The Courts, the ADA, and the Academy

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> *Individuals with disabilities are a discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.*

The epigraph above is part of legislative findings of Congress when it enacted the Americans with Disabilities Act of 1990. These same words were cited in 1999 by Justice Ruth Ginsburg as the reason for her concurrence with the ruling of the Supreme Court in the case *Sutton v. United Air Lines*, which established an important precedent in limiting the individuals who qualify as being disabled under the ADA. In her words, "Congress' use of the phrase (*discrete and insular minority*) . . . is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class."

This decision by the Supreme Court to focus on the purpose of the ADA presaged a far more restrictive interpretation of the standard for disability applicable to the ADA that was delivered by the Court in 2002 in *Toyota v. Williams*. These two landmark rulings, amplified and interpreted by numerous subsequent decisions of the U.S. Courts of Appeals, have sharply narrowed the type of physical or mental impairment that qualifies for accommodation under the ADA. The consequences of these judicial decisions impact the academic freedom of every university faculty member when asked to provide modifications relating to academic procedures or to methods of evaluation for students based upon a claim of disability. Therefore it is important that all university personnel who participate in the accommodation process be aware of these recent changes in federal disability standards resulting from case law (judicial rulings that interpret existing statutes).

The Legal Framework

The protection of federal law for qualified students with disabilities was first provided by Section 504 of the Rehabilitation Act of 1973, applicable to institutions that receive federal funds. This protection was later extended to cover all educational institutions by Title II and Title III of the Americans with Disabilities Act of 1990. These acts require universities to make reasonable and

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necessary modifications to rules, policies, or practices in order to prevent discrimination against qualified students based upon disability. In short, universities must ensure that disabled students have full access to the services, programs, and activities available to non-disabled students on their campuses.

The most complex issue in applying disability law on university campuses is determining who qualifies as a person with a disability. Both Section 504 and the ADA define a disability as a physical or mental impairment that "substantially limits a major life activity." Major life activities have been defined by federal regulations or interpreted by federal courts to include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and reading. In a decision of 1999 by the Tenth Circuit of the U.S. Court of Appeals in *Pack v. Kmart*, the court described a major life activity as "a basic activity that the average person in the general population can perform with little or no difficulty."

In 1999, the Supreme Court in *Sutton v. United Air Lines* limited the definition of disability by excluding those impairments that can be corrected or controlled by medication or by other mitigating measures. The specific issue before the Court in this case involved a claim of disability in seeing by two severely myopic twin sisters whose visual impairment was corrected by using appropriate optometric lenses. In rejecting this claim of disability, the Court held that "a disability under the Act is to be determined with reference to corrective measures." It further noted that "a disability exists only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken." The Court also made it clear that this ruling was not limited to those with visual impairments but was instead applicable to all individuals who rely on daily medication or other remedies for their well-being. When the Court of Appeals for the Eighth Circuit applied this restrictive standard of disability in 2002 in *Orr v. Wal-Mart Stores*, it stated that "To hold otherwise could expand the ADA to recognize almost every working American as disabled to some degree."

The Supreme Court subsequently clarified the meaning of the phrase "substantially limits a major life activity" in 2002 in *Toyota v. Williams*, where it ruled that these terms "need to be interpreted strictly to create a demanding standard for qualifying as disabled." In this case it held that the litigant, Ella Williams, was not disabled in the major life activity of performing manual tasks despite severe neuromuscular impairments that rendered her, in the opinion of her treating physicians, unable to perform manual work of any kind at a Toyota manufacturing facility. The Court ruled in a unanimous decision that a disability under the ADA must "prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives." It regarded such activities as "household chores, bathing, and brushing one's teeth" as being indicative of the types of manual tasks that are "of central importance to most people's daily lives."

Since Williams was still able, despite her impairments, to perform these routine manual activities, the Court held in this landmark ruling that her impairments, although considerably limiting, were not "substantially limiting" and therefore did not constitute a disability within the meaning of the ADA. She was therefore not eligible to receive accommodations from her employer under the provisions of the ADA.

