CHAPTER 1
Overview of the Rehabilitation Act, the ADA, and the ADAAA

> Too often cases have turned solely on the question of whether the plaintiff is an individual with a disability; too rarely have courts considered the merits of the discrimination claim, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied inappropriately, or qualification standards were unlawfully discriminatory.
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> House Report 111-730, Part I, at p. 8 (June 23, 2008)

The first broad federal statute prohibiting employment discrimination was Title VII of the Civil Rights Act of 1964, which bars discrimination on the bases of race, color, national origin, sex, and religion. It was not until nine years later that the first statute prohibiting employment discrimination on the basis of disability in the federal government was passed in the form of the Rehabilitation Act of 1973. In 1990, the Americans with Disabilities Act (ADA) extended the prohibition to the private sector, and the 1992 amendments to the Rehabilitation Act broadened the base of federal sector protections by incorporating certain provisions of the ADA. The Rehabilitation Act and the ADA helped to reshape the nation's view of individuals with disabilities, and expanded the opportunities for those individuals.

But a series of U.S. Supreme Court decisions beginning with *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999), eroded those protections by significantly narrowing the number of individuals protected by the Acts. That narrowing continued with the Court's decision in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002). As the federal courts and the Equal Employment Opportunity Commission began to follow *Sutton* and *Toyota*, two things happened. First, fewer and fewer individuals were found to be covered by the Rehabilitation Act and the ADA. Second, the decisions spawned a conceptually complex body of law that often left the federal courts and the EEOC at odds with each other in their attempts to define what it means to have a disability under the Acts.

In 2008, Congress responded by passing the Americans with Disabilities Act Amendments Act. Pub. L. 110-325. Signed into law by President George W. Bush on September 25, 2008, the ADAAA, like the 1991 Civil Rights Act before it, was a sharp rebuke of the Supreme Court. The title of the ADAAA puts it quite succinctly—"An Act to restore the intent and protections of the Americans with

Disabilities Act of 1990." In passing the ADAAA, Congress expressly rejected the notion that the ADA should be interpreted narrowly in terms of its coverage and stressed the concept of "broad coverage." Where prior to January 1, 2009, the effective date of the ADAAA, litigation under the ADA had focused primarily on whether the complainant was an individual with a disability, the amendments were intended "to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis…" Pub. L. 110-325, uncodified Findings and Purposes, Sec. 2(b)(5).

The simple fact of the matter is that neither the Rehabilitation Act nor the ADA lived up to their original promises. While the Supreme Court whittled away at the protections for individuals with disabilities, the federal government failed dismally in forwarding its mandate under the Rehabilitation Act to become the "model employer" of individuals with disabilities. In the decade leading to passage of the ADAAA, the number of individuals with disabilities employed by the federal government steadily declined to just over five percent and individuals with so-called "targeted disabilities" made up less than one percent of the federal workforce. On July 30, 2010, President Barack Obama issued Executive Order 13548, "Increasing Federal Employment of Individuals with Disabilities," designed to reverse that trend. Combined, the ADAAA and E.O. 13548 represented a substantial effort to increase the number of individuals with disabilities employed by the federal government and to provide those individuals with adequate protections once they enter that workforce.

In 2017, the Commission issued a final rule amending the regulations implementing Section 501 of the Rehabilitation Act of 1973. The rule, an affirmative action plan of sorts, requires federal agencies to "take specific steps that are reasonably designed to gradually increase the number of persons with disabilities or targeted disabilities employed at the agency until it meets the goals…"29 CFR 1614.203(d)(7)(ii). Representation goals are 12% for individuals with disabilities and 2% for individuals with specific, targeted disabilities. Title 29 USC 791(b) already established an affirmative action plan, but this rule created timelines for implementation.

The metamorphosis of the last five decades is perhaps best exemplified by the abandonment of the original language of the Rehabilitation Act, which used the term "handicapped individuals," in favor of the language of the ADA that adopted the term "individuals with disabilities." Within a few short years, the term "handicapped" had moved from the legal lexicon to the realm of derogatory epithet, though it remains in the terminology to some degree, particularly with respect to building accessibility requirements, where terms like "handicapped

