



## **Monograph on State Disability Discrimination Laws**

With 50-State Charts on Employment, Public Services, Public Accommodations,  
Housing, and Education

**A Publication of the American Bar Association Commission on Mental and Physical Disability Law**

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### Preface

**T**his *Monograph* views disability discrimination from a state perspective comparing state laws to each other and to federal laws. The publication includes detailed charts that compare the governing state disability discrimination statutes in the 50 states and the District of Columbia in four broad areas—employment, public services (which includes state and local government), public accommodations, and housing—with respect to dozens of different factors. The charts are discussed in the *Monograph's* text, along with relevant case law and comparisons to applicable federal laws. Both the charts and text are fully cited using materials that were last updated in August 2004. Future state law developments will be covered in the *Mental & Physical Disability Law Reporter* and *Mental & Physical Disability Law Digest*, both published by the American Bar Association's Commission on Mental and Physical Disability Law.

The *Monograph* was produced by the same people who publish the *Reporter* and *Digest*. *Reporter* Editor-in-Chief and Commission Director, John Parry, is the primary author. Research Attorney, F. Phillips (Phil) Gilliam, was in charge of overseeing the charts and cite-checking. The Managing Editor is Amy Allbright. Production and Marketing Coordinator, Letty Brown, was in charge of layout and design.

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# Monograph on State Disability Discrimination Laws

## With 50-State Charts on Employment, Public Services, Public Accommodations, Housing, and Education

State disability discrimination laws, much like analogous federal statutes, provide protections in a variety of situations. Yet, many of these laws tend to have significant gaps in coverage, which may differ depending on the jurisdiction, the nature of the disability, and the specific area of discrimination law involved (e.g., employment, housing, or public accommodations). Generally, state discrimination laws have less of an impact than their federal counterparts, especially the Americans with Disabilities Act (ADA), Rehabilitation Act, Fair Housing Amendments Act (FHAA), and Individuals with Disabilities Education Act (IDEA). This does not mean, however, that these laws are not important or will not grow in importance if the influence of federal law begins to wane generally or in specific areas or is foreclosed or severely limited, as applied to the states, due to constitutional sovereign immunity considerations.<sup>1</sup> Currently, despite the U.S. Supreme Court's 2004 decision in *Tennessee v. Lane*<sup>2</sup> upholding Title II of the ADA as applied to the states in private actions for monetary damages, that opinion leaves doubts as to whether all of Title II is safe from Eleventh Amendment sovereign immunity attacks, or only if fundamental due process concerns such as courthouse access are at issue. (See 3.04(d) of the *Mental & Physical Disability Law Digest*).

Before the ADA's enactment, disability discrimination was handled a la carte from jurisdiction to jurisdiction.<sup>3</sup> Both the state and federal laws embraced specific issue areas, but did not cover discrimination in general. The closest state models came to a comprehensive approach was in those states that already had adopted civil rights legislation and then broadened it to protect persons with disabilities as well. Yet, even those schemes were limited because they did not include the notion of reasonable accommodation and usually focused on employment and public accommodations.<sup>4</sup>

Today, many state discrimination statutes (in the statutory language itself or through court interpretations) apply definitions and principles found in federal laws, particularly the ADA. However, these state laws also address (or are limited by) specific state concerns, resulting in significant variations from the basic federal definitions and coverage—a few of which go beyond what the ADA requires. At the same time, these state schemes frequently have roots in common law, some of the principles of which were then incorporated in the federal disability discrimination statutes, including the ADA.

This Monograph begins with a general overview of state disability discrimination laws, which is then followed by more detailed discussions of key substantive topics, including employment, state and local government, public accommodations, housing, zoning, and education. Much of the information has been extracted from materials found in the *Mental & Physical Disability Law Reporter* and the *Mental & Physical Disability Law Digest*, which are periodicals published by the American Bar Association's Commission on Mental and Physical Disability Law. Both can be used to augment and update the state disability law developments covered in this Monograph and to compare those developments to what is happening simultaneously under federal laws.

