

The Americans with Disabilities Act

Emerging Issues for Ophthalmologists

Peter D. Blanck, PhD, JD¹ Robert Folberg, MD²

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¹College of Law, University of Iowa, Iowa City.

²Departments of Ophthalmology and Pathology, University of Iowa, Iowa City.

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Background: The Americans with Disabilities Act of 1990 is the most comprehensive federal law to address discrimination against an estimated 49 million Americans in the areas of employment, governmental services, public accommodations, transportation, and telecommunications.

Methods: The authors describe title I of the Americans with Disabilities Act and examine the challenges of implementing the employment provisions set forth in this legislation as they relate to visual impairment and disability.

Conclusions: It is crucial that ophthalmologists understand the implications of the Americans with Disabilities Act when caring for individuals with visual impairments and communicating with their employers and other healthcare specialists. Ophthalmologists play an increasingly important role in shaping public policy toward people with visual impairments. *Ophthalmology* 1994;101:1635-1640

In 1990, the Americans with Disabilities Act (ADA) became law. [1] The ADA is the most comprehensive federal law to address discrimination against an estimated 49 million Americans with disabilities. During the last 3 years, various provisions of the ADA have taken effect in the areas of employment, governmental services, public accommodations, and telecommunications. Debate over the scope of its employment provisions, set forth in "title I" of the Act, has threatened effective implementation. Critics contend that the ADA will be a nightmare for business and a full-

employment act for lawyers.[2] Others question whether the Act will become an entitlement statute.

In the first year that title I became effective, approximately 14,000 charges alleging disability-based employment discrimination were filed with the Equal Employment Opportunity Commission, the agency responsible for enforcement. [3]. Most charges involved back impairments, constituting 19% of all charges filed, and representing almost twice as many charges as the next most common type of claim for mental disability (accounting for approximately 10% of charges filed). [3,4]. Charges involving persons with visual impairments constituted approximately 3.5% of all claims filed.[3]

According to the American Foundation for the Blind, approximately 3.4 million Americans have visual impairments. [5]. Unemployment and underemployment are serious problems for the visually impaired. [5]. Only 25% to 35% of persons who are considered visually impaired are working. [6]. In a survey of Fortune 500 companies after passage of the ADA, one quarter of the companies responded that they were making their recruiting materials accessible to individuals with visual impairments.[5]

In light of the high unemployment rate and lack of accessibility to employment facing the visually impaired community, it is crucial that ophthalmologists understand the impact of the ADA's employment provisions on people with visual impairments and their potential employers. This is true for several reasons. First, ophthalmologists frequently are asked to communicate with employers, federal and state agencies, and insurance companies about the visual status of their patients. Second, many visually impaired patients require advice from ophthalmologists about employment standards: patients recently rendered monocular may have concerns about their ability or qualification to continue work in certain jobs. Finally, as those physicians who diagnose and treat visual disorders, ophthalmologists are asked increasingly to comment on public policies toward this segment of the population and to aid in the resolution of the growing

number of ADA visual impairment lawsuits or workers' compensation claims.

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Title I of the Americans with Disabilities Act

The ADA is not just another law, but a vehicle for social and cultural change that will shape public attitudes and behavior toward people with disabilities well into the next century. [7, 8] Title I of the ADA is designed to provide a national mandate for the elimination of discrimination in employment against individuals with disabilities. Title I provides that entities covered by the law may not discriminate against a qualified individual with a disability in employment application, hiring, advancement, discharge, compensation, training, or any other terms or privileges of employment. Currently, firms with 25 or more employees are covered by title I. After July 26, 1994, Discrimination under the ADA includes not making reasonable accommodations to the known physical or mental impairments of a qualified individual with a disability unless the entity demonstrates that the accommodation would impose an undue hardship. In the legal literature and relevant case law, there is great ambiguity in many of these defining terms of the ADA. [9] *These terms include disability, qualified individual with a disability, essential job functions, reasonable accommodations, and undue hardship.*