parking" and "handicapped access ramps" still exist. The change in terminology was not a simple matter of semantics. Under the ADA, individuals are not disabled; they have a disability. The difference, though subtle, is significant in two respects. First, there is the recognition that those protected by the Act are individuals, first and foremost, who happen to have a disability. They are not defined by the disability, *i.e.*, they are not "handicapped individuals." In addition, and equally important, the language of the ADA countermands one of the misconceptions that arose under the Rehabilitation Act: the law does not require reasonable accommodation of a disabled individual. Rather, it requires that the known work-related limitations imposed on the individual by the disability be reasonably accommodated by an employer unless doing so would impose an undue hardship on the operations of the employer. For example, an employee with a visual impairment is not entitled to a flexible start time as a reasonable accommodation simply because they have a disability. The employee must demonstrate that the need for a flexible start time is caused by the visual impairment. In such an example, the employee would likely be unable to demonstrate the required nexus between that requested accommodation and the disability. On the other hand, an accommodation request for an optical scanning device, voice-recognition software, or a reader may demonstrate the required nexus for a visual impairment. The ADAAA took the linguistic distinction even further. As is discussed more fully below, the ADAAA replaced the term "qualified individual with a disability" with "qualified individual." For example, 42 USC 12111(8) previously defined a qualified individual with a disability as an individual who can perform the essential functions of the position he or she holds or desires with or without reasonable accommodation. The current version of that section drops the "with a disability" phrase and refers simply to a "qualified individual." Corresponding changes were made in other parts of the ADA, as in 42 USC 12112(a) which previously prohibited discrimination against a qualified individual with a disability and now prohibits discrimination against a qualified individual "on the basis of disability…." Again, the change is subtle but not without its point that individuals should not be defined by their disabilities. That evolution continues as the ADAAA still leaves some inconsistencies in terminology and in some sections the "individual with a disability" and "qualified individual with a disability" terminology was left in place. *See, e.g.*, 42 USC 12112(b)(5)(A-B).

The evolution of disability discrimination law was by no means complete with the passage of the ADAAA. The first substantive case decided by the Commission under the ADAAA, *Dania S. v. SSA*, 0120142114 (2016), wasn't issued until eight years after its passage. A rapidly expanding universe of medical research seems to change almost daily our understanding of a vast array of physical and mental conditions with improved chances of treating and, in some cases, curing what had previously been regarded as untreatable or incurable. As a result, lawyers,

judges, personnelists, human relations specialists, and EEO personnel must deal not only with a complex body of law and evolving social attitudes, but an ever-changing understanding of disabilities from the medical perspective.

Whatever can be said about disability discrimination law as it relates to employment, and much will be said in the pages that follow, it cannot be said that the subject matter is uncomplicated. Neither the Rehabilitation Act nor the ADA is a model of clarity. Who is entitled to reasonable accommodation? The answer is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 USC 12111(8). *See also* 42 USC 12102(1)(A) ("an individual with 'a physical or mental impairment that substantially limits one or more major life activities of such individual'"). There is a circular nature to the statutory language that uses the term "reasonable accommodation" to define who is entitled to "reasonable accommodation." Moreover, the statute provides that a qualified individual with a disability is entitled to reasonable accommodation, unless it would "impose an undue hardship on the employer." How can it be that a "reasonable" accommodation would impose an "undue hardship"? Wouldn't an accommodation that imposes an undue hardship be unreasonable? The language of the Rehabilitation Act and the ADA places the courts and the EEOC in the position of attempting to make sense of the legislation not by interpreting the plain meaning of the statutory language but by attempting to glean congressional intent from that language.

The fact that individuals with a disability are by no means a homogenous group adds an additional layer of complexity. Different individuals have different disabilities. Even individuals with the same disabilities suffer from different symptoms in terms of the nature, severity, and duration of those symptoms. As a result, one individual with a hearing impairment may not be an individual with a disability because the impairment does not rise to the level of substantially limiting the major life activity of hearing. Another individual with the same hearing impairment may be substantially limited in the major life activity of hearing because the effect of the impairment produces a more profound loss of hearing. The only way to determine if a particular person *is* an individual with a disability is to conduct an "individualized inquiry." The analysis becomes even more complex at the next stage of the inquiry where it must be determined if the individual with a disability is "qualified." In order to make that determination, the essential functions of the specific job the individual holds or desires must be considered. This, too, requires an "individualized inquiry" because it is entirely possible, if not likely, that an individual with a disability could perform the essential functions of one job but not another.

This book focuses on the Rehabilitation Act and the ADA as they apply to federal sector employment. It is not intended to champion the rights of individuals with disabilities, nor the rights of agencies as employers. It is an in-depth explanation

and exploration of federal sector employment disability discrimination law. As with the 1964 Civil Rights Act, the Rehabilitation Act and the ADA address more than employment discrimination. Other provisions in the acts cover topics such as public accommodations and architectural barriers in buildings financed with federal funds. These provisions are sometimes relevant to understanding the overall intent of Congress in passing the legislation and, to that extent, are occasionally referenced.

