

**Transcen
ADA Today
Conversation with John Wodatch - Part 1
Speakers: Caleb Berkemeier, Host
John Wodatch, Guest**

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>> CALEB BERKEMEIER: Welcome to ADA Today, a podcast of the Mid-Atlantic ADA Center. My name is Caleb Berkemeier, training specialist for the Center.

In this episode, we have Part 1 of a conversation that I had with John Wodatch during our recent ADA virtual conference. John is the former chief of the Disability Rights section of the Department of Justice, and he's had a very long career in the field of disability rights.

As we're celebrating the 30-year anniversary of the passage of the ADA, this was a great conversation to have with someone who was deeply involved in both the passage and the enforcement of the law. So I hope you enjoy Part 1 of this discussion.

Okay. So, John, welcome to today's session.

>> JOHN WODATCH: Thank you. Thank you for having me.

>> CALEB BERKEMEIER: So I think probably a great place to start, because some people who are listening to this may not know who you are, so just start with a little personal background. Where were you educated? You know, what was your career pre-ADA? What did that look like? And, you know, what got you interested in disability rights?

>> JOHN WODATCH: Sure. I grew up in Connecticut, went to undergraduate school there at a place called Trinity College, private at that time men's school, if you can remember back that far when we had such things, before the Supreme Court took care of that. And I then went to Georgetown Law School and graduated in 1969 and began my legal career then. I was interested in

civil rights. I had always been interested in the promise that our country had for its citizens. Part of that comes from my parents, who were immigrants to this country from Italy. And so I was raised with the belief in how wonderful this country was and the opportunities that it provided.

Through the '60s, through the role of the Civil Rights Movement, we saw what, in fact, still had to be done, and that very much captured my imagination, working on race and color and then sex discrimination issues. And so I started my career at an agency that doesn't exist anymore, the Department of Health, Education and Welfare, because it was doing school desegregation, and I was interested in that.

And so I began in 1969 as a lawyer doing cases. My second day in the office I had a case. I look back on that with horror at the amount of expertise I had at the time; however, they gave newbies pretty easy cases. And so I started doing race, national origin, color discrimination, and sex discrimination work under what was a federal executive order that required affirmative action for colleges and universities. So one of my cases was Columbia University, doing their affirmative action plan. I had a case against a college I won't name anymore, but, you know, getting a woman who had been denied tenure on the basis of sex for her case. But also did a lot of race discrimination. I had cases in the South, school desegregation cases in the North. I helped desegregate nursing homes.

Just to show you how long ago it was, one of my cases was desegregating the blood supply in Louisiana, which at that point was segregated by the race of the donor. But you'll see an absence of anything about disability in this work because there was none. I was aware of issues involving kids with disabilities, having grown up in a school where there were no kids with disabilities and aware that there was a separate school in my town for kids with disabilities, but other than that was just an awareness of that issue. And I didn't have family members with disabilities that spurred me on to do disability work.

I think one day on my desk I was given an assignment to work on some new law that was passed, the Rehabilitation Act of 1973. And I was given responsibility for Section 504 and was told to figure out what it meant and to write regulations implementing it. So that began my career. So that was in 1973. I've been doing disability rights work ever since. By about the mid-'70s, I was just doing disability rights work. For a while I did both race, color, and national origin work, but by the time I was

working on 504 until now, my career has been involved with disability rights.

My friend Pat Wright, who I assume many of you know, told me I had to keep doing this until I got it right, so I'm still doing it. And over that period of time, I've worked on certainly Section 504 for federally assisted programs, doing the first federal regulation, then working with other federal agencies as they did their federal regulations. I moved to the Department of Justice in the '80s, in 1980, and worked, then, on doing 504 regs and doing other disability rights issues and then was lucky enough to work and was called to be part of the team that negotiated the ADA and then got the job of enforcing the ADA and also got -- worked on the Convention on the Rights of Persons with Disabilities in the international level. So I've -- since about 1975, I have just been doing disability rights issues.

>> CALEB BERKEMEIER: Yeah. I definitely want to get into ADA, CRPD as well. Before we get there, though, you're retired now; right? What are you doing now?

