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Stephen L. Mikochik

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# EMPLOYMENT DISCRIMINATION AGAINST AMERICANS WITH DISABILITIES

*Stephen L. Mikochik\**

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### I. INTRODUCTION

On July 26, 1990, the President signed into law the Americans with Disabilities Act (ADA). The ADA is comprehensive legislation prohibiting discrimination against disabled persons in employment, public services, transportation, places of public accommodation, and telecommunications. This article will attempt to provide an overview of the ADA's major provisions concerning employment discrimination.

### II. BACKGROUND

In passing the ADA, Congress found that the approximately forty-three million disabled Americans<sup>1</sup> encountered discrimination in many forms "including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."<sup>2</sup> Consequently, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."<sup>3</sup> Con-

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1. Pub. L. 101-336, § 2(a)(1), 104 Stat. 327, 328 (1990) (codified at 42 U.S.C. § 12101(a)(1)).

2. *Id.* at § 2(a)(5), 104 Stat. 327, 328-29 (codified at 42 U.S.C. § 12101(a)(5)).

3. *Id.* at § 2(a)(6), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(a)(6)).

gress, finding that individuals with disabilities were "a discrete and insular minority,"<sup>4</sup> and invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,"<sup>5</sup> passed the ADA in order

to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.<sup>6</sup>

### III. DISABILITY DEFINED

The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>7</sup> This definition is comparable to that of "individual with handicaps"<sup>8</sup> under Section 504 of the Rehabilitation Act of 1973,<sup>9</sup> and is intended to have a similar construction.<sup>10</sup>

The report of the Senate Committee on Labor and Human Resources which accompanied the ADA makes plain that persons with contagious conditions, including AIDS, come within the Act's provisions: "[A] person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability.'"<sup>11</sup>

Homosexuality, however, is not covered.<sup>12</sup> Neither does the Act nor its corresponding amendments to Section 504 protect individuals who use illegal drugs, un-

4. *Id.* at § 2(a)(7), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(a)(7)).

5. *Id.* at § 2(b)(4), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101(b)(4)).

6. S. REP. NO. 116, 101st Cong., 1st Sess., pt. II, at 2 (1989); *see also* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. II, at 22-23 (1990); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. III, at 27 (1990); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. IV, at 23 (1990).

7. Pub. L. 101-336, § 3(2), 104 Stat. 327, 329-330 (1990) (codified at 42 U.S.C. § 12101(2)).

8. 29 U.S.C. § 706(8) (Supp. 1988).

9. *Id.* at § 794.

10. S. REP. NO. 116, at 21 (1989). *See also* H.R. REP. NO. 485, pt. II, at 50 (1990); H.R. REP. NO. 485, pt. III, at 27 (1990); H.R. REP. NO. 485, pt. IV, at 36 (1990).

11. S. REP. NO. 116, at 22 (1989). *See also* H.R. REP. NO. 485, pt. II, at 51 (1990); H.R. REP. NO. 485, pt. III, at 28 (1990). Relying on the Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), the Committee observed:

The third prong [of the definition of "disability"] includes an individual who has a physical or mental impairment that substantially limits major activities only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment . . . . This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination.

S. REP. NO. 116, 101st Cong., 1st Sess., pt. IV, at 24 (1989); *see also* H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. II, at 53 (1990); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. III, at 29-30 (1990).

12. Pub. L. 101-336, § 511(a), 104 Stat. 327, 376 (1990) (codified at 42 U.S.C. § 12211(a)).

less they have been rehabilitated successfully.<sup>13</sup> Nevertheless, an individual, otherwise disabled, is not excluded from coverage "if such individual also uses or is also addicted to drugs."<sup>14</sup> As the Act's principal Senate sponsor observed:

[T]he fact that a disabled person is a current user of illegal drugs does not mean that the person is not protected under the Act when actions are taken against that individual, not on the basis of the current use of illegal drugs, but on the basis of the disability.<sup>15</sup>