Disability

The Equal Employment Opportunity Commission rules for implementing title I recognize a number of physical and mental conditions that qualify as disabilities, including the visual conditions of blurred vision, monocularity, and blindness. However, the Equal Employment Opportunity Commission regulations do not define specific visual impairments or disabilities. Other federal agencies, such as the Internal Revenue Service, the Department of Health and Human Services, and the Department of Transportation, have attempted to define blindness as best-corrected central visual acuity of 20/200 or less in the better eye; if the diameter of the visual field in an eye subtends an angle no more than 20, the eye is considered to have a visual acuity of 20/200 or less. However, it is not necessary for an individual to meet these criteria for blindness to be considered a disability for purposes of the ADA. A person is defined as having a disability covered by the ADA if that individual, by virtue of a physical or mental condition, is "substantially limited in performing major life activities." [12] Major life activities are things that people do (e.g., seeing, walking, speaking, and working). [13] Several factors are considered in assessing whether an individual is substantially limited in performing a major life activity, including the severity, nature, and duration of the impairment.

One role under title I for ophthalmologists is to aid in the systematic assessment of what visual impairments constitute substantial limitations on major life activities. It is unlikely that the ADA or the Equal Employment Opportunity Commission regulations could have anticipated how every type of visual impairment might affect an individual patient's ability to function. [14] Therefore, the legal definition of visual impairment will evolve with the assistance of ophthalmologists as new situations emerge.

The ADA also includes as people with disabilities those who have a "record of an

impairment" (e.g., history of visual impairment). In addition, a person "regarded as having an impairment," even though he or she may not have such an impairment, is covered. For example, a person with a wrong diagnosis of eye disease who is discriminated against in job assignments on that basis would be covered. Courts will need guidance from ophthalmologists to assess an individual's employment potential and to determine if a person with a visual impairment is incorrectly regarded as "disabled." Ophthalmologists can confront misconceptions about the abilities of the visually impaired. [16] As data become available concerning the abilities of individuals with visual impairments to perform in different working situations, ophthalmologists must reevaluate their own attitudes. Once it is determined that an individual with a disability is covered by the ADA, the next step is to assess if that person is "qualified" to perform the job.

Qualified Individual with a Disability

Prior cases under the Rehabilitation Act of 1973 prohibit the blanket exclusion of people with visual impairments and disability from most everyday tasks. [16] For example courts in District of Columbia [17] and New York [18] have concluded recently that it is illegal under the ADA to categorically exclude qualified people who are blind from jury duty solely on the basis of disability. [19] These courts suggest that "reasonable accommodation", such as audio describers (e.g., individuals who are trained to describe physical movements, settings, and dress for the blind) must be considered before a blind individual is determined to be "unqualified" for jury duty.

An employer cannot terminate a qualified employee with a visual impairment because the employer fears the consequences of an injury to that employee. Recently, a New Jersey court concluded that the termination of an applicant with significantly blurred vision in one eye, but perfect vision in the other, was not justifiable based solely on the employer's fear that the

applicant would be injured during police training. The ADA prohibited the employer from terminating the qualified applicant unless there was "substantial" evidence that the visual impairment prevented him from adequately performing the job or the visual impairment created a substantial risk of injury to the applicant or others. [21]

In a recent case reported in Tennessee, the legal analysis of the definition of a person with a visual disability appeared to conflict with an ophthalmic interpretation of ability [14] A patient, born without sight in the right eye (removed shortly after birth) was found not to be substantially limited in the major life activity of working. He had been working as a trucking route supervisor, training drivers and substitute driving for co-workers on vacation. In 1989, he was informed by the company that Tennessee regulations required medical certification to drive a truck heavier than 26,000 pounds. Because of his monocular status, he could not receive this certification, and his employment was terminated on this basis. The court reasoned that, although working is major life activity, working at a specific job is not. The visual impairment (e.g., monocularity) was found not to be conclusive of a disability covered under the ADA. The employee lost his ADA claim on these grounds

In analyzing a case of this sort, an ophthalmologist may be called upon by a court to assess whether particular state department of transportation requirements accurately assess a truck driver's qualifications. For example, does the fact that a truck driver has one eye make him or her per se unqualified," posing a threat to himself/herself or others? In the Tennessee case, the individual had already demonstrated that he was "qualified" and did not pose a threat because he had been driving a truck safely before certification was required. An ophthalmologist might suggest that the Tennessee court assumed incorrectly that patients with monocular vision who are deficient in stereopsis are not as safe (i.e., "qualified") truck drivers as those patients who

have perfect stereopsis. The ophthalmic community will need to gather clinical data to either confirm or refute broad and potentially discriminatory assumptions about visual impairments. [9]

