

Policy Memo



REGARDING DISCRIMINATION AGAINST LITIGANTS WITH DISABILITIES

PROPOSED BY

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I. Introduction

The Americans with Disabilities Act (“ADA”) codifies the right of all disabled people to access government buildings and the services therein. In the legislative findings of the ADA, Congress acknowledged that, “historically, society has tended to isolate and segregate individuals with disabilities.”¹ Congress further stated that, “individuals who have experienced discrimination on the basis of disability, have often had no legal recourse to address such discrimination.”² The ADA was intended to remedy this isolation by providing Americans with disabilities, full access to society and an infrastructure through which to address discrimination. However, disabled Americans all over the country are still facing difficulties accessing the protections granted to them by the ADA. Disabled litigants have reported non-responsiveness to requests for reasonable accommodations as well as insensitivity. In some instances, disabled litigants have reported outright discrimination from judges and courthouse personnel.

The Founder of The Color of Law Center, Lena Hardaway, has experienced first-hand one of the most conspicuous instances of the gap in protection for Americans with disabilities. Due to her own traumatic experience, she was inspired to connect others in similar situations with the resources to seek retribution. An investigation was completed in conjunction with this memorandum. The result? We discovered that disabled Americans in several states reported similar issues when seeking a remedy for inaccessibility and discrimination.

Most recently, the American Bar Association, in partnership with the Burton Blatt Institute at Syracuse University, published a study regarding disparate treatment of disabled attorneys within the legal system. This study highlighted that attorneys all over the country reported discriminatory treatment in varying sectors of their work environment. Attorneys with disabilities reported heightened levels of overt discrimination, harassment, and bullying. This study only further highlights ableism within the legal justice system. If disabled persons with legal education and training experience such discrimination, it is a logical conjecture that disabled persons without this knowledge and training are even further oppressed.

As for Lena Hardaway, she filed a judicial misconduct complaint, after several instances of questionable behavior and discriminatory statements during her litigation in the District of Columbia. Here is where the plot thickens...The process of filing her complaint included no reasonable accommodation for her disabilities. She was unable to track the status of her complaint and unable to

know whether her complaint was even being investigated. A large portion of the challenges Ms. Hardaway faced were due to the lack of accommodation for people with disabilities alleging judicial misconduct. As nuanced as this issue may be, it highlights a detrimental gaping hole in the enforcement of the protections granted by the ADA.

II. Judicial Misconduct and Reasonable Accommodation

Each district has created its own Canon of Judicial Conduct to ratify behavioral policy for judicial officials. The Federal Court System has established The Judicial Conference of The United States as the national policy-making body for federal courts. As such, The Judicial Conference has published The Rules for Judicial Conduct and Judicial Disability Proceedings. The Rules do provide that discrimination based upon disability should be considered “cognizable misconduct.”³ Nevertheless, there is no mention of the reasonable accommodation process nor whether denial of an accommodation can be grounds for an allegation of misconduct.

While The Rules for Judicial Conduct are silent on this issue, case law has provided some insight. The Supreme Court has ruled that judicial misconduct includes behavior which displays a “high degree of favoritism and antagonism” which makes “fair judgment impossible.”⁴ Needless to say, this standard is an extremely high one. Congress has declared that access to the court system is a fundamental right. Likewise, most judicial codes of conduct prohibit discrimination against disabled persons. Yet ignoring or denying requests for reasonable accommodation is not widely considered judicial misconduct. The rights afforded to persons with disabilities are intended to make fair a system which would otherwise be slanted in favor of abled people. Still, the process of defining judicial misconduct fanes ignorance of the fundamental rights of litigants with disabilities.

Even further, some districts have subverted the accommodation process by creating a separate system to appeal denials of reasonable accommodation. Unfortunately, these alternative systems only address whether the request will ultimately be granted. They do not account for the conduct of the judicial official who denied that request. If a person engaged in this system wanted to also file a judicial misconduct complaint, that person would have to begin an entirely new process. Again, another hurdle for a person with disabilities who is already at a disadvantage. Denial of a request for reasonable accommodation should be grounds for an allegation of judicial misconduct. From thereon, fairness contends that the complaint/allegation should be investigated to evaluate its validity. Separate systems of evaluation deny litigants with disabilities the due process which should accompany their fundamental right.

III. The Process of Filing Judicial Misconduct Complaints

Regardless of the status of the complainant, the process of filing and evaluating judicial misconduct is an unexplored mystery. Upon speaking with an attorney from the U.S. Office of Special Counsel, she opined, “We have parameters for enforcing ethical conduct of attorneys. But, for the most part, judges are left to police themselves.”⁵ And unfortunately — she may be right. Each state has a different process for evaluating judicial misconduct. There is almost no uniformity in how misconduct complaints are submitted and evaluated. The only commonality between the states are the Commissions assigned to review said complaints. The best part of it all, is that these commissions usually consists of other judges.

Undoubtedly, there is implicit bias in a committee of judges evaluating the conduct of their own colleagues. For example, in the District of Columbia, complaints regarding district judges are submitted to the District of Columbia Bar which are reviewed by The Commission on Judicial Disabilities and Tenure. The process is shrouded in mystery. What rubric of validity is used to evaluate the complaints are unknown. Likewise, reports on complaints are released sporadically. As far as accessibility, well there’s a semblance of hope. At least complaints can be submitted through an online form.

