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**The New Disability Law**

**and Policy Framework:**

**Implications for Case Managers**

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**Chapter Highlights**

- **Evolving national employment policy**
- **ADA law and policy overview**
- **Applicability of the ADA**
- **Conclusion**

Understanding the history of disability law and policy and its evolution toward a new framework are important for case managers. This knowledge will help case managers effectively implement the goals of the framework and obtain best outcomes for their clients, agencies, and communities at large. Case managers will be equipped to participate in the dialogue about the future direction of disability policy at local, state, and federal levels.

In the past fifteen years, disability laws and policies have attracted widespread attention from policymakers, courts, legal academics, rehabilitation professionals, researchers, employers, and disability advocates (Blanck, 1997; Blanck, Hill, Siegal & Waterstone, 2003; Blanck & Marti, 1997). Since its passage in 1990, the Americans with Disabilities Act (ADA, 2000) has become America's prominent national policy statement affecting the lives of persons with disabilities. Despite the far-reaching implications of the ADA and related policy developments, analysis of the new disability rights-based approach, and its effects on persons with disabilities and their service providers, has been limited (Blanck & Scharz, 2001).

To a remarkable degree, many contemporary employment, health care, and governmental and rehabilitation programs for persons with disabilities are modeled on outmoded and medicalized stereotypes about disabilities. These longstanding views date as far back as the Civil War pension system, which first linked the definition of disability to an inability to work and established physicians and bureaucrats as the gatekeepers of disability benefits (Blanck, 2001; Blanck & Millender, 2000; Blanck & Song, 2001; 2001/2002; 2003).

The medical model of disability focused on the individual, whose condition was seen as an infirmity that precluded participation in society. The medical model never considered the effects of the physical and social environment in which people with disabilities were forced to function. Instead, it countenanced the segregation and economic marginalization of individuals with disabilities (Drimmer, 1993; Hahn, 2000; Milani, 1999). Because the medical model aimed to address the needs of people with disabilities rather than recognize their rights, it led to government policies that viewed assistance for people with disabilities as a form of either charity or welfare.

Disability laws and policies have undergone a dramatic shift from a model of charity and compensation, to medical oversight, and then to civil rights (Blanck, 2000; Blanck & Millender, 2000). Contemporary employment policies and laws are focused on increasing the labor force participation of qualified persons with disabilities and reducing their dependence on government entitlement programs. Federal laws, such as the Workforce Investment Act of 1998 (WIA), the Rehabilitation Act of 1973 as reauthorized in WIA, the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA), and the Americans with Disabilities Act of 1990 (ADA), illustrate public support for enhancing employment opportunities for working age adults with disabilities

and preventing discrimination in the workplace (Blanck, 2000; Blanck et al., 2003).

This chapter describes the new disability law and policy framework as it impacts labor force strategies and employment opportunities for the emerging workforce of persons with disabilities. The disability framework affects employers and employees, the systems within which employers and employees work, and the rehabilitation professionals who work with them to navigate the systems.

The first part of the chapter highlights the evolution of national employment policy toward persons with disabilities to a civil rights perspective. The second part examines contemporary efforts toward a national employment policy, including legislation, litigation, and relevant policymaking. The third part identifies future challenges and approaches to employment policy initiatives.

### **EVOLVING NATIONAL EMPLOYMENT POLICY FOR INDIVIDUALS WITH DISABILITIES**

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The Social Security Disability Insurance (SSDI) program defines disability as an inability to engage in “substantial gainful activity” and requires a medical assessment of the disabling condition (Stone, 1984). The Rehabilitation Act of 1973 is also grounded in a medical approach to disability, promoting the conception of individuals with disabilities as impaired and needing to be cured through rehabilitation (Blanck & Millender, 2000).

By contrast, the disability rights model that first began to influence government policy in the 1970s conceptualized the disabled as a minority group entitled to the same legal protections for equality that emerged from the struggles of African Americans and women (Blanck & Millender, 2000). The rights model focuses on the environment that subordinates disabled persons and insists that government eliminate the legal, physical, economic, and social barriers to secure full involvement in society for persons with disabilities (Seelman, 2000; Scotch & Schriener, 1997).

Although, until recently, national employment policy conceptualized disability from a medical perspective, people with disabilities as individuals and in organized groups began to challenge these stereotypes. For instance, many applicants rejected for social security benefits in the 1950s appealed those decisions and hired lawyers to represent them in the appeals process (Berkowitz, 1987). Many applicants whose appeals were rejected sought redress in federal court. Federal courts often accepted expanded definitions of eligibility, including ruling in favor of applicants for SSDI who were capable of working but were unable to obtain jobs (Liebman, 1976).

Beginning in the 1970s, disabled individuals asserted their right to be independent in pursuing education and housing. A group of students with disabilities challenged the policies at the University of California at Berkeley (Shapiro, 1993). In New York, an advocacy group for the rights of disabled individuals was formed in 1971, called Disabled in Action (National Council on Disability, 1996).

During this period, concepts from the independent living philosophy were integrated into the national disability policy. Title VII of the Rehabilitation Act initiated funding for independent living services or Centers for Independent Living (CILs). Not only did the CILs provide services for individuals with disabilities, but also, they were to be operated by individuals with disabilities (ILRU, 2004; National Council on Disability, 1996).

The evolving policy of inclusion fostered federal and state laws from accessibility in voting and air travel, to independence in education and housing (National Council on Disability, 1996), culminating with passage of the ADA in 1990, and later supplemented by other disability-related legislation and generic legislation, which incorporates disability-related provisions.

In the ADA, Congress expressly recognized the minority status of disabled persons, finding that:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; . . . (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . (ADA, 42 U.S.C. § 12101(a) (2000)).

#### **CONTEMPORARY EFFORTS TOWARD A NATIONAL EMPLOYMENT POLICY**

The ADA (2000) articulates the nation's goals for assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities (§ 12101(a)(8)). Although the ADA was to remove discriminatory barriers facing individuals with disabilities, prominent barriers remain in federal and state government programs, including economic disincentives to work, reflected in the SSDI and SSI programs, and typically manifested by a lack of adequate and affordable health insurance for the working disabled (e.g., Blanck, Sandler, Schmeling, & Scharz, 2000; Brooks & Klosinski, 1999; Stapleton & Tucker, 2000).

Recent national policy initiatives have been aimed at diminishing the economic barriers to work for disabled persons who want to work and who are

capable of working (Jensen & Silverstein, 2000; Silverstein, 2000). TWWIIA, for instance, expands the availability of health care coverage for individuals with disabilities in several ways. First, states may allow disabled people with incomes over 250% of poverty level to “buy into” Medicaid health insurance programs if they are otherwise eligible for SSI. Individuals whose medical conditions have improved, making them ineligible for SSI or SSDI, may buy into Medicaid if they continue to have a severe determinable impairment. Under TWWIIA, Medicaid premiums and other cost shares are determined on a sliding scale. For those persons with incomes between 250% and 450% of poverty level, premiums may not exceed 7.5% of their income. As of February 2004, twenty-eight states have implemented and five more have authorized Medicaid Buy-In programs (Jensen, 2004).

TWWIIA extends Medicare coverage for people returning to work from SSDI to 8.5 years without payment of a Medicare Part A premium. After 8.5 years, four and one half years longer than previous eligibility, the individual may continue to receive Medicare by paying the premiums for both Part A and Part B. The changes in health insurance options are meant to stimulate SSDI beneficiaries to return to work (e.g., after being injured on the job) without risking the loss of health insurance coverage by retaining Medicare coverage (Blanck, Hill, Siegal & Waterstone, 2003).

TWWIIA and WIA were designed to reduce work disincentives that historically have limited employment options for disabled persons. TWWIIA allows for an expedited reinstatement of benefits for SSDI recipients whose benefits were terminated because of increased earnings from work and who are unable to work because of a disability. The beneficiary may receive SSDI for up to six months during the period that the Social Security Administration is considering the reapplication.

TWWIIA establishes the Ticket to Work and Self-Sufficiency Program (the Ticket Program). SSI and SSDI recipients use a “ticket” to obtain employment services from employment networks. The goal of the Ticket Program is to give beneficiaries choice and control over their employment services and to foster competition and innovation among employment service providers (Virginia Commonwealth University RRTC, 2000). As of March 2004, a total of 6,947,228 tickets had been issued to SSI and SSDI recipients. Of those, 3,936 have been placed with employment networks (Social Security Administration, 2004). A total of 1,077 employment networks had been established at that time (Social Security Administration).