Primary responsibility for enforcement of the Rehabilitation Act and the applicable provisions of the ADA in the federal sector falls to the EEOC. Since federal employees and applicants for employment are required to exhaust their administrative remedies with their employing agencies and the EEOC, most of the emphasis in this book is on the Commission's view of disability discrimination law. However, complainants under the Rehabilitation Act have a right to trial *de novo* in U.S. district court, and because agencies have no appeal rights from Commission decisions in the federal sector, there is no direct review of the Commission's decisions by the federal courts. In essence, only the decisions of the U.S. Supreme Court are binding on the EEOC. Still, the federal appellate courts have much to say on disability discrimination and often issue private sector and federal sector decisions that conflict with the views of the Commission and, in some cases, even other federal appellate courts. Moreover, even though the Commission is not bound by the decisions of federal appellate courts, this is not to say that those decisions are not considered by the EEOC in developing its own views. Accordingly, relevant decisions of the federal appellate courts are discussed, not only because they may ultimately result in decisions by the Supreme Court that are binding on the Commission, but because they may be helpful to the reader confronted with persuading the EEOC that its view on a particular issue is in error. This latter point is significant because the law, in general, and disability discrimination law, in particular is in a constant state of flux as the Commission attempts to apply it to the unique circumstances of each case. Finally, the reader should not ignore the fact that the Commissioners change over time, as do presidential administrations. Each Commissioner brings his or her own experience and view of the law to the job, just as each President brings a new set of priorities in the enforcement of anti-discrimination laws. Any analytical approach to disability discrimination law that ignores the discordance between the EEOC and the federal courts for the sake of simplicity sacrifices a full understanding of the state of the law. Although simplicity has its virtues, the author has rejected that approach in favor of one that attempts to give the reader a more comprehensive view of the current state of the law, along with some insight as to where its future may lie.

This chapter is a comprehensive overview of the Rehabilitation Act, the ADA, and the ADAAA provisions applicable to federal employees. It includes a discussion of the relevant EEOC regulations and resources available to assist in

interpreting and applying the respective pieces of legislation. The courts and the Commission have often looked to the history of disability discrimination legislation in the federal sector to determine congressional intent. That is included as well. Finally, the chapter concludes with a suggested step-by-step analytical approach to disability discrimination cases.

I. THE REHABILITATION ACT

The Rehabilitation Act of 1973 was originally passed as Pub. L. No. 93–112, and the employment provisions were codified at 29 USC 791, *et seq*. [Reference Materials A]. The thrust of the Rehabilitation Act was to increase the employment of individuals with disabilities through the provision of vocational rehabilitation services that were to be largely implemented through the states. But, the Rehabilitation Act did include employment provisions that were applicable to the federal government and was unique as a federal antidiscrimination statute because it applied only to federal agencies and employers that received federal funding. With other antidiscrimination statutes, such as Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act, Congress made the statutes applicable to private sector employers first and later amended them to apply to the federal sector. *See* Pub. L. No. 92-261 (1972), amending Title VII to apply to the federal government and Pub. L. No. 93-259 (1973), amending ADEA to apply to the federal government. But from the outset, the Rehabilitation Act was intended to make the "Federal Government a model employer of handicapped individuals," *see* 29 CFR 1613.703 (1978), which now reads "model employer of individuals with disabilities," 29 CFR 1613.703(c) (2017).

The Rehabilitation Act strove to do more than prohibit discrimination against disabled persons. The Act was designed to promote the hiring, advancement, and proper placement of individuals with disabilities and it also required federal employers to "reasonably accommodate" those individuals when doing so would not impose an undue hardship on the employer.

For federal sector employment purposes, there are two relevant sections of the Rehabilitation Act:

- Section 501, codified at 29 USC 791 (prohibited discrimination against qualified individuals with disabilities); and
- Section 505, codified at 29 USC 794a (prescribing the remedies for disability discrimination).

A. SECTION 501—REHABILITATION ACT

Section 501 of the Rehabilitation Act had two distinct substantive requirements: it prohibits agencies from engaging in employment discrimination because of an individual's disability, and it also required agencies to develop and implement

affirmative action plans to promote the hiring, advancement, and placement of individuals with disabilities. Most disability discrimination cases involve the first requirement of the Rehabilitation Act, also known as the nonaffirmative action requirement.

1. Nonaffirmative Action Requirement

The Rehabilitation Act no longer contains any provisions that explicitly prohibit discrimination. Since its amendment in 1992, the Act, at 29 USC 791(f), incorporates sections of the ADA in cases involving nonaffirmative action employment discrimination:

> The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et seq*.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

The relevant sections of the ADA are codified at 42 USC 12111 *et seq.*, 42 USC 12201–204, and 42 USC 12210, which contains specific provisions relating to the illegal use of drugs. [Reference Materials B] These provisions are discussed below in the section on the ADA.

