Introduction

THE AMERICANS WITH DISABILITIES ACT

I. Congressional Intent

On July 26, 1990, President George Bush signed into law the Americans With Disabilities Act of 1990 (the ADA).[1] Congress's goals in passing the ADA were to provide a clear and comprehensive mandate to end discrimination against individuals with disabilities and to bring them into the economic and social mainstream of American life.[2] The ADA's purpose was "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[3]

Congress found discrimination against the disabled to be a "serious and pervasive social problem."[4] Disabled individuals encounter both outright intentional discrimination and unintentional discrimination arising from "architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities."[5]

Accordingly, Congress enacted a broad federal statute to address the isolation and segregation experienced by disabled individuals because existing federal legislation, such as the Rehabilitation Act of 1973,[6] and state and local anti-discrimination statutes were of limited scope and failed to provide the breadth of protection incorporated into the ADA.

On September 25, 2008, the President signed the "ADA Amendments Act of 2008," Public Law No: 110-325 (the ADAAA). That act amended the ADA by redefining the definition of disability, providing clarifications related to terminology used in the definition, and rejecting several opinions of the U.S. Supreme Court that have served to narrow the definition of disability. In large measure, these amendments expressed the original Congressional intent behind the ADA which many courts had ignored in interpreting the original language in the ADA.

II. Scope of the ADA

The ADA provides protection and benefits to the disabled in the areas of employment, public services (including transportation), public accommodations and services provided by private entities (including private transportation services), and telecommunication.

The definition of "disability" is specific to the statute. While it is broadly defined, it serves as a threshold that must be crossed before the statute's protections will apply. Under the terms of the ADA, a disabled individual is an individual with a physical or mental impairment that substantially limits a major life activity, an in-

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[1] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (hereinafter cited as "ADA") (signed into law July 26, 1990).

[2] Congressional Statement of Purpose, ADA § 2(b)(1); Report of the House Comm. on Education and Labor on the Americans With Disabilities Act of 1990, HR Rep. No. 485, 101st Cong., 2d Sess., pt. 2 (1990) (hereinafter cited as H. Comm. on Educ. and Lab. Rep.) at 22.

[3] Congressional Statement of Purpose, ADA § 2(b)(2).

[4] ADA § 2(a)(2), 42 U.S.C.A. § 12101(a)(2).

[5] ADA § 2(a)(5), 42 U.S.C.A. § 12101(a)(5).

[6] 29 U.S.C.A. §§ 701-796i.

dividual who has a record of such impairment, or who is regarded as having such an impairment even though he or she does not.[7] The ADAAA requires that this language be broadly construed. However, the courts have been uniform in holding that the ADAAA does not apply retroactively to extent the Supreme Court had narrowly construed the definition of the term disability before those amendments were effective.[8]

The ADA has five Titles. Title I sets forth the provisions relating to employment of the disabled. It applies to employers and in general prohibits discrimination against the disabled in hiring, employment, and termination decisions. Title I incorporates many of the standards and obligations contained in the regulations implementing Section 504 of the Rehabilitation Act, including the key requirement that covered entities provide reasonable accommodation for the disabled unless doing so would impose an undue hardship.[9] Title I also regulates the use of medical examinations, preemployment and employment inquiries, and drug testing. It incorporates by reference the enforcement provisions contained in Title VII of the Civil Rights Act of 1964.[10] The vast majority of litigation under the ADA has been brought under Title I, and consequently a large body of case law interpreting the ADA now exists.

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[7] ADA § 3(2), 42 U.S.C.A. § 12102(2).