WIA establishes “one stop” employment and job training centers that provide accessible services to all individuals, including those with disabilities. WIA provides that recipients of SSI and SSDI are automatically eligible for Vocational Rehabilitation Services (Seelman, 2000). WIA mandates that partners work together in the workforce system, including welfare-to-work

programs, and provides for optional partners such as the Temporary Assistance to Needy Families (TANF) program. Section 188 of WIA requires nondiscrimination on the basis of disability, supplementing obligations under the ADA (Silverstein, 2004).

The new employment policy framework reflects a significant change in acknowledging the rights of qualified individuals with disabilities to work (Seelman, 2000). The approach is in contrast to the medical model of disability that dominated American federal policy for most of the twenty-first century (Blanck & Millender, 2000).

### **THE NEW DISABILITY LAW AND POLICY FRAMEWORK**

Disability policy guides practice and practice informs policy. It is important, therefore, for rehabilitation professionals and case managers to understand and apply policy, as well as to promote policy change when necessary. Advocacy for policy change has many sources, including CILs, people with disabilities, case managers, legislators, and other stakeholders.

Impetus for policy change often comes from the field and people working within the system who have first-hand knowledge of flaws or solutions. Effective integration of the state vocational rehabilitation systems with Medicaid, Medicare, TANF, Welfare to Work, Unemployment Insurance, Mental Health, and other service delivery systems is a goal of WIA. Not all of these systems, however, are designed in accordance with the needs of people with disabilities.

President George W. Bush, during his first month in office in 2001, announced the “New Freedom Initiative” (NFI) stating “Americans with disabilities should have every freedom to pursue careers, integrate into the workforce, and participate as full members in the economic marketplace” (White House, n.d.). The purpose of the NFI is to remove barriers to the workplace and promote access and integration. NFI proposes increasing access to assistive and universally designed technologies; expanding educational opportunities for Americans with disabilities; and promoting full access to community life.

Despite the new approach toward a national disability employment policy of inclusion, millions of disabled individuals who are capable of working remain unemployed or underemployed (e.g., National Organization on Disability, 2000; Schwochau & Blanck, 2000). Individuals with disabilities may be less prepared for competitive employment in the future (Seelman, 2000; U.S. Census Bureau, 2003).

Not all of the available information paints a dismal picture for individuals with disabilities. Kaye (1998) reports increases in employment among people aged 21–64 with severe functional limitations (i.e., a smaller group of individuals compared to those with severe disabilities) from almost 28% in

1991–1992 to 32% in 1994–1995. Kruse and Schur (2003) find that from 1990 to 1994, employment trends of disabled persons after the ADA differ depending on the disability category: employment rates declined among those reporting work disabilities, but improved among those reporting severe functional limitations without a work disability.

An analysis of SIPP information (McNeil, 2000) from 1994 to 1997 for persons with non-severe disabilities finds that employment rates increased from 77% to 81%. Although during 1994 to 1997 employment rates for those with severe disabilities declined from 34% to 29%, overall employment rates for younger individuals with severe disabilities were higher in 1997 compared to 1991.

Other evidence suggests that disabled individuals have been attaining higher levels of education over time. The 1998 N.O.D. / Harris Survey reported that 20% of disabled individuals responded they had not completed high school, compared to 39% in 1986 (Taylor, 1998). Education is the foundation for transition to higher education or work. New initiatives from SSA, such as the Youth Transition Process Demonstration, will assist youth with disabilities to maximize their economic self-sufficiency as they transition from school to work. Focused on people with disabilities from ages 14 to 25 who either receive SSI, SSDI, or Childhood Disability Benefits (CDB) or youth who could receive these benefits, the Youth Demonstration is intended to promote collaboration among state, local, and federal agencies for transition services and supports. WIA implements youth services in the One-Stop intended to improve employment and education for youth with disabilities. The U.S. Department of Labor funds a national center on youth with disabilities to provide technical assistance in this area (National Collaborative on Workforce and Disability / Youth, 2004).

## **CHALLENGES AND OPPORTUNITIES**

A cardinal question remains: how will policymakers, researchers, rehabilitation professionals, and people with disabilities assess the effectiveness of the new national disability policy? The ADA attempts to define these goals “to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals [with disabilities]” (ADA, 42 U.S.C. § 12101(a)(8) (2000)). Title IV of WIA amended the Rehabilitation Act of 1973 to reiterate the national employment goals of “empower[ing] individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society” (Rehabilitation Act, 29 U.S.C. 701(b)(1) (2000)).

These national initiatives conceive employment as part of a broader concept of civil rights. Implementation and evaluation of these initiatives, therefore, must reflect and assess not only trends in labor market activity, but

also advancements in self-sufficiency, independence, inclusion and integration (Blanck & Schartz, 2001). Rehabilitation professionals must understand the current research and apply the results of research to the practice of rehabilitation and case management.

States with progressive rehabilitation professionals may integrate new policy into practice to take advantage of granting opportunities from the various federal initiatives, and importantly, to comply with the requirements of new legislation and policy. More critical, though, is that the federal agencies responsible for new initiatives are increasingly turning to demonstration programs to field new programs and service delivery options.

These demonstration programs are evaluated for effectiveness, and then agencies use best practices from the field and replicate them nationwide in an effort to increase the integration and self-sufficiency of people with disabilities. There are several examples of new funding opportunities with which rehabilitation professionals must be familiar, such as Work Incentive Grants, Medicaid Infrastructure Grants, Customized Employment Grants, and Disability Program Navigator. These demonstration programs and grants have the potential to impact practice in their respective states (see Law, Health Policy & Disability Center, 2003, for an extensive listing for many states). Each may generate new knowledge and practice that may be replicated.

The WIA final regulations provide principles relevant to such projects: “The success of the workforce investment system is dependent on the development of true partnerships and honest collaboration at all levels among all stakeholders” and “the underlying notion of One-Stop is the coordination of programs, services, and governance structures so the customer has access to a seamless system of workforce investment services” (65 Fed. Reg. 49295). Rehabilitation and workforce professionals are at the core of both.

### **INTEGRATING DISABILITY LAW AND POLICY**

Employment inclusion and integration require access to a range of workplace and non-workplace activities. Traditional economic outcomes need to be augmented by examining a range of employment opportunities, including self-employment, entrepreneurial activities and temporary employment. A preliminary study of Iowa’s Entrepreneurs with Disabilities (EWD) program describes how participants with disabilities progress through the program of technical and financial assistance, business development grants to establish or expand small-businesses with the goal of becoming self-sufficient, and the characteristics of successful participants (Blanck et al., 2000).

Similar approaches have been undertaken across the country. Changes have occurred in the past decade in self-employment, and more than thirty state agencies have developed self-employment policies since WIA was passed in

1998, and almost forty state agencies now have policies for self-employment (Arnold & Ipsen, 2003).

Technology has become an integral part of the workplace. Without effective access to technology (e.g., the Internet and computers), individuals with all types of disabilities (e.g., mobility, sensory, neurological, and learning impairments) will continue to face obstacles in work and in their daily lives (Blanck & Sandler, 2000). Achievement of the promise of full inclusion and labor force participation requires more than advancing technology. It requires legislative mandates and corresponding technology.

The Technology-Related Assistance for Individuals with Disabilities Act of 1988 and Assistive Technology Act of 1998 are disability-related laws that involve accessible technology; Section 508 of the Rehabilitation Act is another. Inclusion and labor force participation also require change in underlying attitudes and behaviors toward individuals with disabilities in all parts of American society.

Practitioners should consider environmental factors that contribute to and define disabilities. Scotch and Schriener (1997) consider disability as human variation in which an individual is disabled to the extent that their environment does not accommodate their needs. Building on this concept, the National Institute on Disability and Rehabilitation Research (NIDRR) (Seelman, 2000) has promoted the adoption of a conception of disability as “the product of an interaction between individual characteristics and the natural, built, cultural, and social environments” (p. 3).

NIDRR has funded research projects on “Technology for Independence” that address this interaction, as well as a resource center to provide technical assistance and training to these projects (see TI-CBRC, 2003, for descriptions of the projects). Rehabilitation professionals also need to address attitudinal and environmental factors that act as barriers to employment (Hahn, 2000). For instance, in what ways will the accessibility and universal design goals of WIA enhance employment opportunities for disabled individuals?

Increasing dialogue among corporations and government about disability and diversity is one strategy for increasing awareness of issues of importance to people with disabilities, and for promoting attitudinal change. Rehabilitation professionals, working with the local workforce system that is responsive to the needs of businesses, may dialogue with employers, local, state, or federal government, and people with disabilities.

