

CONTENTS

PART I: A History of Disability Discrimination Law

1.01 Disability Discrimination in the Pre-Civil Rights Era	1
1.02 The Abuse of Persons with Mental Disabilities in Civil Institutions	4
(a) Involuntary Confinement	
(b) Rights in Institutions	
(c) Rights of Citizenship Lost	
1.03 The Rights of People in Mental Institutions	7
(a) The Right to Treatment	
(b) Rights in Involuntary Commitment Hearings	
(c) Deinstitutionalization	
1.04 Rehabilitation and Community-Based Rights and Services	13
(a) Federal Legislation	
(i) The Architectural Barriers Act	
(ii) The Rehabilitation Act	
(iii) The Education of All Handicapped Children's Act	
(iv) Developmental Disabilities Assistance and Bill of Rights Act	
(b) Self-Determination and Personal Autonomy	
1.05 The ADA and the Civil Rights of All People with Disabilities	18
(a) Self-Advocacy	
(b) The ADA and Its Limitations	
1.06 ADA Enactment, Implementation, and Enforcement	22
(a) Extreme Enthusiasm	
(b) Early Warnings	
(c) ADA Litigation in the Federal Courts	
(i) Disability Definition	
(ii) Qualified Person with a Disability	
(iii) Essential Job Functions	
(iv) Judicial Estoppel	
(v) Direct Threat to Health or Safety	
(vi) Reasonable Accommodation	
1.07 Conclusion	30

PART II: LEGAL OVERVIEW OF KEY STATUTES AND SOVEREIGN IMMUNITY LIMITATIONS

2.01 Federal Legislation33

- (a) ADA
 - (i) Findings and Purposes
 - (ii) The ADA's Titles
 - (iii) Reasonable Accommodations and Modifications
- (b) Rehabilitation Act
- (c) FHAA
- (d) IDEA
- (e) FMLA
- (f) P&A
 - (i) Persons with Developmental Disabilities
 - (ii) Client Assistance Program
 - (iii) P&A for Individuals with Mental Illness
 - (iv) P&A for Individual Rights
 - (v) Native Americans P&A
 - (vi) Technology-Related Assistance for Individuals with Disabilities Act
 - (vii) P&A for Traumatic Brain Injury
 - (viii) P&A for Beneficiaries of Social Security
 - (ix) P&A for Voter Assistance

2.02 State Sovereign Immunity42

- (a) Generally
- (b) ADA Title I
- (c) FMLA
- (d) ADA Title II
- (e) Section 504 and the IDEA

2.03 State Laws49

PART III: DISABILITY DEFINITIONS IN FEDERAL AND STATE DISCRIMINATION LAWS

3.01 ADA; Rehabilitation Act; FHAA; Certain State Statutes.....51

- (a) Three-Pronged Disability Definition

- (b) Substantial Limitation
 - (i) Mitigation
- (c) Major Life Activities
- (d) Associating with Persons with a Known Disability
- (e) Specific Disability-Based Exclusions
- (f) Otherwise Qualified; Direct Threat
 - (i) Otherwise Qualified
 - (ii) Direct Threat

3.02 IDEA65

3.03 FMLA66

3.04 State Laws68

**PART IV: ENFORCEMENT UNDER FEDERAL AND STATE
DISABILITY DISCRIMINATION LAWS**

4.01 ADA; Rehabilitation Act71

- (a) ADA Enforcement Provisions
 - (i) Introduction
 - (ii) Title I: Employment
 - (iii) Title II: Public Services
 - (iv) Title III: Public Accommodations
 - (v) Title IV: Telecommunications
 - (vi) Title V: Miscellaneous

4.02 IDEA85

4.03 FHAA88

4.04 FMLA90

4.05 ACA91

4.06 State Discrimination Laws92

- (a) Employment
- (b) Public Services

- (c) Public Accommodations
- (d) Housing

PART V: ATTORNEYS' FEES IN FEDERAL AND STATE DISABILITY DISCRIMINATION CASES

5.01 Federal Attorneys' Fee Statutes	99
(a) Federal Statutes	
(b) Prevailing Parties	
(i) Plaintiffs	
(ii) Defendants	
(c) Reasonable Fees and Costs	
5.02 State Attorneys' Fees Statutes	106
(a) Employment	
(b) Public Services	
(c) Public Accommodations	
(d) Housing	