In addition, the Monograph includes four appendices that provide charts with statutory and related disability-discrimination information from the 50 states and the District of Columbia covering employment, public services, public accommodations, and housing. Text based on interpretations of those charts is found throughout the Monograph.

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1. John Parry, *Handbook on Disability Discrimination Law* 27-30 (American Bar Association Commission on Mental and Physical Disability Law 2003).
  2. 124 S. Ct. 1978 (2004), 28 *Mental & Physical Disability L. Rep.* (hereinafter *MPDLR*) 424.
  3. Peter Blanck et al., *Disability Civil Rights Law and Policy* 21-2 to -6 (2004).
  4. *Id.*

## 1.01 Overview

### (a) In Response to Federal Legislation

While in recent years disability discrimination law has focused predominantly on federal statutes and court decisions interpreting them, state laws have become increasingly more important as state legislatures have responded to more vocal disability constituencies and the federal options have been limited by enforcement difficulties, sovereign immunity concerns, and stricter court interpretations. Almost every jurisdiction now has a statutory scheme that prohibits discrimination on the basis of a person's disability.<sup>5</sup> Many are modeled on the ADA, providing comparable protections to the federal law, yet the details of some of those statutory protections have been left to the courts to determine, often citing to federal cases. A significant number of the statutory provisions provide lesser protections than the ADA, while a somewhat smaller number provide greater protections.<sup>6</sup>

Collectively, state statutes deal mostly with the same subjects as the ADA (Titles I through III), the FHAA, and the IDEA. About a dozen now cover electronic information technology and access for persons with disabilities similar to what the federal government does under §508 of the Rehabilitation Act. (State disability discrimination and fair housing statutes, as reflected in the appendices, cover only the ADA Titles I–III and the FHAA.) These state statutory provisions provide an important mosaic of possible legal remedies that should be considered when discussing disability discrimination. Their specific usefulness, however, depends on the particular statutory scheme in a given jurisdiction, the nature of the dispute, and the likely outcome if alternative federal remedies are pursued.

Many jurisdictions generally follow the ADA with respect to their statutory provisions dealing with employment discrimination based on disability. This is particularly true with regard to the definition of “disability” or “handicap.” About two-thirds of the states and the District of Columbia have similar or identical definitions to the ADA.<sup>7</sup> Yet, the distinction between being similar or identical can be somewhat confusing. Take, for example, the concept of mitigating measures, which the U.S. Supreme Court ruled must be applied to limit the scope of coverage under the ADA for persons who have disabilities that can be corrected or improved by technical or medical intervention.<sup>8</sup> While 18 jurisdictions specifically follow the ADA in their case law with respect to mitigating or corrective measures, over 30 have no case law on the subject, although many of them indicate that they generally follow the ADA with regard to the definition of disability.<sup>9</sup> Three states—California, Maryland, and Rhode Island—clearly specify in their statutes that they do not use mitigating measures to limit coverage, and Massachusetts, by virtue of its case law, has decided not to as well.<sup>10</sup>

Oftentimes, state discrimination laws that seem to complement federal law add no substantive protections<sup>11</sup> or may be more limited in their coverage. For instance, Connecticut requires that, in order to establish a physical disability, plaintiffs must go further than the ADA and prove that they have a chronic condition.<sup>12</sup> In addition, a few states, such as Ohio and Texas, have exclusions for cosmetic or anatomical loss that are not part of the ADA. Other states, such as Colorado and Illinois, have exclusions for drugs that appear to be more sweeping than the federal law because the statutes are not limited only to current users.<sup>13</sup>

Occasionally, state law will provide greater protections in specific areas than the applicable federal provision, such as the states previously mentioned that do not require plaintiffs to show that they are disabled after mitigating measures are considered. Also, several jurisdictions have broader protections involving the definition of disability than the ADA. A prominent example, California's Fair Employment and Housing Act (FEHA), does not require complainants to prove that their impairments are *substantially limiting* in order to demonstrate that they have a

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5. See Appendices. See also “Title I of the Americans with Disabilities Act and the States: A Statutory Comparison Eight Years Later,” 2 *Syracuse J. of Legis. & Policy* #1, 1, 2 (1998).

