FOREWORD

*Senator Tom Harkin*

Over the past 25 years the Americans with Disabilities Act (ADA) has been one of the most successful pieces of civil rights legislation in United States history. Since its inception, the ADA has been supplemented with regulations and rules enforced by the Department of Labor, Equal Employment Opportunity Commission, Department of Transportation, Federal Communications Commissions, and Department of Justice, among others, which provide individuals with disabilities a broad range of rights including access to public transit, buildings, and facilities, as well as the judicial system for issues concerning employment discrimination. But implementation of the ADA has not occurred without setbacks. Following its passage, the United States Supreme Court overly restricted the ADA by limiting interpretations of the definition of “disability” and whether a disability “substantially limits” the individual and affects a “major life activity” of the individual, two necessary requirements within the ADA for an individual to be covered under the law.

The four major goals of the ADA are to provide “equality of opportunity, full participation, independent living, and economic self-sufficiency” to persons

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* Senator Tom Harkin’s signature legislative achievement is The Americans with Disabilities Act (ADA). Almost 20 years after its enactment, Senator Harkin and Senator Orrin Hatch (R-UT) introduced the ADA Amendments Act of 2008 to preserve the intent of the ADA after several court rulings weakened its standards and to ensure continuing protections from discrimination for all Americans with disabilities. It was signed into law in September 2008, and in November 2008, Senator Harkin made history by becoming the first Iowa Democrat to win a fifth term in the U.S. Senate. Senator Harkin retired from the United States Senate in January, 2015. He would like to thank his wife, Ruth, who has been by his side since 1968, for her unwavering support throughout his entire career, especially that time spent representing the citizens of Iowa as well as his daughters Amy and Jenny. Finally, he will never forget the inspiration of his work in representing and advocating on behalf of individuals with disabilities: his late brother, Frank.

2. See id.
with disabilities.\textsuperscript{4} While there is always room for advancement and improvement, the first two goals for the most part, have been successfully implemented and administered. For example, since the ADA’s passage persons with disabilities have greater accessibility to public buildings,\textsuperscript{5} transportation,\textsuperscript{6} and recreational areas.\textsuperscript{7} Phones, televisions, books, and computers are more accessible than ever.\textsuperscript{8} Also, the ADA and subsequent legislative action have ensured American society is more inclusive of people with disabilities.\textsuperscript{9} With the passage of the Individuals with Disabilities Education Act (IDEA), this is especially true for children. Specifically, the IDEA provides “early intervention, special education and related services to more than 6.5 million infants, toddlers, children and youth with disabilities.”\textsuperscript{10}

However, two of the main goals of the ADA—economic self-sufficiency and independent living—have not been achieved to the desired results. For example, over 60 percent of adults with disabilities who wanted to work, and were able, to work were not in the workforce.\textsuperscript{11} This number is eye-opening, tragic, and inexcusable. America has not succeeded in hiring, providing basic workplace accommodations and accessibility, or offering necessary job skills training to persons with disabilities, which has led to the inexcusable unemployment rate among disabled adults.\textsuperscript{12} Underlying these disappointing statistics, however, are notable exceptions and examples. Walgreens’ Former CEO Greg Wasson and

\begin{footnotes}
\item[5.]{See id. at 45 (citing studies suggesting that 75 percent or more disabled surveyed “perceived improvement” in accessibility to public facilities).}
\item[6.]{See id. at 30 (citing studies suggesting that the number of disabled persons reporting access to public transportation as a major problem has decreased since the passage of the ADA).}
\item[7.]{See id. at 45 (Studies “suggest people with disabilities perceive improvement in access to public facilities, including restaurants, theaters, stores and museums.”).}
\item[8.]{See id. at 54–55 (discussing the positive impact of the telecommunications requirements of the ADA, including the implementation of the Telecommunications Relay Services); Effective Communication, ADA.gov, http://www.ada.gov/effective-comm.htm (last visited April 29, 2015) (discussing the various “auxiliary aids and services” the ADA requires covered entities to provide, including books in Braille and real-time closed captioning).}
\item[9.]{See NAT’L COUNCIL ON DISABILITY, supra note 4, at 19–20 (discussing how the ADA has given people with disabilities the ability to access parts of society they would not have been able to prior to the legislation’s passage).}
\item[12.]{See id.}
\end{footnotes}
Randy Lewis, a retired Senior Vice President of the company, have championed and implemented a successful persons with disabilities employment program.\textsuperscript{13} The success of this program is evidenced by the fact that almost fifty percent of employees at Walgreens’ largest U.S. distribution center in Windsor, Connecticut are persons with disabilities.\textsuperscript{14} Other Walgreens distribution centers and many of its individual stores also have a strong record for hiring persons with disabilities.\textsuperscript{15} Noticing the success of this program, other major companies, including Best Buy, have implemented similar programs.\textsuperscript{16} While more large corporations and small businesses across America must realize the potential of these programs for the unemployment numbers to fall substantially, these companies represent the potential to end the anemic employment numbers for disabled adults.