PART VI: EFFECTIVE REPRESENTATION OF CLIENTS WITH DISABILITIES AND THE CLIENT-LAWYER RELATIONSHIP

6.01 Introduction to the Client-Lawyer Relationship	109
6.02 The Client's Perspective	110
(a) Finding a Competent Lawyer	
(b) Communicating with a Lawyer	
(i) Gather All Possible Information That May Help Your Case	
(ii) Be Forthcoming with Your Lawyer from the Outset	
(iii) Be Forthcoming About Any Legally Relevant Disability	
(c) Understanding Why a Lawyer May Not Want to Represent a Client	
(d) Paying a Lawyer	
6.03 The Lawyer's Perspective	115
(a) Understanding the Client's Disability	
(i) Common Classes of Disabilities	

- (b) Communicating with Clients
- (c) Legal Duty to Provide Reasonable Accommodations
- (d) Self-Determination for Clients
- (e) Lawyer Versus Client Perspectives: Rights and Money
- (f) Ethical Obligations in Representing Clients with Disabilities

6.04 The Case Perspective127

- (a) Introduction
- (b) Civil Rights
- (c) Benefits
- (d) Disputes

PART VII: EMPLOYMENT DISCRIMINATION

7.01 Key Federal and State Statutes and How They Interrelate131

- (a) Federal and State Statutory Overview
- (b) Rehabilitation Act
 - (i) Section 501
 - (ii) Section 502
 - (iii) Section 503
 - (iv) Section 504
- (c) ADA Title I
 - (i) Purposes
 - (ii) Definition of Employer/Employee; Jurisdiction; Standing
- (d) State Laws
 - (i) Sovereign Immunity
 - (ii) Scope of Coverage

7.02 ADA Disability Definition As Applied to Employment142

7.03 Qualified Individual with a Disability; Judicial Estoppel; Direct Threat145

- (a) Definitions of Qualified
- (b) Qualified to Perform Essential Job Functions
- (c) Judicial Estoppel
- (d) Direct Threat
 - (i) Health or Safety to Others
 - (ii) Direct Threat to Self

7.04 Arbitration153

7.05 Medical Leave	156
(a) ADA Title I; Rehabilitation Act	
(b) FMLA	
(i) Definition of Covered Employer	
(ii) Employee Return-to-Work Protections	
(iii) Employee Eligibility: Hours of Service	
(iv) Serious Health Condition	
(v) Notice Requirements	
(vi) Twelve Weeks of Leave	
(vii) Retaliation; Production Bonus	
(c) FMLA's Relationship to ADA	
7.06 Medical Exams and Inquiries; Confidentiality	164
(a) Generally	
(b) Pre-employment	
(c) Post-Offer	
(d) On-the-Job	
(e) Voluntary	
(f) Genetic Predispositions	
(g) Confidentiality Requirements	
7.07 Employee Benefits: Employer-Sponsored Insurance	168
7.08 Reasonable Accommodation	171
(a) Generally	
(b) Undue Hardship	
(c) Types of Accommodations	
(i) Generally	
(ii) Job Reassignment/Transfers	
(iii) Part-time or Modified Work Schedules; Medical Leave	
(iv) Changing Supervisors or Supervisory Methods; Training	
(v) Auxiliary Aids and Services; Alternative Benefits	
7.09 Proving Discrimination	180
(a) Generally	
(b) <i>Prima Facie</i> Case	
(i) Material Adverse Change; Mixed Motive	
(c) Legitimate Reason	
(d) Pretext	
(e) Retaliation; Harassment; Hostile Work Environment	
(f) Reasonable Accommodation; <i>McDonnell Douglas</i>	

