Traumatic Brain Injury and the Americans with Disabilities Act: Implications for the Social Work Profession

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Traumatic Brain Injury and the Americans with Disabilities Act: Implications for the Social Work Profession

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The practice of social work has been greatly affected by the Americans with Disabilities Act of 1990 (ADA). Title I of the statute prohibits discrimination against people with disabilities, including the increasing number of workers who are returning to work after a traumatic brain injury (TBI). This article examines the extent to which the ADA protects those with TBI from being harassed, being denied reasonable workplace accommodations, or suffering other adverse actions related to perceived discrimination. To do so, it relies on judicial decisions from U.S. federal courts involving alleged workplace discrimination of this population. Implications for social work practice are noted with the intent of increasing ADA awareness among professionals providing services to people who meet the criteria for disability under the ADA as well as to those persons who do not. The authors hope to encourage social workers to rely on case law analysis as a mechanism to provide further evidence of the systematic problems faced by people with TBI and thus increase their visibility.

KEY WORDS: Americans with Disabilities Act; decision tree; employment discrimination; social determinants of health; traumatic brain injury

Employment is a right of citizenship and a social determinant of health, yet employment rates remain low for people with disabilities (Kirsh et al., 2009). Throughout history, U.S. society has ostracized, rejected, and discriminated against individuals affected by physical and mental disabilities (Mackelprang & Salsgiver, 1996). Today, many employees returning to work with a traumatic brain injury (TBI) find themselves in a vulnerable position.

In fact, disability discrimination in the workplace is on the rise in the United States. In fiscal year 2012, the U.S. Equal Employment Opportunity Commission (EEOC) received 26,379 claims of job bias citing disability issues, up slightly from 25,742 filed in the previous year. Of the disability-related cases the agency handled in 2012, 5,907 of the allegations were found to have merit. Since the effective date of Title I of the Americans with Disabilities Act of 1990 (ADA), the EEOC has received and resolved 2,037 allegations of employment discrimination involving individuals with a TBI (EEOC, 2012). These numbers suggest that people with TBI continue to experience a significant degree of employment discrimination (McMahon, West, Shaw, Waid-Ebbs, & Belonga, 2005).

This article seeks to fill the gap in the social work literature regarding implications of the ADA for people with TBI who meet the criteria for disability and hence protection, as well as those who have a diagnosis but do not meet the standards for protection under the ADA. The second aim of the article is to present a sample of judicial decisions involving plaintiffs with TBI. These cases evaluate the nature of employee requests for accommodations and the efforts made by employers to fulfill such requests.

THE ADA

Passed in 1990, the ADA is a federal law that provides civil rights protections to individuals with disabilities to prevent discrimination in employment and ensure equal access to government programs, facilities, goods, and services. The ADA has profoundly influenced social workers and social services administrators in virtually all work settings (O'Brien & Ellegood, 2005) as evidenced by research exploring the implications of the ADA for people with various afflictions, including mental illness (O'Brien & Brown, 2009).

Under Title I of the ADA, private employers with 15 or more employees, state and local governments, employment agencies, and labor unions
cannot discriminate against qualified individuals with disabilities in employment. In 2008, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA) (P.L. 110–325) to broaden the definition of disability after a series of U.S. Supreme Court cases had significantly narrowed it. Currently, the ADA broadly defines employment as including applying for jobs, hiring, firing, promotions, compensation, training, and other terms and conditions of employment. In order to qualify for ADA protection, individuals must meet two criteria. First, they must have one of three types of disabilities listed in the ADA: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. The Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act (2013) define physical impairments as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory . . . skin, and endocrine" and mental impairments as "any mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities." Working is considered a major life activity. Some individuals are "qualified" under the act if they can satisfy the requirements of the job with or without a reasonable accommodation. A reasonable accommodation is an adjustment of job duties or the work environment to meet the needs of a qualified individual. Some permissible accommodations include restructuring and reassigning jobs, modifying work schedules, adapting tests and training materials, and providing interpreters. The act explains that employers must offer job applicants and employees an accommodation unless it would cause them "undue hardship," meaning it would be excessively costly, extensive, substantial, or disruptive or would fundamentally alter the nature or operation of the business.