America has also underperformed in the ADA’s goal of independent living. In \textit{Olmstead} v. L.C., the U.S. Supreme Court held that the institutionalization of individuals with disabilities is in violation of the ADA, and community-based treatment is required “when the State’s treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”\textsuperscript{17} \textit{Olmstead} provided promise for the growth of Americans with disabilities’ independence, but states have been slow to fully implement \textit{Olmstead}.\textsuperscript{18} As a result, far too many disabled Americans that have the capability and desire to live an independent life remain institutionalized. Recently, however, the Community First Choice Option of the Affordable Care Act (ACA) has provided states with incentives to fully implement the \textit{Olmstead} decision by providing participating states larger Medicaid allowance for adhering to \textit{Olmstead}.\textsuperscript{19}

\begin{thebibliography}{99}
\item 14. \textit{See id.}
\item 19. \textit{See Kathleen Sebelius, Report to Congress Community First Choice: Interim Report}
\end{thebibliography}
While these two goals are currently missing the mark, the desired results are attainable. The best path to economic self-sufficiency and independent living for persons with disabilities lies in stopping young individuals from being pipelined in grade and high school, which leads to low rates of post-secondary education among disabled persons, eventually resulting in high rates of disabled persons in sheltered employment with sub-minimum wages and no hope of job skills training or upgrading. To achieve success in self-sufficiency and independent living, this pipeline of disabled persons must stop. The IDEA, as mentioned above, is a major step that works to include and integrate children with disabilities into the mainstream of school instruction. Further, the Workforce Innovation and Opportunity Act of 2014 provides young adults with disabilities the distinct ability to procure internships and job coaching in order to compete for and attain competitive, integrated employment in the mainstream of America’s workforce and break free from the antiquated pipeline of “disabled employee jobs” that lead to a lifetime of sub-minimum wage employment and low-skill jobs.

To help ensure the realization of a broader application of the rights within the ADA and restore the law to its intended reach, the ADA Amendment Act (ADAAA) of 2008 was passed. The ADAAA broadened the definitions of disability and whether a disability “substantially limits” an individual. The ADAAA’s overall purpose was to ensure the law reached more individuals that were originally intended to be covered under the ADA but had been left out due to the Supreme Court’s overly narrow interpretations of the law. Specifically, the


22. See id. at 814.
23. Id. at 818.
27. Id. at 228 (“By amending the ADA’s definition of disability, Congress has assured that more individuals will qualify as having disabilities.”).
ADAAA rejected the holdings of cases including *Sutton v. United Airlines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*28 In *Sutton*, the Court held that an individual’s measures taken to mitigate or correct an otherwise covered disability should be considered when determining whether the person is covered by the ADA.29 In *Toyota Manufacturing*, the Court went further by concluding that “substantially limits” must “be interpreted strictly to create a demanding standard for qualifying as disabled,” and for an individual’s disability to affect a “major life activity” that “individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”30 Rejecting these definitions, the ADAAA defines major life activities that can be substantially limited by physical or mental impairment so as to constitute a disability as “includ[ing], but . . . not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” and “whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”31

Internationally, the United Nations has chartered an international human rights treaty—the Convention on the Rights of Persons with Disabilities (CRPD)—with the stated goal to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”32 While the United States is, as of this writing, one of 159 nations and regional integration organizations to sign the treaty,33 the U.S. Senate has failed to ratify it, unfortunately making it one of three

nations to sign but not ratify the treaty as of July 1, 2015.\textsuperscript{34} Upon the passage of the ADA, the United States became a world leader in providing rights, accommodations, and accessibility to persons with disabilities;\textsuperscript{35} and while the ADA remains a shining example of successful civil rights legislation around the world, the United States is in danger of lagging behind the rest of the world with regards to disability rights by not ratifying this important piece of international legislation.\textsuperscript{36}

Regardless of the difficulties, headwinds, and continued efforts to broaden or restrict the ADA and related laws, treaties, and regulations, no one can deny the law’s overwhelming success in serving to protect the rights and enhance the lives of millions of Americans who previously had no rights to fight discrimination against them; to provide assistive measures and physical access to public buildings, facilities, and transit; and to ensure America’s workplaces and employers provide important accommodations to lessen the effects of a person’s disability on their daily lives.\textsuperscript{37}

Earlier this year in Washington D.C., the Employment Discrimination and Disability Law sections of the Association of American Law Schools (AALS) held a panel discussion during AALS’s annual meeting to commemorate the ADA at 25 years; discuss the current state of the law; propose solutions to current legal and policy issues affecting the law; and present potential advances Congress could take to improve and sustain the law moving forward. Following my opening remarks, discussion on the topic was continued by seven of the nation’s leading scholars and experts in disability and employment discrimination law including EEOC.