The Supreme Court made it clear in its analysis of the Toyota case that the demanding standard it established for a disability in performing manual tasks is applicable to determining a disability in every major life activity. It also asserted that only the federal courts have the authority to interpret the meaning of the term "disability" as used in the ADA. Both the U.S. district courts and the courts of appeals promptly began incorporating this ruling as precedent in ADA cases unrelated to a disability in the specific life activity of performing manual tasks. In 2003, the Eighth Circuit wrote in *Fenney v. Dakota,* "These terms (used in the Toyota case) are not just ones involved in the major life activity of performing manual tasks, but are ones which are necessary in every determination (of disability)." A few months after the decision in the Toyota case was announced in 2002, the Sixth Circuit of the U.S. Court of Appeals in *Mahon v. Crowell* cited the Supreme Court rulings in the Toyota case as well as in the earlier Sutton case as "decisions sharply limiting the reach of the ADA."

The Supreme Court also stated in the Toyota case that the standard for disability in the context of employment (covered by Title I of the ADA) applies to all the other contexts in which a disability could be claimed, including educational services (covered by Titles II and III of the ADA). The U.S. Department of Education has acknowledged that the precedent set in the Toyota case is binding on educational institutions when they implement either Section 504 of the Rehabilitation Act of 1973 or the ADA to provide disability accommodations for their students.

University faculty and administrators should take special note of the 2004 ruling of the Ninth Circuit of the U.S. Court of Appeals in *Wong v. Regents of the University of California.* This court applied the Toyota standard to determine whether a learning disability as diagnosed by a clinical professional met the demanding legal standard for a disability within the meaning of the ADA. In rejecting the disability claim of plaintiff Andrew H.K. Wong, the court ruled that the clinical diagnosis of his disability failed to establish that "his impairment substantially limits his ability to learn as a whole, for purposes of daily living, as compared to most people." The court also rejected as a matter of law the clinical diagnosis of a reading disability, noting that "Wong has not established that he was unable to read newspapers, government forms, street signs, or the like." It further noted that he failed to prove that "he was substantially limited in his ability to read for purposes of daily living, or as compared to what is important in the daily life of most people. That is the appropriate standard."

This ruling makes clear that the federal courts, pursuant to the 2002 decision in the Toyota case, are now limiting accommodations under the ADA to only those individuals with impairments that severely restrict them from performing the common, everyday activities of major importance to the average person. This demanding threshold for qualifying as disabled poses a particular challenge for a college student who seeks to establish a claim for having a learning or cognitive disability as defined by the ADA, because the learning activities of a university student are not those performed by the average person in the general population in daily life. This is the appropriate reference group to which the college student's learning abilities must be compared when invoking the protection of the ADA.

Documentation of a Student's Disability

In order for a college student to validate the eligibility for disability accommodations in the classroom (formally called academic adjustments) under either Section 504 or the ADA, this student typically must first submit a medical or clinical evaluation of his/her impairment to the disability services office at the university. It then becomes the responsibility of this office or of other relevant university officials to determine whether the documentation submitted by the student justifies the student's claim of a disability. If this requirement is met, then university officials must decide what academic adjustments are appropriate, based upon the functional aspects of the confirmed disability.

Many entering freshmen applying for ADA accommodations at a university may have been previously classified as LD (learning disabled) in their elementary or secondary schools under the Individuals with Disabilities Education Act of 1975 (IDEA). This Act applies to "children with disabilities" enrolled in the public schools and does not apply to postsecondary institutions. Furthermore, this Act defines a learning disability merely as a disorder in the basic psychological processes involved in understanding "that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." Thus the prior determination of a learning disability under the broadly inclusive standards of IDEA is in no way sufficient to warrant a similar classification under the demanding standards of the ADA. As the Fourth Circuit of the U.S. Court of Appeals noted in *Betts v. The Rector and Visitors of the University of Virginia* in 1999, "Indeed, many specific (clinically diagnosed) learning disabilities are impairments, rather than actual disabilities, under the ADA."