[8] Rosario v. Western Regional Off Track Betting Corp., 556 Fed. Appx. 58 (2d Cir. 2014); Schneider v. Giant of Maryland, LLC, 389 Fed. Appx. 263, 23 A.D. Cas. (BNA) 806 (4th Cir. 2010); Kirkeberg v. Canadian Pacific Ry., 619 F.3d 898, 23 A.D. Cas. (BNA) 1000 (8th Cir. 2010); Carmona v. Southwest Airlines Co., 604 F.3d 848, 857, 23 A.D. Cas. (BNA) 140 (5th Cir. 2010) (Fifth Circuit declined to "find that Congress intended the ADAAA to apply retroactively."); Nyrop v. Independent School Dist. No. 11, 616 F.3d 728, 23 fA.D. Cas. (BNA) 801, 260 Ed. Law Rep. 57 (8th Cir. 2010); Shin v. University of Maryland Medical System Corp., 369 Fed. Appx. 472, 478 fn14, 22 A.D. Cas. (BNA) 1809 (4th Cir. 2010) ("Our sister circuits have found that the 2008 ADA amendments are not retroactive ... and we see no reason to disagree with their conclusion"); Becerril v. Pima County Assessor's Office, 587 F.3d 1162, 22 A.D. Cas. (BNA) 1025 (9th Cir. 2009) (holding the ADA amendments are not retroactive); Thornton v. United Parcel Service, Inc., 587 F.3d 27, 22 A.D. Cas. (BNA) 929 (1st Cir. 2009); Fredricksen v. United Parcel Service, Co., 581 F.3d 516, 22 A.D. Cas. (BNA) 551 (7th Cir. 2009) (same); Lytes v. DC Water and Sewer Authority, 572 F.3d 936, 22 A.D. Cas. (BNA) 157 (D.C. Cir. 2009) (same); Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 22 A.D. Cas. (BNA) 6, 246 Ed. Law Rep. 43 (6th Cir. 2009) (same); E.E.O.C. v. Agro Distribution, LLC, 555 F.3d 462, 21 A.D. Cas. (BNA) 788 (5th Cir. 2009) (same).

See also Colwell v. Rite Aid Corp., 602 F.3d 495, 22 A.D. Cas. (BNA) 1857 (3d Cir. 2010) (declining to determine whether the amendments are retroactive, but observing every circuit to consider the issue has found the amendments not retroactive).

Supreme Court precedent establishes that subsequent legislation declaring the intent of an earlier law is entitled to great weight when it comes to statutory construction. N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134, 85 L.R.R.M. (BNA) 2945, 73 Lab. Cas. (CCH) P 14465 (1974); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371, 1 Media L. Rep. (BNA) 2053, 79 Pub. Util. Rep. 3d (PUR) 1 (1969); Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671, 50 L.R.R.M. (BNA) 2693, 45 Lab. Cas. (CCH) P 17685 (1962).

Courts have held that these cases are not on point as to the retroactivity of the ADA because the meaning of the statutes at issue before the Supreme Court in those cases had not been definitively established by the Court in any of its prior opinions. Thus, the "subsequent legislation" at issue in these cases did not involve a Congressional overturning of settled Supreme Court precedent. Each case involved a situation in which the Court examined a statute and established its definitive interpretation for the first time. With the ADA, however, the ADAA was designed to expressly overturn Supreme Court precedent. See Carmona v. Southwest Airlines Co., 604 F.3d 848, 23 A.D. Cas. (BNA) 140 (5th Cir. 2010).

[9] ADA § 102, 42 U.S.C.A. § 12112.

[10] ADA § 107, 42 U.S.C.A. § 12117.

Title II of the ADA concerns public services provided by public entities. It generally states that no qualified individual with a disability may be discriminated against by any entity of a state or local government.[11] It also includes specific requirements relating to public transportation provided by public authorities.

Title III of the ADA concerns public accommodations and services provided by private entities. It prohibits discrimination based on disability, and requires public accommodations to provide full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations operated by a private entity.[12] Public accommodations include restaurants, hotels, doctors' offices, pharmacies, grocery stores, shopping centers, and similar establishments.[13] Under Title III, all existing facilities covered by the ADA must be made accessible to the disabled if the changes are "readily achievable," that is, able to be accomplished without significant difficulty or expense.[14] New construction and major modifications of such facilities must be designed and constructed to be readily accessible and usable by the disabled.[15] Title III also includes specific prohibitions regarding discrimination in public transportation services provided by private entities.[16] Title III is enforced by pattern and practice cases brought by the Department of Justice and by private actions comparable to those brought under Title II of the Civil Rights Act of 1964.[17] The majority of Title III cases are resolved by settlement negotiations between the parties.