>> JOHN WODATCH: I retired from the federal government in 2011. I'm still doing disability rights work. I've been working as a consultant since then. I spent a lot of time in the first years of retirement trying to get ratification of the Convention on the Rights of Persons with Disabilities by the United States very unsuccessfully over a several-year period. I'm on a couple of organizations that work on disability issues, the United States International Council on Disability, working on international disability issues.

I've done a lot of traveling abroad, working with countries, trying to get them to adopt similar laws and programs related to the ADA, but also working on training and dealing with disability rights issues in this country.

Oddly enough, recently I've become a government contractor for a federal agency and am working on a lot of COVID issues as they affect people with disabilities now. So I'm sort of keeping my hand in issues, still working to try to get the promise of the ADA fulfilled.

>> CALEB BERKEMEIER: Well, why don't we talk a little bit about the drafting of the ADA. I sometimes get calls and emails from people who have questions about certain things in the ADA. They want to know why is that there, because to them it might seem a little weird. They don't quite understand. And so I

kind of have to go a little bit into, you know, well, this law went through an extensive drafting process, and there were a lot of issues and debates. So maybe you could talk a little bit about that. What did that process look like, and what were some of the major debates at the time?

>> JOHN WODATCH: Again, as you well know, I can talk about this forever, so I'll try to be a little more succinct. I think it's important to think in the early '80s and the '80s, we started to have a realization that the laws that we had, Section 504, Section 503 that applied to government contracting, the work of the Access Board was very important, but it wasn't enough. Section 504 only applied to where federal funds were received. And so if you had something like a school district got federal funds every year, they were covered. A college was covered. But think of a lot of community programs. A police department might get funds one year and not another year; and, therefore, they would be covered by nondiscrimination one year but not the next. And most of the private sector wasn't covered.

So there was a realization that people with disabilities were not getting the same federal civil rights protections that people of color, women, the national origin groups were. And so there was a recognition that something had to be done. An agency called the National Council on Disability, which is a federal agency, an independent agency, in the '80s, with the work of Lex Friedan and Justin Dart and others, looked into this issue and issued a report basically saying that we needed comprehensive civil rights legislation protecting people with disabilities.

It was groundbreaking work. They actually, with the help of Bob Bergdorf, created an actual draft of a piece of legislation, and in 1988 they actually had a joint hearing of the House and Senate on that piece of legislation. At the same time, it was a period of time of the AIDS epidemic, and there was another government investigation, and they came up with a series of recommendations, and one was -- one of the recommendations -- one of the chief recommendations was the need for civil rights legislation protecting people who were HIV positive.

In 1988, we had a presidential election. George Bush, who had been Vice President, and who had a history of working on 504 over his tenure and dealing with disability issues through the National Council on Disability, in his campaign came out and said he was interested in having federal legislation that would integrate people with disabilities into mainstream American

life. He won the election, and there's some power that goes along with making a presidential promise in an election, and so that put that in motion from that aspect.

The disability community at that point was very well-organized. They had worked on the bill that had the 1988 hearing, but there was a recognition that although that bill, which some people called the flatten the earth bill because it was so stringent, that it was the right concepts, that it went too far, and although it was a wonderful concept piece, if you wanted a piece of legislation that would pass, there would have to be some further action.

And so the disability community reached out to Ted Kennedy and Tom Harkin in the Senate and worked toward issuing a bill. And so those groups came together, the disability community and the Senate and Tony Coelho and Steny Hoyer and others in the House, and worked up a bill. And then in the spring of 1989 sent that bill to the administration and, "Okay, Mr. President, you said you were in favor. What do you think of this?"

And I got involved with that. At this point I was at the Department of Justice, was, you know, an expert on disability rights issues and so worked with people at the White House on fashioning a response. And my boss was Dick Thornburgh, the Attorney General of the United States, who himself was a parent of a child with a disability and so understood disability issues personally. Was married to Ginny Thornburgh, who was a -- is a well-respected disability rights advocate, especially dealing with issues involving religion and accommodation by religious institutions. He'd also had experience as a governor and was very keen on -- and was told by the President, "Okay, I want you to get a bill."

A key part of this -- there were a lot of people, by the way, in the administration who were not so keen on this. Keep in mind, this was a Republican administration. The bill in the Senate did have Senator Durenberger, who was a Republican from Minnesota, involved. But it was mostly Democrats who were pushing this. And the other people pushing it was the President of the United States and his legal counsel, Boyden Gray, who had a long history of working with the disability rights community.