**TBI AND EFFECT ON THE WORK ENVIRONMENT**

TBI results when an outside force directly hits the head, causing the brain to move rapidly within the skull, leading to potential damage and altered consciousness (Pick, 2010). TBI is often characterized as a growing health problem, with civilian emergency room visits and hospitalizations increasing by 14 percent and 20 percent from 2002 to 2006 (Faul, Xu, Wald, & Coronado, 2011). Although TBI is frequently undiagnosed and underreported (Leibson et al., 2011), it is more prevalent than HIV, breast cancer, and multiple sclerosis combined.

The Traumatic Brain Injury Model Systems National Data Center (2001) reported that approximately 59 percent of 2,553 people who sustained a TBI in the United States were competitively employed at the time of their injury; one year later, only 24 percent were competitively employed. Others decided not to return to work, and some attempted to return but were unsuccessful. From an employment perspective, a key concern is that the highest percentages of TBI cases occurred among those in their prime earning years (Kisung, 2008).

Workplace-specific evidence collected by McMahon et al. (2005) with their analysis of the EEOC’s Integrated Mission System found that people with TBI were more likely to encounter discrimination when they were younger or white or employed in the Midwest or the western United States. Allegations occur in moderate proportions only when the discrimination issue involves matters of disability harassment. This issue typically applies to currently employed people, and it includes tormenting or ridiculing people because of their disability. Harassment is a particularly insidious form of discrimination, especially considering the vulnerability of people with TBI to depression and social isolation (McMahon et al., 2005).

In light of this demographic and vocational profile, it is likely that social workers will encounter at least one client or colleague who has sustained a TBI during their career (Strachan & Clark, 2007). A majority of these clients may be veterans. According to the Defense and Veterans Brain Injury Center (2012), the worldwide estimated incidence of TBI among U.S. military service members between the years 2000 and 2012 was 266,810. Miller and Zwerdling (2010) noted that the military medical system has failed to diagnose brain injuries in thousands of soldiers who served in Iraq and Afghanistan. An estimated 300,000 service members will leave the military each year over the next five years, which will equate to approximately 1.5 million individuals who will be looking to start new careers (RTW) (Review of Veterans Employment, 2012). According to Elizabeth Clark, former executive director of NASW, “to practice efficiently in the future, it is important for us as social workers to acquire knowledge and skills around the issues of TBI and posttraumatic stress when working with service members and veterans” (Malai, 2012). Therefore, in addition to having a knowledge base in the areas of education and research, competent social work practice must incorporate an understanding of the types of reasonable accommodations that with TBI are entitled to receive.

**TBI CLASSIFICATION**

Classification of TBI is typically based on a person’s Glasgow Coma Scale (GCS) score. The GCS is used to assess level and duration of consciousness, a prognostic indicator after TBI (Teasdale & Jennett, 1974). The GCS assesses motor response, verbal response, and eye opening on a 15-point scale. On the most widely used version, 1 is the lowest possible score and indicates no motor or verbal response and no eye opening. A score of 15 indicates spontaneous eye opening; full orientation to person, place, and time; coherent verbal responses; and appropriate motor movements on command (Teasdale & Jennett, 1974). A score from 3 to 8 is considered “severe” TBI, 9 to 12 is “moderate,” and 13 to 15 is “mild.”

With moderate to severe TBI, the diagnosis is often self-evident. However, head injuries can be missed in the presence of other life-threatening injuries, where treatment focuses on lifesaving measures. If a patient is on a ventilator and sedated, an evaluation for brain injury will be delayed until the patient emerges from medications and ventilation. Thus, a mild TBI may not be diagnosed until the individual begins having problems with what were once easy tasks or social situations (Moore, 2013).

