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1999

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Citation:

Mark C. Weber, Reciprocal Lessons of the ADA and
European Disability Law, 93 Am. Soc'y Int'l L. Proc.
(1999)

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Tue Dec 5 11:10:36 2017

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concerned intergovernmental bodies of the United Nations, and interested member states; and

5. organization of periodic expert-group meetings on policy and program questions relating to norms, standards and legislation and persons with disabilities, in order to translate relevant international norms and standards into practice in both disability legislation and policy frameworks.

RECIPROCAL LESSONS OF THE ADA AND EUROPEAN DISABILITY LAW

*by Mark C. Weber**

The experience of the United States with the ADA²⁸ provides a number of lessons to the world community that bear on the desirability of other countries' adoption of similar laws. These lessons, however, should not obscure the information that the experience of other countries provides for the United States. Indeed, the lessons of the American and European laws relating to disability are reciprocal. Three of these reciprocal lessons are discussed here.

LESSON 1: THE ADA IS EXPORTABLE

For various reasons countries other than the United States are well advised to adopt provisions similar to those of the ADA. The costs are low, and the side benefits great. Trends in European law show a movement toward ADA-like statutes.

Low Costs

The costs of implementing the ADA in the United States have been low. One example is employment. In a series of studies conducted at Sears, Roebuck from 1978 to 1996, nearly all of the 500 accommodations sampled required little or no cost. Other studies show average costs at less than \$100.²⁹

Side Benefits

Side benefits from the ADA include productivity gains, increased accessibility for individuals who do not have disabilities, and reduced construction costs.

Employers who provide accommodations to enable people with disabilities to be economically productive realize significant economic gains. For instance, by aggressively acting to accommodate employees returning to work after job-related injuries, companies have drastically reduced workers compensation outlays. For example, the disability management program at Federal Express saved the company \$4 million in the program's first year.³⁰

Accessible design also benefits people without disabilities. Parents with strollers and shoppers wheeling carts have benefited from curb cuts. People who simply happen to be short

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²⁸ 42 U.S.C.A. §§ 12201–12213 (West 1999). The ADA has five titles. Title I bars employment discrimination by all but the smallest employers. It forbids segregation, denial of reasonable accommodations, using qualification criteria or tests that screen out persons with disabilities unless the criteria or tests are job related and supported by business necessity, and various other practices. Title II bars discrimination by state and local government. It requires program accessibility for public services. Title III forbids discrimination by places of public accommodation. It imposes a duty to eliminate readily removable barriers to access. Title IV requires the extension of telecommunication services to persons with hearing and speech impairments. Title V includes enforcement and other provisions. Titles II and III have specific provisions addressed to accessibility in the design, construction and alteration of buildings. Disability discrimination by the federal government and entities it assists is forbidden by additional provisions found at 29 U.S.C.A. §§ 794–794a (West 1999).

²⁹ Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act*, 46 DEPAUL L. REV. 877 (1997) (collecting studies).

³⁰ James G. Frierson, *The Legality of Medical Exams and Health Histories of Current Employees under the Americans with Disabilities Act*, 17 J. REHABILITATION ADMIN. 83, 86 (1993) (citing studies).

in stature benefit from lower elevator buttons, sinks and drinking fountains meant to accommodate people who use wheelchairs.

In the construction of a new building, an accessible design frequently costs no more than other designs. By contrast, retrofitting can be very expensive. The cost-effective method is to build accessibility into the construction of all facilities. American experience, however, is that builders did not do so until forced by the law.

The Emerging Trend in Europe

European countries appear to be moving toward laws forbidding at least employment discrimination against people with disabilities. British provisions include a requirement that employers make reasonable adjustments to job requirements for people with disabilities. The German constitutional provision and French criminal law provision are somewhat less clear on what they require from employers, but they do forbid discrimination. Spain also forbids employment discrimination.³¹

LESSON 2: ANTIDISCRIMINATION LAWS ARE NOT ENOUGH TO END UNEMPLOYMENT AND POVERTY AMONG PEOPLE WITH DISABILITIES

Antidiscrimination measures, though highly important and eminently exportable, remain insufficient to alleviate the pervasive unemployment and poverty among people with disabilities. The experience of the United States in the wake of the ADA's enactment demonstrates this point. Unemployment and poverty continue because of inherent limits on the earnings capacity of many people who have disabilities, and because of hidden employment discrimination that the ADA cannot eradicate.

Continuing Unemployment and Poverty in the United States

Less than 30 percent of working-age Americans with disabilities work even part-time, as opposed to almost 80 percent of working-age Americans without disabilities. Of people with disabilities who are not working, 72 percent say they want to work.³²

The poverty rate for adults with work disabilities, both severe and nonsevere, is three times that of the rest of the adult population (30.0 percent versus 10.2 percent). A third of people with disabilities live in households with an annual income of \$15,000 or less (versus 12 percent of others).³³

Disability-Related Limits on Earnings

Bertrand Russell remarked that work is of two kinds: "First, altering the position of matter at or near the earth's surface relative to such other matter; second, telling other people to do so." Limits on carrying, pushing, pulling, speaking, listening, reading, writing or reasoning inevitably decrease the marginal contribution that a worker can make in moving matter or directing others to do it.³⁴ Though technology may permit those with strength limits to be more

³¹ Sources describing these developments and providing citations to the applicable provisions include Bernard Gutow, *Survey of Rights of Workers with Disabilities: Comparison of the United States with the European Community*, 11 N.Y. INT'L L. REV. 101 (1998); Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 ARIZ. J. INT'L & COMP. L. 283 (1992); Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62 (1996); Josh Bernstein, Comment, *The Enforcement of European Union Directives on Employment of the Disabled*, 30 TEX. INT'L L.J. 603 (1995); Eric A. Besner, Comment, *Employment Discrimination for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act*, 16 COMP. LAB. L.J. 399 (1995).