So there was some controversy within the administration, and it became a key point about what the Attorney General was going to say when he testified. He was going to testify in, I think, June. And leading up to that was an intense period of time of negotiation in the administration. What would be the

administration's view? Would we endorse this bill? Would we endorse this particular bill? What would be said?

Finally, Dick Thornburgh prevailed, and he testified and basically testified that, you know, there are some things about the bill we didn't like, but we wanted a bill. We wanted a bill that was comprehensive; that used 504 as its basis. And then negotiations began.

Through the summer of 1989, those negotiations between the Senate and the administration and the disability community had some rough points. The disability community wanted a very broad coverage of public accommodations. The administration was looking at -- wanted narrower coverage. They looked to the 1964 Civil Rights Act, which talked about public accommodations, and wanted it to be narrower.

There were a lot of issues like that going back and forth. I don't have to go through all of them for you. But what happened was what I would call a grand compromise occurred between the sides, which was amazing when you look at it from the vantage point of today, that here you had two sets of ideas that were somewhat at odds, and the people got together with an idea toward actually having a bill that would please both sides.

And so this compromise included broad coverage of public accommodations. It included private right of action for people with disabilities. But it did not include compensatory damages and civil penalties for lawsuits brought by private litigants, but it did bring those for the Department of Justice, which could bring suits.

The other part of it was there were business concerns about costs. And so the limitations that had been put into federally conducted federal regulations on undue burdens, undue hardship for employment, no fundamental alteration in the nature of a program or activity were included in the bill. And there was also to deal with the large number of public accommodations, many of them small, the idea that buildings that were less than three stories tall would not have to have an elevator. So that was the grand compromise that came out of the Senate. It passed with over 90 votes.

It wasn't the end. We went to the House, where you had four full committees, seven subcommittees looking at this bill. It was a long and tortuous process. And there were changes that were made during that process. Steny Hoyer became a -- for the Democrats and Steve Bartlett, who is a conservative Republican

congressman from Texas, held a negotiation together with the Disability Community Administration, Pat Wright, Arlene Mayerson, Chai Feldblum were people very heavily involved in the negotiations that really put together the bill as we know it now.

There were things that were changed that were technical changes that were -- maybe sounded technical but they were not. We realized that the Senate Bill didn't cover standardized tests because of the way the language was written, or I think one of the key changes that happened, and I think our friends from DREDF were key in getting this done, was sort of the lease, lease to language for public accommodations, which became -- is a very important part of the ADA.

For those of you who may not know, a public accommodation is one of 12 categories of types of enterprises, but it also includes entities that lease or lease to them. So think of a doctor's office that's in a private office building. If you didn't have some coverage of the private office building, they wouldn't have to make their parking accessible or their front entrance accessible. Or think about some organization that has a conference and it leases the space of a hotel. By leasing that space, that conference becomes covered in that entity holding. So these were major changes that were done.

I think what a lot of people associate with the House, though, is the effort late in the bill's -- consideration of the bill to strike out certain people who were HIV positive, restaurant workers, from coverage of the bill. The disability community -- and this provision passed in the House. The disability community organized very rapidly to try to change that, because the bill would then have to go back to the Senate because the House and Senate have to pass the same bill.

And the hero of the day was Senator Hatch, Oren Hatch, from Utah, who is a very conservative senator, but worked to really bring about a change that would deal with the issue and not -- because the disability community really said if you were going to take pieces of this away, we're not going to support this bill. So the bill really was hanging in the balance in the House, but, in my view, saner heads prevailed. The bill passed.

But to get to the point you made, you know, this is a piece of legislation that was written by 435 people in the House, another hundred in the Senate. It has its quirks. It's a very nuanced bill. I think its strength comes from all of the discussion that went on, the compromises that were made, and

really the strength of the bill of recognizing that disability rights are civil rights and have to be enforced.

>> CALEB BERKEMEIER: Yeah. Thanks. That's a great summary of those things. And, actually, quite a few of those are questions I've been asked, like, "Why is that in there?" So...

>> JOHN WODATCH: And there are many more like that.

>> CALEB BERKEMEIER: Yeah. Yeah. Well, next time I'll just have to direct them to this interview.