**DISTINCTION BETWEEN DIAGNOSIS AND DISABILITY**

Diagnosis and disability are not synonymous. An individual may have a diagnosis but may not necessarily have a disability. Typically, professionals assess disability through measures of functional outcomes at intervals of six months, one year, and five years post-TBI to inform return-to-work (RTW) strategies (Sandhag, Andelic, Bernstein, Seiler, & Myglund, 2012). These measures will distinguish between diagnosis and disability. In the past three decades, multiple definitions of disability have been noted in the literature based on various models, including an assessment of chronic disease(s) requiring treatment and the individual’s eligibility for Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI). Another definition is based on the inability to perform certain functions expected of the able-bodied population (Roth, 1987). With TBI, the Disability Rating Scale and the Functional Independence Measure will track an individual from coma to the community. Measurement across a wide span of recovery is possible because various items in both of these scales address all three World Health Organization categories: impairment, disability, and handicap (Sandhag et al., 2012). A score on one or both of these scales may predict whether employees might meet the criteria for ADA protection if they are to return to work.

However, there is a newer, more appropriate psychosocial model for examining how TBI affects employees in the workplace. This model views disability as a socially defined category. In other words, people with disabilities constitute a minority group that experiences discrimination (Karger & Rose, 2010). The ADA does not contain an exclusive list of medical conditions that constitute disabilities. Instead, the ADA has three general categories of disability that a plaintiff must meet. Individuals with a TBI will only qualify for ADA protection if their impairment falls into one of the categories and they can perform the essential functions of their job, with or without an accommodation. Therefore, some people with a TBI will have a disability under the ADA, while others will not.

**CASE LAW ANALYSIS**

To choose the cases presented in this article, we began our research by entering the terms “ADA and TBI or traumatic brain injury” in a legal research database. The search returned the most up-to-date version of the reference text American Law Reports (ALR) (2011). (Note: The ALR is continuously supplemented beyond the date of its publication.) ALRs compile published case law according to its subject matter and its holding. The categories provided follow the key legal elements of the ADA, such as being a qualified individual. ALR entries summarize each case and provide its citation. Using the citations, we pulled the cases from the database, read them, and categorized
Employee Not Disabled or Regarded as Disabled as Defined by ADA
Slepier v. Northwest Ohio Developmental Center (2000) illustrated the plight of a plaintiff with multiple diagnoses, including a TBI, who was deemed not disabled for ADA purposes.

Employee Not "Qualified" because Unable to Perform Essential Job Function
In Emerson v. Northern States Power Co. (2001), the court held that a plaintiff was not a "qualified individual" because she could not handle safety-sensitive calls, an essential job function, due to her anxiety attacks. In Back v. Fries & Fries, Inc. (1996), the plaintiff suffered a head injury that resulted in a subdural hematoma and necessitated emergency surgery. The court ruled that the plaintiff could not establish that he was a qualified individual with a disability because he had certified that he was disabled and unable to work to the Social Security Administration (SSA) and ratified that assertion by regularly cashing SSA disability checks.

Navigating the ADA Claims Process
To assess the validity of an ADA claim, social services administrators and social workers can use the decision-tree model proposed by O'Brien and Ellsegood (2005). The decision tree model, which breaks down the decision-making process into discrete steps, may be used in tandem with case law analysis. To improve the accuracy of conclusions, social workers should apply case law methodology under the guidance of a legal expert. Another advantage of the decision-tree model is that it illustrates in a pictorial format how difficult it is to "win" an ADA case, both procedurally and evidentially.

Based on their knowledge of the legal landscape regarding TBI and ADA, social workers may develop a set of questions to assist in organizing the parameters of the counseling process. The four questions that follow could guide the development of a screening checklist for use in the early stages of the decision-making process, before introducing the decision-tree model during the consultation.

1. Was the employee disabled or regarded as disabled as defined by the ADA? For example, in Tejada v. Jefferson County (2007), the court found a plaintiff could be disabled under the ADA because he was blind in one eye, had trouble standing, and suffered from TBI, which affected the major life activities of walking, seeing, and learning.

