



ADA Live! Episode 37: Employment Law Developments and Advocacy Strategies For Workers And Job Seekers With Disabilities

Event Date: October 5, 2016

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VOICE-OVER ANNOUNCER: (Music) Welcome to WADA ADA Live! Talk radio. Brought to you by the Southeast ADA Center, your leader for information, training and guidance on the Americans with Disabilities Act. And here's your host.

CELESTIA OHRAZDA: Good afternoon and welcome to WADA ADA Live!. On behalf of the Southeast ADA Center, the Burton Blatt Institute at Syracuse University, and the ADA National Network, welcome to the 37th episode of ADA Live!. My name is Celestia Ohrazda and I am the information technology coordinator for the Southeast ADA Center. Today we are talking with Steven Mendelsohn about employment law developments and advocacy strategies for workers and job seekers with disabilities. Steve has served in a variety of research advocacy consulting settings, working for the full participation, economic, and legal equality of all persons with a disability. He served as principle consultant to the National Council on Disabilities Annual Report to the President and Congress between 2001 and 2008. And he has also been my colleague at the Burton Blatt Institute between 2008 and 2013. ADA Live! listening audience, you can submit your questions about employment development and advocacy strategies for people with disabilities or any other ADA Live! program at any time on adalive.org. Steve, welcome to our show!

STEVEN MENDELSON: Thank you Celestia, it's a great pleasure to be here with you.

CELESTIA OHRAZDA: We're very fortunate to have you. Steve, to start out with, what are the major laws addressing the employment rights of people with disabilities?

STEVEN MENDELSON: Well, there's several key laws. The first one, obviously exemplified by the very title of this program, is the ADA, the Americans with Disabilities Act. Which was passed in 1990, and which deals with public accommodations, governmental services, and what we're mainly concerned about today, employment rights. And the ADA is a classic civil rights law. It sets forth the reasonable expectations we can have in dealing with employers in various situations. It indicates the various obligations of employers to treat us fairly. And it sets up a number of criteria in determining whether or not the process has gone adequately, and hopefully it gives us a basis for understanding when something has legal implications or for developing a strategy for dealing with situations to prevent them from taking on legal dimensions.

The second major law is the Federal Rehabilitation Act. It's important probably because it confers some classic civil rights on us through primarily its Section 503 and Section 504, which determines what people of federal funds must do in terms of employment equity, but it's also important because it defines the parameters of a number of the training and rehabilitation systems available to us. It has a major role in transition services for youth leaving school and entering adult services and the labor market. And it's recently been dramatically updated by new legislation and by new regulations, which have just been published in final form a couple of months ago. So for anyone needing vocational services, through the vocational rehabilitation system or interacting with the government's labor market-oriented programs in other ways, the Rehabilitation Act can become very important, too. Then we have other laws which will come into play, depending upon the circumstances. If we're talking about education, we have to think about the role of the Individuals with Disabilities Education Act in special education and how it interacts with the ADA. And if we're talking about healthcare, we have to think about Medicare and Medicaid. These latter two don't impact so directly upon employment. From the standpoint of employment, the ones we really want to focus on right now are the ADA primarily and the Rehab Act secondarily.

CELESTIA OHRAZDA: What about legal developments? Would you talk about one or two recent developments in the law and explain how they could impact members of the disability community in everyday life?

STEVEN MENDELSON: Oh, yes. There's been so many developments and developments are ongoing. And trends are always manifesting themselves. Sometimes good trends and sometimes bad trends in regulations or in court decisions. And you always have to think about the law, not so much as a single event, but as a conversation. Too often people will read a case and either be very happy or very disappointed depending upon its reasoning and its outcome, but will tend to think of it in isolation. It's not ever to be taken that way. It's always part of a conversation. There will be another case – or may be another case next week or next year -- which

will modify it, which will build upon it, which will agree with it, which will disagree with it. And so in that light, we see some recent trends that are developing that seem to have some momentum behind them.