6. *Id.*

7. Appendix 1: Employment, col. 3.

8. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), 23 *MPDLR* 510.

9. Appendix 1, col. 16.

10. *Id.*

11. *Garcia v. Allen*, 28 S.W.3d 587 (Tex. Ct. App. 2000).

12. *Caruso v. Siemens Bus. Communications, Inc.*, 2004 WL 235365 (D. Conn. Feb. 5, 2004), 28 *MPDLR* 244.

13. See Appendix 1, col. 4.

covered disability.<sup>14</sup> Plaintiffs need only demonstrate that they have an impairment that makes the achievement of a major life activity difficult. Thus, in 2003 the Ninth Circuit ruled that, under the FEHA, a person with a potentially disabling disorder—in this instance, an adjustment disorder that was not yet disabling—would meet the state’s disability definition.<sup>15</sup>

Similarly, a New Jersey appeals court ruled that an employee with attention deficit disorder had a covered condition because the state’s discrimination statute does not require that disabilities be severe.<sup>16</sup>

Also, an Ohio appeals court found a former employee protected where it interpreted the state’s disability discrimination law to require that the employee only show that her employer regarded her as having a disability, whether or not it believed her thyroid cancer substantially limited a major life activity.<sup>17</sup>

Moreover, the Second Circuit ruled that while the ADA did not apply to an individual diagnosed with panic disorder and agoraphobia, the plaintiff could sue his employer under New York law, which makes a “medically diagnosable impairment” a covered disability.<sup>18</sup>

Delaware diverged from the federal model and arguably broadened its law with respect to the “undue hardship” defense in the context of the duty of employers to provide reasonable accommodations. Rather than resorting to the ADA’s case-by-case approach, this regulation provides that any accommodation that costs less than five percent of an employee’s salary is presumed not to be an undue hardship.<sup>19</sup>

Finally, for many years a number of states, including Missouri<sup>20</sup> and Massachusetts,<sup>21</sup> provided special education coverage that exceeded the federal mandate. Now only a very few, such as Michigan, continue to do so.<sup>22</sup>

#### **(b) Sovereign Immunity**

All state disability discrimination laws have become important in light of the Supreme Court’s 2001 decision in *Board of Trustees of the University of Alabama v. Garrett*,<sup>23</sup> which held that Title I of the ADA was unconstitutional under Eleventh Amendment’s sovereign immunity as applied to private lawsuits filed in federal courts for monetary damages. Since then, two other Supreme Court decisions have come out indicating that, while there will not be a total bar on these lawsuits against states, significant obstacles remain.

*Nevada Department of Human Resources v. Hibbs*<sup>24</sup> reaffirmed much of the Court’s reasoning in *Garrett*, but still found that the Family and Medical Leave Act (FMLA), as applied to the states, did not violate Eleventh Amendment sovereign immunity in providing both monetary and equitable remedies to private individuals. Unlike disability-based discrimination, gender-based discrimination is entitled to heightened equal protection scrutiny. Thus, the FMLA, unlike ADA Title I, was found to be a congruent and proportional congressional response to violations of Section 5 of the Fourteenth Amendment.<sup>25</sup>

Similarly, in *Tennessee v. Lane*,<sup>26</sup> the Court found that Title II of the ADA did not violate the Eleventh Amendment as applied to private lawsuits against states for monetary damages related to the denial of court access to persons with disabilities. With respect to violations of fundamental due process rights, courts must provide a

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14. Cal. Gov’t Code §12926.1(c), 25 *MPDLR* 139.

15. *Goldman v. Standard Ins. Co.*, 341 F.3d 1023 (9th Cir. 2003), 27 *MPDLR* 924. *See also* *Bryan v. United Parcel Serv., Inc.*, 307 F. Supp. 2d 1108 (N.D. Cal. 2004), 28 *MPDLR* 429.

