

I greatly appreciate being asked to share my thoughts with you on this, the 20th anniversary of the signing of the Americans with Disabilities Act. It is difficult to believe that a full 20 years has passed since the Act was signed. The obvious correctness of the Act also makes it difficult to believe that it took until the 90th year of the 20th century for such legislation to be passed and signed.

The ADA has had an effect, both large and small, on the lives of people with disabilities. As one member of Disability Rights New Jersey's (DRNJ's) staff observed, the ADA has allowed people with disabilities to become participants in everyday life, not just observers. Another staff member, who is deaf, volunteered that prior to the ADA-mandated telephone relay system, he had to rely on friends or, worse yet, his parents to call girls for dates during high school. Thanks to the relay system, he was able to call to arrange for dates with women, and now, he uses the system to make restaurant reservations for pleasant evenings with his wife.

Bright red curb cuts now dot the urban landscape. And, barrier-free access, particularly for new construction, is nearly universal, although there are still some efforts that are more amusing than effective. The renovated Trenton Transit Center, for example, placed giant concrete spheres at the top and bottom of its ramps, presumably to discourage skateboarders, and located the automatic door switch so that the less nimble among us have a better shot of getting whacked by the door than going through the open doorway. The switch got moved, and now it simply doesn't work; joining the perpetually broken elevator at the New Brunswick train station.

The citizens of New Jersey should take some pride in the fact that our legislature passed our basic Law Against Discrimination (LAD) in the immediate aftermath of World War II and expanded it to prohibit discrimination against persons with disabilities in 1972. The New Jersey Supreme Court's landmark decisions, *Anderson v. Exxon Company*, 89 N.J. 483 (1982), and *Jansen v. Food Circus Supermarkets*, 110 N.J. 363 (1988), interpreting the Law Against Discrimination favorably for persons with disabilities, were decided in 1982 and 1988 respectively.

Therefore, while New Jersey citizens with disabilities already enjoyed legal protections at the time the ADA was signed, there can be no doubt that the ADA raised the state and national consciousness of the rights of persons with disabilities. Even though New Jersey's Law Against Discrimination has been in effect some 20 years longer than the ADA, and even though its provisions are frequently more favorable to people with disabilities, it is the awareness of the ADA that makes the phones in our office ring.

It is an unfortunate fact of life, however, that enacting a law is only one step, albeit a crucial step, in achieving change. The passage of the ADA is no exception.

In New Jersey, as well as nationally, the stigma faced by people with mental illness continues to be difficult to bust; and New Jersey particularly needs to do more to integrate students with disabilities in the general education classroom.

There can be little doubt that it is in the area of employment that the greatest number of complaints of discrimination based on a disability are generated.

Despite the most vigorous individual use of the ADA (and the LAD), the employment discrimination provisions have not been able to have a significant

effect on the un- and underemployment of persons with disabilities. Almost 80% of people with disabilities are not even in the workforce, while almost 15% of those who are in the workforce are unemployed.¹

This is not to say that the ADA has had no effect on the employment opportunities for people with disabilities. The passage of the ADA was a boon to consultants providing training to employers on how to comply with (or at least look like they were complying with) the ADA.

Some employers paid better attention than others.

While establishing a case of individual employment discrimination is difficult, our litigation appetite is whetted by the employer who insists that it is under no obligation to provide an accommodation to anyone. And, while there is at least one study that posits that the availability of an attorney doubles the chances of a complainant's successful outcome,² I would suggest that there is one persistent cause of discrimination that could be quickly resolved by better basic business practices.

Our office regularly receives calls on behalf of people with disabilities who have been employed by the same employer for five, ten, fifteen, or twenty years and who are now being threatened with termination or have been terminated. In virtually every instance, there is a new supervisor. Interestingly, the vast majority of these employers are large national chains and public employers.

¹ June 2010: 21.7% of people with disabilities were in the workforce compared to 70.5% of people without disabilities, and 14.4% of people with disabilities in the workforce were unemployed compared to 9.4% of people without disabilities.

² Moss *et al*, Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts, *Mental & Physical Disability Law Reporter*, Vol. 29, p. 303, May/June 2005

The comprehensive and effective training of new supervisors has got to be one of the most neglected of good business practices, both large and small, profit and nonprofit, public and private. And, I am willing to bet that the new supervisor who is unable to accommodate the long-term employee with a disability is making other mistakes.

It is the United States Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that gives advocates the greatest hope for long term transformative change in the perception of people with disabilities. On the national level, the growing acceptance that institutions should not be the default placements for people with disabilities, young or old, has spawned President G.W. Bush's New Freedom Initiative and President Obama's Year of Community Living.

In New Jersey, the realization of the promise of the *Olmstead* decision has been, and continues to be, an interesting adventure. At the time of the *Olmstead* decision, more people resided in New Jersey's developmental centers both in absolute numbers and as a percentage of the population than in almost every other state, while in the state-run psychiatric hospitals, an average of 50% of the patients were eligible for discharge but had no place to go.

Near the first anniversary of the *Olmstead* decision, more than 70 representatives of people with disabilities, their families, provider organizations, and advocacy groups met with representatives from the Department of Human Services to urge the formation of a task force comprising all relevant governmental agencies as well as community stakeholders to develop a comprehensive plan for moving those covered by the *Olmstead* decision out of the institutions. Five years later, despite two incarnations of a less-than-complete

task force, there still was no comprehensive plan. It was only after an act of the legislature and litigation by DRNJ that the Division of Developmental Disabilities published its Path to Progress in 2007, and the Division of Mental Health Services its Home to Recovery in 2008.

Since then, the litigation against the Division of Mental Health Services has been settled, and the first year goals of reducing the hospital population and adding community services have been met. *Olmstead* thinking has become institutionalized in New Jersey incorporating not just the *Olmstead* plans, but also *Olmstead* initiatives, *Olmstead* support coordinators, and *Olmstead* budget lines, even during these extraordinarily difficult economic times. But there is more that needs to be done.

While the Division of Developmental Disabilities has published a plan that would go a long way toward fulfilling its *Olmstead* obligations, it has not been given the resources needed to implement the plan. This litigation continues, and it is the State's response to this litigation that is particularly troubling.

In seeking to avoid its obligations under the Americans with Disabilities Act and the Rehabilitation Act, the State of New Jersey has filed a brief in the United States District Court arguing that the Congress of the United States lacked the constitutional authority to enact either act and make them binding on the states. The State's argument is based on the arcane and shifting principles of sovereign immunity, which the State is free to waive.

In other words, it is the State's position that not only is it not legally bound to conform to the requirements of the ADA, but it also chooses not to voluntarily adhere to the same requirements. While the U.S. Department of Justice has

joined DRNJ in disputing the State's arguments, it is profoundly disappointing that our state government is lending its authority to those who would challenge the implementation of the ADA. Our state officials must be encouraged to embrace the ADA, not resist it.

Today's program commemorates the 20th anniversary of the signing of an historic piece of legislation not just for people with disabilities, but for all of us. It is in the finest tradition of American laws that acknowledge the moral and legal imperative of equality under law, a commitment to a society of equality of opportunity, and a recognition of the value and richness of our diversity as a people. While many of its promises remain unfulfilled, and the competition for limited resources during the current economic crisis is especially acute, the change the ADA promises is inevitable with our insistence and persistence. I know that you all are eager to continue to break through the physical and virtual barriers for however long it will take.