The threshold issue in a diagnosis of a learning disability within the meaning of the ADA is first to confirm that the student with an impairment is significantly restricted in the ability to learn in comparison to the average person in the general population. The tests used to diagnose learning disabilities in children, however, are not normed to "most people in the general population." According to the U.S. District Court for the Southern District of New

York in *Bartlett v. New York State Board of Law Examiners* in 2001, "Tests like the DRT (Diagnostic Reading Test) and Woodcock (Reading Mastery Test) are developed to assist with the diagnosis of learning disabilities, particularly in children having problems in school. They are diagnostic tools. They are not ADA and (Section 504) Rehabilitation Act tests." While the results of such tests may be used to document a learning disability under IDEA, they are not valid in establishing a disability under the ADA.

The most common learning disability, recognized by both IDEA and the ADA, is dyslexia. This condition, found in about 80 percent of people with a learning disorder, impairs a person's ability to process or break down written words into their basic linguistic components. Under IDEA, the clinical diagnosis of this impairment is sufficient evidence to establish that the student is eligible for adjustments in his educational program. However, under the ADA, the student diagnosed with dyslexia must provide clinical evidence that his condition severely limits him in the learning activities of daily living, and not just in the classroom, in order to qualify for accommodations. Under IDEA, the clinical diagnosis of attention deficit disorder (ADD) or of attention deficit hyperactivity disorder (ADHD), along with a certification that the condition "adversely affects a child's educational performance," are sufficient to warrant academic adjustments. However, under the ADA, the student diagnosed with such an impairment must first provide a comprehensive neurological and psychometric assessment verifying that, despite the mitigating effects of medication, his learning ability is below average. He must also confirm that he "could not learn during the activities of everyday life," according to the First Circuit of the U.S. Court of Appeals in *Calef v. The Gillette Company*, 2003.

A further sharp distinction between the standards for disability in IDEA and those in the ADA relates to psychological impairments that pose difficulties in spelling or in performing mathematical calculations. Such impairments are recognized as specific learning disabilities and qualify for adjustments under IDEA. Under the ADA, however, these difficulties, while troublesome, are not recognized as a disability unless they substantially limit learning as a whole. "Weakness in a particular subject matter... does not constitute a disability (under the ADA)" according to the U.S. District Court for Massachusetts in *Baer v. National Board of Medical Examiners*, 2005.

Several other important issues arise when university officials consider a student's request for disability accommodations. First of all, most medical/clinical professionals who provide the documentation and evaluation of a student's impairment are limited by their training and expertise to offering a diagnosis based upon accepted clinical standards used for diagnostic purposes in their profession. They can also authoritatively attest to the impact that this impairment may have on the life activities of the student. It is unrealistic, however, to expect such a professional to have the legal expertise necessary to decide whether the student's impairment meets the threshold for a disability

under the ADA as established by recent decisions in our federal courts. The First Circuit of the U.S. Court of Appeals in *Calef v. The Gillette Company*, 2003, when presented with a medical certification of a disability, observed that "Nonetheless, the Supreme Court has recently required more analysis than a doctor's conclusory opinion" in order to validate a claim of disability.

Federal judges, beginning with the Sutton decision in 1999, have routinely rejected the validity of a clinical finding of disability and have concluded that the impairment, although properly diagnosed and assessed, is not "substantially limiting" as required by law. Thus university officials making accommodation decisions must be adequately trained in the law, and especially in recent case law relating to disability standards, in order accurately to apply the ADA.

Even if the appropriate decision to classify a student as being disabled has been made, the relevant university officials must be knowledgeable in case law when deciding upon appropriate accommodations for the disabled student. The federal courts, in addition to limiting the definition of disability in Section 504 and in the ADA, have also issued many rulings that pare back the legal obligation of universities to provide accommodations for students having legally recognizable disabilities. The first such case decided by the Supreme Court was *Southeastern Community College v. Davis* in 1979, in which the Court held that a university is not required "to undertake affirmative action" by eliminating a legitimate program requirement that a disabled student is unable to meet. The Court ruled that "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."