Title IV of the ADA requires that telephone services offered to the general public include telecommunication relay services such that the disabled who use nonvoice terminal devices are provided service comparable to that offered individuals who use voice telephones.[18] Finally, Title V contains miscellaneous provisions relating to the construction and application of the ADA. This book focuses on Titles I and III.[19]

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[11] A significant issue under Title II is under what circumstances a claim is barred by the Eleventh Amendment. In Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820, 15 A.D. Cas. (BNA) 865 (2004), the Supreme Court held that Title II of the ADA validly abrogated Eleventh Amendment immunity through enforcement of the Fourteenth Amendment, as applied to cases implicating the fundamental right of access to the courts.

However, in Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2nd 866, 11 A.D. Cas. (BNA) 737, 151 Ed. Law Rep. 35 (2001), the Court held that Congress exceeded its Constitutional authority in granting state employees a private cause of action for monetary damages against state governments for violations of the ADA's employment provisions (otherwise applicable to the state under Title II).

Similarly, in U.S. v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650, 17 A.D. Cas. (BNA) 673 (2006), the Supreme Court held that Title II of the ADA validly abrogates state sovereign immunity insofar as it creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment.

[12] ADA § 302, 42 U.S.C.A. § 12182.

[13] ADA § 301(7), 42 U.S.C.A. § 12187(7); H. Comm. on Educ. and Lab. Rep. at 23.

[14] ADA § 301(9), 42 U.S.C.A. § 12181(9).

[15] ADA § 303, 42 U.S.C.A. § 12183.

[16] ADA §§ 302(b)(2), 304, 42 U.S.C.A. §§ 12182(b)(2), 12184.

[17] ADA § 308, 42 U.S.C.A. § 12188.

[18] ADA § 401, 47 U.S.C.A. § 225.

[19] The Second, Fourth, Seventh, Ninth, and Tenth Circuits have held that litigants asserting public employment discrimination claims against their state and local government employers cannot rely on Title II. Reyazuddin v. Montgomery County, Maryland, 789 F.3d 407, 31 A.D. Cas. (BNA) 1265 (4th Cir. 2015); Brumfield v. City of Chicago, 735 F.3d 619, 28 A.D. Cas. (BNA) 1328 (7th Cir. 2013) (rejected on other grounds by, Stokes v. Nielsen, 751 Fed. Appx. 451, 2018 A.D. Cas. (BNA) 367637 (5th Cir. 2018)); Mary Jo C. v. New York State and Local Retirement System, 707 F.3d 144, 2013 A.D. Cas. (BNA) 173592 (2d Cir. 2013); Elwell v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma, 693 F.3d 1303, 26 A.D. Cas. (BNA) 1422, 284 Ed. Law Rep. 63 (10th Cir. 2012); Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169, 1178, 9 A.D. Cas. (BNA) 215 (9th Cir. 1999).

♦ **NOTE:** The ADA and Rehabilitation Act may be asserted as grounds for invalidating a federal or state regulation or order. See, for example, Children's Health Defense v. Federal Communications Commission, 25 F.4th 1045 (D.C. Cir. 2022); Arc of Iowa v. Reynolds, 24 F.4th 1162 (8th Cir. 2022); Disability Rights South Carolina v. McMaster, 24 F.4th 893 (4th Cir. 2022).

See United States v. Secretary Florida Agency for Health Care Administration, 21 F.4th 730 (11th Cir. 2021), on issue of authority of the United States Attorney General's authority to bring action under Title II to challenge a state's action allegedly in violation of the ADA.

III. Relation of the ADA to the Rehabilitation Act of 1973

It is important to understand the relation of the Rehabilitation Act of 1973 to the ADA. The Rehabilitation Act was in many respects the predecessor statute for the ADA, and the ADA provides that in interpreting its provisions, the principles established under Section 504 of the Rehabilitation Act are to be followed except where the new statute expressly adopts a different standard.[20] The legislative history of the ADA repeatedly points out that Congress was building on principles developed by courts and federal agencies in interpreting the Rehabilitation Act. The definition of a disabled individual under the ADA is derived from the definition of "handicapped" under the Rehabilitation Act and the enforcement agencies' interpretation of that term.[21] Therefore, unless the language of the ADA requires a contrary result, precedent developed under the Rehabilitation Act (especially cases under

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In addition, the Third and Sixth Circuits have expressed the view that Title I is the exclusive province of employment discrimination within the ADA. Elwell, 693 F.3d at 1314 (citing Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113, 118-119, 8 A.D. Cas. (BNA) 725 (3d Cir. 1998), and Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1014, 24 A.D.D. 174, 6 A.D. Cas. (BNA) 1865, 21 Employee Benefits Cas. (BNA) 1369, 1997 FED App. 0230P (6th Cir. 1997)).