\textsuperscript{36} Adam Sharon, \textit{Ratifying the Disability Treaty: Statements of Support}, U.S. Senate Committee on Foreign Rel. (Nov. 21, 2013), http://www.foreign.senate.gov/press/ chair/release/ratifying-the-disability-treaty-statements-of-support (quoting former U.S. Senate Majority Leader Bill Frist, who said “Voting no to this treaty without a specific and compelling reason is saying that we do not think the global community deserves an ADA of their own . . . U.S. leadership matters. We should be at the table.” (internal quotation mark omitted)).

Commissioner Chai Feldblum and Professors Stephen F. Befort, Ruth Colker, Arlene Kanter, Nicole Porter, Deborah Widiss, and Jessica Roberts. The Articles of five of the panelist speakers are published by the Drake Law Review in this Issue.

Professor Befort’s Article entitled *Accommodating an Employee’s Commute to Work Under the ADA: Reasonable, Preferential, or Both?* discusses the ADA’s “reasonable accommodation” requirement, which requires a disabled employee covered under the ADA to be provided reasonable accommodations by the employer to ensure the individual is able to perform the duties of their employment. Professor Befort points out that, while a circuit court split exists on whether making accommodations with respect to a disabled individual’s work commute is required by the employer, the majority of circuits and lower courts within those circuits have held that such commuting accommodations are per se unreasonable and not required to be made by employers. Professor Befort argues that such accommodations should not be automatically dismissed as preferential treatment to a disabled employee, but instead determined on a case-by-case basis by analyzing the plausibility, effectiveness, and hardship it creates.

Professor Colker, in her Article titled *The Americans with Disabilities Act is Outdated*, points out that the statutory structure and language of the ADA has not kept up with the quantum leap in technology that America has made in the 25 years since the ADA’s passage. Specifically, she writes how the original language of the ADA places barriers to accessibility for persons with disabilities in the realms of employment, education, public accommodations, and access to public services. Importantly, Professor Colker concludes her Article with proposed solutions to the ADA’s technological gap, including new statutes to supplement the ADA; updated regulations; judicial review that takes new technology into account; and interpreting and implementing the original ADA language in a way that will allow it to self-update as technologies change around it.

Professor Kanter, in *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, focuses on the major differences between the ADA and CRPD. Specifically, the fact that the CRPD contains what Professor Kanter identifies as a “right of support” that differs, and in most respects goes further than the ADA, including: its approach to equality and disability; its reliance on both a right to be free from discrimination and affirmative steps to eliminate discrimination; its perspective on reasonable accommodations; and its value on independence. She particularly notes the underwhelming results the ADA has achieved in its goal of independent living, which is inconsistent with American’s long-held value of self-sufficiency.

Importantly, Professor Kanter notes that even though the U.S. Senate has failed to ratify the CRPD, the lessons learned from its language can still have a direct impact on the growth and maturity of disability and employment discrimination law in the U.S.

Professor Porter, in her Article, *Withdrawn Accommodations*, addresses the prevalent issue involving employers that withdraw an accommodation that had previously been provided to a disabled employee. In these scenarios, the previously provided accommodation is withdrawn either because it was originally intended to be a temporary solution to a temporary disability that became permanent or due to a supervisor approving and implementing the accommodation being replaced by a new supervisor that cancels it.

Professor Porter discusses how the courts will often apply a one-size-fits-all approach. In this, the withdrawn accommodation is either ruled to be reasonable under the ADA because it was not causing an undue hardship to the employer during its implementation, or no weight is given to the withdrawn accommodation because giving the accommodation a great deal of weight might dissuade employers from providing temporary accommodations (implying concession to its long-term reasonableness). Professor Porter argues that neither of these solutions advance the ADA’s original intent to require employers to offer “reasonable accommodations” to disabled employees and that courts must take the withdrawn accommodation into consideration, but not use it as a “gotcha” device against employers.

In *Still Kickin’ After All These Years: Sutton and Toyota as Shadow Precedents*, Professor Widiss writes about the significance of the ADAAA as a return to Congress’s intended interpretation of the ADA. Professor Widiss’s article contains a broad discussion of the significant role that congressional overrides should have on future caselaw, but how courts will, at times, continue to rely on overridden judicial precedent. In the ADA context, Professor Widiss focuses on the U.S. Supreme Court holdings in *Sutton* and *Toyota* and how the ADAAA was intended to directly supersede the restrictions and narrow interpretations found within those holdings. However, regardless of the clear language found within the ADAAA rejecting the holdings in *Sutton* and *Toyota*, Professor Widiss explains that some courts continue to rely on the superseded holdings of those cases, specifically in litigation determining whether an individual is to be “regarded as disabled.”

It is an honor to have contributed to the passage of the ADA, assist in its growth and success over the years, and to contribute to this commemoration of a historic milestone of one of America’s great civil rights success stories. In my retirement from Congress, I look forward to continuing my work to further the
ADA’s reach and help achieve its goals.