So as you were talking, it made me wonder, you know, over the past 30 years, as I'm sure you know, there have been continued criticisms of the ADA on both sides. You know, some people thinking that it goes too far and then also people, especially in the disability community, who think that it doesn't go far enough.

>> JOHN WODATCH: M-hmm.

>> CALEB BERKEMEIER: You know, at the time, because of the process, obviously, you know, it seems like it was, you know, a project of compromise. I'm curious, though, as you look back over the past 30 years, like from the standpoint of 2020, is there anything about the ADA where you can say, you know, on one side or the other do think that it ended up going too far or not going far enough?

>> JOHN WODATCH: Well, remember, I'm a civil rights attorney and a disability rights attorney, so I certainly don't think it goes too far.

>> CALEB BERKEMEIER: Of course.

>> JOHN WODATCH: I think the people in the disability community who -- some have had concern with it not being enforced enough, but I think some of the people who see shortcomings from it come from things that the bill doesn't do. The bill, keep in mind, is a civil rights law. It is a law that provides equal opportunity for people with disabilities, and it is limited by its scope. So it doesn't cover housing, for example. The Fair Housing laws cover housing. It doesn't include affirmative action in employment. Perhaps maybe it should at this point in the same way that Section 501 and 503 do. But I think those concerns are really concerns about -- and maybe we will talk about, you know, the issues confronting people with disabilities now and what they are and what we need

to do with them, but I think really those are -- from the point of view of the disability community, the problems that they see are not problems of the bill itself but other issues that confront people with disabilities that need to be addressed that may not be civil rights issues.

You know, take, for example, IDEA, the law that provides education for children ages 3 to 22 for special education-related services. It's never been fully funded. You know, that's not an ADA issue, but people on the outside don't differentiate that. And from the business community, it's a different thing. They were concerned about costs. They were concerned about how extensive the bill was. But keep in mind the idea behind the ADA -- there were a couple of ideas. One was to give to people with disabilities the same federal civil rights protections that everyone had, and one of those ideas was it had to be comprehensive.

If you were going to have employment coverage, that's great, you have to have employment. How do you get to work? You have to have transportation covered. If you are, you know, someone, okay, can get to work, they can draw a salary. What do they do in evening? Everyone else goes to movies, goes to plays, goes sporting events, you know, uses recreation facilities. Those things have to be covered. And so I think the idea of the ADA itself is a bill that has to be comprehensive and looks at most features of people's lives.

The business community was concerned about costs. They were concerned about lawsuits. And, in fact, that grand compromise I talked about really limited the idea behind not having compensatory damages for people with disabilities was to limit lawsuits. And the idea of costs were somewhat alleviated by the notion of a separate law that was passed at the same time that gave tax credits to businesses and some tax deductions to businesses. So there was a recognition there would be costs on business. They were going to have to make their services accessible. They would have to provide sign language interpreters. These are increased costs, and a way to deal with that is to provide some tax relief for them.

So I think that there were concerns. And I think in our modern-day thinking there is concern that there are too many lawsuits, and I think we're all aware that over the past five to seven years, there have been efforts to limit the number of lawsuits that people can file under the ADA.

I do not agree with the fact that there are too many

lawsuits. Whether we like it or not, we live in a litigious society, and we allow the courts as our last resort for solving disputes that we cannot. And if you actually look at the number of lawsuits that are filed under the ADA and you think about there are 7 million businesses and 61 million people with disabilities, the number of ADA lawsuits is really, I think, small in comparison to the scope of the issue. But that is a concern that businesses have.

I think you all know that a couple years ago the House did pass an amendment that would have limited the ability of people with disabilities to bring lawsuits against private businesses. It did not go forward in the Senate, and it is not -- it's not being pushed at this particular time. But those issues are still there. I think there are a couple answers to that, and one I hope we'll talk about, because one of the things that the ADA has that civil rights laws didn't have was an obligation by entities that enforce it to provide what the law called technical assistance, which is basically information on how to comply with the law. And I think the combination of tax credits and really public outreach information make it a different kind of law from other laws.

>> CALEB BERKEMEIER: Yeah. And since you mentioned technical assistance, maybe you could just talk real quick about the creation of the ADA National Network of which the Mid-Atlantic ADA Center is one of the regional centers.