Only the Eleventh Circuit has reached a contrary conclusion. Bledsoe v. Palm Beach County Soil and Water Conservation Dist., 133 F.3d 816, 7 A.D. Cas. (BNA) 1433 (11th Cir. 1998) (rejected by, Taylor v. City of Shreveport, 798 F.3d 276, 31 A.D. Cas. (BNA) 1653 (5th Cir. 2015)).

Because the substantive rules for employers are the same under both Title I and Title II, the book is relevant to Title II entities.

In Edmonds-Radford v. Southwest Airlines Co., 17 F.4th 975 (10th Cir. 2021) (discussed in detail at 30 No. 1 Disability Law Compliance Report NL 2), the Tenth Circuit held that an employer was not subject to the Rehabilitation Act because it was not the direct beneficiary of federal aid.

[20] Report of the House Comm. on the Judiciary on the Americans With Disabilities Act of 1990, HR Rep. No. 485, 101st Cong., 2d Sess., pt. 3 (1990).

The Rehabilitation Act incorporates the standards used in cases brought under the ADA. Solomon v. Vilsack, 763 F.3d 1, 30 A.D. Cas. (BNA) 649 (D.C. Cir. 2014) (the Rehabilitation Act directs courts to employ the standards of the ADA); Crowell v. Denver Health and Hosp. Authority, 572 Fed. Appx. 650, 30 A.D. Cas. (BNA) 317, 2014 Wage & Hour Cas. 2d (BNA) 164289 (10th Cir. 2014) (Congress passed ADAAA to provide for a broader construction of the definition of disability); Jeudy v. Attorney General, Dept. of Justice, 482 Fed. Appx. 517, 519, 26 A.D. Cas. (BNA) 1049, 115 Fair Empl. Prac. Cas. (BNA) 996 (11th Cir. 2012) ("Discrimination claims brought under the Rehabilitation Act are governed by the same standards as those brought under the ADA."); Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266, 95 Empl. Prac. Dec. (CCH) P 44458, 162 Lab. Cas. (CCH) P 36008 (3d Cir. 2012); Quiles-Quiles v. Henderson, 439 F.3d 1, 17 A.D. Cas. (BNA) 1089 (1st Cir. 2006); Calero-Cerezo v. U.S. Dept. of Justice, 355 F.3d 6, 15 A.D. Cas. (BNA) 129, 84 Empl. Prac. Dec. (CCH) P 41596 (1st Cir. 2004); Feliciano v. State of R.I., 160 F.3d 780, 8 A.D. Cas. (BNA) 1520 (1st Cir. 1998); Craven v. Gonzalez, 2006 WL 133477 (S.D. Tex. 2006); Lyons v. Louisiana Pacific Corp., 217 F. Supp. 2d 171 (D. Me. 2002).

[21] See Report of the Senate Comm. on Labor and Human Resources on the Americans With Disabilities Act of 1989, S. Rep. No. 116, 101st Cong., 1st Sess. (1989) at 21; H. Comm. on the Jud. Rep. at 29; the Equal Employment Opportunity Commission's (EEOC's) Interpretive Guidelines at 56 Fed. Reg. 8592 (1991) ("Congress intended the relevant case law developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA").

