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Victory For Small Business: Lawsuit-Spawning Disabilities Rights Treaty Blocked

by HANS BADER *on DECEMBER 5, 2012* · 0 COMMENTS

in ECONOMY, EMPLOYMENT, INTERNATIONAL, LEGAL

"By a vote of 61 to 38 with two-thirds needed, the U.S. Senate" Tuesday "failed to ratify the far-reaching Convention on the Rights of Persons with Disabilities," notes Cato Institute legal scholar Walter Olson at the world's oldest law blog, Overlawyered. Backers of the treaty falsely claimed that it would not lead to any changes in U.S. law. But as Olson notes in The Daily Caller, the Convention does indeed prescribe mandates that go beyond anything in the current Americans with Disabilities Act, including employment coverage for the smallest employers, which are "now exempted" from the ADA, which does not cover employers with less than 15 employees. This matters a lot, because even the existing legal definition of what is a disability (and what an employer must do to accommodate it) is very vague and broad, making compliance especially difficult for small businesses that do not have human-resource bureaucracies designed to cope with such regulatory burdens.

Even if the treaty is not self-enforcing, it could be relied upon by courts to create new causes of action against small businesses. Many states have anti-discrimination statutes that exempt small employers. But state courts in such states (including Maryland, Virginia, and across the country) have relied on the mere existence of such statutes to create a tort of "wrongful termination in

violation of public policy" against even the smallest employers, arguing that they create a general policy against discrimination that prevents even the tiniest employers from discharging people for discriminatory reasons. Similarly, if the treaty had passed, trial lawyers would have argued that it created a public policy that justified lawsuits against even the smallest employers over disability discrimination. (They would argue that its mandates were incorporated into state law, citing Article 4, Section 5 of the convention, which says: "The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.")

One can only hope that the Senate will not change its mind and ratify the treaty next year when it grows slightly more liberal due to the 2012 election. Olson laid out some of the many bad provisions of this treaty in an article yesterday in The Daily Caller, and a followup analysis at Cato at Liberty.

As Olson notes, other mandates in the treaty that go beyond current U.S. law include "requirements for 'guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public,' [which appears to partly override the Supreme Court's decision in *Southeastern Community College v. Davis* (1979)], a new right of disabled persons not to be discriminated against in the provision of life insurance, and much, much more."

The treaty could also have an adverse effect on civil liberties, such as freedom of speech regarding zoning decisions. In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the Ninth Circuit Court of Appeals ruled that speech

against a proposed housing project for a category of disabled people — mentally-ill recovering substance-abusers — could not be prohibited by the Fair Housing Act merely because it incited discrimination based on disability, and that such speech was core political speech protected by the First Amendment. Critics argued that the housing project was inappropriately located near bars and drug markets. The federal government investigated the critics for discrimination for months, threatening them with civil fines. If the treaty had been in force at the time, the federal government might well have argued that the treaty gave rise to a "compelling interest" that overrode the First Amendment. The D.C. Circuit Court of Appeals once upheld a municipal ordinance restricting protests around embassies based on a "compelling interest" derived from international law, although the Supreme Court partly reversed that ruling in a 6-to-3 vote in *Boos v. Barry* on the grounds that the restriction the appeals court upheld on that basis was not proven to be essential to achieving that compelling interest. Some well-known left-leaning legal scholars, such as Peter Spiro, argue that treaties can give the federal government a "compelling interest" for imposing a regulation otherwise forbidden by the First Amendment.