### **ADA LAW AND POLICY OVERVIEW**

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In this part, we review the major legal cases decided under the ADA and their disability framework policy implications for case managers. The ADA is composed of six sections or titles. The beginning or the preface, § 12101, sets out Congress’s “Findings and Purposes” (ADA, 42 U.S.C. § 12101 (2000)) and

identifies people with disabilities as “a discrete and insular minority who have been faced with restriction and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” (§ 12101(a)(7)). The preface identifies the nation’s goals of assuring “equality of opportunity, full participation, independent living, and economic self sufficiency” (§ 12101(a)(8)) for individuals with disabilities. Among the purposes of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities,” (§ 12101(b)(1)) and to ensure that the federal government plays a central role in enforcing these standards (§ 12101(b)(3)).

### ADA TITLE I

Title I sets forth the antidiscrimination provisions for employment. “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment” (§ 12112). Covered entities are defined as employers, employment agencies, labor organizations or joint-labor management committees (§ 12111). Although a covered entity is forbidden from discriminating, it is not required to make accommodations that create an “undue hardship,” (§ 12111(10)) or create a situation where an employee is a significant risk to the health or safety of others in the workplace.

#### 1. The Definition of Disability: *Sutton* Trilogy

In 1999, the U.S. Supreme Court rendered three important decisions in ADA employment cases. Known as the “*Sutton* trilogy,” the cases interpreted the definition of disability under the ADA, including the extent to which mitigating measures must be considered in determining if a person is disabled under the law.

The *Sutton* trilogy illustrates the ways in which rehabilitation professionals should be aware of changing definitions of disability under Title I of the ADA. It shows the interaction of the case law with DOT, OSHA, or other federal regulations that impact workplace health and safety. Case managers also need to assess the appropriateness of workplace accommodations. Complex assessments involve the degree to which individuals (1) self-compensate or mitigate orthopedic impairments in major life activities such as working; and (2) may be reasonably accommodated to work safely and productively in various settings.

The ADA prohibits employment discrimination for qualified individuals with a disability. To be covered by the law, the employee or perspective employee must be “an individual with a disability who, with or without

reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires” (ADA, 42 U.S.C. § 12111(8)). A “disability” is defined as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual” (§ 12102 (2)(A)). In the *Sutton* trilogy, the Supreme Court concluded that mitigating measures, things that could be done to help correct or mitigate an individual’s impairment, must be considered when determining whether an individual has a disability under the ADA.

In *Sutton v. United Air Lines, Inc.* (1999), the court held that the determination of whether an individual has a disability within the meaning of the ADA should be made with reference to measures that mitigate the individual’s impairment. United Airlines denied the plaintiffs, who suffered severe myopia, commercial airline pilot positions on the basis that the plaintiffs did not meet the minimum vision requirement. Without corrective lenses, the plaintiffs could not see to conduct numerous activities such as driving a vehicle, watching television, or shopping in public stores. With corrective measures such as glasses or contact lenses, however, the plaintiffs had vision of 20/20 or better.

The Court held that measures to correct for, or mitigate, a physical or mental impairment, must be taken into account when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’ under the ADA” (*Sutton v. United Air Lines, Inc.*, 1999, p. 482). The majority held that one may still have a disability under § 12102(A) of the ADA if they are substantially limited in a major life activity despite the mitigating measures. Determining whether an individual is disabled under the ADA, therefore, requires an individualized inquiry.

In *Murphy v. United Parcel Service* (1999), the court extended the set of mitigating measures to be considered to medication used to treat impairments. Similar to *Sutton*, the court held that the determination of whether individuals are substantially limited must take into account the functioning of the individuals when they are medicated.

In *Murphy*, a plaintiff with hypertension was terminated from his job as a UPS mechanic because his high blood pressure disqualified him for a DOT health certificate. Although he had high blood pressure, the plaintiff’s doctor testified that the plaintiff had normal functioning when medicated. The Court held that the plaintiff was not disabled under the ADA because, when medicated, his hypertension did not substantially limit major life activities.

In *Albertsons, Inc. v. Kirkingburg* (1999), the Court held that ADA plaintiffs are required to offer evidence that they are substantially limited in a major life activity to prove their disability and that an employer does not have to justify its enforcement of a safety regulation when the regulation may be waived under an experimental program in individual cases.

A truck driver for Albertson's Grocery Stores, Kirkingburg, was mistakenly certified as meeting the DOT vision standards, although he was monocular. A physician later correctly assessed that Kirkingburg did not meet the applicable DOT standards. Independent of the standards, the DOT had implemented an experimental waiver program for drivers with deficient vision who had recent commercial driving experience without incident. Although Kirkingburg applied for the waiver, Albertson's fired him for failure to meet the DOT standard. Kirkingburg sued Albertson's claiming that under the ADA he was a qualified individual with a disability because he was able to meet the standards of a waiver program that the DOT had in place.

The Court found that Kirkingburg was not an individual with a disability, and, that even if he were an individual with a disability, he would not have been qualified to perform the job in question. The Court noted that Kirkingburg had developed "self-correcting mechanisms" for coping with his visual impairment. The Court stated that these self-correcting measures, whether conscious or unconscious, may be considered a mitigating measure just like artificial aids, medications, or other devices.

The Court ruled that Albertson's was justified in firing Kirkingburg when he could not meet the DOT standard. The Court reasoned that because the waiver program was experimental and designed to collect data regarding the experiences of experienced drivers with visual acuity deficits, but not a change of the regulatory visual acuity standards, the waiver did not modify the DOT safety-related requirements. The *Sutton* Trilogy illustrates the importance of understanding factors that mitigate impairment in determining whether a person has a disability for purposes of the ADA.

## 2. Substantial Limitation of a Major Life Activity: *Toyota v. Williams*

The issue in *Toyota Motor Manufacturing v. Williams* (2002) was interpretation of the ADA's phrase "substantially limited." The court considered whether the plaintiff's impairments substantially limited her in the major life activity of performing manual tasks. The Court held that for a plaintiff to be substantially limited in performing manual tasks, the plaintiff must demonstrate an impairment that prevents or severely restricts her from activities of central importance to most people's everyday lives.

In *Toyota*, the plaintiff sued her former employer for failing to provide her with an accommodation when she became disabled with carpal tunnel syndrome from working on the automobile assembly line. The Court unanimously decided that "substantially" suggests "considerable" or "to a large degree" and precludes impairments that interfere in only a minor way with performing manual tasks (*Toyota Motor Manufacturing v. Williams*, 2002, pp.

196–197). Interpreting "major" as important was restricted to those activities that are of central importance to daily life.

The Court held that an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives and the impairment's impacts must be permanent or long term (*Toyota Motor Manufacturing v. Williams*, 2002, p. 197). Household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives (*Motor Manufacturing v. Williams*, p. 202).

### 3. Direct Threat Defense: *Chevron v. Echazabal*

In *Chevron U.S.A., Inc. v. Echazabal* (2002), the Court interpreted the ADA defense that employers are not required to hire or retain employees who pose a direct threat to the health or safety of others in the workplace. The Court was asked whether the direct threat defense would apply to an employer who refuses to hire a job applicant with a disability because the job would endanger the applicant's own health. The Court held that the ADA allows an employer's refusal to hire a job applicant with a disability where the applicant's job performance would endanger his own health.

In this case, the plaintiff's physical examination showed liver abnormality or damage caused by Hepatitis C, which the employer's doctors said would be aggravated by exposure to toxins at the employer's refinery. The employer relied on the EEOC "direct threat to self" regulation, which allows an employer to screen out potential workers with disabilities for risks that they would pose to others in the workplace and for risks on the job to their own health or safety.

The direct threat determination is to consider, among other aspects, the potential imminence of the risk and the severity of the harm based on a reasonable medical judgment that relies on the most current medical knowledge or the best available objective evidence, and on an individual assessment of the individual's present ability to safely perform the essential functions of the job (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (2003)). The primary issue was whether the ADA permits the EEOC regulation allowing a threat-to-self defense. The Court decided that the ADA permits the EEOC regulation.

A major purpose of the ADA is to eliminate paternalistic attitudes by covered entities in dealing with qualified persons with a disability. Rehabilitation professionals should not declare an individual ineligible for programs and services based on the idea that it is best for the person with a disability if they do not participate. Persons with a disability should be encouraged to make their own informed decisions rather than have agencies make the decisions as to their best interests.

**4. Reassignment and Workplace Accommodations: U.S. Airways  
v. Barnett**

In *U.S. Airways, Inc. v. Barnett* (2002), the issue was whether the ADA requires an employer to reassign an employee with a disability to a position as an accommodation even though another employee is entitled to hold the position under the employer's bona fide and established seniority system. The Court held that when a requested accommodation conflicts with the rules of a seniority system, that fact will ordinarily make the accommodation unreasonable, entitling an employer to summary judgment. The plaintiff, however, may present evidence of special circumstances that make reasonable a seniority rule exception in the particular case.