#### IV. COVERED ENTITIES

Title I of the ADA, which becomes effective July 26, 1992,<sup>16</sup> prohibits discrimination in employment. The title covers employers "engaged in an industry affecting commerce" who, during the first two years following the effective date, have twenty-five or more employees (and fifteen or more employees thereafter) "for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person."<sup>17</sup> Although not named expressly, "[state] governments, governmental agencies, and political subdivisions" are nonetheless intended to be included within the definition of "employer", if they would be otherwise covered.<sup>18</sup> Moreover, notwithstanding that Title I expressly excludes the United States from coverage,<sup>19</sup> Section 509 revives that coverage as regards Congress and its instrumentalities.<sup>20</sup> Title I in addition applies to employment agencies and labor organizations,<sup>21</sup> as those terms are defined in Section 701 of the Civil Rights Act of 1964.<sup>22</sup>

13. *Id.* at § 510(a), 104 Stat. 327, 375 (codified at 42 U.S.C. § 12210(a)-(b)); *id.* at § 512(a), 104 Stat. 327, 376 (codified at 29 U.S.C. § 706(8)(C)(i)-(v) (Supp. 1991)). *See also id.* at § 104(b), 104 Stat. 327, 335 (codified at 42 U.S.C. § 12114(b)). Specifically, the Act excludes from Section 504's coverage any individual who currently uses illegal drugs. *Id.* at § 512(a). The ADA and its Section 504 amendments further provide that for purposes of covered entities providing medical services, an individual who uses illegal drugs shall not be denied the benefits of such services "on the basis of the current illegal use of drugs, if the individual is otherwise entitled to such services." *Id.* at § 510(c), 104 Stat. 327, 376 (codified at 42 U.S.C. § 12210(c)); *see also id.* at § 512(a)(iii), 104 Stat. 327, 377 (codified at 29 U.S.C. § 706(8)(C)(iii) (Supp. 1991)); *id.* at § 104(c), 104 Stat. 327, 335 (codified at 42 U.S.C. § 12114(c)).

14. *Id.* at § 512(a), 104 Stat. 327, 376-77 (codified at 29 U.S.C. § 706(8)(C)(i)-(v) (Supp. 1991)); *id.* at § 104(a), 104 Stat. 327, 334 (codified at 42 U.S.C. § 12114(a)).

15. 135 CONG. REC. S11, 224 (daily ed. Sept. 15, 1989) (remarks of Sen. Harkin). Alcoholics, however, are considered "disabled" for purposes of the ADA, S. REP. NO. 116, at 22 (1989). *See also* H.R. REP. NO. 485, pt. II, at 142 (1990); H.R. REP. NO. 485, pt. III, at 76 (1990); H.R. CONF. REP. NO. 558, 101st Congress, 2d Sess., at 84-55 (1990), which leaves the coverage of alcoholics under Section 504 where it finds it. Pub. L. 101-336, § 512(a), 104 Stat. 327, 377 (1990) (codified at 29 U.S.C. § 706(8)(C)(i)-(v) (Supp. 1991)).

16. Pub. L. 101-336, § 108, 104 Stat. 327, 337 (1990) (codified at 42 U.S.C. § 12111).

17. *Id.* at § 101(5)(a), 104 Stat. 327, 330 (codified at 42 U.S.C. § 12111(5)(a)).

18. S. REP. NO. 116, at 24 (1989); *see also* H.R. REP. NO. 485, pt. II, at 54 (1990); H.R. REP. NO. 485, pt. III, at 32 (1990).

19. Pub. L. 101-336, § 101(5)(b)(i), 104 Stat. 327, 330 (codified at 42 U.S.C. § 12111(2)).

20. *Id.* at § 509, 104 Stat. 327, 373-75 (codified at 42 U.S.C. § 12209).

21. *Id.* at § 101(2), 104 Stat. 327, 330 (codified at 42 U.S.C. § 12111(2)).

22. 42 U.S.C. § 2000e(c) (employment agency); *id.* at § 2000e(d)-(e) (labor organization); Pub. L. 101-336, § 101(7), 104 Stat. 327, 331 (codified at 42 U.S.C. § 12111(7)). Title I also covers joint labor-management committees. *Id.* at § 101(2), 104 Stat. 327, 330 (1990) (codified at 42 U.S.C. § 12111(2)).