Unfortunately, there are numerous states which still require that all judicial misconduct complaints be hand-delivered: Virginia, Florida, Utah (which actually offers no instruction on how to submit a complaint), Delaware, Maryland, Montana, Ohio, Kentucky, Mississippi, Alabama, Maine, Rhode Island (which requires submission via certified mail at a cost to the complainant), Tennessee, North Dakota, South Dakota, West Virginia, New Hampshire, Michigan, California, Arizona, Missouri, Nevada, New Mexico, Iowa, Minnesota and Colorado. The fact that these states have no electronic process for reporting judicial misconduct is not just antiquated — it’s ableist. This “hand-delivery” requirement renders this process inaccessible to people with disabilities which restrict their ability to travel.

As evidenced, there is much left to be desired with this process. Nevertheless, areas such as the District of Columbia and the state of New York are still more efficient than the Federal process. On the Federal level, the judicial complaint process requires that all complaints be hand-delivered to the appropriate court office.⁶ Whatever that means. This lack of transparency and uniformity disproportionately affects litigants with disabilities. For an able person this process is murky enough.

But, for a person with disabilities, it is akin to climbing a mountain without sight. The status quo is a breeding ground for further victimization of disabled Americans who are attempting to report allegations of judicial misconduct.

III. What Should Be Done

As discrimination against disabled litigants is a multi-layered issue, so should be the road to rectifying this issue. The Color of Law Center is proposing a two tiered solution: 1) Electronic Submission and Tracking For All Judicial Misconduct Complaints 2) Education/Training for Judicial Officials. The district, state, and federal process for submitting judicial misconduct complaints should be electronic. States such as New York and New Jersey provide a guideline for how the judicial misconduct reporting process can be brought online.

Persons filing a complaint could access a secure portion of the applicable court website and fill out an online form which provides all the information needed to evaluate the allegations of misconduct. The states that do offer online submission already have this method in place. While it does not totally eliminate all challenges facing litigants with disabilities, making submission more accessible is a step in the right direction.

To further address the problem at hand, the reporting process should also have a heightened level of transparency. It should be made visible, to the public, how many complaints a judicial official has received each year, every year. Now we are not, of course, suggesting that the substance of all complaints be made public. We are only requesting available and accurate statistical data categorizing complaints according to the pertinent Judicial Code of Conduct. For instance, the District of Columbia's Code of Judicial Conduct is organized into four canons. So D.C.'s improved system would categorize complaints by judicial official and reported canon violation.

This transparency would benefit both the public and the committees tasked with reviewing complaints. Complainants would be able to track their complaints. The general public would be able to view real time statistics regarding the conduct of their judiciary. Correspondingly, committees evaluating complaints would have immediate information to determine key elements in complaint validity including, *inter alia*, patterns in judicial misconduct. Sounds like heightened accountability and transparency doesn't it? — What a novel idea!

A transparent system is extremely effective for maintaining a more equitable complaint process. Still, as the old adage goes, prevention is always better than cure. A deeper understanding of disability

is a part of the path towards fair treatment of disabled litigants. The World Health Organization defines disability as any impairment, mental or physical, caused by injury or disease, which impairs everyday function. Physical disability is sometimes visible, which grants almost immediate recognition of the rights therein. Contrastingly, mental disability is not as easily recognizable. Disabilities such as autism and other mental conditions are not obvious to the untrained eye. Due to the complexities of disability, further education is essential to preventing disparate treatment. Additional education regarding people with disabilities and their rights under the ADA could prevent some of the issues which directly correlate with allegations of judicial misconduct.

Currently there is government mandated ADA training. Nonetheless, this training is, for lack of more refined word, basic. Specialized education and training regarding disabled Americans should be mandatory for all judicial officials. Upon initiation of tenure, all judicial officials should be educated on the implications of disability civil rights during pending litigation and appropriate behavior when engaging with a disabled litigant. The Color of Law Center has already created, “Justice for All - The Rights of the Disabled Litigant,” a free educational course available on our website. While “Justice For All” could be the starting point, this education would have to evolve just as society does.

IV. Conclusion

It has been thirty years since the passage of the Americans With Disabilities Act. To paraphrase Lex Frieden during his appearance on the program ADA live, “We owe it to the spirit of the ADA and those who came before us, to update as times change and the need arises.”⁷ Dr. Frieden further exclaimed that it is the role of the attorney with knowledge of disability civil rights to help society adjust to the reality of disability. Well, the time for adjustment has come. Technology has provided the tools for the legal system to be fully accessible to those with disabilities.

The Color of Law Center is most certainly not the first organization to request that the legal justice system be brought into the 21st century. Dr. Peter Blanck along with his colleagues Ann Wilichowski and James Schmeling led the charge for technology in the courtroom by explaining its connection to the rights enumerated in the ADA. In their article, Disability Civil Rights Law and Policy: Accessible Courtroom Technology, they assert that “accessible courtroom technology is one cornerstone of participation in the courts for many persons with disabilities.”⁸ This need for technology extends to the judicial misconduct process as well. True access includes the right to utilize government services as well as the right to receive redress for discrimination suffered at the hands of

those acting on behalf of the government. Herein lies the policy behind making all judicial misconduct reporting electronic and visible.

As we all know, educating ourselves on the implications of the Americans With Disabilities Act must be a part of any realistic approach to closing the gap in accessibility and equality. So that's where we recommend you start. Take our course, educate yourself, and begin the process towards becoming a part of the solution. Then share this memorandum with your congressional officials and request that they make the judicial misconduct process true to our nation's pledge, "Liberty and Justice for all."⁹

References

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