The above decision was applied in 1988 by the U.S. Court of Appeals for the Sixth Circuit in *Doherty v. Southern College of Optometry*. This court concluded that, "An educational institution is not required to accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of study." Further judicial interpretations limiting the obligation of a university to provide accommodations are found in the more recent decisions of the Eighth Circuit in *Amir v. St. Louis University*, 1999, and in *Stern v. University of Osteopathic Medicine and Health Services*, 2000. These courts held that accommodations can be denied if they are not directly related to the functional aspects of the disability or if they would simply make a course exam easier for a student with a disability. An understanding of such decisions is needed by university personnel when determining what accommodations are legally mandated by the ADA.

Faculty Participation in the Accommodation Decision

It is a common practice at many universities for the disability services office or other designated university officials to make the decisions regarding appropriate accommodations without first consulting the faculty member who is responsible for providing these accommodations in the classroom. The fac-

ulty member is then notified by the university about these appropriate accommodations authorized for a student enrolled in his/her class and can choose simply to acquiesce in this decision, thereby relying solely on the judgment of others in this matter. However, since the faculty member charged with providing such accommodations is often called upon to offer preferential treatment in testing or evaluating the disabled student's performance that is not available to the other students in this class, the professor may feel a professional obligation to investigate the need for such academic adjustments. Such an investigation is particularly warranted to ensure that the recent judicial restrictions on the applicability of the ADA have been properly incorporated into the accommodation decision.

The professor who chooses to make an independent inquiry into the appropriateness of the accommodations authorized by the university must have access to the medical/clinical documentation of disability that the student has provided to the university, since this information is the basis for determining eligibility for accommodations under the ADA. The confidentiality of this information is therefore an important issue in the accommodation process.

Neither Section 504 nor the ADA contains any applicable provisions regarding confidentiality, according to the Program Legal Group of the U.S. Department of Education's Office for Civil Rights. This is the federal agency that enforces both Section 504 and Title II of the ADA on university campuses. The privacy of this medical or clinical documentation of a student's disability is protected, however, by the Family Educational Rights and Privacy Act (FERPA), and FERPA is the controlling federal law regarding the disclosure of such information. This law is enforced by the U.S. Department of Education's Family Policy Compliance Office. According to the director of this office, such documentation is considered by law to be part of a student's education records. Furthermore, FERPA permits a university to share such information with a faculty member who has been asked to provide accommodations for a student, in order to assist the faculty member in determining what academic modifications are appropriate for the student.

A further clarification of federal law as it applies to the disclosure of such medical/clinical documentation of a student's disability can be found at www.ed.gov/policy/gen/guid/fpco/ferpa/library/copeuna.html. This Web site is provided by the U.S. Department of Education to offer technical assistance to educational institutions in matters relating to the proper implementation of FERPA.

It is important to note that while FERPA permits a university to disclose such information about a student's disability to a faculty member, it does not compel the university to do so. Therefore, a university which adopts a policy that prohibits the disclosure of such information to a faculty member does not violate FERPA. However, universities routinely acknowledge that the freedom of inquiry is a cornerstone of academic freedom and guarantee this right to

faculty in their faculty handbooks. In addition, universities typically have policies that allow a faculty member who has received an accommodation request to appeal the appropriateness of this request to designated university officials. Thus a university which adopts a policy that prohibits faculty members from reviewing clinical documentation in which they have a legitimate educational interest would find it difficult to defend such a policy on legal or contractual grounds.