PART VIII: STATE AND LOCAL GOVERNMENTS AND OTHER PUBLIC SERVICES

8.01 Key Statutes and How They Interrelate	189
8.02 Section 504	190
8.03 ADA Title II	191
(a) Subtitle A: Discrimination Provisions	
(i) Public Entity	
(ii) Qualified Individual with a Disability/Direct Threat	
(iii) General Prohibitions	
(iv) Reasonable Modifications	
(v) Integration Mandate	
(vi) Exclusionary Eligibility Criteria	
(vii) Auxiliary Aids and Services	
(viii) Effective Communication	
(ix) Program Access: Discrimination Generally	
(x) Program Access: Existing Facilities	
(xi) Program Access: New Construction and Alterations	
(b) Subtitle B: Public Transportation	
(i) Fixed Route Systems	
(ii) Paratransit (Demand Responsive Systems)	
(iii) New and Existing Facilities	
8.04 State Laws Generally	206
8.05 Integrated Services	208
(a) General Framework	
(b) Institution-Based Programs	
(c) Community-Based Services	
(d) Temporary Assistance to Needy Families (TANF)	
8.06 Termination of Parental Rights	214
8.07 Correctional Facilities	215
(a) ADA Title II; §504; Prison Litigation Reform Act	
(b) Lawsuits Challenging Prison and Jail Conditions	

8.08 Court Access; Jury Service	220
(a) Court Access	
(b) Jury Access	
(i) State Laws	
(ii) Court Decisions	
8.09 Fitness to Practice a Profession	225
8.10 Voting	228
8.11 Program Access; Architectural Barriers	232
8.12 Public Transportation	234
(a) Generally	
(b) Paratransit	

PART IX: PUBLIC ACCOMMODATIONS AND THE PRIVATE SECTOR

9.01 ADA Title III	239
(a) Purpose and Constitutionality	
(b) Scope and Coverage	
(c) General Nondiscrimination Principles	
(i) Denial of Participation	
(ii) Unequal Benefit	
(iii) Separate Benefit	
(iv) Integrated Settings	
(v) Administrative Methods	
(vi) Associational Disability	
(vii) Retaliation or Coercion	
(viii) Private Residences	
(ix) Direct Threat	
(x) Smoking	
(xi) Exams and Courses	
9.02 Specific ADA Title III Requirements	250
(a) Eligibility Criteria	
(b) Policy Modifications; Fundamental Alterations	
(i) General Rule	

(ii) Fundamental Alteration Exception	
(iii) Specific Types of Required Modifications	
(c) Auxiliary Aids and Services	
9.03 Architectural and Other Barriers to Goods and Services	256
(a) Removal of Existing Barriers	
(b) Readily Achievable for Existing Structures	
(c) Personal Devices and Services; Accessibility of Special Goods	
(d) Seating in Assembly Areas	
9.04 New Construction and Alterations	261
(a) New Construction	
(b) Alterations	
(c) Path of Travel	
(d) Elevator Exemption	
(e) Historic Preservation	
(f) ADAAG Standards	
(g) Certification	
9.05 Transportation	266
(a) Nondiscrimination Generally	
(b) Fixed Route System	
(c) Demand Responsive System	
(d) Over-the-Road Buses	
(e) Specified Public Transportation	
(f) Airlines	
9.06 Insurance	275
(a) Generally	
(b) Health and Long-term Disability	
(c) Life and Other Insurance	
9.07 State Laws	277

PART X: TELECOMMUNICATIONS AND THE INTERNET

10.01 Key Statutes and How They Interrelate	281
10.02 Telecommunications	283

- (a) ADA Title IV
- (b) Telecommunications Act
 - (i) General Requirements
 - (ii) Requirements for Accessibility and Usability
 - (iii) Requirements for Compatibility with Peripheral Devices and Specialized Customer Premises Equipment

10.03 EIT288

- (a) Generally and in the Legal Profession
- (b) Section 508
 - (i) Federal Agencies/Departments
 - (ii) EIT Standards
 - (iii) Functional Performance Criteria
 - (iv) Information, Documentation, and Support
- (c) ADA Title III

10.04 State Laws294

PART XI: HOUSING AND ZONING

11.01 Introduction and Constitutional Considerations297

- (a) Introduction
- (b) Constitutional Considerations

11.02 FHAA299

- (a) Scope of Coverage
- (b) Exemptions and Exceptions
- (c) Direct Threat to Health or Safety; Controlled Substances
- (d) Discriminatory Housing Practices
 - (i) Refusal to Sell, Rent, or Negotiate
 - (ii) Discriminate in Terms and Conditions of Sale or Rental
 - (iii) Other Prohibited Conduct in Sales and Rentals
 - (iv) Advertisements and Notices
 - (v) Availability of Dwellings
 - (vi) Blockbusting
 - (vii) Brokerage Services
- (e) Discrimination in Residential Real Estate Transactions
 - (i) Generally
 - (ii) Making Loans and Providing Other Financial Assistance