The first one let's talk about in that regard are those surrounding technology. For example now, in the case of computer technology, which has evolved in almost every job from some degree or other, whether we're literally using a computer on a job, or being monitored by a computer, or have to access with a computer system to get in and out of the building through an ID card or otherwise, or as is extremely common now, have to use an online job board, which is ultimately a computer system in order to even apply for the job. And it's the rise of these online job boards and automated electronic job application systems that has posed particular accessibility issues for many people with disabilities and many kinds of disabilities that can be impacted by the systems so far as accessibility is concerned. And these systems, I guess it's best known for people who are blind or who have low vision. But it's true for people with many other disabilities, as well, that various aspects of these systems can interfere with their ability to participate in the job application process.

So it's very good to know that, for example, the federal government has begun under the auspices of its power to implement Title I of the ADA in respect to the activities of local governments. It's important and interesting to note that the federal government has begun in 2015 to require municipalities – counties and cities -- to make their job application systems accessible to people with disabilities. Implementation of that is a very complicated matter and one might think it's a matter that can be dealt with by generalized rules, but it's hard to because there are so many local variations that it too often becomes a case by case matter, And it's going to be up to the advocates to help enforce that by reminding their localities that there are requirements for accessibility in these job application systems. And by helping the localities to find resources to achieve greater accessibility where it's lacking, and in some cases, where nothing works in that regard, to let localities know that there is a potential federal involvement if they're not able and willing to solve the problem. And it's up to the advocates leading up to, if necessary, and hopefully not being necessary, to contact the Justice Department and file a complaint. It's hopeful that this will bring about some good results, otherwise you run the risk of being screened out. And the ADA is very clear that you cannot use procedures to screen people with disabilities out, whether that's your intention or not. If that's the effect, particularly here where it's a foreseeable effect, it's not good enough to say that wasn't your intention.

Another area in the technology domain, which is very important potentially, it hasn't received a lot of attention yet, and the case as a whole may not be fully resolved. Hopefully it will ultimately end in favor of the plaintiff. But it's a case out of Maryland called Reyazuddin vs. Montgomery County. It's the case of a woman who was an

employee in a county call center who was unable to retain her job because the county decided to develop a call center that was inaccessible, and refused to make the modifications that would allow her to do her job. But it's extremely complex and lengthy litigation. I won't go into all the details about them. The main thing I want to bring up is something that the U.S. Court of Appeals for the Fourth Circuit said in its analysis of the case. And this is applicable to technology beyond the accessibility setting. It's in the situation that we have today where companies are always upgrading and always making technological changes to improve and increase their productivity. As, indeed they should, and no one would ever question the wisdom of doing that. But there are implications for workers with disabilities that have to be considered both in terms of training, in terms of accessibility, and in terms of a whole variety of other relationships that go along with that.

What the point here is, is that the Court was called upon to decide what would constitute an undue burden, or how to go about calculating undue burden. Why does that matter? Well, the law says, and the ADA says, and actually the Rehabilitation Act says as well, when it's applied to firms receiving federal financial assistance that basically you don't have to provide a reasonable accommodation if it's not reasonable. Meaning, among other things, if it constitutes a fundamental alteration or would constitute a fundamental alteration in the operations of the employer, or was unduly difficult, if it constituted an undue burden. Of course, the main, not the only -- but the main criteria for determining an undue burden has always been a financial one. Well, the law is very helpful and not so helpful at the same time, in that regard. The law gives us a list of what criteria need to be taken into account in deciding whether it's an undue burden – the size of the entity, the number of people working there, the nature of the activity, the cost – and many, many things. It's a long list of factors. All of which are particularly relevant.