In this case the employee, who injured his back while working, requested assignment to a mailroom position as an accommodation. At least two other employees had seniority and, therefore, were entitled to the position. The employer decided not to make an exception to the seniority system, and the employee lost his job.

The Court reasoned that discrimination includes an employer's not making reasonable accommodations for a qualified employee, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business" (ADA, 42 U.S.C. § 12112 (b)(5)(A) (2000)). But, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not 'reasonable'" (*U.S. Airways, Inc. v. Barnett*, 2002, p. 1521).

Because of the importance of seniority to employee-management relations, an employer's showing that a proposed assignment will violate the rules of a seniority system, by itself, will be sufficient to meet the "undue hardship on the operation of the business" requirement (*U.S. Airways, Inc. v. Barnett*, 2002, p. 1519). However, if specific circumstances have altered the employee expectations of fair, uniform treatment, a requested accommodation may be reasonable.

Because an accommodation may amount to a preference for a person with a disability does not mean that it is *per se* not reasonable and not required by the ADA. When working with clients, employers, and agencies, case managers should consider modifications to rules, policies, or practices as generally reasonable, even though persons not protected by the ADA would not necessarily be entitled to the same modification.

### 5. Social Security Benefits and Title I: *Cleveland v. Policy Management Systems*

In *Cleveland v. Policy Management Systems Corp.* (1999), the Court considered whether the receipt of Social Security Disability Insurance (which benefits persons with disabilities who are unable to do their previous work and incapable of engaging in any other kind of substantial gainful work) precludes the SSDI recipient from simultaneously pursuing an action for disability discrimination under the ADA. The Court held that an ADA plaintiff cannot defeat a defendant company's summary judgment motion when there are apparent contradictions between her ADA claim and SSDI claim, unless there is a sufficient explanation for the discrepancy.

*Cleveland* involves a plaintiff who suffered a stroke, and then sought and obtained Social Security Disability Insurance (SSDI) benefits. SSDI provides monetary benefits to every insured individual who "is under a disability" (Social Security Act, 42 U.S.C. § 423 (a)(1) (2000)). Disability is defined as an "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to last for a continuous period of not less than 12 months" (§ 423 (d)(2)(A)). The individual's impairment must be "of such severity that she is not only unable to do her previous job but cannot, considering her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (§ 423 (d)(1)(A)).

In contrast, the ADA prohibits covered employers from discriminating "against a qualified individual with a disability because of the disability of such individual" (ADA, 42 U.S.C. § 12112 (a) (2000)). The ADA defines a "qualified individual with a disability" to include a person who can perform essential job functions with or without reasonable accommodation (§ 12111 (8)).

According to the Court, "when the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of 'reasonable accommodation' into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI" (*Cleveland v. Policy Management Systems Corp.*, 1999, p. 803). The Court decided that receipt of SSDI benefits did not bar the plaintiff from bringing an ADA claim when she had offered an adequate explanation that she could nonetheless "perform the essential functions of her job, with or without reasonable accommodation" (*Cleveland v. Policy Management Systems Corp.*, 1999, p. 807).

Case managers and other rehabilitation professionals may not rely on SSDI findings alone that a person is incapable of working to determine that person is not a qualified person under the ADA. The fact that a person is receiving SSDI compensation does not necessarily mean that that person is not capable of working if provided reasonable accommodations, entitled to

reasonable modifications of services covered by Title II of the ADA, or capable of benefiting from the services and programs.

#### **6. Arbitration Agreements and Title I: *EEOC v. Waffle House***

In *EEOC v. Waffle House* (2002), the issue was whether an agreement between an employer and an employee to arbitrate employment claims precludes the EEOC from pursuing victim specific judicial relief, such as back pay, reinstatement, and damages, in an enforcement action under Title I. The Court held that an arbitration agreement does not prohibit the EEOC from seeking victim-specific judicial relief on behalf of an employee subject to the arbitration agreement because the EEOC is pursuing a public interest.

In his employment application, the plaintiff agreed that disputes concerning his employment would be settled by arbitration (*EEOC v. Waffle House*, 2002, p. 282). After having a seizure at work, the plaintiff was discharged. The plaintiff filed a charge of discrimination with the EEOC alleging that he was discharged because of his disability. The EEOC filed an enforcement action against Waffle House, requesting specific relief to make plaintiff whole, including back pay, reinstatement, and compensatory damages.

The Court decided that the arbitration agreement, which barred the employee from seeking relief, did not bar the EEOC from pursuing make-whole relief specifically for the employee. The EEOC was seeking to vindicate a public interest, rather than simply providing make-whole relief for an employee, even when the EEOC pursued victim-specific relief.

Case managers should note that when they act as representatives for an employer, the EEOC may bring an ADA action against the case manager, employer, or agency independent of the employee's ADA claim. When acting as a representative of the employer or agency, the case manager takes on the employer's obligations of non-discrimination under the ADA. When acting as an advisor to clients in ADA matters, case managers and rehabilitation professionals may consider advising clients to seek enforcement assistance from the EEOC.

### **TITLE II AND PUBLIC ENTITIES**

Title II of the ADA prohibits discrimination by state or local governments. Part A defines the antidiscrimination provisions, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" (ADA, 42 U.S.C. § 12132 (2000)). Part B is devoted to the special circumstances and requirements for non-discrimination in public transportation. A core element of Title II involves the "integration mandate."

Perhaps the most significant Title II case is *Olmstead v. L.C. ex rel. Zimring* (1999). In *Olmstead*, the Court held that Title II requires a state to place persons with mental disabilities in community settings rather than in institutions when the state's treatment professionals have determined that community placement is appropriate, the transfer is not opposed by the affected individual, and the placement may be reasonably accommodated, taking into account the resources of the state and the needs of others with mental disabilities.

The *Olmstead* plaintiffs had mental retardation and mental illness and had been voluntarily admitted to the psychiatric unit at Georgia Regional Hospital in Atlanta (GRH). Although their treatment professionals concluded that each could be cared for appropriately in a community-based program, plaintiffs remained institutionalized at GRH. Plaintiffs alleged that the State violated Title II in failing to place them in a community-based program once their treating professionals determined that such placement was appropriate. According to four Justices, undue institutionalization qualifies as discrimination "by reason of . . . disability" as advocated by the Department of Justice, and unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of disability based discrimination prohibited by Title II.

State rehabilitation and workforce programs are to provide programs and services to qualified persons with a disability in the most integrated setting possible. These programs should avoid discrimination against qualified persons with a disability by making all modifications in policies, practices, and procedures that do not result in undue financial and administrative burdens or fundamentally alter the nature of the service or program.

### **TITLE III AND PRIVATE ENTITIES**

Title III of the ADA provides antidiscrimination requirements for public accommodations and services operated by private entities. The requirement is that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation" (ADA, 42 U.S.C. § 12182(a) (2000)).

A public accommodation must make reasonable modifications in its policies, practices, and procedures, unless that entity demonstrates that doing so would fundamentally alter the nature of its goods, services, or facilities. Older facilities must remove architectural barriers if it is "readily achievable" to do so (ADA, 42 U.S.C. § 12182(b)(2)(A)(iv) (2000)), while facilities (or alterations) that post-date the ADA must be designed to be readily accessible to individuals with disabilities to the "maximum extent possible" (§ 12183(a)(2)).

**A. Asymptomatic Impairments, Definition of Disability, and Title III**

In *Bragdon v. Abbott* (1998), the issue was whether asymptomatic HIV disease is a disability within the language of the ADA and whether the plaintiff's HIV disease posed a direct threat to the health or safety of the treating dentist. The Court held that asymptomatic HIV disease is a physical impairment that substantially limits the major life activity of reproduction, and thereby a disability under the ADA. In addition, the record did not support a determination, as a matter of law without a trial, that HIV infection did not pose a direct threat to the health and safety of others.

Although a public accommodation includes the "professional office of a health care provider" (ADA, 42 U.S.C. § 12181 (7)(F) (2000)), a public entity is not required to provide services to an individual who poses a direct threat to the health or safety of others (§ 12182 (b)(3)). The Court found that a private health care provider may refuse to treat a patient without violating title III when the patient's infectious condition "poses a direct threat to the health or safety of others" (§ 12182 (b)(3)).

A direct threat, as defined by the ADA is "a significant risk to the health or safety of others than cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services" (§ 12182 (b)(3)). The Court held that lower courts must assess the direct threat risk with objective views of health care professionals without deferring to their individual judgments. Public rehabilitation programs that are operated by private entities are covered by Title III. The *Bragdon* court endorsed a broad reading of Title III antidiscrimination provisions.