16. *Domurat v. Ciba Specialty Chems. Corp.*, 801 A.2d 423 (N.J. Ct. App. 2002), 26 *MPDLR* 838 (interpreting the New Jersey Law Against Discrimination, N.J. Stat. Ann. §10:5-1-42).

17. *Johnson v. Metrohealth Med., Ctr.*, 2004 WL 1233954 (Ohio Ct. App. June 3, 2004), 28 *MPDLR* 599.

18. *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 153 (2d Cir. 1998), 22 *MPDLR* 359.

19. Code Del. Regs. 65 400 004, §4.18d(5).

20. *Lagares v. Camdenton R-III Sch. Dist.*, 68 S.W.3d 518 (Mo. Ct. App. 2001), 26 *MPDLR* 255.

21. *David v. Dartmouth Sch. Comm.*, 775 F.2d 411 (1st Cir. 1985), 9 *MPDLR* 450.

22. Mich. Stat. §380.1751. *See also* N.C. Gen. Stat. §115C-106.

23. 531 U.S. 356 (2001), 25 *MPDLR* 236.

24. 538 U.S. 721 (2003), 27 *MPDLR* 449.

25. *Id.*

26. 124 S. Ct. 1978 (2004), 28 *MPDLR* 424.

“more searching judicial review” than disability discrimination alone.<sup>27</sup> This level of judicial oversight falls somewhere between heightened scrutiny for sex-based discriminations and the rational-relationship test for disability discrimination. Given the Court’s language, it would seem that only those rights deserving of a “more searching” review would be exempt from the sovereign immunity limitations in *Garrett*.

Sovereign immunity considerations may limit plaintiffs in another way as well. In the past, when federal claims were proceeding in federal court, the state limitations period was deemed tolled. However, in 2002, the U.S. Supreme Court ruled that no tolling is warranted where a claimant tries to re-file an action against the state in state court. Unless the state consents to be governed by the federal tolling provision, Eleventh Amendment sovereign immunity prohibits using the federal law to extend the filing period.<sup>28</sup>

In light of these developments, a particularly important issue in disability discrimination law is whether states will waive their Eleventh Amendment immunity. To date, only three states—Illinois, Minnesota, and North Carolina—have enacted provisions that allow those states to be sued for federal disability discrimination. The provisions are quite similar. Minnesota’s law enables employees, former employees, or prospective employees aggrieved by the state’s violation of the ADA or the FMLA to sue for legal or equitable relief, including money damages.<sup>29</sup> Illinois allows current or former state employees or applicants to sue the state for violating either the ADA or the FMLA,<sup>30</sup> while North Carolina permits state employees to sue for monetary damages under the ADA.<sup>31</sup>

Also, in a case involving race and sexual discrimination under a statute that also covers disability discrimination, a federal court found that the State of New Jersey had waived its sovereign immunity in employment claims for monetary damages.<sup>32</sup>

More typical, though, is California which has retained sovereign immunity for state agencies, but not for localities or municipalities. Thus, the Ninth Circuit ruled that a county air pollution control district is not an arm of the state for Eleventh Amendment purposes because its functions are local.<sup>33</sup>

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27. *Id.*

28. *Raygor v. Regent of Univ. of Minn.*, 534 U.S. 533 (2002), 26 *MPDLR* 502.

29. Minn. Stat. §1.05, 25 *MPDLR* 686. *But see* *Faibisch v. University of Minn.*, 304 F.3d 797 (8th Cir. 2002), 26 *MPDLR* 1041.

30. 745 Ill. Comp. Stat. 5/1.5, 27 *MPDLR* 821.

31. N.C. Gen. Stat. §143-300.35.

32. *Rudolph v. Adamar of N.J., Inc.*, 153 F. Supp. 2d 528 (D.N.J. 2001). *See* N.J. Stat. Ann. §10:5-5(e).

33. *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775 (9<sup>th</sup> Cir. 2005), 29 *MPDLR* .