The Disability Services Office as an Advocate for the Student

The goal of the disability services office at a university, and of all university officials who are involved in the accommodation process, should be to ensure that federal disability law is properly applied in order to prevent discrimination against students on the basis of disability. There is evidence to suggest, however, that on some university campuses the disability services office seeks instead to be an advocate for students with impairments and chooses to ignore the standards imposed in disability law. Some illustrations where the disability services office at one university recently certified students as having a "legitimate, documented disability" under the ADA and directed faculty to provide the indicated accommodations in accordance with the ADA include

- Waiving the class attendance policy for a student recovering from a hospital stay. (The ADA regulations exclude impairments that are not permanent or long term. A temporary impairment may be disabling, but it is not considered to be a disability under the ADA.)
- Doubling the allotted time in taking tests for a student with asthma. (The student's asthma was controlled by medication, and the Supreme Court in *Sutton* held that mitigating measures must be taken into account when deciding whether a person has a disability.)
- Allowing a student with a learning disability who is majoring in elementary education to use a calculator when performing arithmetic in a course designed to prepare college students to teach arithmetic in elementary school. (The ADA regulations exclude from reasonable accommodations a waiver of course requirements that are essential to the program of instruction being pursued by the student. See also the decision in *Doherty v. Southern College of Optometry.*)
- Giving a student twice as many exams as the other students in the same class, each covering half the material of the usual exams, because of a memory impairment resulting from a fall. (There was no medical documentation of the severity of the impairment or whether the impairment was permanent or long term.)
- Providing a separate biology lab with individualized, one-on-one instruction, for a student with a learning disability. (Services of a personal nature, such as close, individual attention are not considered reasonable accommodations according to the Supreme Court in *Southeastern Community College v. Davis.*)

The above accommodations authorized by the disability services office were motivated by a genuine desire by this office to help students with impairments overcome their academic difficulties. However, these directives in the name of

the ADA are misrepresentations of this statute and are without legal support. Such actions fully justify the need for closer scrutiny by faculty of accommodation decisions by university administrators that purport to be in accordance with the ADA.

Federal Law Applicable to Unwarranted Accommodation

What recourse is available from federal law to faculty members who are subjected to directives from a university office to provide students with accommodations that are not warranted? It is important to note that neither Section 504 nor the ADA contains any provisions which prohibit an institution from giving accommodations to students who fail to qualify as being disabled. These federal laws against discrimination are violated only when a student with a disability is discriminated against because of this disability. Therefore, the U.S. Department of Education's Office for Civil Rights, the agency that enforces federal disability law at public universities, lacks jurisdiction to pursue this issue of unwarranted accommodations.

So what about the role of the federal courts in this matter? These courts respond to complaints about alleged discrimination from a person claiming to have a disability and determine whether the complaining party has been subjected to an action that violates either Section 504 or the ADA. In all of the court cases cited in this article, the courts ruled that there was no such violation of federal law, because either the complaining party was not disabled as a matter of law or the action taken against the disabled complaining party by the defendant was allowed under federal law. So once again, the federal courts lack jurisdiction over a case alleging unwarranted accommodations, since such action is not prohibited by federal law.

Federal courts have issued several opinions, however, that individuals who fail to have an impairment that "substantially limits a major life activity" but who may be perceived erroneously by others as having such an impairment are not entitled to receive accommodations under either section 504 or the ADA. In *Taylor v. Pathmark Stores*, 1999, the Third Circuit noted that, "It seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to an accommodation." The same year, the Eighth Circuit in *Weber v. Strippit* held that impaired persons who are mistakenly regarded as having a disability are not entitled to receive reasonable accommodations. In this ruling the court stated that "The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations." In a 2002 case involving a college student erroneously classified by a university's disability services office as having a learning disability, the U.S. District Court for the Western District of Virginia

in *Betts v. Rector and Visitors of the University of Virginia* decided that this student was not entitled to any accommodations. A similar ruling was issued in 2004 by the Ninth Circuit in *Wong v. Regents of the University of California.*