But the factor that the Court of Appeals here focused on, which has not been emphasized before in a lot of cases, but which I hope will get some traction, is this. You can't really consider the question of undue financial burden by looking at the cost of the reasonable accommodation in relation to the amount of money expended by the employer on the function or service which you're seeking the accommodation for. You have to look in the case of a technological upgrade at how much money the employer hopes to save or make as a result of the upgrade. And in this case, the county had postulated that the new call center would save it millions and millions and millions of dollars a year. And again, quite worth it that they should do so. But against that figure, the potential cost of the accommodation to make the new system accessible, probably \$100,000, really wasn't very much in relative terms. Now if you look at how much they were spending on the upgrade, obviously the amount they were spending on the upgrade was much less than the amount of money they hoped to save on the upgrade,

otherwise they wouldn't make the upgrade. So you get a very different percentage, a very different cost benefit equation when you look at it that way. It was very important what the court did. They emphasized that was a proper question to ask. I'm hopeful you'll see much more adoption of that kind of a standard by other courts.

A third area of tremendous change that I want to talk about, and that I think we should all be very proud of is movement, major movement in the area of the rights of subminimum wage workers. That is people employed in what have traditionally been called sheltered workshops. There was a tremendous decision by a federal administrative law judge in the Department of Labor just earlier this year in the case of [Magers, et al. v. Seneca Re-Ad Industries Inc. (sic)]. And it involved the methods by which the subminimum wage levels for these workers were calculated. Under a federal law, in this case the applicable law is yet another statute called the Federal Fair Labor Standards Act. That law allows certain people to be designated or certified by the Department of Labor as eligible to be paid a wage lower than the minimum wage on the alleged grounds that their productivity is lower, and therefore they shouldn't be paid the minimum wage. And also partly on the alleged grounds that although they're working for a wage, they're also receiving rehabilitative or other services in the facility where they're working.

It turns out in this case, the administrative law judge was very skeptical about the methods used to evaluate the productivity of the workers. Therefore, the circumstances under which they were tested, the equipment on which they were tested, the training that they got on the equipment, and the comparable or competitive standards used were all open to question. And the judge was able to rule that these workers were not appropriate for the kind of subminimum wage certification that they had been routinely receiving, and the institution had been repeatedly obtaining on their behalf. Again, it's a very important decision if it's followed, and we hope it will be. It will open up tremendous opportunities for subminimum wage workers to get a living wage, at least a minimum wage. It's also going to open up opportunities, that along with some other things that have happened, in the way of Justice Department settlements in states like Rhode Island and Oregon under a decision called Olmstead, which we can't get into now. But in the wake of those activities and some other things going on, we hope we can look forward to the abolition of subminimum wage work in favor of competitive paid work. If we can't look forward to that in the near future, then at least as an interim matter, we can look forward to better wages for people who are serving in those environments.

CELESTIA OHRAZDA: I really like the analogy of the law as a conversation. That really struck a chord with me. Can you discuss a couple of issues that are emerging and may prove important to people in the near future? We talked about some of the legal developments, but what about emerging developments?

STEVEN MENDELSON: Yes, Celestia. There are always emerging issues. There are always new ones coming along. Three very important ones that have already come to the floor and will continue to be important for the foreseeable future are these: First, affirmative action. There is nothing in the ADA, except for a few very narrow contexts, about affirmative action. There is nothing in the ADA that requires affirmative action. There's nothing in the ADA that bars it for people with disabilities either. That's very important because also when we think about affirmative action, we think about how it may be illegal in certain contexts but there is no issue of that kind with disability. It's very important to consider the possibility of using affirmative action in those cases where it may bring about participation of people with disabilities in the work force. As we know, the participation of people with disabilities in the workforce today is very, very low. Affirmative action is one way to deal with that.

One very interesting context where that has been done recently is under the provision of the Rehabilitation Act, Section 503, dealing with federal contractors, and that is a section of the law, of the Rehabilitation Act, where affirmative action is allowed. It took a long time to figure out how to do that because it's also illegal to ask people before they're hired if they have a disability. So many people who needed accommodations in order to qualify for the job and in order to be able to do the particular job didn't want to ask for it because they didn't want them to know that they had a disability. And the employer couldn't ask them before a job offer was made. And even then, could only ask very limited questions, or else the employer violates the law. So now they figured out a way that employers can give people an opportunity to voluntarily disclose a disability in the job application context or afterwards, if they need an accommodation, and that can hopefully be a way that we can implement the affirmative action provisions of Section 503. That is the first area.

