BUSINESS AS THE GREAT WALLENDA:

WALKING THE ADA TIGHTROPE

Enter a retail store today and you are likely to be met by a "Greeter," someone to welcome you, point you in the right direction and wish you a pleasant shopping experience. Increasingly, those hired as "Greeters" are individuals confined to wheelchairs or walkers. Although disabled people have more to offer our economic structure than friendly hellos, it remains a certain, though resisted, fact of human nature that not every person is suited for every job.

In employing disabled persons as "Greeters," business has not only helped to change national attitudes about disabilities, but has also achieved a creative, positive means of compliance with the Americans with Disabilities Act ("ADA"). The ADA was enacted in 1990 by an overwhelming majority in Congress and signed by Republican President George Bush. Before the ADA, disabled individuals were often excluded from jobs because of fears that such individuals would be unable to perform; would generate negative reaction from customers, clients or co-workers or would increase insurance costs. The ADA's purpose was to recognize the important contributions disabled individuals can make to our economic culture and to permit disabled persons to reap the full economic benefits of their participation by affirmatively protecting access to employment opportunities.

The brunt of establishing this national mandate, however, has fallen upon the business community. Unlike most other civil rights statutes before it, the ADA not only prohibits discrimination but also includes an affirmative obligation to make accommodations for disabilities. Employers are therefore left to balance legitimate job demands against a limited ability to perform them. For many employers, the intricacies of ADA compliance remains a struggle between individual rights of disabled workers and practical business realities. Understandably, tensions erupt when safety, performance or morale are impacted.

Take, for example, a hypothetical employee named Wanda, who is a valued, long-time employee. She recently told her boss that her diabetes can no longer be controlled, resulting in frequent dizziness. As a "Greeter," Wanda may only need a stool to continue performing her job in her exemplary manner. The stool costs the employer virtually nothing, affects no other employees and certainly does not create a safety hazard, and all are happy.

Suppose, instead, that Wanda is a Police Officer. In this situation, accommodating Wanda's disability may be problematic, if not impossible. Where public safety is an issue, the scales must tip in favor of caution.

In recognition of the importance of workplace safety, Congress included in the ADA a "direct threat" defense. However, as recently construed by the Supreme Court in *Bragdon v. Abbott* (June 25, 1998), this defense is narrow, recognized only where there is a real and quantifiable "substantial risk" of harm that cannot be eliminated by reasonable accommodation. In safety sensitive positions, courts have employed a pragmatic approach and have found firefighters, police officers, train conductors, professional drivers, nuclear power plant workers and operators of heavy machinery to be without an ADA remedy.

The scales must also tip against the disabled where other legitimate concerns are significantly impacted. Suppose Wanda is neither a Greeter nor a Police Officer, but is instead working on an assembly line filling candy boxes. Her condition prevents her from filling the required number of boxes. An employer should not be asked to reduce its production, thereby diminishing its

competitiveness in the marketplace, in the name of individual rights. Fortunately, courts typically hold that a person who cannot meet legitimate, uniform production standards is not qualified for the job. Unfortunately, it sometimes takes the time and expense of federal litigation to convince the employee and his attorney of that fact.

In cases where a reasonable accommodation will enable the employee to meet production standards, the employer must provide it. Wanda claims that the newest ergonomic candy packing machinery will enable her to *exceed* current production standards. Provision of this equipment is both costly and technically difficult. Both the ADA and courts interpreting the statute recognize that an employer need not make an unreasonable accommodation or take an action that results in an undue burden. However, disputes abound concerning the precise meaning of "reasonable" and "undue."

The impact on other workers must also be added to the balance. Suppose Wanda is a secretary and can no longer do the filing. Her employer, wanting to do the right thing by Wanda and the law, decides to redistribute work and swaps Wanda's filing for Mary's typing. Unbeknownst to the boss, no one likes to file. Mary is not happy performing Wanda's "grunt work," and the other secretaries do not think it is fair either. Co-worker discontent is often bred in the, sometimes justifiable, perception of unfairness in allowing disabled workers to do less work. This, in turn, can lead to workplace harassment of disabled workers, for which the employer is responsible. Although courts recognize that requiring other employees to work longer or harder is not a reasonable accommodation, employers are often forced to undertake educational efforts to maintain morale.

Few police stations, offices or factories have "Greeters." For these and most other businesses, balancing a disabled individual's rights with other legitimate concerns is a difficult and time-consuming task that frequently lands even the well-intentioned in court. As continued increases in ADA filings reflect, employers will continue to bear the burden of defending legitimate business decisions when a disabled employee is simply not suited for the job.

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