMPACT ENVIRONMENT

Many European Union countries have been particularly harsh on workplace harassment. Although to date, with the exception of Sweden,<sup>70</sup> legislative

64. Employment Equality Act, No. 21 § 16 (Ir.).

65. 42 U.S.C. §§ 2000(e)(1)–(4) (2004).

66. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

67. See Steven F. Stuhlberg, *Reasonable Accommodation Under the Americans with Disabilities Act How Much Must One Do Before Hardship becomes Undue?*, 59 U. CIN. L. REV. 1311, 1327 (1991).

68. 42 U.S.C. §§ 12101(b)(4), 12113(b) (2004). Interestingly, in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court approved a regulation that extended such protection to the worker himself, a more paternalistic stance than that reflected in the statutory language.

69. §§ 12112(d)(3)(A)–(B).

70. See, e.g., Convention for the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (entered into force September 3, 1981) (The Convention provided sweeping protection for women, and was signed by more than 100 countries, including most EU member states). Interestingly, the United States is not a signatory to this U.N. treaty. *Id.* An example of a European domestic statute protecting women from workplace discrimination and harassment is the Employment Equality Act, No. 21 § 15 (Ir.). Similarly, section 32 of the Employment Equality Act prohibits racial harassment. *Id.*

proscriptions against such activity have been on grounds of race and sex.<sup>71</sup> Mention should be made of an employment setting tort being increasingly recognized by courts in Europe—"mobbing." This concept makes unlawful workplace harassment for any reason, whether or not related to the worker's membership in any express group.<sup>72</sup> The Framework Directive expressly forbids harassment, defined as "unwanted conduct . . . with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment."<sup>73</sup>

Several of the federal appellate courts in the United States have extended the principle that harassment is unlawful under the ADA. For example, the Fourth Circuit held that hostile work environment harassment claims are actionable under the ADA in *Fox v. General Motors*.<sup>74</sup> The Fifth Circuit, in *Flowers v. Southern Regional Physician Services*,<sup>75</sup> and the Eighth Circuit, in *Shaver v. Independent Stave Co.*<sup>76</sup> have also held such claims are actionable.

American anti-discrimination legislation does not expressly refer to disparate impact discrimination as unlawful—*i.e.*, an employer's actions which, although not intended to be discriminatory, nonetheless have that effect. The United States Supreme Court first held disparate impact discrimination to be unlawful under Title VII in *Griggs v. Duke Power*<sup>77</sup> and by dictum has extended this doctrine to ADA claims.<sup>78</sup> European terminology for disparate treatment and disparate impact claims are, "direct" and "indirect" discrimination respectively. The Framework Directive expressly states that both are unlawful.<sup>79</sup> Presumably, the principles of "hostile environment" and "direct versus indirect" discrimination are examples of the EU's following the lead of American federal law that predated the European versions.

71. Prohibition of Discrimination in Working Life of People with Disabilities Act, art. 132 (Swed.) (Section 9 expressly prohibits harassment on the ground of disability).

72. See Carol Daugherty Rasnic, *Not Just in Sicily: "Mobbing" the European Workplace Tort*, 36 BUS. L. REV. 173-95 (2003).

73. See Framework Directive, *supra* note 2, art. 2 ¶ 3. Cf. *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57 (1986).

74. *Fox v. General Motors Co.*, 247 F.3d 169, 175 (4th Cir. 2001).

75. *Flowers v. Southern Regional Physicians, Inc.*, 247 F.3d 229, 232 (5th Cir. 2001).

76. *Shaver v. Independent Shaver Co.*, 350 F.3d 716, 719 (8th Cir. 2003).

77. *Griggs et al. v. Duke Power Co.*, 401 U.S. 424 (1971).

78. See *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (holding that the lower court wrongfully applied disparate impact analysis to a claim, which properly should have been decided under the disparate treatment principle.) The Court inferred that both disparate treatment and disparate impact were appropriate in ADA claims. *Id.*

79. Framework Directive, *supra* note 2, art. 2 ¶¶ 1, 3.

VI. ASPECTS OF THE ADA THE PANEL OF EXPERTS  
APPEARS DESIROUS OF AVOIDING

While looking to the ADA as the ideal statute, those concerned with compliance with the Framework Directive want to avoid any legislative language that might be an invitation to European courts to construe the laws similar to some United States Supreme Court decisions which would restricting the directive's rights-conferring purpose.

