

## Preface

This book discusses the harassment of individuals on the basis of their disabilities. Its central focus is on the legal remedies and policy reforms that can be advanced to address the problem of disability harassment. The analysis is not strictly legal, however. It seeks to build on the insight of many writers in the disability studies field that people with disabilities are members of a minority group in America. Though disability may define the group, what imposes limits on individuals is not necessarily disability itself but the artificial environment of physical and attitudinal barriers that people with disabilities must negotiate. Harassment is a manifestation of the attitudinal barriers.

The book will consider the courts' approaches to the problem of harassment, particularly the application of an analogy to race and sex harassment and the development of remedies under the Americans with Disabilities Act (ADA) comparable to those applied in race and sex cases under other civil rights laws. It criticizes the limits of that approach, which so far has provided remedies only in a few, extreme situations and left the vast undercurrent of harassing activity unaffected. The book suggests that other provisions of the ADA should be applied and other legal remedies developed. It also takes up special problems of harassment in the public schools and the legal response. It discusses possible challenges to the constitutionality of expanded legal protections against harassment. It also explores other policy measures to diminish harassment and end isolation of people with disabilities, thus considering social as well as legal changes.

A note to readers who are not lawyers: a major goal of this book is to demystify some of the legal analysis of disability harassment. Nevertheless, I found myself unable to avoid employing legal jargon without adding hugely to the length of the description of court cases. To understand the description of the cases, it is helpful to know that cases begin

with a complaint filed in a court. The complaint contains the story of what happened to the plaintiff at the hands of the defendant and what remedy—damages, an injunction, possibly something else—the plaintiff wants the court to award. Most often, the defendant responds to the plaintiff’s complaint with a motion to dismiss, saying that even if the complaint’s version of what happened is correct, the plaintiff loses because there is no violation of the law for which the court can order a remedy. The assumption, then, is that what the plaintiff said is correct. If the court denies the motion to dismiss, it is saying that if what the plaintiff alleged is right, then the defendant has violated the law and some remedy may be awarded. Frequently, lawyers refer to that sort of decision as one upholding the claim. It permits the case to proceed to trial.

In many cases, sometimes ones in which the defendant has previously moved to dismiss and had the motion denied, the case proceeds with further factual development. The parties, that is, the plaintiff and defendant, conduct depositions, submit affidavits, and identify documents that can be used as evidence at trial. If at the conclusion of this process one of the parties, typically the defendant, believes that undisputed facts disclosed so far mean that the plaintiff cannot win, it will move for summary judgment. The relevant standard is that no genuine issue of material fact exists. That means that there is no factual dispute for the jury or judge, if the case is heard by a judge, to resolve by hearing live testimony. In other words, on the basis of indisputable or undisputed facts, no reasonable finder of fact could decide in favor of the other side. At this point, the assumption is no longer that everything in the complaint is correct. Nevertheless, all inferences that reasonably could be drawn are to be drawn in favor of the party opposing summary judgment. If the judge denies a summary judgment motion brought by the defendant, once again the judge could be said to be upholding the claim. The court upholds the claim on the basis of the facts developed and presented to the court, both those that are undisputed and those that could be found to favor the plaintiff if a reasonable jury is so persuaded.

Although this book, like other legal sources, describes the allegations of the plaintiffs in cases decided on motions to dismiss or motions for summary judgment as if they were fact, they may not be. It is simply that the judge, for making the decision, must assume that they are fact. If a motion to dismiss or a motion for summary judgment is decided against the plaintiff, no one will ever know whether the plaintiff’s version of disputed facts was right. Even if the motions are denied, many cases settle,

and so again no one knows what really happened. In any instance, a reader should take descriptions of cases in this book with the understanding that the facts may not be right. The legal analysis depends on making the assumption that they are, but it is always an assumption.

A further note: the federal courts in the United States are organized into geographic circuits. Each trial court, known as a district court, has a court that sits in review of it. These reviewing courts, except for two that sit in Washington, D.C., are identified by numbers. Thus the Seventh Circuit embraces district courts in Illinois, Indiana, and Wisconsin, the Second Circuit the district courts in New York, Connecticut, and Vermont, and so on for the other numbered circuits. These courts are below only the United States Supreme Court and so are powerful legal actors. As a matter of shorthand reference, this book will adopt the legal terminology of referring to a given numbered circuit court as, for example, “the Second Circuit,” rather than spelling out the entire title “Second Circuit Court of Appeals” or “United States Court of Appeals for the Second Circuit.”

Now a final note: sources of law, of course, include both state law, either written in statutes or unwritten, as with much of the law of civil liability for negligence and intentional wrongdoing, as well as federal law, principally statutes passed by Congress and federal constitutional provisions and principles. Sometimes state courts apply federal law and sometimes federal courts apply state law. The reasons that is so are largely outside the scope of discussion of this work. Where I think it is important for the reader to be able to identify whether the source of law is state or federal, I provide specific information, usually in an endnote. The three basic sources of federal law that I discuss in this book are (1) the Americans with Disabilities Act of 1990 (ADA), found at 42 U.S.C.A. §§ 12101-12213 (West 2006), which bars disability discrimination in private employment (title I), state and local government activities (title II), privately operated public accommodations (title III), and telecommunications (title IV); (2) section 504 of the Rehabilitation Act of 1973, found at 29 U.S.C.A. § 794 (West 2006), which forbids discrimination against otherwise qualified persons with disabilities by recipients of federal funding; and (3) the Individuals with Disabilities Education Act (IDEA), found at 20 U.S.C.A. §§ 1400-1487 (West 2006), which requires states that receive federal special education funding to provide children with disabilities a free, appropriate public education in the least restrictive environment.

Significant portions of the material in this book appeared in an earlier form in three law review articles: “Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act,” 63 *Maryland Law Review* 162 (2004); “Workplace Harassment Claims under the Americans with Disabilities Act: A New Interpretation,” 14 *Stanford Law and Policy Review* 241 (2003); and “Disability Harassment in the Public Schools,” 43 *William and Mary Law Review* 1079 (2002). Thanks to the editorial staffs of those publications for their contributions to the work. Thanks also to the research assistants at DePaul College of Law who assisted with the articles and the book. They have been many over several years, but Elizabeth Graham, Sara Mauk, Janet Brewer, Victoria Napolitano, and Catherine Tetzlaff deserve special recognition. Thanks also for research support from DePaul College of Law and for the support of Dean Glen Weissenberger on this project.