There are at least two ways for ophthalmologists to gather data that would assist courts in determining who might be a "qualified" person with a visual disability. The first would be to test the work abilities of individual patients with visual impairments on a case-by-case basis in employment settings. [15,17] For example, if the driving performance of the truck driver with monocular vision from Tennessee had been assessed in actual driving situations and he proved to be "qualified" and posed no threat to himself or to others, there would be no basis for denying him a trucking license. Based on the Tennessee regulations alone, denial would be a discriminatory act in violation of the ADA. A second, more research-oriented approach is to gather data prospectively that would apply to classes of patients with visual disabilities. A driving simulator could test the abilities of patients with monocular vision, patients with a variety of visual field abnormalities and visual acuity levels under different driving conditions.²² Data based on the performance of large numbers of patients with classifiable visual disabilities might aid courts, legislators, and policy makers to make more informed decisions about whether an individual patient with a specific visual impairment was "qualified" or posed a threat to himself/herself or to others in specific driving situations. Legally, however, the burden would still rest with the patient with a visual impairment to show that he or she is "qualified." [15, 16]

These same two approaches can be applied in other contexts. For example, some ophthalmologists who lack perfect stereopsis perform microsurgery. This issue may become important as individual hospitals seek to "certify" surgeons in the performance of specific procedures. [24] If it can be shown that the surgical outcome rate for these stereopsis-deficient surgeons is not significantly different from outcome rates for their colleagues who have excellent

stereopsis, there would be no legal basis to deny them and their patients the ability to use their skills as ophthalmic surgeons. [24] In the future, when virtual reality operation simulators become available, it may be possible to assess the abilities of monocular ophthalmologists to perform microsurgery in a setting that is not threatening to patients.

The example of the monocular ophthalmic surgeon is mentioned because the qualifications of an ophthalmologist who loses one eye might be challenged, and because of the implications that the ADA might have for the selection process of ophthalmology residents by training programs. [23, 24] Under the ADA, an employer may not require a qualified job applicant with a disability to take a medical examination before making a job offer. [6, 8.25] Therefore, with the knowledge that there are ophthalmologists who are deficient in stereopsis and who perform microsurgery successfully, it may be discriminatory under the ADA for ophthalmic residency programs to require copies of ophthalmic examinations that include tests of stereopsis if that criterion alone is used to eliminate an applicant or class of applications from consideration. [23, 24] On the other hand, an employer may condition a job offer (or continued employment for employees) on a satisfactory medical examination if this is required of all similarly situated employees, and if it is job related and consistent with business necessity. [27] The issue for ophthalmic residency programs (or other jobs requiring critical visual functions such as commercial airline pilots) is identifying what criteria are truly job related. Maximum vision requirements, often found in the law enforcement and other public safety positions, are not considered such pre-employment examinations under the ADA. [28]

Essential Job Functions

An employer will likely determine whether an individual with a visual impairment is "qualified" based on two criteria: (1) whether the applicant satisfies the prerequisites for the job,

such as appropriate educational or employment experience, and (2) whether the individual can perform the "essential functions" of the job with or without reasonable accommodation.¹⁻⁹ Essential functions are those central to the task that the employee must perform unaided or with reasonable accommodation. This determination is meant to ensure that qualified people with visual and other disabilities are not denied employment because they cannot perform marginal functions of the job.

The Equal Employment Opportunity Commission has identified three factors to determine essential job functions: (1) whether the job exists to perform that function, (2) whether few other employees are available to perform that job function, and (3) whether a high degree of skill is required to perform the job function.⁷⁻⁸ For example, under the first of these factors, a visually impaired clerk hired to sort records might need the accommodation of a magnification device, yet the essential job functions of someone who sorts records may not include the job requirement that those records be filed in a cabinet, a separate activity for which the clerk would not be able to use the magnifier easily.