**B. Reasonable Accommodation: *PGA v. Martin***

*PGA Tour, Inc. v. Martin* (2001) involved whether Title III protects access to professional golf tournaments by a qualified entrant with a disability, and whether use of a golf cart by a contestant might be a reasonable accommodation. The Court held that the PGA's golf tours and their qualifying rounds fall within Title III of the ADA, protecting access by a qualified entrant with a disability. The walking requirement imposed by the PGA is not compromised by allowing Martin to use a cart—a modification that provides an exception to a peripheral tournament rule without impairing its purpose does not "fundamentally alter" the tournament.

The issue was whether the ADA protects access to professional golf tournaments by qualified entrants with a disability. The Court decided that golf courses constitute a type of place specifically identified as a public accommodation under the ADA. The ADA defines a public accommodation to include "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation" (*PGA Tour, Inc. v. Martin*, 2001, p. 677).

A second issue is whether a disabled contestant may be denied the use of a golf cart because it would “fundamentally alter the nature” of the tournament (*PGA Tour, Inc. v. Martin*, 2001, pp. 664–665). The Court found that the waiver of the walking rule for plaintiff would not work a fundamental alteration of the game. In addition, the waiver would not give plaintiff an advantage over others and fundamentally alter the character of the competition.

*Martin* endorses a policy of broad access for qualified persons with a disability to public accommodations covered by Title III. Privately operated rehabilitation programs should provide broad access to services, including by making reasonable accommodations.

### **APPLICABILITY OF THE ADA TO THE NEW DISABILITY LAW AND POLICY FRAMEWORK**

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This part highlights the applicability of the ADA to other disability laws and policies designed to enhance the independence and self-sufficiency of persons with disabilities.

#### **WORKFORCE INVESTMENT ACT (WIA)**

The Workforce Investment Act of 1998 establishes state and local Workforce Investment Boards responsible for developing a “one-stop” delivery system of accessible, innovative, and comprehensive employment services (Blanck & Schartz, 2001; Morris & Farah, 2002). The boards partner with local vocational rehabilitation agencies, businesses, and job training and education programs to assist local communities in increasing employment (Blanck et al., 2003).

Among the services provided by one-stop system are assistance in job search activities, career planning, job skill assessments and training, and childcare resources. One-stops provide resources for job and entrepreneurial training, transportation and housing assistance, and access to affordable health coverage (Morris & Farah, 2002).

WIA is designed to help individuals with disabilities achieve employment, economic independence, and inclusion into society (29 U.S.C. § 701(b)(1) (2000)). It is the federal funding vehicle for states to provide rehabilitation services and employment opportunities to people with disabilities (Frieden, 2003).

The programs and services supported by WIA are covered by the antidiscrimination provisions of the ADA and Section 504 of the Rehabilitation Act of 1973 (Hoff, 2000). The antidiscrimination provisions apply to state and local agencies supported with WIA funds, state and local workforce boards, one-stop operators, and employment providers (Silverstein, 2000).

“Disability” is defined under WIA consistently with the regulations implementing the ADA (Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998, 29 C.F.R.

§ 37.4 (2003)). Employees of private service providers are protected by Title I. State and local activities are covered under Title II. Title III's public accommodation provisions apply to private service providers receiving WIA funds from workforce boards.

A qualified person with a disability is entitled to effective benefits and services provided under WIA. One-stops and service providers must administer their programs in the most integrated setting possible (Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998, 29 C.F.R. § 37.7(d) (2003)), and not impose criteria that screen out individuals with disabilities (§ 37.7(i)). They must provide reasonable accommodations to qualified applicants, participants, and employees with disabilities, unless doing so causes undue hardship. They also must make reasonable modifications to policies and practices to avoid discrimination (§ 37.8(a)–(b)).

### **TICKET TO WORK AND WORK INCENTIVES IMPROVEMENT ACT (TWWIIA)**

TWWIIA provides benefits to eligible individuals with disabilities who want to and are capable of working (Ticket to Work and Self-Sufficiency Program, 20 C.F.R. § 411.125(B) (2003)). One benefit allows working individuals with disabilities the option of maintaining Medicaid health insurance coverage. This promotes the ability of participants to return to work without the loss of essential health care benefits. Another benefit is providing “tickets” for persons with disabilities to choose, rather than be assigned to, service providers for employment training.

One of the barriers to work for persons with disabilities has been the inability to obtain health care coverage (Schartz, Schartz, & Blanck, 2002). Disability-based payments often diminish incentives to work, particularly when the attempt to work itself reduces eligibility for such benefits (Pacer Center, 2003). Cash benefits, for instance under the SSI and SSDI programs, primarily have been available to individuals who could not engage in “substantial gainful activity” (Blanck, Clay, Schmeling, Morris, & Ritchie, 2002).

TWWIIA's Ticket to Work and Self-Sufficiency Program provides recipients of disability insurance with a “ticket” to purchase employment training services from qualified Employment Networks (ENs) (see Ticket to Work and Self-Sufficiency Program, 20 C.F.R. § 411.300 (2003), defining the EN's purpose). The goal is to encourage individuals with disabilities to seek rehabilitation services that aid in attaining employment and to reduce dependence on governmental benefit programs (Ticket to Work and Self-Sufficiency Program, 2001). Ticket program services include the provision of case management, workplace accommodations, peer mentoring, job training, and transportation assistance.

ENs receive payment from SSA when they succeed in placing the participant in employment. Public and private organizations may apply to be ENs, as may family and friends who meet the EN qualifications. More than one-third of the states have implemented TWWIIA and others have passed legislation creating similar programs (Folkemer, Jensen, Silverstein, & Straw, 2002).

Individuals with disabilities covered by TWWIIA likely are qualified individuals with disabilities under the ADA. The applicability of the ADA to ENs depends on the classification of the EN. ENs include individuals, cooperatives, and public and private rehabilitation providers. Case managers and other rehabilitation professionals are likely to encounter ENs in their professional practice. It will be important to understand requirements of ENs for compliance with the ADA and other non-discrimination provisions.

Although Title I protects employees of an EN, the relationship between an EN and its Ticket participants is governed by Title II provisions for public entities or Title III provisions for private entities as places of public accommodation. A state agency serving as an EN is a public entity governed by Title II. A private community rehabilitation provider is a public accommodation covered under Title III. Public and private ENs receiving federal grants or contracts also are subject to the antidiscrimination provisions of Section 504 of the Rehabilitation Act of 1973 (Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 1991).

Although a Ticket participant is a person with a disability for purposes of SSI or SSDI and likely covered under the ADA as an individual with a disability, as noted, the Supreme Court in *Cleveland* decided being “disabled” under SSA regulations does not necessarily mean an individual is disabled under the ADA. Title II requires that ENs not exclude a qualified individual with disabilities from their services and programs. These ENs must be physically and programmatically accessible (Ticket to Work and Self-Sufficiency Program, 20 C.F.R. § 411.315(a)(2) (2003)).

State or local government ENs, covered under Title II, must ensure that their programs, when viewed in their entirety, are accessible (Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. §§ 35.149–150 (2003)). Title III requires that privately run ENs provide access to all persons with disabilities, not just those who are “qualified” for a particular program or service, which differs from Title I and II approaches (Parmet, 1993). An individual, family member, or friend of a Ticket participant who owns, leases, or operates a place of public accommodation as an EN is subject to Title III. Private ENs must remove barriers in existing buildings or provide services through alternative methods when “readily achievable” (ADA, 42 U.S.C. § 12181(9) (2000); Nondiscrimination on the

Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.304 (2003)).

As ADA Title II or III entities, ENs must ensure effective communication with, and physical and programmatic access to, facilities and services for Ticket applicants, participants, their families, and the public (ADA, 42 U.S.C. § 12182(b)(2)(A)(iv) (2000); Blanck & Sandler, 2000)). ENs may not adopt program eligibility criteria that screen out people with certain disabilities (or individuals who have an association with people with disabilities) from programs or services, unless such criteria are necessary to program operation (§ 12182(b)(2)(A)(i)). Public and private ENs must reasonably modify their policies, practices, and procedures when necessary to allow people with disabilities to participate, unless doing so would fundamentally alter the program (Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. § 36.202 (2003); Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.130(b)(7) (2003)).

Program participants may assign their Ticket to a public or private EN willing and able to provide services (Ticket to Work and Self-Sufficiency Program, 20 C.F.R. § 411.140 (2003)). The program encourages a range of service choices in which the participant and the EN choose their working partners (§§ 411.145; 411.150). Participants are able to choose their EN and deposit the Ticket to receive services from that EN or the state VR agency, and may choose to re-assign the Ticket to another EN (see § 411.150, placing limitations on Ticket reassignment).