One example is the *Sutton* triad of decisions in 1999.<sup>80</sup> The United States Supreme Court held that one is not a "person with a disability" under the statute if his impairment is correctable.<sup>81</sup> For example, the plaintiffs in *Sutton* were twin sisters whose applications for positions as pilots with defendant airline were rejected because of their eyesight. Although they both had 20/200 vision, prescribed eyeglasses corrected both to 20/20. This resulted in the quixotic situation in which they proved discrimination because of an alleged disability, but they actually were not disabled. The Court did not accept the plaintiffs' argument that they were "perceived" as persons with a disability, which would have qualified them under the third prong of the statute.<sup>82</sup> Interesting, while the Framework Directive does not expressly require protection of persons because they have a history of a disability or are regarded by others as being disabled, or because of their association with a person with a disability,<sup>83</sup> experts have determined that such protection lies within its spirit.<sup>84</sup>

Another example of a result to be avoided is that in *U.S. Airways v. Barnett*,<sup>85</sup> in which the United States Supreme Court decided that an accommodation which encroached upon another worker's seniority rights would be unreasonable. In Europe, seniority generally is viewed as vesting one with retirement security from the state, although some countries, such as Germany, give longer-serving workers priority in the event layoffs are necessary.<sup>86</sup>

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80. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

81. *Sutton* and *Murphy* were decided by like votes of 7-2 because of two distinguishing facts, which Justices Breyer and Stevens viewed as material. *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting); *Murphy*, 527 U.S. at 525 (Stevens, J., dissenting). *Albertson* was decided unanimously because of distinguishing facts. *Albertson's, Inc.*, 527 U.S. at 577.

82. 42 U.S.C. § 12102(2)(C).

83. The ADA extends protection to persons who have been subjected to discrimination because of their association with a person with a disability. § 12112(b)(4).

84. See the rationale in Baseline Study, *supra* note 30, at 46.

85. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

86. German law, for example, requires that workers' seniority (in addition to age and number of dependents) be taken into account when layoffs become necessary. For a good discussion of this principle, see Manfred Weiss, *The Role of Neutrals in the Resolution of Labor Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L.J. 339, 352 (1988).

A final United States Supreme Court opinion repugnant to the intent of the directive is *Toyota Manufacturing, Kentucky v. Williams*.<sup>87</sup> Here, the Court limited protection to those whose impairments limit their performance of tasks of a central importance to the daily lives of most people. The plaintiff, who suffered from carpal tunnel syndrome, was not a person with a disability under this principle because her condition did not preclude her from performing a wide range of activities.

This author has observed from several legal work assignments in Germany, Austria, Northern Ireland, and Ireland that the general European concept of what constitutes a disability is considerably broader than the American one, whether in anti-discrimination or social security laws.<sup>88</sup> The legal protection for disabled workers and/or job applicants will affect the pre-EU enlargement estimation of some thirty-seven million persons with disabilities,<sup>89</sup> a figure that is presumably considerably greater after the addition of the ten new member states.

Finally, the American company doing business in Europe should be aware of the usual absence of a legislative requirement that coverage requires a minimum number of employees, such as the fifteen specified in Title VII and the ADA. Generally, in Europe an employer is required to comply with employment legislation regardless of the size of its work force.<sup>90</sup>

## VII. CONCLUSION

The integration of social policies into the European Communities originally founded on economic principles and the EC's express adoption of the European Convention on Human Rights place additional burdens on companies with regard to the employer-employee relationship. The European Commission's emphasis on rights for the disabled has essentially viewed the ADA as its basic model, but the greater focus on human rights relative to American law and the social state reality of all EU member states predictably will impose more particularized duties on the employer in Europe.

The paternalism of the Council of Europe has become an adopted sibling to European Union law in general and more specifically, to legal obligations to

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87. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

88. See, e.g., Carol Daugherty Rasnic, *Who Hold the Employment Contract 'Trump Card'? Comparing Labor Laws in Germany and the United States for the International Investor*, 4 *IND. INT'L & COMP. L. REV.* 33 (1993), for discussion on the substantial social protections for workers in Germany, as an example of similar legislation throughout the EU.

89. 1 *EUROPEAN YEAR OF PERSONS WITH DISABILITIES (EYPD) NEWSLETTER* (Summer, 2003).

90. Examples are Germany's *Mutterschutzgesetz* (*MuSchG*) [Law for the protection of working mothers] (1968) (F.R.G.). Both Ireland's *Employment Equality Act* and the United Kingdom's *Disability Discrimination Act* prohibit discrimination in the workplace on specified grounds, with no reference to any minimum number of workers required for coverage. *Employment Equality Act*, No. 21, 1998 (Ir.); *Disability Discrimination Act*, 1995, (Eng.).

persons with disabilities. The words may be similar, indeed, often identical, to American federal law, but the meanings to be inferred by the European Commission and the courts is likely to have considerable more breadth.

The American company expanding into Europe must be cognizant of this substantial human rights element in its dealings with employees. A seismic shift can be expected in post-Framework Directive domestic law implementation regarding the extent of protection required for the disabled in the workplace.