The second area that I would like to talk about is the area created by the new economy. The so-called [unintelligible] economy, the so-called shared economy, and that's the situation faced by contract employees – these are people who work in all kinds of contexts, from being Uber drivers to being clerks in fast food restaurants, to all kinds of things. They're not technically employees. They're contract employees, not regular full time employees as we've traditionally understood that term over the years. Well, why does that matter? Under the ADA this matters because the ADA Title I provides protection against discrimination to employees. It doesn't provide protection against discrimination to contractors, at least not clearly so. So now the question that courts have had to deal with -- who is an employee and who is a contractor, and that's not a very simple question. A lot of people believe that is a function of what the parties decide should be the case. Of course, that means what the, quote, employer decides should be the case. But it's not that simple. The law, depending on the question that you're asking, depending on the context, uses various tests to determine who is an

employee and who is a contractor. That matters for a variety of purposes, as we know, including who is responsible for paying the taxes, obligation to provide employee benefits, and so on. But it also matters very much from the standpoint of whether the anti-discrimination federal provisions of Title I of the ADA apply. So this is being battled out in the courts now. There are decisions on the particular fact pattern in this situation, some holding that the person is an employee, some holding that the person is a contractor. That's going to become more and more important in the coming years as contractors, temporary employees and so forth become a larger and larger part of the workforce, as I suspect they will become.

The third issue that I want to talk about, and hopefully a positive one, and that is the enactment of the Workforce Innovation and Opportunity Act, WIOA. And that includes the Federal Rehabilitation Act. And that is the law under which a variety of vocational rehabilitation services and other government labor market-related services are provided to people, including people with disabilities. And what WIOA does is make a number of changes in the vocational rehabilitation system for people with disabilities. The rules are being rolled out now. A major chunk of the final rules have been published and will go into effect October 1st, January 1st. And it will take time to see what their practical effect is. But some of the important ones are – that under WIOA there is a much greater emphasis on employment per se. That's always been the goal, broadly speaking, of employment services for people with disabilities. But it's a much more tightly defined goal than the quality of life outcomes that had been tolerated or used before, to a certain degree, will no longer be so readily available. The services will be more and more calibrated in terms of what's available to the actual goal of obtaining employment within a specific period of time.

Also, there's going to be much more attention under WIOA to services needed by people with intellectual and developmental disabilities. And there's going to be much more attention under WIOA to transition services. Now, we know there are many transition points in a lifetime. The particular transition of most concern here is the transition from school to post school adult services in higher education or employment. Hopefully, in many cases, given the overall thrust of the act -- employment. So the way that plays out, and other changes in WIOA, the way they play out over the coming years will also be important affecting people who receive or need vocational rehabilitation or other government funded labor market services in order to obtain, maintain, or advance in employment. And that would include people who need assistance with technology and other kinds of specialized services or training.

CELESTIA OHRAZDA: Thank you, Steve. ADA Live! listening audience, you can submit your questions about employment law and advocacy strategies or any other ADA Live! program at any other time on adalive.org. Now a word from our sponsors.

VOICE-OVER ANNOUNCER: Available as a Kindle e book from Amazon, [People with Disabilities and Employment Law: Recent Developments, and Emerging Issues in Everyday Life.] This book by attorney and advocate Steven Mendelsohn offers information about recent developments of significance to workers and job seekers with disabilities. In an understandable way, the book explains these developments, highlights the emerging issues, discusses their practical implications, and most of all seeks to enhance effective self advocacy. Download your copy today at Amazon.

CELESTIA OHRAZDA: Welcome back to the second part of Episode 37 [of] ADA Live!. We're talking with Steven Mendelsohn about employment law developments and advocacy strategies for people with disabilities. Steve, let's shift our focus just a bit. Can you describe some recently encountered employment barriers and how to determine if they have civil rights implications?