Section 504) should be considered to be good law in interpreting the ADA.[22]

In addition, the Rehabilitation Act remains important in the area of disability law because it places affirmative action obligations on covered employers, and because the penalties for violation of the Act are potentially greater than those allowed by the ADA. Therefore, although the ADA supplants the Rehabilitation Act in many respects, the older act must be considered in evaluating the rights of the disabled. Knapp v. City of Columbus Slip Copy, 2006 WL 1878332 (6th Cir. 2006) (the Supreme Court has identified two sources of guidance when interpreting the ADA's definition of "disability": regulations issued by the Department of Health, Education, and Welfare (HEW) pursuant to the Rehabilitation Act of 1973 and the EEOC regulations interpreting the ADA).[23]

INTRODUCTION TO THIS MANUAL

This manual is designed as a guide for attorneys, human resources professionals, employers, and other individuals who must comply with and understand the ADA in their professional and personal lives. Each of the book's chapters addresses a different topic under Titles I and III of the ADA. Each chapter outlines and discusses important legal principles, offers guidance to employers and others with relevant responsibilities, and presents significant developments in case law.

In the 25 years since the ADA was enacted, courts have decided many cases that interpret the statute and construe its terms. The manual discusses important circuit court decisions in detail, discusses district court decisions in brief, and includes further citations in footnotes. Cases decided under the Rehabilitation Act of 1973 are cited where appropriate. Interpretive guidelines and positions of the Equal Employment Opportunity Commission and the Department of Justice, the enforcing federal agencies, are cited as well. In addition, appendices contain relevant forms, resources, and technical guidance.

The manual is updated semi-annually, and the Disability Law Compliance Report is published monthly, offering a current analysis of developments and trends in disability law, and reporting on important judicial opinions.

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[22] In its first opinion interpreting the ADA, the Supreme Court specifically referred to 1977 regulations issued by the Department of Health, Education and Welfare interpreting the Rehabilitation Act of 1973 in deciding that an individual who has HIV is disabled for purposes of the statute. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540, 8 A.D. Cas. (BNA) 239 (1998).

See Flynn v. Distinctive Home Care, Inc., 812 F.3d 422, 32 A.D. Cas. (BNA) 853 (5th Cir. 2016), on the legislative history demonstrating the importance of the passage of the ADA and the need to include the philosophies embodied in the ADA in the Rehabilitation Act.

[23] See, for example, Frazier v. Secretary, Department of Health and Human Services, 710 Fed. Appx. 864, 33 A.D. Cas. (BNA) 1156 (11th Cir. 2017) (claims brought under the Rehabilitation Act are governed by the same standards used in cases under the ADA; therefore, cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa); Kemp v. Holder, 610 F.3d 231, 23 A.D. Cas. (BNA) 513 (5th Cir. 2010); Livingston v. Fred Meyer Stores, Inc., 388 Fed. Appx. 738, 23 A.D. Cas. (BNA) 727 (9th Cir. 2010); Thompson v. Rice, 422 F. Supp. 2d 158, 166 n.6, 17 A.D. Cas. (BNA) 1610 (D.D.C. 2006), aff'd, 305 Fed. Appx. 665 (D.C. Cir. 2008) ("The liability standards of the Rehabilitation Act and the ADA are the same in employment discrimination cases, and thus cases interpreting either statute are applicable in defining the term disability and otherwise determining liability."); Walton v. U.S. Marshals Service, 492 F.3d 998, 19 A.D. Cas. (BNA) 702 (9th Cir. 2007); Delano-Pyle v. Victoria County, Tex., 302 F.3d 567, 574, 13 A.D. Cas. (BNA) 913 (5th Cir. 2002) ("The language in the ADA generally tracks the language set forth in the RA," and "[j]urisprudence interpreting either section is applicable to both.").

See also McLean v. Runyon, 222 F.3d 1150, 10 A.D. Cas. (BNA) 1569 (9th Cir. 2000) (analyzing a Rehabilitation Act accommodation claim under the same standard as the ADA).

Most courts hold that Congress has not granted the EEOC the authority to interpret the ADA. See Steffen v. Donahoe, 680 F.3d 738, 25 A.D. Cas. (BNA) 1825 (7th Cir. 2012); Winsley v. Cook County, 563 F.3d 598, 604 n.2, 21 A.D. Cas. (BNA) 1450, 106 Fair Empl. Prac. Cas. (BNA) 12, 92 Empl. Prac. Dec. (CCH) P 43535 (7th Cir. 2009).

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