## V. QUALIFIED PERSONS

The ADA protects only qualified disabled persons from employment discrimination. Individuals with disabilities are "qualified" if, "with or without reasonable accommodation, [they] can perform the essential functions of the employment position that such individual[s] [hold] or [desire]."<sup>23</sup> The term "reasonable accommodation" includes:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>24</sup>

Title I prohibits a covered entity from denying "reasonable accommodations to the known physical or mental limitations of [a] qualified individual . . . who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of . . . [its] business,"<sup>25</sup> by requiring "significant difficulty or expense."<sup>26</sup> The Senate Committee Report clarifies that "[i]n situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity,"<sup>27</sup> defined as an opportunity "to attain

23. Pub. L. 101-336, § 101(8), 104 Stat. 327, 331 (1990) (codified at 42 U.S.C. § 12111(8)).

24. *Id.* at § 101(9), 104 Stat. 327, 331 (codified at 42 U.S.C. § 12111(a)).

25. *Id.* at § 102(b)(5)(A), 104 Stat. 327, 332 (codified at 42 U.S.C. § 12112(b)(5)(a)). Title I also prohibits a covered entity from "denying employment opportunities to a job applicant or employee who is [a] . . . qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." *Id.* at § 102(b)(5)(B), 104 Stat. 327, 332 (codified at 42 U.S.C. § 12112(b)(5)(B)).

26. *Id.* at § 101(10)(A), 104 Stat. 327, 331 (codified at 42 U.S.C. § 12111(10)(A)). The Committee Report described "undue hardship" by way of actions which were "unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program." S. REP. NO. 116, at 35 (1989). *See also* H.R. REP. NO. 485, pt. II, at 67 (1990); H.R. REP. NO. 485, pt. III, at (1990); H.R. CONF. REP. NO. 558, at 56 (1990). Factors to consider in determining undue hardship include:

(i) the nature and cost of the accommodation needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expense and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Pub. L. 101-336 § 101(b)(10)(B), 104 Stat. 327, 331 (codified at 42 U.S.C. § 12111(b)(10)(B)).

27. S. REP. NO. 116, at 35 (1989). *See also* H.R. REP. NO. 485, pt. II, at 66 (1990); H.R. REP. NO. 485, pt. III, at 40 (1990).

the same level of performance as is available to non-disabled employees having similar skills and abilities."<sup>28</sup>

Title I permits employers to require as a job qualification that applicants or employees with "currently contagious disease[s] or infection[s] . . . not pose a direct threat to the health or safety of other individuals in the workplace."<sup>29</sup> The Committee Report elaborates:

It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property. The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.

The employer must identify the specific risk that the individual with a disability would pose. The standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others or to property, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk.<sup>30</sup>

Title I further permits a covered entity to "hold an employee [who is a drug user or alcoholic] to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to . . . drug use or alcoholism."<sup>31</sup>

## VI. FORBIDDEN DISCRIMINATION

Title I prohibits covered entities from discriminating against qualified individuals "because of the disability of such individual[s] 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."<sup>32</sup> The prohibition in Section 504 against discrimination "solely" by reason

28. *Id.* The ADA follows regulations implementing § 504, 45 C.F.R. § 84.11(c) (1989), by forbidding employers from relying on the provisions of collective bargaining agreements to excuse their non-compliance. S. REP. NO. 116, at 32 (1989). *See also* H.R. REP. NO. 485, pt. II, at 63 (1990). Such provisions, however, can be considered in determining the reasonableness of proposed accommodations: "For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job." *Id.*

29. Pub. L. 101-336, § 103(b), 104 Stat. 327, 334 (1990) (codified at 42 U.S.C. § 12113(b)).

30. S. REP. NO. 116, at 27 (1989). *See also* H.R. REP. NO. 485, pt. II, at 76 (1990); H.R. REP. NO. 485, pt. III, at 45 (1990); H.R. CONF. REP. NO. 558, at 58 (1990).