STEVEN MENDELSON: Yes. First of all, it's important to think of the employment system not as a single point in time, but as a continuum. So when we speak of employment, and in a moment when we speak of barriers, we're speaking of the process of training for a job, the process of getting qualified for a job, through licensing requirements or test-taking or whatever, the process of applying for a job, and then the process of doing a job, and then the process hopefully of maintaining one's skills and advancing in one's job. So bearing in mind that continuum, I want to try to talk about some issues or barriers that can be or that are encountered at every stage along that pathway. I think the first one we want to talk about in that regard is the question of reasonable accommodations.

Reasonable accommodations are the things that perhaps most distinguishes vocational rehabilitation and the employment life cycle for people with disabilities from other disadvantaged or marginalized groups who are protected by anti discrimination laws. Normally we think we want an employer or a system to treat everybody equally, to treat everybody identically, and to make no distinctions based on individual characteristics that we have no control over such as race, age, gender or disability. However, that's not always the case. One of the areas where that is not the case is reasonable accommodations for people with disabilities. We need -- in contrast to other groups -- a degree of individualization. And that is accomplished, very largely, through the reasonable accommodation process. So at any stage in the process, we're going to find that we may have a need for reasonable accommodations, and the employer may have an obligation to provide them.

What are reasonable accommodations is a complex question depending in very large part upon the facts of each case. The law provides a number of criteria to be used in determining whether a requested accommodation is reasonable. Many of these are defenses or justifications for not providing the requested accommodation that an

employer can use. Those include undue burden – undue hardship, rather. That would be a matter of cost, or fundamental alteration of what goes on at the work site, or what is the nature of the job, things of that nature.

But most important to reasonable accommodations is the process. I think we can't always guarantee that we'll get the accommodations that we need or that the law will consider the accommodations we need [are] reasonable. And the employer is never required to provide any particular accommodation. The employer is always given a great deal of discretion in what accommodation to provide where one is needed and to provide what the employer offers is reasonably calculated to meet the actual need. But the process is supposed to involve a high degree of interaction, a high degree of interactivity, wherein the employer, or the test giving or the training organization, as the case may be -- will work with and talk with the employee. The employee has to initiate the process. And then the employer or the other entity is supposed to respond. That doesn't always happen for many reasons. Sometimes negotiations begin and break down. Sometimes they never begin at all.

There have been a number of instances in which an employer's failure or refusal to participate in the interactive process at all has itself been considered a violation of the law. These are mostly in administrative settlements. There haven't been a lot of cases where that's the case. Only where you can actually show that if the employer had participated in the accommodation process through discussion the result would have been satisfactory to you. Do you have much hope of making that failure in itself a ground for complaint? It has happened. And in any event, one can and should always work to initiate the process where one feels it is needed, and to document the process, and to do anything possible to make the process work, or do anything possible to document where the process didn't work, if that becomes necessary.

Now the next issue, of course, is technology. And I know we referred to this before in our discussion in the Reyazuddin case and other technology cases. But technology is becoming part and parcel of almost every workplace and almost every job. And if you don't have access to technology, you're likely not going to be able to do the job, or you're likely to only be able to do a very minimal job and have very little prospects for advancement or upward mobility, and that's unfortunate. We think of those issues in very vivid terms for people who cannot see and are presented with printed materials. Or people who cannot hear and are presented with oral materials. Or people who cannot climb stairs [who are] presented with long staircases and no other means of access.

But in fact there are technology issues now affecting people with almost every disability. And these are all likely to be encountered and are increasingly being encountered in the workplace. And the complexity of these issues is also something

that we have to deal with. And I'm hopeful that as technology becomes more familiar and as the price of technology comes down that it will become more and more possible to make sure that people get the reasonable accommodations for technology in terms of the assistive devices. Auxiliary aids and services. The additional training and the other parameters of accessibility that they need. The barrier there is partly employer ignorance, partly employer fear, and partly the fact that the technology is changing so fast now that it's often very hard to keep up. It's an issue that we have to deal with for the whole workforce really. Our country's entire workforce is facing an issue of being technologically challenged, but it's particularly poignant and a powerful and a universal issue almost for workers with disabilities.