The nonaffirmative action provisions encompass four general theories of discrimination: (1) intentional discrimination; (2) disparate impact discrimination; (3) hostile environment discrimination; and (4) failure to provide reasonable accommodation. In addition, the Rehabilitation Act incorporates the ADA prohibition against retaliation for activity protected under the Act. 42 USC 12203. [These theories are discussed in Chapter 7.]

Because the Rehabilitation Act now incorporates many of the provisions of the ADA, the terms "Rehabilitation Act" and "ADA" are often used interchangeably. For those involved in federal sector employment discrimination cases, it is important to understand that from a purely technical perspective, those cases are governed by the Rehabilitation Act, but the specifics are enunciated in the ADA.

2. Affirmative Action Requirement

One of the primary distinguishing factors of disability discrimination law in the federal sector is the Rehabilitation Act's requirement that agencies develop plans for "affirmative action." The Act established an Interagency Committee on Employees who are Individuals with Disabilities. 29 USC 791(a). The purpose of that Committee is:

(1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section.

The Rehabilitation Act's provision for affirmative action is found in Section 501, and is set forth at 29 USC 791(b):

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

An agency's affirmative action plan is not subject to the provisions of the ADA.

The plan is required to be annually updated and reviewed and approved by the Commission. *Id*. The Commission itself is required to prepare an annual report to Congress on its own activities, as well as those of other federal agencies, in promoting job opportunities for individuals with disabilities. *See* 29 USC 791(d) [Reference Materials A].

3. Other Requirements

As noted above, Section 501 of the Rehabilitation Act establishes an Interagency Committee on Employees who are Individuals with Disabilities that requires several federal agencies to coordinate programs for disabled individuals and to carry out the provisions of the Act. In its current form, 29 USC 791(a) provides:

> There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities

(hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Disability Employment Partnership Board and the President's Committee for People with Intellectual Disabilities shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Although the EEOC was part of the Interagency Committee on Handicapped Employees when the Rehabilitation Act was enacted in 1973, enforcement powers under the Act were vested in the now defunct Civil Service Commission (CSC). Enforcement authority was transferred from the CSC to the EEOC under section 4 of Reorganization Plan No. 1 of 1978 and section 1-100 of Executive Order 12106 (Dec. 28, 1978).

Subsection (c) of Section 501 applies only to the states and requires the EEOC, in conjunction with the Interagency Committee, to develop recommendations for policies and procedures to facilitate the hiring, advancement, and placement of individuals with disabilities who participate in state vocational rehabilitation plans. Individuals who, as part of a state rehabilitation program, participate in programs offering unpaid work experience in federal agencies are not, by virtue of that participation, considered federal employees. 29 USC 791(e) [Reference Materials A].

Subsection (d) requires the Committee to prepare a report to appropriate congressional committees on the progress in hiring, placing and advancing individuals with disabilities and to make appropriate recommendations on the adequacy of those efforts. Finally, subsection (f) requires the Secretaries of Labor and Education to cooperate with the President's Committee on People with Disabilities and further provides that qualified individuals with disabilities are to be given special consideration in filling positions on the Committee.

4. Persons Covered

The Rehabilitation Act applied to "handicapped individuals" as defined by the Act. Through the 1992 amendments to the Act, the archaic "handicapped" language was dropped from the Rehabilitation Act in favor of the "disabilities" language of the ADA.

Previously, Section 7 of the Rehabilitation Act, codified at 29 USC 706(8)(B), provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

Enforcement power under the Act was vested in the former Civil Service Commission as was the authority to issue implementing regulations. The CSC implemented regulations defining a "handicapped person," which were carried forward in the Commission's regulations at 29 CFR 1613.702(a) (1978), when enforcement power was transferred to the EEOC as part of President Carter's Civil Service Reform Act of 1978. The regulations provided:

> "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

Although phrased somewhat differently, this provision used the same criteria for defining a disability as under the ADA. *See* 42 USC 12102(2) [Reference Materials B]. Subsequent to the 1992 amendments to the Rehabilitation Act, discussed below, 29 USC 705(20)(B) now provides that "the term 'individual with a disability' means…any person who has a disability as defined in section 12102 of Title 42."

However, the mere fact that someone is an individual with a disability does not entitle him or her to coverage under the nonaffirmative action provisions of Section 501. By incorporating the standards of the ADA, at 29 USC 791(g)