VIEWPOINT
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Disability Discrimination: Good Intentions Can Produce Bad Law

by Mark Fischer

Summary

Laws intended to help disabled people find and keep jobs have encouraged those with personal problems to clog the legal system with frivolous lawsuits. Legislators must clarify the vague wording of state and federal disability employment acts and other anti-discrimination laws.

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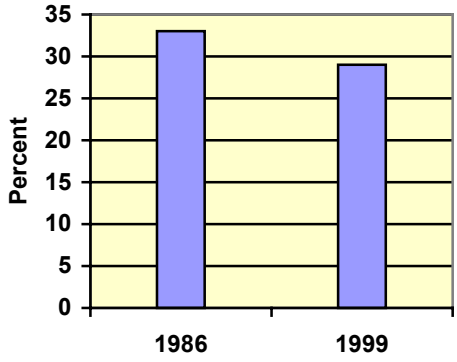
Regulatory "cures" motivated by good intentions sometimes create more problems than they solve. The 1990 federal Americans with Disabilities Act (ADA) is one of the best illustrations of that.

The ADA requires employers to provide "reasonable accommodation" to individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. It also bans discrimination against the disabled in pay, hiring and firing. The law was passed during the Bush administration amid much fanfare about the need to provide disabled people with greater access to the workplace. The Equal Employment Opportunity Commission (EEOC) is charged with administering the Act.

What may appear to be a simple, common-sense directive has spawned tens of thousands of regulatory enforcement actions and lawsuits over who the laws cover, when the law applies, and exactly what constitutes compliance. Congress left many of the ADA's key terms, such as "reasonable accommodation" and "undue hardship" undefined. The U.S. Supreme Court will soon decide whether Congress intended the law to apply to only the most severely handicapped or just about anybody with a problem, because the law itself was not clear.

Workforce Participation Among The Disabled



The Americans with Disabilities Act* has not increased the percentage of disabled people who are employed, but it has made it more difficult to employ them.

* The ADA passed in 1990.
Data source: Walter Olson, Manhattan Institute

Vagueness in disability law isn't confined to federal statutes. Michigan's Persons with Disabilities Civil Rights Act (MPDCR) has stirred up its own controversies. The Michigan Court of Appeals, for example, is currently considering whether Tourette syndrome constitutes a disability under the MPDCR in a case involving a supermarket employee discharged after an outburst with a customer.

Much to the dismay of employers and the delight of trial attorneys, there are strong incentives for an employee or job applicant to file a complaint under the ADA. The EEOC then either resolves the case or sues the employer. If it does neither, the person complaining

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can often sue on his or her own. Enough cases like the following have occurred to encourage many complaints that have questionable merit:

- Ryder Systems, Inc. let go a truck driver because his epileptic seizures were regarded as a safety hazard. A jury decided Ryder had discriminated against the driver because of his health condition, and awarded him $5.5 million.
- Ship officers have won suits against oil companies for the right to command vessels despite serious problems with another "disability," alcoholism.
- UCLA hospital officials allowed a surgeon to operate on patients—18 of whom he infected—even though they knew he had a serious and highly-transmittable disease. They did so to avoid claims of discrimination against the surgeon based on his "disability."

Now that disability can pay, more and more people seem to be disabled. The most recent Census Bureau data show that from 1991 to 1994, the number of "severely disabled" workers jumped by 800,000—a whopping 27 percent increase. This saddles employers with conflicting mandates—protect the public from injury at the hands of your employees, but don't violate the rights of a growing class of "disabled" workers.

How's this for a "damned-if-you-do, damned-if-you-don't" situation: The EEOC filed an ADA suit against Federal Express over its "discriminatory" policy of hiring only drivers with sight in both eyes, even though the Department of Transportation forbids such drivers from operating trucks!

Some might argue that the abuse of the law, its resulting confusion, and the high costs of retrofitting the workplace to accommodate various handicaps, are all worth it if more disabled people are now entering the workplace. But indications are strong that disabled people are not big beneficiaries of the law because the ADA has made it very risky and costly for businesses to employ them. Economists at the Massachusetts Institute of Technology recently examined data from 1988 to 1997 and concluded,

> "The ADA had a negative effect on the employment of disabled men of all working ages and disabled women under age 40. The effects appear to be larger in medium-sized firms, possibly because small firms [those with fewer than 15 employees] were exempt from the ADA. The effects are also larger in states where there have been more ADA-related discrimination charges."

When the ADA was being debated in Congress, skeptics who warned against its vagueness were ridiculed as heartless alarmists. Now that those warnings seem to have been prophetic, perhaps those who sponsored the state and federal disability statutes will join the laws' original critics to fix the problem.

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