³² Great Lakes Disability and Business Technical Assistance Center, *Harris Poll Results*, REGION V NEWS, Spring/Summer 1998, at 1 (collecting statistical sources).

³³ Mitchell P. LaPlante et al., *Disability and Employment #11*, DISABILITY STATISTICS ABSTRACT, Sept. 8, 1997 (collecting statistical sources).

³⁴ See, e.g., Marjorie L. Baldwin, *Can the ADA Achieve Its Employment Goals*, 549 THE ANNALS 37, 42 (1997).

competitive, it further disadvantages those with intellectual, attentiveness and learning deficiencies.

Hidden Discrimination

The real reasons behind hiring decisions are easy to conceal. Moreover, unconscious discrimination and stereotyping are exceedingly hard to eradicate.³⁵

LESSON 3: EUROPEAN-STYLE DISABILITY LAWS ARE ALSO NEEDED

If the United States is to take effective action to end poverty and unemployment among people with disabilities, measures that go beyond antidiscrimination law will be needed. Americans would be well advised to look to Europe for programs to adopt. Three measures that alleviate the poverty and unemployment of people with disabilities are widely found in Europe. They are *job set-aside programs*, *partial disability benefits* and *universal medical care*.

Job Set-Asides

Job set-aside programs are pervasive in Europe. Austria, for example, requires employers with twenty-five or more employees to hire at least one person certified as having a disability for every twenty-five employees. France makes firms with more than ten workers allocate 10 percent of vacancies to persons with disabilities; employers with at least twenty workers must have at least 6 percent of their workforce consist of full-time or part-time employees with disabilities. German workplaces have a 6 percent quota for persons with severe disabilities, and such workers are protected from termination upon completing a probationary period. Luxembourg makes employers of more than fifty workers reserve 2 percent of positions for people with disabilities.

The Netherlands has negotiated standards, but the government may impose a quota of 3 to 7 percent. Spain reserves 2 percent of jobs for workers with disabilities in companies with more than fifty employees. Japan has a quota of 1.5 percent for profit-making businesses and 1.8 to 1.9 percent for public entities and nonprofits.

The European experience shows that such programs are workable (though not without enforcement difficulties). Effectively, a tax is placed on the entities in society that have a monopoly on a scarce good. The scarce good is employment. The monopolists are employers.³⁶

Partial Disability Benefits

In Europe, social security systems typically provide partial benefits if a person has an impairment that causes a threshold loss of work capacity. In Finland, if the individual has a 40 percent or more permanent loss of earning capacity, a pension is paid based on previous earnings. Israel and Norway use thresholds of 50 percent. Germany, France, the Netherlands and Sweden all pay partial disability benefits based either on the loss of earnings that occurred when the beneficiary became disabled or the difference between the beneficiary's earnings and those of comparably trained persons without the disability. American analogues include veterans' benefits, workers compensation and the tort system, all of which compensate partial disability.

³⁵ See, e.g., Marta W. Casper, *Seasons of Change, The Americans with Disabilities Act: Implementation in the Work Place*, 17 J. REHABILITATION ADMIN. 129, 132 (1993) (describing employers' continuing attitudinal barriers to hiring persons with disabilities).

³⁶ For citations to sources on these programs and a more detailed argument in favor of the adoption of comparable provisions in the United States, see Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 166-74 (1998).

Though logistics create some problems (primarily, how to rate disability for those who can no longer do an existing job, but who could shift to other employment with additional training), existing American and European systems have developed satisfactory methods for making the determinations. Costs could be met as they are in Europe, through social security contributions, or by general taxation. Benefits could phase out for those with high incomes.³⁷

Health Benefits

There is significant evidence that employers in the United States, especially smaller ones, do not hire people with disabilities because of fear of medical costs to group insurance plans. Some people who receive medical benefits as part of welfare or Social Security programs are reluctant to return to work for fear of losing the coverage.³⁸

Universal health insurance, as found throughout Europe, or at least, government-guaranteed health coverage for all Americans with severe disabilities, would eliminate that disincentive to hire and be hired, and could make job candidates with disabilities more attractive. The Clinton administration has made initiatives in this direction for those currently on benefit programs, but the medical coverage should be made available even to those who are not currently getting assistance.³⁹

³⁷ For a citations to sources on European programs and a more detailed argument in favor of the adoption of comparable provisions in the United States, see Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination* 89–95 (Apr. 1999) (unpublished manuscript, on file with author).

³⁸ See *id.* at 104–06.

³⁹ For a citations to sources and a more detailed argument in favor of the adoption of medical insurance provisions in the United States, see *id.*