(iii) Purchasing Loans	
(iv) Terms and Conditions for Making Loans or Other Financial Assistance	
(v) Selling, Brokering, or Appraising Residential Real Property	
(f) Discrimination Because of Handicap	
(i) Generally	
(ii) Reasonable Modifications of Existing Premises	
(iii) Reasonable Accommodations	
(iv) Design and Construction Requirements	
11.03 Section 504; ADA Titles II and III	308
(a) Section 504	
(b) ADA Titles II and III	
11.04 State Laws	309
(a) Fair Housing Laws	
(b) Zoning; Group Homes	
11.05 Public Housing	312
11.06 Private Housing	314
(a) Federal Law	
(b) State Laws	
11.07 Group Homes, Zoning, and Land Use	317
(a) Maximum Occupancy Restrictions	
(b) Minimum Distance Requirements	
(c) Special Regulations/Enforcement	
(d) Restrictive Covenants	
(e) Reasonable Accommodations	

PART XII: EDUCATION, EXAMS, AND LICENSING

12.01 Individuals with Disabilities Education Act	325
(a) History, Purpose, and Key Definitions	
(b) Individualized Education Program	
(c) Procedural Safeguards	
(i) Administrative Proceedings	
(ii) Judicial Review; Attorneys' Fees	

(iii) Placement in Alternative Settings; Disciplinary Procedures	
(iv) Time Limits for Due Process Complaints	
(v) Foster and Homeless Children; Surrogates	
(d) Infants and Toddlers	
12.02 Section 504 (Rehab Act); ADA Title II	340
(a) Section 504	
(b) ADA	
12.03 Medicaid (EPSDT)	342
12.04 Infants, Toddlers, and Preschoolers	342
(a) IDEA	
(b) Medicaid	
(c) State Law	
12.05 School-Aged Children	345
(a) FAPE; Reimbursement	
(i) Educational Benefit	
(ii) State Laws That Require More Than an Educational Benefit	
(iii) Tuition Reimbursement	
(iv) IEP	
(v) Limits on FAPE	
(b) Related Services	
(i) Generally	
(ii) Medical Services	
(iii) Services in Non-Public Settings	
(c) Mainstreaming	
(d) Residential Settings	
(e) Extended School Year; Compensatory Education	
(i) Extended School Year	
(ii) Compensatory Education	
(f) Suspensions and Other Discipline	
(i) IDEA Amendments in 1997 and 2004	
(ii) State Laws	
(g) “Stay-Put” Provision	
(i) Generally	
(ii) Disciplinary and Safety Issues	
(h) Exhaustion of Administrative Remedies; Statutes of Limitations	
(i) Section 504 and ADA Issues, Particularly Athletics	

12.06 Adults; Post-Secondary Education; Access to Professions	366
(a) Colleges and Universities	
(i) Disability Definition	
(ii) Qualified to Participate	
(iii) Reasonable Accommodations	
(b) Private Testing	
(c) Professional Licensing and Exams	
(i) Mental Health Queries	
(ii) Reasonable Accommodations	

PART XIII: MENTAL DISABILITY DISCRIMINATION LAW

13.01 Mental Disability Jurisprudence¹	373
(a) Individualized Decision-making; Therapeutic Jurisprudence	
(b) Self-determination	
(c) Stigma and Sanism	
(d) Pretextual Decision-making	
(e) Jails and Prisons for Persons with Severe Mental Disabilities	
13.02 Key Mental Disability Legal Concepts	379
(a) Right to Treatment/Habilitation	
(i) Generally	
(ii) Habilitation	
(b) Dangerousness	
(c) The Least Restrictive Alternative	
13.03 Institution-Based Rights	384
(a) Involuntary Civil Commitment	
(i) Third-Party Commitment of Adults	
(ii) Short-term, Inpatient Adult Commitment	
(iii) Extended, Inpatient Adult Commitment	
(iv) Mental Retardation, Developmental Disabilities, and Substance Abuse	
(v) Procedural Due Process	
(vi) Recommitment/Release/Periodic Reviews	
(vii) Outpatient Commitment; Conditional Release	
(viii) Involuntary Commitment of Minors	

1. *Id.* at 1.01 Mental Disability Jurisprudence.