31. Pub. L. 101-336, § 104(c)(4), 104 Stat. 327, 335 (1990) (codified at 42 U.S.C. § 12114(c)(4)). Although urging employers to provide rehabilitation programs or opportunities for rehabilitation to their addicted or alcoholic employees, the Senate Committee Report, nonetheless, recognized that this was not an accommodation required by the ADA. S. REP. NO. 116, at 42. *See also* H.R. REP. NO. 485, pt. IV, at 72 (1990); H.R. CONF. REP. NO. 485, at 60 (1990). This result, however, should not limit the accommodations required by § 504 since the ADA was not meant to reduce the scope of coverage or "apply a lesser standard" under that statute. Pub. L. 101-336, § 501(a), 104 Stat. 327, 369 (1990) (codified at 42 U.S.C. § 12201(a)).

32. Pub. L. 101-336, § 102(a), 104 Stat. 327, 331-32 (1990).

of a person's handicap<sup>33</sup> was omitted from the ADA to ensure that the consideration of non-disability factors would not immunize an employment decision which otherwise took disability into account.<sup>34</sup>

Title I proceeds to define discrimination more specifically to forbid "limiting, segregating, or classifying . . . job applicant[s] or employee[s] in a way that adversely affects . . . [their] opportunities or status . . . because of . . . [their] disability[ies]."<sup>35</sup> This requires covered entities "to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do."<sup>36</sup>

The ADA also incorporates a disproportionate impact standard. A covered entity is forbidden from "participating in a contractual or other arrangement or relationship that has the effect of subjecting a . . . qualified applicant or employee with a disability to . . . discrimination."<sup>37</sup> The Senate Report notes that "[t]his standard is consistent with the interpretation of section 504 by the United States Supreme Court in *Alexander v. Choate*,"<sup>38</sup> where the Court recognized that the promise of non-discrimination for disabled people "would ring hollow if . . . legislation could not rectify the harms resulting from action that discriminated by effect as well as by design."<sup>39</sup>

Moreover, the ADA prohibits the use of "employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the . . . test or other . . . criteria has been shown [by the covered entity] to be job-related . . . [and] consistent with

33. Section 504 of the Rehabilitation Act of 1973 provides in pertinent part that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794 (1991) (emphasis added).

34. S. REP. NO. 116, at 44 (1989). See also H.R. REP. NO. 485, pt. II, at 35 (1990).

35. Pub. L. 101-336, § 102(b)(1), 104 Stat. 327, 332 (1990) (codified at 42 U.S.C. § 12112(b)(1)).

36. S. REP. NO. 116, at 28 (1989). See also H.R. REP. NO. 485, pt. II, at 58 (1990); H.R. REP. NO. 485, pt. III, at 36 (1990). Similar to § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), the ADA forbids retaliation against individuals because they "opposed any act or practice made unlawful by th[e] Act or because [they] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under th[e] Act." Pub. L. 101-336, § 503(a), 104 Stat. 327, 370 (1990) (codified at 42 U.S.C. § 12203(a)). Section 503(b) also prohibits the coercion or intimidation of persons for exercising rights afforded by the legislation. *Id.* at § 503(b), 104 Stat. 327, 370 (codified at 42 U.S.C. § 12203(b)).

37. Pub. L. 101-336, § 102(b)(2), 104 Stat. 327, 332 (1990) (codified at 42 U.S.C. § 12112(b)(2)). Title I further prohibits the use of "standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control." *Id.* at § 102(b)(3), 104 Stat. 327, 332 (1990) (codified at 42 U.S.C. § 12112(b)(3)).

38. 469 U.S. 287, 105 S. Ct. 712, 83 L.Ed.2d 661 (1985).

