

on law

Issue 2 | Jan. – Feb. 2017

GEORGIA STATE LAW PROFESSORS EXPLORE CURRENT ISSUES

PEOPLE WITH AUTISM SPECTRUM DISORDER IN THE WORKPLACE: An Expanding Legal Frontier

Wendy F. Hensel, Associate Dean for Research and Faculty Development and Professor of Law

early half of all individuals diagnosed with Autism Spectrum Disorder (ASD) possess average or above average intelligence, but only a small percentage are employed, regardless of their level of educational attainment or qualifications. At the same time, as a result of the 2008 amendments to the Americans with Disabilities Act, litigants of all disabilities increasingly have been successful in establishing coverage under the statute and securing protection against discrimination in employment. Taken together, there is little doubt that increased numbers of individuals with ASD will enter the labor pool during the next decade, raising new legal challenges for employers.

Profile of Individuals with Autism Spectrum Disorder

Individuals with ASD who are sufficiently high-functioning to work in independent settings bring many strengths to employers, such as high attention to detail and the ability to sustain intense concentration in areas of interest. Within specialized fields, some possess the ability to recall facts, think outside of the box, and persevere in repetitious and routine circumstances in ways that are superior to their "neurotypical" colleagues.

Nevertheless, success in a work environment requires more than competence in the skills and tasks one is employed to perform. Being able to successfully navigate the social nuances and relationships that exist within a workplace setting is often more critical to career success and advancement than the mastery of hard skills. Because ASD is primarily a social disorder, it can create serious hurdles to securing and maintaining employment.

Individuals with Autism Spectrum Disorder who are sufficiently high-functioning to work in independent settings bring many strengths to employers, such as high attention to detail and the ability to sustain intense concentration in areas of interest.

Courts reasoned that “**getting along with others**” was an essential function of nearly every job. Because some individuals with Autism Spectrum Disorder cannot perform these functions consistently because of their social and communication challenges, they were deemed unqualified by courts and thus not protected from discrimination.

Legal Protection of Individuals with Autism Spectrum Disorder

The Americans with Disabilities Act protects qualified individuals with disabilities from discrimination in employment. Prior to 2008, individuals with ASD struggled to show either that they were sufficiently disabled or sufficiently qualified to merit the protection of the statute.

Any evidence of the ability to interact in society, however trivial, was typically sufficient for courts to conclude that these plaintiffs did not have an impairment that substantially limited a major life activity, the definition of disability. Courts characterized plaintiffs' significant interpersonal difficulties with supervisors and colleagues as mere “personality conflicts” that did not preclude them from working in a class or broad range of jobs.

Those plaintiffs with Autism Spectrum Disorder who passed the disability hurdle were often found to be unqualified for employment and not covered by the statute. Courts reasoned that “getting along with others” was an essential function, or fundamental duty, of nearly every job, and the ability to handle stressful situations without upsetting others to be a critical and universal job function. Because some individuals with ASD cannot perform these functions consistently because of their social and communication challenges, they were deemed unqualified by courts and thus not protected from discrimination.

In 2008, Congress stepped in to restore the initial vision of the ADA through passage of the ADA Amendments Act (ADAAA). Congress retained the statute's original definition of disability but made clear to courts that the determination of disability should be broadly interpreted.

Of particular significance, the Equal Employment Opportunity Commission in the wake of the amendments stated that Autism Spectrum Disorder is “almost always covered” as a disability because it “substantially limits brain function.” As a result, in many cases involving autism, the parties no longer contest whether the employee has a disability. In those cases that are disputed, employees generally have experienced greater success post-amendments, even when supported primarily by personal testimony rather than extensive medical evidence. Courts have found plaintiffs to be substantially limited in social communication despite evidence showing their capability to function in some circumstances.

Nevertheless, employees with ASD continue to struggle to show that they are qualified for employment. Courts continue to assert that the ability to communicate appropriately with customers and co-workers is an essential function of the jobs in question. Particularly in cases dealing with employees who have contact with the public or collaborative interaction with colleagues, communication challenges typical for those with ASD have been sufficient to derail class coverage. This may prove to be a significant hurdle in litigation for employees with ASD in the future.

Personality Testing

The increased number of individuals with ASD at work coupled with broader coverage under the ADA Amendments Act is likely to create legal issues for employers. One particular area of concern is the practice of using personality tests for hiring and advancement. Approximately 76 percent of all companies with more than 100 employees require job applicants to take personality

tests, purportedly to provide insight into an applicant's fit with an employer and aptitude for a particular job. Those who score poorly are unlikely to receive an interview.

One commonly used test for this purpose asks the applicant to look at pictures of other people's eyes and expressions to identify what they are feeling. It is highly significant that this test is modeled on questions developed by a leading researcher in the field of autism to study the degree to which individuals on the spectrum possess "social sensitivity." In light of the test's origins, adults with ASD unsurprisingly performed considerably worse than other test takers, even when compared to individuals with other disabilities.

Absent strong evidence that a test is a valid and meaningful measure of successful job performance, employers' continued use of such measures may give rise to significant

ADA liability. In August 2015, for example, the EEOC reached a settlement with Target Corp. for \$2.8 million as a result of claims that its personality tests discriminated against employees on the basis of race, sex and disability. Because several of the tests commonly used by employers have specifically been found to identify markers of ASD and were even developed for this purpose, employers who continue to use them as screening mechanisms likely are violating the ADA.

There is no question that the next decade will see increasing numbers of individuals with ASD applying for jobs and working in the labor force. Whether or not they experience success will be highly dependent on the actions of employers and their compliance with federal anti-discrimination laws. By taking a broader perspective and recognizing the value in employees who think and approach problem solving differently, employers will simultaneously benefit themselves and people with Autism Spectrum Disorder.