(b) Rights in Institutions	
(i) Rights Related to Treatment and Habilitation	
(ii) Protection from Harm	
(iii) Least Restrictive Alternatives	
(iv) Privacy, Communications, and Religion	
(v) Patients' Bills of Rights	
13.04 Community-Based Care; Protective Services	399
(a) Deinstitutionalization	
(i) <i>Pennhurst</i> Litigation and its Aftermath	
(ii) Integrated Services in the Community	
(iii) Medicaid and ADA Title II	
(iv) The Right to Remain in a Facility	
(v) Less Restrictive, Facility-Based Programs	
13.05 Insurance: Health and Long-term Disability	405
(i) Federal Preemption; ERISA	
(ii) Mental Health Parity	
(iii) ADA and Section 504	
13.06 Mentally Disordered Offenders	411
(a) Care and Treatment Issues	
(i) Constitutional Rights	
(ii) ADA; Section 504	
(b) Post-Imprisonment Commitment	

PART XIV: EXPERT EVIDENCE AND TESTIMONY²

14.01 Introduction	417
14.02 Admissibility of Specialized Knowledge	418
(a) Admissibility	
(i) Historical Roots	
(ii) <i>Frye</i> As Modified: General Acceptance Plus	

2. Parts of this chapter are derived from sections found in John Parry & Eric Y. Drogin, *Mental Disability, Law and Evidence* (2007), particularly, 1.07: "Specialized Mental Disability Knowledge," 1.08: "Expert's Qualifications," 1.09: "Limitations on Expert Evidence and Testimony," and 7.03(a): "Expert Testimony."

- (iii) *Daubert*/Rule 702: Theories, Techniques, and Applications
- (iv) Post-*Kumho* Considerations

14.03 Experts' Qualifications.....424

- (a) Education and Training
 - (i) Physicians
 - (ii) Psychiatrists
 - (iii) Physiatrists; Physical Medicine and Rehabilitation
 - (iv) Psychologists
 - (v) Nurses
 - (vi) Occupational Therapists
 - (vii) Audiologists
 - (viii) Speech-Language Pathologists
 - (ix) Optometrists
 - (x) Architects
- (b) Licensing Provisions

14.04 Limitations on Expert Evidence and Testimony.....433

- (a) Testimonial Privileges
 - (i) Introduction
 - (ii) Treatment-Related Privileges Generally
 - (iii) Physician-Patient and Related Treatment Provider Privileges
 - (iv) Psychiatrist-Patient Privilege
 - (v) Psychologist-Patient Privilege
 - (vi) Waivers & Exceptions
 - (vii) Attorney-Client Privilege
- (b) Prominent Rules of Evidence
 - (i) Hearsay Rule and Its Exceptions
 - (ii) Ultimate Issue
- (c) Challenging Disability Experts in Cross Examination

14.05 The Existence of a Disability.....441

- (a) Existence of a Covered Disorder or Condition
- (b) Existence of an Excluded Disorder or Condition; Direct Threat
- (c) Severity of the Impairment: Substantial Limitation of a Major Life Activity
 - (i) Is Expert Evidence Necessary?
 - (ii) Major Life Activity
 - (iii) Substantially Limiting Impairments
 - (iv) Record of Impairment
 - (v) Regarded As Having an Impairment
- (d) Serious Medical Condition under the FMLA

14.06 Qualified Person with a Disability	450
14.07 Reasonable Accommodation/Modifications	451
14.08 Economic Expertise	452
(a) Economic Damages	
(b) Compensatory Damages	
(c) Cost of a Service, Reasonable Accommodation/Modification	
14.09 Architectural, Transportation, and Other Physical Barriers	455
14.10 Conclusion	456

APPENDICES AND INDEX

Appendix 1: Employment	457
Appendix 2: Public Services/State Government	523
Appendix 3: Public Accommodations	549
Appendix 4: Housing	605
Appendix 5: Alphabetical Listing of Supreme Court Cases	637
Appendix 6: Summary of Supreme Court Cases	645
Index	663