39. S. REP. NO. 116, at 30 (1989) (quoting *Choate*, 469 U.S. at 297). See also H.R. REP. NO. 485, pt. II, at 61 (1990). The Supreme Court in *Choate*, however, also "rejected 'the boundless notion that all disparate impact showings constitute prima facie cases under section 504.'" S. REP. NO. 116, at 30 (1989) (quoting *Choate*, 469 U.S. at 299).

business necessity,"<sup>40</sup> and "such performance cannot be accomplished by reasonable accommodation."<sup>41</sup> The Committee Report explains:

[T]he requirement that job selection procedures be "job-related and consistent with business necessity" underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the job, but that even if they do provide such a measure, a disabled applicant is offered a "reasonable accommodation" to meet the criteria that relate to the essential functions of the job at issue.<sup>42</sup>

Title I permits covered entities to inquire into "the ability of . . . applicant[s] to perform job-related functions."<sup>43</sup> "[T]o assure that misconceptions do not [enter] the employment selection process,"<sup>44</sup> however, the Act forbids pre-offer medical examinations and inquiries into whether applicants are disabled.<sup>45</sup> Post-offer medical examinations are permitted "so long as they are given to all entering employees in a particular category, the results of the examinations are kept confidential, and the results are not used to discriminate against individuals with disabilities unless such results make the individual not qualified for the job."<sup>46</sup> As the Committee Report observes: "[B]eing identified as disabled often carries both blatant and subtle stigma. An employer's legitimate needs will be met by allowing . . . [post-offer] medical inquiries and examinations which are job-related."<sup>47</sup>

## VII. ENFORCEMENT

Title I incorporates the remedies and procedures set forth in Title VII of the Civil Rights Act of 1964, including recourse to the Equal Employment Opportunity Commission,<sup>48</sup> which is required to issue implementing regulations within

40. Pub. L. 101-336, § 102(b)(6), 104 Stat. 327, 332 (1990) (codified at 42 U.S.C. § 12112(b)(6)).

41. *Id.* at § 103(a), 104 Stat. 327, 333-34 (codified at 42 U.S.C. § 12113(a)). This burden of proof is meant to parallel that imposed by regulations implementing section 504 which require that, "once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related." 45 C.F.R. pt. 84 app. at 352 (1989). Those regulations further provide: "[An employer] is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related." *Id.*

42. S. REP. NO. 116, at 38 (1989). *See also* H.R. REP. NO. 485, pt. II, at 76 (1990); H.R. REP. NO. 485, pt. III, at 44 (1990).

43. Pub. L. 101-336, § 102(c)(2)(B), 104 Stat. 327, 333 (1990) (codified at 42 U.S.C. § 12112(c)(2)(B)).

44. S. REP. NO. 116, at 39 (1989). *See also* H.R. REP. NO. 485, pt. II, at 72 (1990); H.R. REP. NO. 485, pt. III, at 42 (1990); H.R. CONF. REP. NO. 558, at 57 (1990).

45. Pub. L. 101-336, § 102(c)(2)(A), 104 Stat. 327, 333 (1990) (codified at 42 U.S.C. § 12112(c)(2)(A)). With some restrictions, covered entities, pursuing affirmative action, may invite applicants for employment to indicate whether they have a disability. S. REP. NO. 116, at 40 (1989). *See also* H.R. REP. NO. 485, pt. II, at 75 (1990); H.R. REP. NO. 485, pt. III, at 44 (1990).

46. Pub. L. 101-336, § 102(c)(3), 104 Stat. 327, 333 (1990) (codified at 42 U.S.C. § 12112(c)(3)); *see also* S. REP. NO. 116, at 39 (1989). *See also* H.R. REP. NO. 485, pt. II, at 3 (1990); H.R. REP. NO. 465, pt. III, at 43 (1990); H.R. CONF. REP. NO. 558, at 58 (1990).

47. S. REP. NO. 116, at 40 (1989). *See also* H.R. REP. NO. 485, pt. II, at 75 (1990); H.R. REP. NO. 485, pt. III, at 44 (1990).

48. Pub. L. 101-336, § 107, 104 Stat. 327, 336 (1990) (codified at 42 U.S.C. § 12117).



one year of the ADA's enactment.<sup>49</sup> Finally, Section 505 permits the award of attorney's fees in any action or administrative proceeding commenced under the ADA to the prevailing party, other than the United States, which "shall be liable for [attorney's fees] the same as a private individual."<sup>50</sup>

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49. *Id.* at § 106, 104 Stat. 327, 336 (1990) (codified at 42 U.S.C. § 12116).

50. *Id.* at § 505, 104 Stat. 327, 371 (1990) (codified at 42 U.S.C. § 12205).