ABOUT THE AUTHOR



Wendy F. Hensel

Associate Dean for Research and Faculty Development and Professor of Law

Wendy F. Hensel, associate dean for research and faculty development and professor of law, teaches and writes about disability discrimination in American society and its intersection with education, employment, and tort law. She has written numerous articles on the legal treatment of disability under the Americans with Disabilities Act and Individuals with Disabilities Education Act, and is a frequent invited speaker around the country on related topics.



76%
of all companies
with more than 100
employees require
job applicants to take
personality tests.
**Those who score
poorly are unlikely
to receive an
interview.**

on law

Issue 2 | Jan. – Feb. 2017

GEORGIA STATE LAW PROFESSORS EXPLORE CURRENT ISSUES



Office of the Dean
PO Box 4037
Atlanta, Ga. 30303-4037

Nonprofit Organization
U.S. Postage
PAID
Atlanta, GA
Permit No. 152

WENDY F. HENSEL

PUBLICATIONS

People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier, Harvard Civil Rights – Civil Liberties Law Review (forthcoming 2016).

The Limits of Federal Disability Law: State Educational Voucher Programs, 44 Journal of Law & Education 199 (2015).

The Impact of Disability: A Comparative Approach to Medical Resource Allocation in Public Health Emergencies (with Katie Hanschke and Leslie Wolf); 8 St. Louis Journal of Health Law & Policy 259 (2015).

Recent Developments in Voucher Programs for Students with Disabilities, 59 Loyola Law Review 323 (2013).

Playing God: The Legality of Plans Denying People with Disabilities Scarce Resources in Public Health Emergencies, 63 Florida Law Review 719 (2011) (with Leslie Wolf).

Valuing Lives: Allocating Scarce Medical Resources During a Public Health Emergency and the Americans with Disabilities Act (Perspective); PLoS Currents: Disasters. 2011 Aug 4 [revised 2011 Oct 25] (with Leslie Wolf).

Private School Vouchers for Students with Disabilities: The Future of Special Education?, 39 Journal of Law & Education 291 (2010).

COLLECTED WORKS

The Legal Foundations of Special Education, Special Education for All Teachers (with Colleen M. O'Rourke) (Ronald P. Colarusso & Colleen M. O'Rourke, eds.) (Kendall Hunt Publishing Company) (2016).

The Case For Inclusive Eligibility Under the IDEA, Righting Educational Wrongs: Disability Studies in Law & Education (Arlene Kanter, ed.) (2013).

The Disability Dilemma: A Skeptical Bench & Bar Rights of the Disabled (Sonia Katoch, ed.) (ICFAI University Press) (2010).

A Call to Action for the Legal Academy; Conference Proceedings of the American Bar Association's Second National Conference on the Employment of Lawyers with Disabilities, June 16, 2009.

Vouchers for Students with Disabilities, Sixth Commonwealth Education Law Conference – Critical Issues in Education Law and Policy 137 (LexisNexis 2008).

SELECTED PRESENTATIONS

Autism Spectrum Disorder in the Workplace; United States Department of Agriculture, National Agricultural Statistics Service; Athens, Georgia; November 16, 2016.

Rationing Care for People with Disabilities in Public Health Emergencies: U.S. and International Approaches; National Association of County and City Officials National Preparedness Conference; Dallas, Texas; April 21, 2016.

The Limits of Federal Disability Law; Education Law Association Annual Conference; Cleveland, Ohio; November 6, 2015.

Rationing Care for People with Disabilities in Public Health Emergencies: U.S. and International Approaches; Southwest Conference on Disability; Albuquerque, New Mexico; October 8, 2015.

Developing Learning Outcome Measures: The Experience of GSU College of Law; AALS Workshop on Measuring Learning Gains; Orlando, Florida; June 26, 2015.

The Limits of Federal Disability Law: State Educational Voucher Programs; Hawaii International Conference on Education; Honolulu, Hawaii; January 5, 2015.

Assessing the Exit Option: Vouchers for Students with Disabilities as an Alternative to Mediation; Symposium on Dispute Resolution in Special

Education, Ohio State University Moritz College of Law; February 27, 2014.

Recent Developments in Vouchers for Students with Disabilities; GSU Center for Research on Atypical Learning & Development; Atlanta, Georgia; February 21, 2014.

Vouchers 2.0: An Update; Education Law Association Annual Conference; Denver, Colorado; November 21, 2013.

Recent Developments in Vouchers for Students with Disabilities; Special Education In An Era of Reform; Loyola University New Orleans; New Orleans, Louisiana; March 1, 2013.

Playing God: The Legality of Plans Restricting People with Disabilities from Scarce Resources in Public Health Emergencies; Disability Studies: Every Body In, University of Otago; Dunedin, New Zealand; November 29, 2011.

Special Education Vouchers: The Promise and Peril for Students with Disabilities; Exploring Difference: Disability and Diversity in Education, Law, and Society; Chapman University College of Educational Studies and School of Law; Orange, California; September 24, 2011.

Playing God: The Legality of Plans Restricting People with Disabilities from Scarce Resources in Public Health Emergencies; 34th Annual Health Law Professor's Conference; American Society of Law, Medicine & Ethics; Chicago, Illinois; June 9, 2011.

Disability Discrimination: An Overview; Manager's Duty of Care Certificate Program; Georgia State University; Atlanta, Georgia; April 13, 2011.

Disability Discrimination Twenty Years After the Americans with Disabilities Act; Georgia Higher Education Compliance Assistance Program; American Association of Affirmative Action – Region IV; Atlanta, Georgia; March 3, 2011.