There are sound reasons why ENs may specialize in services to particular groups of individuals (Ticket to Work and Self-Sufficiency Program, 2001, p. 67,399). Specialization can provide for greater efficiency and effectiveness in the delivery of services. Where an EN is not qualified to serve a particular individual, the ADA's undue burden provision does not require the EN to serve that Ticket holder. When accommodation is possible and reasonable, public or private ENs may not charge an individual to cover their costs (Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. §§ 36.301(c) (2003); Nondiscrimination on the Basis of Disability in State and Local Government Services, 35.130(f) (2003)).

Questions remain about TWWIIA implementation. What is an EN's responsibility under the ADA to serve individuals with multiple disabilities? In the case of a Ticket participant who is deaf and blind, does an EN specializing in serving deaf Ticket holders violate the ADA's nondiscrimination provisions by not providing materials in Braille, effectively excluding the blind and deaf individual from services?

Addressing such issues under the ADA, an EN's core obligation to Ticket holders is nondiscrimination in the provision of program access and services. An EN's decision not to provide service to a Ticket holder with multiple or secondary disabilities must be substantiated by evidence that such secondary disabilities require a service modification that would either fundamentally alter the program or pose an undue burden. An EN must ensure physical access to potential program participants and their families, for instance, by using alternative means of meeting with clients or their representatives (Ticket to Work and Work Incentives Advisory Panel, testimony of Blanck, 2002).

Another prominent question related to Ticket implementation is whether the ADA prevents ENs from choosing to provide services only to the pool of least disabled and "creamed" participants. Disability advocates' concerns about program implementation reflect the emergence of two separate and perhaps unequal markets for EN services, one served by private specialized ENs and another by state VR providers (Ticket to Work and Work Incentives Advisory Panel, testimony of Imperato, 2002).

The economic incentives in the Ticket Program encourage ENs to serve participants who need the fewest and least costly services (e.g. workplace accommodations and job training), and those who are able to return to work for an extended period of time (Ticket to Work and Work Incentives Advisory Panel, testimony of Imperato, 2002). Disability advocates are concerned that state VR agencies will bear a greater burden of serving individuals with more involved disabilities and costly service needs (Ticket to Work and Work Incentives Advisory Panel, testimony of Cebula, 2002).

Current trends suggest that most program participants either have not used their Tickets or have remained in the state VR system instead of assigning their ticket to an EN of their choice (Social Security Administration, 2002). Education that explains the Ticket Program is vital for beneficiaries and service providers, as well as for other stakeholders on the local, state, and federal levels (Social Security Administration). Ticket participants, moreover, must be knowledgeable about their rights and responsibilities under the program.

### **TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)**

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act created the Temporary Assistance for Needy Families program. TANF replaced the Aid to Families with Dependent Children program as a shift away from long-term welfare services and toward the requirement of employment for welfare recipients (Schoen, 1997).

Among other goals, the TANF program strives to promote job preparation and employment to help reduce dependency on government welfare (General TANF Provisions, 45 C.F.R. § 260.20(b) (2003)). TANF's work requirements encourage eligible recipients to seek employment and self-sufficiency.

Recipients must begin working when the state determines they are ready for employment, or after twenty-four cumulative months of assistance (Schoen, 1997, p. 646). Families receiving TANF benefits must participate in work activities for at least twenty hours per week, with two-parent families required to work at least thirty-five hours per week. A state has the option to exempt single parents with a child under one year of age from these requirements (Schoen, pp. 647–648).

With a focus on reducing the number of welfare recipients, monetary benefits end after a total of sixty months, regardless of whether an individual has found gainful employment (Schoen, 1997, pp. 648–649). TANF agencies may reduce or terminate benefits if a recipient refuses to work (Social Security Act, 42 U.S.C. § 607(e)(1) (2000)). There are exceptions to the work term limit for personal hardship and situations involving family violence (Schoen, pp. 648–649).

TANF places requirements on the state administering agencies. The agency is responsible for developing an individual responsibility plan (IRP) for participants by assessing job skills, prior work experience, and prospects for employability (Schoen, 1997, pp. 648–649). The IRP is intended to help the individual achieve employment and to increase job responsibility over time (Social Security Act, 42 U.S.C. § 608(b)(2)(A)(3) (2000)). States are subject to declines in federal assistance if they do not satisfy minimum participation rates (Accountability Provisions—General, 45 C.F.R. § 262.1(a)(4) (2003)), comply with work term time limits (§ 262.1(a)(9)), or sanction recipients who refuse to work (§ 262.1(a)(14)).

In 2001, TANF services were provided to more than two million families comprising some five million individuals. Over four million of the recipients were children (Office of Family Assistance, 2003). Families typically end TANF services when they locate employment (Office of Family Assistance). Many families that have left the TANF program continue to rely on governmental programs such as Medicaid, Food Stamps, and the Earned Income Tax Credit (Welfare Reform Hearing, 2001).

The TANF program is not directed specifically towards individuals with disabilities. Yet, a substantially higher proportion of TANF recipients reported having physical or mental impairments than did adults in the non-TANF population (National Council on Disability, 2003). Many TANF families include a child with a disability or a member with an undiagnosed disability (LaCheen, 2001; National Council on Disability). Psychiatric disabilities and learning disabilities are prevalent in the TANF population (LaCheen, 2001). Many TANF recipients have undiagnosed disabilities, and their histories of disability do not establish a record of a substantially limiting impairment (LaCheen, 2001). As TANF agencies develop and maintain recipient profiles

and track their progress, information about participants' records of disabilities may develop (LaCheen, 2001).

Programs and activities supported by TANF funds are subject to federal antidiscrimination laws such as the ADA, the Age Discrimination in Employment Act, Section 504 of the Rehabilitation Act of 1973, and Title VI of the Civil Rights Act of 1964 (General TANF Provisions, 45 C.F.R. § 260.35 (2003)). An individual with a physical or mental limitation receiving TANF benefits does not, however, qualify automatically as an "individual with a disability" under the ADA (LaCheen, 2001, pp. 89–90).

Subject to restrictions, state TANF programs may establish exceptions to the mandatory work requirements (LaCheen, 2001). State programs have not ordinarily applied the ADA's definition of disability when defining exceptions (Thompson, Holcomb, Loprest & Brennan, 1998). For instance, California's TANF program (CalWORKs) exempts from work requirements individuals with a doctor's verification that the disability likely will last at least thirty days, and that it significantly impairs the ability to be employed or participate in welfare-to-work activities (CalWORKs, Cal. Welf. & Inst. Code § 11320.3(b)(3)(A) (2003)). New York's program exempts individuals who are "disabled or incapacitated" based on a determination by the welfare agency or a private doctor referred by the agency (Public Assistance and Food Stamp Employment Program Requirement, N.Y. Comp. Codes R. & Regs. tit. 12, § 1300.2(b)(4) (2002)). New York also exempts those who are ill or injured, when unable to engage in work for up to three months (§ 1300.2(b)(1)).

There are aspects to the applicability of ADA law to state TANF programs. If a claim of discrimination arises from lack of access to the application process, individuals with disabilities who are covered by the ADA need not qualify for TANF benefits to raise such a challenge (LaCheen, 2001). However, where a job-training program requires participants to have a certain diploma to participate, and the applicant with a disability does not have such a diploma, the ineligibility requirement for program participation may properly preclude an ADA challenge (LaCheen, 2001). Some states may argue that individuals who have not been compliant with TANF work requirements are not qualified individuals for purposes of an ADA challenge (LaCheen, 2001).

One unresolved issue is whether TANF program work requirements will have an unfair impact on persons with disabilities (LaCheen, 2001). No study has assessed whether TANF recipients with disabilities face more significant barriers to employment than nondisabled recipients (National Council on Disability, 2003). To strengthen protections for persons with disabilities in TANF programs, advocacy groups have recommended that states give assurances that participants with disabilities are screened with appropriate diagnostic tools, and that work activities include rehabilitation activities (e.g., as supported by TWWIIA) to help the individual attain work.

States may train their staffs who serve TANF recipients on issues related to disabilities to, for instance, aid in access to Medicaid or other health coverage when recipients move from welfare to work. Compliance may require regular reviews to ensure that TANF programs comply with the ADA and Section 504 requirements (National Council on Disability, 2003). Case managers must be familiar with the requirements of non-discrimination as they work with TANF programs and participants.

## CONCLUSION

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Before the ADA, there was not a comprehensive federal antidiscrimination protection framework for people with disabilities (Blanck, Hill, Siegel & Waterstone, 2003). Different states had laws covering nondiscrimination in employment, public accommodations, and state services. Many states covered one, but not the rest, of these areas. The passage of the ADA changed the federal landscape, and many states subsequently passed new or amended antidiscrimination laws modeled in part on the ADA.