Under title I, consideration is given to the employer's judgment as to what job functions are essential. The factors for assessing essential job functions, however, vary within a group of people with a particular disability, as illustrated by the wide variation in the extent of visual impairment (e.g., approximately 80% of people with visual impairments have some vision).⁶ Therefore, those best able to make determinations about essential job functions will be employees with visual disabilities themselves, in consultation with ophthalmologists. Little systematic information is available currently to employers or covered employees on the relation between particular visual impairments and the qualifications for performing essential job functions. Ophthalmologists may provide much of this needed information

Reasonable Accommodations

An individual is considered a qualified employee with a disability if the person can perform the essential functions of the job with or without "reasonable accommodation." This requires employers to make individualized adjustments to jobs so that people with disabilities have equal access to job opportunities, benefits, and advancement.^{7 8} A reasonable accommodation is a modification in job tasks or in the work place that permits a qualified employee with a disability to perform the job.

There are three categories of reasonable accommodations. These include those that (1) ensure equal opportunity in the application process (e.g., job applications in large print formats), (2) enable employees with disabilities to perform essential job functions (e.g., providing assistive equipment for reading), and (3) enable employees with disabilities to enjoy the same benefits and privileges as employees without disabilities (e.g., benefit plans that do not discriminate on the basis of visual disability). [26, 27]

The scope of the reasonable accommodation provision may be the most controversial aspect of title I in addressing visual impairments. This is because the appropriateness of any accommodation must involve consideration of the employer's needs and interests, the treatment or compliance plan as determined by ophthalmologists, and the needs of the employee with the visual disability. [7, 8]

The importance of this problem-solving dialogue to resolving ADA disputes is becoming increasingly apparent [28] and is illustrated by a recent case in New York. [29] In that case, the state board of law examiners refused to give the plaintiff, who had severe visual impairments, 4 days instead of 2 to take her bar examination. The plaintiff's ophthalmologist recommended that such an accommodation was necessary to ensure that the plaintiff was given a fair opportunity to

pass the bar examination. In finding for the plaintiff, the court concluded that the opinion of the treating ophthalmologist was properly of great weight in determining the appropriate accommodation for one with a visual disability. [29] Ophthalmologists will be called upon increasingly to provide guidance to courts and employers in assessing whether an accommodation is reasonable or whether it imposes an undue hardship.

Undue Hardship

Title I regulates employers' obligations to provide reasonable accommodations to qualified employees through the term "undue hardship." This provision focuses on the fiscal impact of a potential accommodation. Undue hardship arises if the employer would encounter significant difficulty or expense in providing an accommodation. Factors to be considered in determining undue hardship include the resources, type and size of the business, the structure of the work force, the nature and cost of the accommodation, and the potential effect of the accommodation on the business as a whole. [8] Effective implementation of the ADA requires additional input and research from ophthalmologists about appropriate, safe, and cost-effective accommodations that do not impose undue hardship.

The Equal Employment Opportunity Commission is responsible for enforcing title I. An employer found to have discriminated under title I could be liable to the employee for compensatory and punitive damages, lost pay, reinstatement, reasonable accommodation, attorneys' and experts' fees, and other remedies provided by the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. Although the Civil Rights Act of 1991 strengthens the ban on discrimination in employment against people with disabilities (e.g., providing for jury trials in ADA cases), it limits monetary damages in cases of intentional discrimination in relation to the size of the employer, with damages capped from \$50,000 to \$300,000. Filing a federal

ADA charge with the Equal Employment Opportunity Commission, however, does not prevent an injured worker from filing a state workers' compensation claim. [30]

Implications of Title I for Ophthalmologists

The previous discussions illustrate the importance to ophthalmologists of monitoring and communicating information about the employment of qualified people with visual impairments covered by the ADA. For ophthalmologists, title I poses a threefold communications challenge: (1) to foster dialogue about the ADA among employers, employees, unions, and other professionals and about the meaning of its defining terms; (2) to raise public awareness and debunk longstanding myths about people with visual impairments; and therefore (3) to help forestall or minimize disputes, legal or other, about effective ADA implementation through dialogue, research, new technology, and awareness. [7, 8]

Many sources now exist to address these issues. [7, 8] But misperceptions about the implementation of title I continue to adversely affect acceptance of the Act by the business community, the professional community, and people with disabilities themselves. [31] It is critical that title I be understood as an effort to include and empower people through work, and not as an affirmative action initiative. Many unfounded fears about the scope of the ADA are based on a misunderstanding of this principle. Communicating information about title I from many viewpoints (medical, economic, legal, cultural, and others) is a critical first step toward achieving the empowerment and inclusion envisioned by the ADA. [7, 8]