CELESTIA OHRAZDA: Given the great diversity of disabilities, how much generalization about the law is even possible?

STEVEN MENDELSON: Well, that's a good question. There's always a tug, so to speak, between people who want to frame the issue in terms of the practical problems and specific barriers faced by people with a specific disability, and people who want to frame the issue more generally. I guess I would say this. To the extent that the issues are ones of a general nature, that is, does the employer make a provision for anybody who wants to apply for a job to do so, irrespective of any disability? Does the employer require medical examinations prior to making a job offer? Which they shouldn't, or doesn't. Does the employer provide insurance to all employees after the same number of months of employment, or do they try not to?

To the extent that there are general provisions that ought to be applicable to everybody, one can think of disability rights law as a general matter. But of course when you get into the question of individual accommodations, then obviously the nature of the disability counts. As a blind person, it's not going to matter to me very much that closed captioning is available. But if I were a deaf person, the availability of closed captioning would matter tremendously and the availability of audio description, which a blind person might use, might matter less. Ideally, we can effectively advocate for the universal things and we can be respectful and supportive of the more specific generic things, and in that way, hopefully, strike a balance between them and hopefully bring the cause of advocacy and full participation in the labor market forward for all of us.

CELESTIA OHRAZDA: I have one final question for you, Steve.

STEVEN MENDELSON: Yes?

CELESTIA OHRAZDA: What is the one or maybe two most important things you would like our listeners to take away from this show?

STEVEN MENDELSON: Okay. The two most important things that I would like our listeners to take away from this show is this. The best way to think about law, I think, is by an analogy to health. By that, I mean this. We are all in the age and practice of self-help. We are all trying to figure out what we should eat and what exercise we should do, etcetera. We don't do this because we think we should be doctors. We do this so we can engage in reasonable choices for our day to day lives and so we can know when we need a doctor.

I think it's the same as with law. We want to understand the law. It's incredibly complex and ever changing. We can't hope to know it all. Even lawyers can't hope to know it all. But we can know enough to get a general sense of what kind of a situation we're in. Whether we have a problem. Whether we can deal with the problem ourselves. What some of the options for dealing with the problem might be in a self help or quasi-self help vein, and when we need to try to find professional help, and we know that finding advocates is not always easy. There are many, many wonderful advocates in the country in various organizations. Lawyers, and non lawyers, alike. But there are never enough to deal with all the problems that come up for everybody on a daily basis, even just with employment. But just to know when we have that need and to reach out for it.

I would say those are the two major things. To be able to engage in a reasonable amount of self diagnosis, if you will, of self help. And also to understand what are reasonable expectations and what are not, for ourselves and for others. And to understand when we are being dealt with stereotypically and when we are being dealt with as an individual. To insist upon the right of being dealt with as an individual, and not stereotypically. And to know, finally, when it is that we're in a situation that because of these legal or other ramifications requires outside assistance of a kind that we're not in a position to furnish for ourselves.

CELESTIA OHRAZDA: Thank you, Steve.

STEVEN MENDELSON: You're welcome. Thank you very much for the opportunity.

CELESTIA OHRAZDA: At this time, I would like to thank Steven Mendelsohn for joining us today on WADA ADA Live!. And thank you also for our ADA Live! listening audience. The Southeast ADA Center is grateful for your support and participation in this series of WADA ADA Live! broadcasts. Remember, you may submit your questions about any of our ADA Live! topics by going to adalive.org. If you have questions about the Americans with Disabilities Act, please contact your regional ADA center at 1 800 949 4232. That's 1 800 949 4232. All calls are free and confidential. Join us again on November 2nd at 1 o'clock Eastern for the next episode of ADA Live!.

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