This chapter has highlighted ways that the Supreme Court has interpreted the ADA and has discussed disability-related legislation. The ebb and flow between and among the federal and state laws is reflective of changing views about the role of the federal and state government in the lives of citizens (Noonan, 2002). With the narrowing by the Supreme Court of federal civil rights laws and the ADA in particular, states' laws take on renewed importance for the protection of people with disabilities from discrimination.

A complete treatment of the different states' laws is beyond the scope of this chapter, but several authors have given a more complete examination to these issues pre- and post-ADA. Blanck et al. (2003) discuss these issues in detail, covering the evolution of state disability laws in response to the ADA and to Supreme Court decisions interpreting the ADA.

Post-ADA, and particularly after various Supreme Court decisions limited the reach of the ADA, states have reacted by enacting or changing state anti-discrimination laws. California expanded on the protections of the ADA post-*Sutton* in the Fair Employment and Housing Act, requiring that mitigating measures not be used as factors in the determination of disability (Blanck et al., 2003). The Act provides greater protection for people with disabilities than the ADA, in many settings, and is indicative of the mandate that people with disabilities should be included in all settings in California. Other states have responded as well, and case managers must be familiar with relevant state legislation on anti-discrimination provisions.

Important issues are emerging about the new disability law and policy framework and its reach and applicability to American social and economic policy. The issues are compelling in light of the changes that have occurred in the areas of employment, welfare, and health care policy. Case managers will

increasingly be called on to assess and advise their clients as to the application of these policies.

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**REFERENCES**

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- Accountability Provisions—General, 45 C.F.R. Part 262 (2003).
- Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
- Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).
- Arnold, N., & Ipsen, C. (2003). *State self-employment policies: A decade of change*. Missoula, MT: University of Montana Rural Institute, RTC on Disability in Rural Communities. Retrieved March 24, 2004, from <http://rtc.ruralinstitute.umt.edu/SelEm/FinalReport/StateSelfEmploymentPolicies.htm>.
- Berkowitz, E. D. (1987). *Disabled policy: America's programs for the handicapped*. New York: Cambridge University Press.
- Blanck, P. (1997). The economics of the employment provisions of the Americans with Disabilities Act: Part I—workplace accommodations. *DePaul Law Review*, 46, 877–914.
- Blanck, P. (Ed.) (2000). *Employment, disability, and the Americans with Disabilities Act: Issues in law, public policy, and research*. Evanston, IL: Northwestern University Press.
- Blanck, P. (2001). Civil war pensions and disability. *Ohio State Law Journal*, 62, 109–249.
- Blanck, P., Clay, L., Schmeling, J., Morris, M., & Ritchie, H. (2002). Applicability of the ADA to “Ticket to Work” employment networks. *Behavioral Sciences and the Law*, 20, 621, 625–627.
- Blanck, P., Hill, E., Siegal, C., & Waterstone, M. (2003). *Disability civil rights law and policy*. St. Paul, MN: Thomson/West.
- Blanck, P., & Marti, M. W. (1997). Attitudes, behavior, and the employment provisions of the Americans with Disabilities Act. *Villanova Law Review*, 42, 345–408.
- Blanck, P., & Millender, M. (2000). Before disability civil rights: Civil war pensions and the politics of disability in America. *Alabama Law Review*, 52, 1–50.
- Blanck, P., & Sandler, L. A. (2000). ADA title III and the internet: Technology and civil rights. *Mental & Physical Disability Law Reporter*, 24, 855–859.
- Blanck, P., Sandler, L. A., Schmeling, J. L., & Scharz, H. A. (2000). Emerging workforce of entrepreneurs with disabilities: Preliminary study of entrepreneurship in Iowa. *Iowa Law Review*, 85, 1583–1670.
- Blanck, P., & Scharz, H. A. (2001). Toward researching a national employment policy for persons with disabilities. In *22nd Mary E. Switzer Memorial Seminar: Emerging workforce issues: WIA, Ticket to work, and partnerships*. Alexandria, VA: National Rehabilitation Association.
- Blanck, P., & Song, C. (2001). “With malice toward none, with charity toward all:” Civil war pensions for native and foreign-born union army veterans. *Transnational Law and Contemporary Problems*, 11, 1–74.

- Blanck, P., & Song, C. (2001/2002). Civil war pension attorneys and disability politics. *University of Michigan Journal of Law Reform*, 35, 137–217.
- Blanck, P., & Song, C. (2003). “Never forget what they did here”: Civil war pensions for Gettysburg union army veterans and disability in nineteenth-century America, *William and Mary Law Review*, 44, 1109–1171.
- Bragdon v. Abbott, 524 U.S. 624 (1998).
- Brooks, R. A., & Klosinski, L. E. (1999). Assisting persons living with HIV/AIDS to return to work: Programmatic steps for AIDS service organizations. *AIDS Education and Prevention*, 11(3), 212–223.
- CalWORKs (California Work Opportunity and Responsibility to Kids Act), Cal. Welf. & Inst. Code §§ 11200–11215 (West 2003).
- Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002).
- Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999).
- Drimmer, J. C. (1993). Cripples, overcomers, and civil rights: Tracing the evolution of federal legislation and social policy for people with disabilities. *UCLA Law Review*, 40, 1341–1410.
- EEOC v. Waffle House, 534 U.S. 279 (2002).
- Folkemer, D., Jensen, A., Silverstein, R., & Straw, T. (2002). *Medicaid buy-in programs: Case studies of early implementer states*. Retrieved March 24, 2004, from <http://aspe.hhs.gov/daltcp/reports/EIcasest.htm>.
- Frieden, L. (2003, March 18). Letter to the Honorable John A. Boehner, Chair, Education and the Workforce Committee. Retrieved March 25, 2004, from [http://www.ncd.gov/newsroom/correspondence/boehner\\_03-18-03.html](http://www.ncd.gov/newsroom/correspondence/boehner_03-18-03.html).
- General Temporary Assistance for Needy families (TANF) Provisions, 45 C.F.R. Part 260 (2003).
- Hahn, H. (2000). Accommodations and the ADA: Unreasonable bias or biased reasoning? *Berkeley Journal of Employment and Labor Law*, 21, 166–192.
- David Hoff. The Workforce Investment Act: Opportunities and Issues for the Disability Community (Nat’l Ctr. On Workforce and Disability, Dec. 1, 2000), Retrieved March 29, 2004, from [http://www.onestops.info/print.php?article\\_id=119](http://www.onestops.info/print.php?article_id=119).
- ILRU (2004). ILRU Directory of Independent Living Centers & SILCs, Vol. 26, Houston, TX: Author.
- Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998, 29 C.F.R. Part 37 (2003).
- Jensen, A., & Silverstein, R. (2000, February). Improvements to the SSDI and SSI work incentives and expanded availability of health care services to workers with disabilities under the Ticket to Work and Work Incentives Improvement Act of 1999. *Policy Brief*, 2. Retrieved March 24, 2004, from <http://www.communityinclusion.org/publications/text/pb2text.html>.
- Jensen, A. (2004). State Medicaid Buy-In Programs Summary Table: Implementation, Authorization, Studies and Enrollments – February 23,

- 2004 update. Retrieved March 29, 2004, from [http://www.uiowa.edu/~lhpdc/work/summary\\_tables/StateMedBuyIn\\_summarytable.doc](http://www.uiowa.edu/~lhpdc/work/summary_tables/StateMedBuyIn_summarytable.doc).
- Kaye, H. S. (1998). Is the status of people with disabilities improving? *Disability Statistics Abstract*, 21, 1–4.
- Kruse, D., & Schur, L. (2003). Employment of people with disabilities following the ADA. *Industrial Relations*, 42, 31–66.
- LaCheen, C. (2001). Using title II of the Americans with Disabilities Act on behalf of clients in TANF programs. *Georgetown Journal of Poverty Law and Policy*, 8, 1–215.
- Law, Health Policy & Disability Center. (2003). *State resources for disability program navigators to coordinate systems change activities*. Iowa City, IA. Retrieved March 25, 2004, from [http://disability.law.uiowa.edu/lhpdc/projects/dol\\_wigs/index.html](http://disability.law.uiowa.edu/lhpdc/projects/dol_wigs/index.html).
- Liebman, L. (1976). The definition of disability in Social Security and Supplemental Security Income: Drawing the bounds of social welfare estates. *Harvard Law Review*, 89, 833–853.
- McNeil, J. M. (2000, July 3). *Employment, Earnings, and Disability*. Paper presented at the 75th Annual Conference of the Western Economic Association International, Vancouver, British Columbia. Retrieved March 25, 2004, from <http://www.census.gov/hhes/www/disable/emperndis.pdf>.
- Milani, A. A. (1999). Living in the world: A new look at the disabled in the law of torts. *Catholic University Law Review*, 48, 323–417.
- Morris, M., & Farah, L. (2002). *Building relationships at a community level: Lessons learned from work incentive grantees (WIGs)* (Rep. No. 1). Iowa City, IA: University of Iowa College of Law, Law, Health Policy & Disability Center. Retrieved March 25, 2004, from [http://disability.law.uiowa.edu/lhpdc/projects/dol\\_techdocs/PolicyBrief\\_Lessons\\_Learned.doc](http://disability.law.uiowa.edu/lhpdc/projects/dol_techdocs/PolicyBrief_Lessons_Learned.doc).
- Murphy v. United Parcel Service, 527 U.S. 516 (1999).
- National Center on Workforce and Disability. (2000). *The Workforce Investment Act: Opportunities and issues for the disability community*. Boston: Hoff, D. Retrieved March 24, 2004, from [http://www.onestops.info/print.php?article\\_id=119](http://www.onestops.info/print.php?article_id=119).
- National Collaborative on Workforce and Disability / Youth. (2004). Retrieved on March 29, 2004 from <http://www.ncwd-youth.info/>.
- National Council on Disability. (2003). *TANF and disability—importance of supports for families with disabilities in welfare reform*. Washington, DC. Retrieved March 25, 2004, from <http://www.ncd.gov/newsroom/publications/pdf/familysupports.pdf>.