Among the various Circuits of the U.S. Courts of Appeals there is disagreement, however, on the issue of whether a perceived disability, as opposed to an actual disability, warrants accommodations by an employer. Decisions of the Fifth, Sixth, Eighth, and Ninth Circuits have held that the ADA does not mandate accommodations in the workplace for individuals with impairments that are mistakenly regarded by their employers as substantially limiting a major life activity. In contrast, more recent decisions of the Third, Tenth, and Eleventh Circuits have held that the ADA does require reasonable accommodations for such individuals, in order to protect them from adverse employment actions (in particular, job termination) based upon a misperception of the limitations in the workplace imposed by their impairments. Despite this divergence of opinion, all Circuits are in agreement that the "regarded as" criterion for disability is narrowly defined, both by statute and by case law. For example, the Second Circuit stated in *Capobianco v. City of New York* in 2004, "It is not enough that the employer perceive the employee as *somehow disabled*; the employer must regard the employee as *disabled within the meaning of the ADA*" in order for the employee to warrant the protection of federal disability law. In the academic context, the Fourth Circuit similarly held in *Davis v. University of North Carolina* in 2001 that the perception by university officials that a student was "*in a general sense* disabled by her disorder" does not demonstrate that the university regarded this student as being substantially limited and therefore disabled under the ADA. Thus our federal courts expect the individuals responsible for making appropriate accommodation decisions to be guided by the legal standards for disability, including those that have been established by recent court cases.

So, in the absence of a federal law prohibiting unwarranted accommodations, what options are available to a professor who finds that a university disability services office has authorized accommodations for a student that are not actually supported by the ADA? The professor, for example, may be legitimately concerned that providing accommodations such as extra time for taking tests to a student without a disability is unfair to the other students in the class who are not afforded this opportunity. In this event, the professor should first appeal such an accommodation decision by requesting a formal review through the established administrative process commonly available at universities. If university officials who conduct this review are familiar with the recent decisions of federal courts that impose a demanding standard for qualifying as disabled, they are likely to rescind the inappropriate action of the disability services office. Unfortunately, on some university campuses these officials may lack the legal expertise needed to make a valid assessment of a claim of disability and may simply defer to the judgment of the disability services office.

If the professor is unsuccessful in resolving his disagreement with the disability services office through the established university channel for addressing ADA appeals, he may find that the grievance procedures outlined in the faculty handbook of the university provide an appropriate opportunity for redress. Such faculty handbooks typically include a statement on professional ethics that requires faculty to ensure that their evaluations of students reflect each student's true merit. These professional ethics also prohibit faculty from engaging in discriminatory treatment of students. Both of these issues arise when a faculty member is directed to provide a student with preferential treatment in testing that is alleged to be mandated by the ADA but which cannot be justified by federal law. Faculty members who are appointed to investigate a grievance filed against the disability services office and to weigh evidence in a formal hearing should be acutely aware of their professional responsibility to ensure a level playing field for all students in a class. Presumably, they would be conscientious in determining whether the accommodation decision is in accordance with the recent rulings of federal courts.

Finally, a professor who suspects that his/her university is not applying the ADA appropriately may choose to express these concerns to the faculty senate of the university and to request an investigation of university accommodation practices. If the professor can offer evidence such as case law to demonstrate that specific decisions of the disability services office are not consistent with the current legal standards for disability, the faculty senate may choose to seek the expertise of an outside counsel who specializes in disability law for employers. An open exchange of information about the ADA between the legal expert and the faculty and administrators may lead to major revisions in the ADA policies of the university. At some campuses, for example, a committee of properly trained faculty members has been assigned the responsibility of making accommodation decisions in order to decentralize the process and to provide more oversight and transparency.

Professors are expected to exercise due diligence in ensuring that information they communicate in the classroom to their students has been thoroughly examined and scrutinized for accuracy. When they participate in policymaking decisions on campus, they are similarly expected to base their conclusions and recommendations on a careful consideration of all relevant information. This professional responsibility to base their opinions and actions on a critical assessment of the facts should extend to the decision of providing appropriate accommodations to their students. Professors who seek more information about federal disability law can access the complete text of many ADA or Section 504 court cases at www.findlaw.com/casecode or at www.nls.org. University libraries may also provide access to a database of law through a commercial subscription service.