2. Was the employee "qualified" for protection because his employer deemed him unable to perform his essential job functions? In Martello v. Chemical Bank (1996), the plaintiff suffered from a TBI and had received Medicaid, SSI, and SSDI benefits. He applied for entry-level jobs with the defendant and requested an accommodation of a temporary "job coach." The defendant did not interview him, citing his inexperience and unemployment history, and explained that the plaintiff could not receive an accommodation until he was selected for a job. The plaintiff contended that the defendant discriminated against him by denying him an interview because of his disability. The defendant argued that the plaintiff was not a "qualified individual" because he was eligible for SSI benefits. The court found that the plaintiff could be a qualified individual because there was no evidence of any statements or certifications that the plaintiff was not disabled.

Table 1: Cases Dismissed Before Trial

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that he had made to the SSA or the defendant that he was "totally disabled" and permitted the parties to conduct discovery on whether the plaintiff made statements of total disability to the SSA.

3. Did the employer make a discriminatory decision based on knowledge of the employee’s TBI? In Mencia v. Maricopa Community College District (2009), the plaintiff alleged that the defendant failed to reasonably accommodate her disability by refusing to provide a job coach, improperly required her to undergo medical examinations, and unlawfully terminated her employment. The court held that the plaintiff could present evidence to the trial court that she was disabled under the ADA because her mental impairment could substantially limit the major life activities of caring for herself, working, and interacting with others. She could also present evidence that she was a qualified individual because the accommodation of a job coach could "plausibly have enabled" the plaintiff to perform the essential duties of her job. Regarding the alleged unlawful termination, the court determined that the employee's threat to another employee resulted from her disability and was not a separate basis for termination.

4. Was the employee entitled to accommodations that were not received? In Vazquez v. Bedsole (1995), the plaintiff, a deputy sheriff, suffered a skull fracture on the job and was placed on administrative leave. She underwent a series of surgeries but finally returned to work for sporadic periods with less demanding duties. Eventually, she was removed from her position and reassigned to a clerical position with lower pay. She claimed that the defendant failed to locate a similar position that she could perform and provided the court with evidence of several positions that met her restrictions. The court allowed the case to proceed because the defendant had not explained why those positions were not reasonable accommodations.

Social work practitioners and administrators should be aware of the filing procedures in case they encounter clients who allege discrimination. Employees may file a charge of discrimination at any one of the 53 EEOC field offices within 180 days of the alleged discrimination. Employees and practitioners may access additional details and other guidelines regarding a process that authorizes the EEOC to issue a Notice of Right to Sue at http://www.eeoc.gov/employees/lawsuit.cfm.

Under special circumstances, the filing deadlines may be waived due to incapacity. For instance, in Blunt v. Attna/U.S. Healthcare (2005), the plaintiff suffered a TBI in an automobile accident and began receiving long-term disability payments. She filed a charge with the EEOC alleging that her employer discriminated against her by refusing to consider her for employment until she stopped receiving long-term disability payments. The employer asked the court to dismiss the case because the plaintiff failed to file her lawsuit within 90 days of receiving her right-to-sue letter from the EEOC. The court permitted the plaintiff to present evidence that the deadline should be waived because she was representing herself and had a mental disability.

Social workers may assist in advocacy efforts on behalf of those suffering from a TBI by shedding light on the successful defenses. Successful defenses illustrate what employers should ask for and describe how employers should treat workers with disabilities under the law. These cases also give social workers a glimpse into the experiences of employees with a TBI that led them to seek legal redress. Additional research is needed on the extent to which workplace-related stressors might serve as precursors to risks that may lead to poor health outcomes in this population.

IMPLICATIONS FOR SOCIAL WORK ADMINISTRATORS

In addition to using the O'Brien and Ellegood (2005) decision-tree model to break the ADA claim process down into discrete steps, social work administrators should enhance their awareness of the ADA's provisions by participating in an ADA Coordinator Certification program. The training certification was developed by the University of Missouri School of Health Professions at Great Plains ADA Center, and the curriculum can be accessed at www.adacoordinator.org/faq.html.