It will be important for ophthalmologists to help gather information about the actual costs and benefits of putting visually impaired people to work under title I and to encourage informed and cost-effective compliance with the law. [32] Information from ophthalmologists about reasonable accommodations for employees with visual impairments also will benefit employees

without disabilities, as well as those who may become disabled in the future. Information will aid in improved job design at the work place and in the development of consumer products that are more user-friendly to those with visual impairments. [33] Documenting forward-looking and cost-effective attempts to provide reasonable accommodations also will encourage compliance with the law and enable employers to learn from such proactive efforts. 34 The cost of excluding people with disabilities from the productive mainstream of society in the United States is enormous, and the related mental and emotional costs are immeasurable.

Perhaps the greatest challenge facing policy makers, employers, and employees is the avoidance and resolution of ADA disputes.[7, 8] Title V of the ADA provides that, where appropriate, alternative means of dispute resolution should be used, that is, means other than traditional, often costly trial or workers' compensation litigation. Alternative dispute resolution techniques include settlement negotiations, mediation, and arbitration. The use of such techniques is voluntary under the ADA.

Effective use of alternative dispute resolution techniques will help to avoid costly litigation that could undermine public support for the Act. [35] There are at least two strategies that ophthalmologists may use to help avoid or resolve ADA disputes between employees with visual impairments and their employers. First, the ophthalmologist may establish a dialogue about realistic and achievable clinical outcomes and work-related goals. Second, ophthalmologists can suggest that in the absence of sound prospective clinical data, the ADA will be interpreted primarily on a case-by-case basis. [15] By conducting research on ADA implementation and the provision of reasonable accommodations (i.e., cost-effective medically based job modifications based on a continuum of individual employee needs), ophthalmologists will help advance the legal and policy debate and thereby resolve unnecessary disputes. [36]

Ophthalmologists have begun to assume these roles in resolving potential ADA disputes related to visual impairments. In July 1992, the Department of Transportation's Federal Highway Administration announced its decision to issue waivers of the vision requirements that had prohibited individuals with monocular vision from driving commercial trucks in interstate commerce. [37] The federal vision requirement states that a commercial driver must have distant visual acuity of at least 20/40 in each eye without corrective lenses or visual acuity separately corrected to 20/40 or better in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber. [37]

As suggested above, the Federal Highway Administration's decision to waive the federal vision requirements may allow "qualified" commercial drivers with visual impairments (i.e., those meeting safety and medical requirements) to perform the major life activity of work. In reaching its decision, the Federal Highway Administration recognized that there is a lack of adequate empirical data necessary to establish a link between visual impairment and commercial motor vehicle safety. [37] The "Vision Waiver Program" will therefore include a study comparing a group of experienced visually impaired drivers with a control group of experienced drivers who meet the current federal vision requirements. [37] Ophthalmologists will be able to re-examine the validity of the federal vision requirements in the context of actual driver performance (or, as suggested above, in simulated settings). If warranted, new vision requirements could be established that (1) do not discriminate against qualified drivers with visual impairments covered by the ADA, and (2) are safe and informed by current knowledge from the ophthalmic community.

Discussion

The ADA is foremost a civil rights law. Similar to the civil rights laws of the 1960s, the Act is an impetus for social change, affecting the lives of millions of Americans with visual impairments. [7, 8] It is important that ophthalmologists know the provisions of this legislation and be prepared to communicate accurately with patients, employers, federal and state agencies, schools, insurance companies, and others. The judgment of an ophthalmologist who is knowledgeable about the ADA will help keep many qualified people with visual impairments at work and thus have a major economic impact on our society. Ophthalmologists can help employers to develop strategies that transcend mere compliance with the law and encourage the development of interdisciplinary research programs and technologies to permit reasonable accommodations for the visually impaired.

The principal message of the ADA is straightforward: qualified people with disabilities, visual and otherwise, should be given the same rights as everyone else. The understanding of the message of the ADA by ophthalmologists, policy makers, employers, employees, and others will serve as a measure of our success in meeting the challenges posed by the Americans with Disabilities Act in the years ahead.

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