>> JOHN WODATCH: I think there was a recognition all along that, you know, certainly people with disabilities could bring their own lawsuits. The Department of Justice could bring lawsuits. But there was a recognition -- you're dealing with 7 million businesses. You're dealing with 27,000 units of local and state government compacts. There's no way that lawsuits were going to bring about compliance by themselves, so the idea was that education would bring about voluntary compliance.

There were a couple ways to do it. I can tell you ed justice, when we were setting up enforcement, half of our resources went to technical assistance, to letting people know what their obligations were and how they could comply with them. The idea if they understood what this law was -- this is a good law, if you understand it, you will comply.

But we also recognized that if someone wanted information on how to comply, they wouldn't necessarily go to the Department of Justice, the agency that could sue you. So, you know, there was a disconnect there. And the way to fix that was the creation of

entities that were supported by government funds but were independent of the federal government. And so the idea was to create this network. It had been done in other laws. There had been centers created in other laws. But to have centers that were closer to the people that would be able to provide training, would be able to provide answers, would create networks of people to support information about the ADA so that best practices or what works or information about how the law applies would be available to entities who wouldn't have to go to the federal enforcement agencies to find out what the law meant or how it applied to them.

I think it was genius to do that, and I think that the ADA network has been a resounding success over the years. My only concern about it is that it should be funded at a higher level and do much more. For example, one of the things that was done early on in the ADA was a lot of training of businesses and training of people with disabilities. Well, we've gone through several generations of people since then. I think we need to do that again so that people can understand what the law requires and get us to better compliance than we have now. This ADA network has been, you know, through programs like this, through conferences, through trainings has really brought about voluntary compliance with the ADA.

>> CALEB BERKEMEIER: Yeah. Well, I was five years old in 1990. And I started working for the ADA Center in 2018. So I guess I need to thank you for my job. So let's, like, go back --

>> JOHN WODATCH: You're welcome.

>> CALEB BERKEMEIER: Let's go back to some of the criticisms of the ADA, specifically from the disability community and how it may not go far enough in some people's eyes. Maybe we can talk specifically about employment. I mean, one thing that we often hear year after year is that the employment numbers are still far too low. Do you think that has anything to do with the ADA, or are there other factors here?

>> JOHN WODATCH: I think that's a good example and a good place to start from. I think the employment numbers are dismal, beyond dismal, and the most disappointing part of the response to the ADA, but I think we have to realize that not all of the reason for that is discrimination, and the ADA only addresses discrimination. And so the ADA is a piece of that.

I could argue that one way to fix that is to have some

affirmative action requirements in the ADA, which would go along with the civil rights notion, but there are a lot of other factors that go into this. Health insurance and how you get it and how you keep it, in my view, is a large part of this. Early on, people got health insurance through their employment. A lot of people with disabilities had their health insurance through federal programs, and if they became employed at a certain level, they would lose their Medicaid or other health insurance, and they would likely go to an employer who would be providing either no health insurance or limited health insurance. And so the lack of health insurance was a huge impediment to people seeking employment, people with disabilities seeking employment.

In addition, you had discrimination that had occurred over generations in education. So people with disabilities did not have the skills and talents to really compete for jobs. Certainly, there is discrimination, and I would say that most of the job growth in the United States is in small employers, and small employers are not covered by the ADA. If you look at the ADA, it applies to employers who have 15 or more employees in a period of time in the year. That excludes many, many employers, and it excludes most of the job growth in the United States.

So in a sense you could look at the ADA and say that's a problem. Now, the ADA was really just mirroring the same requirements that exist under the Civil Rights Act of 1964, which has the same 15-or-more-employee requirement. So that would be a structural ADA issue you could look at certainly, but I think there are too many other factors. And we're learning about them. We're learning about having the right kind of job training programs, having mentoring in other kinds of activities that support employment and get people ready for employment. And those programs never really fully worked for people with disabilities.

And I can tell you on a personal note, I'm a grandparent, and I have a grandson who's in college, and I watched in his high school -- junior high and high school years the number of resources that he had that got him ready for the workforce. Those programs still don't exist fully enough for people with disabilities, and so I think there are a lot of issues that go to the employment area, not just the ADA, but I don't think the ADA is free from blame in that issue either.

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