Administrators in schools of social work should also be cognizant of the concerns with the ADA and social work education. Problems surface in schools of social work in two primary areas: mental health issues and learning disabilities. Both issues may also appear in the form of lingering effects of TBI. With the increase in veterans (who may have sustained TBI) returning to institutions of higher education after combat, additional research is needed regarding their experiences with the admissions process, graduation rates, and job placement (American Council on Education, 2011).

IMPLICATIONS FOR SOCIAL WORK PRACTITIONERS

Given the complexity and variation of TBI, treatment typically involves an interdisciplinary team that includes social workers. It is imperative that social workers in this specialty area have a substantive knowledge base to inform their practice. In addition to referring clients to advocacy organizations such as the Brain Injury Association of America and Council on Brain Injury for support, practitioners should also educate individuals about the benefits of community-based interventions that seek to rectify the problems related to obtaining and maintaining employment post-injury. Muenchberger, Kendall, Kennedy, and Charker (2011) developed a structured community-based intervention called the Skills to Enable People and Communities (STEPS) and Niemeier et al. (2010) implemented the Virginia Clubhouse Vocational Transitions Program (VCVTP) to transition severely injured individuals with brain injury living in the community to working as volunteers, in competitive employment full- or part-time, or in education or training programs. Presently, few interventions for employment after brain injury are being adequately evaluated and published in the research literature (Gary & Wilson, 2012).

Continuing education units (CEUs) are another way for social workers to become proficient in the ADA's practical implications. For example, members of the NASW Illinois Chapter earn one CEU by completing an online quiz (Goldstein, 2011). Goldstein warned social workers that although increasing their ADA knowledge is imperative, they should avoid giving legal advice or otherwise practicing law without a license.

Social workers in clinical settings may strengthen their ability to recognize at-risk populations and symptoms through the review of judicial opinions. Fleming, McVey, Shusterman, and DeHope (2012) suggested that social workers should look for a history of loss or alteration of consciousness or significant events, such as falls or motor vehicle accidents. If an event with the potential to cause head trauma is found, social workers should follow up with questions about the immediate effect of the trauma, including amnesia or disorientation, and then with questions about the impact on functioning in the following weeks, months, and even years. The Ohio Valley Center for Brain Injury Prevention and Rehabilitation, in conjunction with BrainLine,
Conclusions

The ADA was enacted to respond to the injustices experienced by those with disabilities (Thomas & Gostin, 2009). As an illustrative example regarding elements of the ADA, TBI represents a complex constellation of comorbid physical, cognitive, and emotional symptoms. Case law analysis is a mechanism that social workers might use to increase the visibility of people with TBI.

A number of conclusions can be gleaned from case law analysis. If employees are subject to adverse actions for residual effects of TBI such as reduced short-term memory or comorbid conditions such as anxiety or depression without a documented diagnosis, it will be difficult for them to substantiate an ADA claim. The “record of a disability” that pertains to medical recordkeeping is critical to determine whether the employee will be considered, as a social worker (Brown & Brown, 2009). Employers should share medical documentation (to the extent possible under the Health Information Portability and Accountability Act [HIPAA]) with their employer if they expect to be regarded as disabled. Employees should educate employers about the effects of TBI by sharing materials from a reputable source such as the Centers for Disease Control and Prevention (see http://www.cdc.gov/traitambraininjury).

Engagement of the social work profession in the design and implementation of RTW strategies will provide professionals with an opportunity to address a social determinant of health: employment security. Social work professionals who have only a superficial awareness of the ADA will be in a disadvantaged position when it comes to providing services to people with a TBI diagnosis (O’Brien & Brown, 2009). Although social workers continue to advocate tirelessly on behalf of the poor, the at-risk, and the oppressed in our society (Maiden, 2001), the concerns presented in this article suggest where more work lies ahead.

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