- National Council on Disability (1996). *Achieving independence: The challenge for the 21st century: A decade of progress in disability policy: Setting an agenda for the future*. Washington, D.C.
- National Organization on Disability (2000). *The 2000 N.O.D. / Harris survey of Americans with disabilities*. Washington, D.C.
- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35552 (July 26, 1991).
- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. Part 36 (2003).
- Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. Part 35 (2003).
- Noonan, J. T., Jr. (2002). *Narrowing the nation's power: The Supreme Court sides with the states*. Berkeley, CA: University of California Press.
- Office of Family Assistance, U.S. Dep't of Health and Hum. Servs., Temporary Assistance for Needy Families Program: Fifth Annual Report to Congress X184-230. Retrieved February 3, 2003 from <http://www.acf.dhhs.gov/programs/ofa/annualreport5/>.
- Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).
- Pacer Center (2003). Work Incentives for Persons with Disabilities, Retrieved July 31, 2003, from <http://www.pacer.org/text/employ/workinc.htm>.
- Parment, W. E. (1993). Title III – Public accommodations. In L. Gostin & H. Beyer (Eds.) *Implementing the Americans with Disabilities Act; Rights and responsibilities of all Americans*. 123. Baltimore, MD: P. H. Brookes Publishing.
- PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).
- Public Assistance and Food Stamp Employment Program Requirements, N.Y. Comp. Codes R. & Regs. tit. 12, Part 1300 (2002).
- Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. Part 1630 (2003).
- Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796l (2000).
- Schartz, K., Schartz, H., & Blanck, P. (2002). Employment of persons with disabilities in information technology jobs: A literature review for 'IT Works.' *Behavioral Sciences & the Law*, 20, 637–657.
- Schoen, L. M. (1997). Working welfare recipients: A comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act. *Fordham Urban Law Journal*, 24, 635–662.
- Schwochau, S., & Blanck, P. D. (2000). The economics of the Americans with Disabilities Act: Part III – Does the ADA disable the disabled? *Berkeley Journal of Employment and Labor Law*, 21(1), 271–313.
- Scotch, R. K., & Schriener, K. (1997). Disability as human variation: Implications for policy. *Annals of the American Academy of Political and Social Science*, 549, 148–159.

- Seelman, K. D. (2000, July 17). *Employment of individuals with disabilities—opportunities and challenges—The best of times/the worst of times*. Paper presented at the Employment and Disability Policy Summer Institute, Cornell University, Ithaca, NY.
- Shapiro, J. P. (1993). *No pity: People with disabilities forging a new civil rights movement*. New York: Times Books.
- Silverstein, R. (2000, March). Provisions in the Workforce Investment Act relating to nondiscrimination on the basis of disability and the development by the governor of a written methods of administration. *Policy Brief, 2*. Retrieved March 25, 2004, from <http://www.communityinclusion.org/publications/text/pb4text.html>.
- Silverstein, R. (2004). What policymakers need and must demand from research regarding the employment rate of persons with disabilities. Manuscript in preparation.
- Social Security Act, 42 U.S.C. §§ 301–1397jj (2000).
- Social Security Administration. (2004, March 3). *Ticket to work: Ticket tracker*. Washington, DC. Retrieved March 25, 2004, from [http://www.ssa.gov/work/Ticket/ticket\\_info.html#TicketTracker](http://www.ssa.gov/work/Ticket/ticket_info.html#TicketTracker).
- Stapleton, D. C., & Tucker, A. F. (2000). Will expanded health care coverage for people with disabilities increase their employment and earnings? Evidence from an analysis of the SSI work incentive program. In D.S. Salkever & A. Sorkin, *Research in Human Capital and Development: Vol. 13, The Economics of Disability*. Stamford, Conn.: JAI Press.
- Stone, D. A. (1984). *The disabled state*. Philadelphia: Temple University Press.
- Sutton v. United Air Lines, Inc., 527 U.S. 417 (1999).
- Taylor, H. (1998, October 14). *The Harris poll #56: Americans with disabilities still pervasively disadvantaged on a broad range of key indicators*. Rochester, NY. Retrieved March 25, 2004, from [http://www.harrisinteractive.com/harris\\_poll/printerfriend/index.asp?PID=152](http://www.harrisinteractive.com/harris_poll/printerfriend/index.asp?PID=152).
- Technology for Independence: Community-Based Resource Center (TI-CBRC). (2003). The technology for independence projects. Iowa City: IA. Retrieved March 25, 2004, from [http://disability.law.uiowa.edu/cbrc/research/ti\\_projects.htm](http://disability.law.uiowa.edu/cbrc/research/ti_projects.htm).
- Thompson T.S., Holcomb, P.A., Loprest, P., & Brennan, K. (1998). The Urb. Inst. and the U.S Dep't of Health & Hum. Servs., State Welfare-to-Work Policies for People with Disabilities: Changes Since Welfare Reform; Executive Summary). Retrieved March 29, 2004 from <http://aspe.hhs.gov/daltcp/reports/wel2wkes.htm>.
- Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67,370, 67,370 (Dec. 28, 2001).
- Ticket to Work and Self-Sufficiency Program, 20 C.F.R Part 411 (2003).

- Ticket to work and work incentives advisory panel: Hearings before committee*, 107th Cong. 35–37 (2002) (testimony of Peter Blanck).
- Ticket to work and work incentives advisory panel: Hearings before committee*, 107th Cong. 20–21 (2002) (testimony of Ray Cebula).
- Ticket to work and work incentives advisory panel: Hearings before committee*, 107th Cong. 26 (2002) (testimony of Andrew Imparato).
- Social Security Administration. (2002). *Ticket to Work and Work Incentives Advisory Panel, Annual Report to the President and Congress: Year Two* (SSA Pub. No. 63-011). Washington, DC.
- Ticket to Work and Work Incentives Improvement Act of 1999, 42 U.S.C. §§ 1320b-19–1320b-22, 42 U.S.C. § 434, 26 U.S.C. § 1260 (2000).
- Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002).
- U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).
- U.S. Census Bureau. (2003). *Disability labor force status—work disability status of civilians 16 to 74 years Old, by educational attainment and sex: 2003*. Washington, DC. Retrieved March 25, 2004, from <http://www.census.gov/hhes/www/disable/cps/cps203.html>.
- Virginia Commonwealth University Rehabilitation Research and Training Center (RRTC). (2000). Ticket to work and self-sufficiency program. *Connections, Spring/Summer*, 3.
- Welfare reform: Hearing before the Subcommittee on Human Resources, Committee of Ways and Means, 107th Cong. (2001) (testimony of Christine Devere). Retrieved March 26, 2004, from <http://waysandmeans.house.gov/legacy/humres/107cong/3-15-01/107-5final.htm>.
- White House. (n.d.). Fulfilling America's promise to Americans with disabilities. Washington, DC. Retrieved March 25, 2004, from <http://www.whitehouse.gov/news/freedominitiative/freedominitiative.htm>.
- Workforce Investment Act of 1998, Pub. L. 105-220, 112 Stat. 936 (codified in scattered sections of 20 and 29 U.S.C. (2000)).
- Workforce Investment Act; Final Rules, 65 Fed. Reg. 49295 (Aug. 11, 2000) (to be codified at 20 C.F.R. pts. 652 et al.).