

DISSENTING STATEMENT AND REBUTTAL OF COMMISSIONER GAIL HERIOT in Report of the U.S. Commission on Civil Rights: Subminimum Wages: Impact on the Civil Rights of People with Disabilities

In our Age of Wokeness, the moralizing tone that this report takes has become all too familiar. But it is entirely uncalled for.

The issue before us is one of practical economics, not one of morality. We all want adults with Down syndrome and other serious intellectual and developmental disabilities to have happy and fulfilling lives. As a nation we are committed to help bring that about. Where we differ is on how to achieve that goal.

Should the program created by Section 14(c) of the Fair Labor Standards Act remain in place? Or should the federal government get rid of it? Given that the program is ***optional*** for disabled persons, I view this issue as easier than most questions faced by the Commission.

Section 14(c) was adopted in 1938 at the same time as the first federal minimum wage. Back then it was believed—no doubt correctly—that a federal minimum wage would cause many disabled persons to become unemployable. An exception was thus created. A limited number of employers would be permitted to obtain certificates authorizing them to pay disabled persons something less than the minimum wage. Under current law, how much less depends upon stringent tests of each such employee’s productivity, which must be conducted every six months.

Many of these disabled persons are employed in “sheltered workshops,” while others are employed in integrated settings. If we keep Section 14(c), they will be able to continue to work for the special minimum wage. If we don’t, sheltered workshops will likely disappear, and disabled individuals will be limited to taking non-sheltered jobs that pay at least the minimum wage. To get those jobs, they will have to compete with non-disabled workers.

Overwhelmingly we are talking about individuals with Down syndrome and other serious developmental disabilities. Right now the law allows them (or their guardian) a choice. They can take a mainstream job at a higher wage if they prefer that and can find an employer willing to hire them. If they prefer sheltered employment and have a willing 14(c) employer, they can choose that.

Nobody understands the issue better than the parents of the men and women currently employed in Section 14(c) programs. They aren’t just the ones who love them best. They are the ones who know their capabilities, likes, and dislikes best. That’s why it is shocking to me that **the report waits till page 99 (by which time nearly all Members of Congress have stopped reading) to mention that 98 per cent of the members of the public who submitted comments to the Commission support the continuation of Section 14(c).**

In my thirteen years on the Commission we've never received anything like the number of comments we got with this report—9,700. Indeed, the report admits that this is the highest number the Commission has ever received. Of them, the overwhelming majority were from parents or other close family members. Almost all of them disagreed—often *vehemently*—with the Commission's conclusion on what is best for their child. It would be difficult to find an issue for which comments were more lopsided.

Some of the parents come close to begging the Commission to leave Section 14(c) in place. One mother wrote us, "There are people who think they know what is best for my son. They are wrong." She describes with honesty and compassion the difficulties of caring for an adult son with the intellectual capacity of a four-year old. Another mother describes her son as a slow worker who requires monitoring and who is prone to temper tantrums in the middle of the day. These women know their sons are not going to be earning a competitive wage. They are not interested in chasing rainbows and unicorns. For their sons, it is a sheltered workshop at less-than-minimum wage or no job at all.¹

¹ One mother that we spoke with at MVLE on March 2, 2020—Catherine Pennington, an MVLE board member—was also realistic about her son's prospects in the job market: "When he works for me around the house, he needs a lot of supervision. ... For example, if he goes to mow the lawn, when he's done, there will be tufts of grass here and there. He will not have gone to the edge of the lawn, and even when I point things out to him, he won't necessarily understand that [he] didn't quite get it right. ... Steven's never going to get faster. He's probably never going to become more thorough than he is now, so if he were to try and compete in the market with people who have no disabilities, he would not do well. ... [I]f the minimum wage were to rise significantly, or even a little bit, I expect that Steven would become unemployed." Tr. at 21.

Commissioner Kladney's Statement sounds sunny and optimistic about the ability of Down syndrome employees to work independently at Greenspring (a senior/assisted living facility that contracts with MVLE to furnish 14(c) workers). Commissioner Kladney is often a sunny and optimistic guy, and I appreciate that. But that's not what I was hearing there from people with experience. The MVLE job coach at the Greenspring site (if I can read my handwritten notes her name was Barbara) told us that these special employees tend to forget things, especially on Mondays. They have to be re-taught over and over again. We were told by another Greenspring employee that that the special employees need to be constantly helped and that a change of manager can be traumatic for them. In food preparation, they must be kept away from anything hot. These are not your average unskilled workers. Policy has to be grounded in that reality.

In this vein, I should point out the testimony of John Anton at our hearing. Mr. Anton has Down syndrome. He also is a Legislative Specialist with the Massachusetts Down Syndrome Congress. With help from a coach, he testified on behalf of the Massachusetts Down Syndrome Congress and the National Down Syndrome Society on November 15, 2019. Among other things, he related that he had had once worked in food service, but quit the job, because he didn't find it challenging. His current job allows him to lobby for legislation that would benefit those, like him, who have Down syndrome. Mr. Anton put it in terms of wanting to carry a briefcase and wear a suit. He stated:

"... I have learned how to dress professionally, develop a self-advocacy presentation, and I wanted to have a job where I could wear a suit and tie and carry a briefcase and be a professional like my dad who was a teacher.

(Transcript at 135.)

No one in his right mind would think that the U.S. Commission on Civil Rights—with its mere two days of fieldwork on this issue—has better insight than these mothers have into what is best for their sons.² It's absurd. Indeed, my

Mr. Anton was quite impressive. Insofar as his job is to model what Down syndrome employees might be able to do, I believe he is very effective. On the other hand, the fact that he can get hired by the Massachusetts Down Syndrome Congress doesn't mean that Ms. Pennington's son can get hired that way. See Margaret Snowling, Hannah Nash & Lisa Henderson, *The Development of Literacy Skills in Children with Down Syndrome: Implications for Intervention*, DSE Library (July 2, 2008) ("Reading skills are often an area of relative strength for individuals with Down syndrome. Most children with Down syndrome acquire literacy skills, although a great deal of variability exists in the level of achievement obtained.") available at <https://library.down-syndrome.org/en-us/research-practice/online/2008/development-literacy-skills-down-syndrome-implications-intervention/>.

The point is that we need to be realistic. **Anyone who argues that the solution to our problem is to find jobs for men and women with Down syndrome where they can "dress professionally" and "carry a briefcase" is being frivolous. Unrealistic policies recommendations have become surprisingly common these days. But they are unhelpful.**

² **Commissioner Kladney complains that MVLE did not allow us to see its Section 14(c) paper shredding workers on site. But he forgot to say why: Shortly before we were to see them, we were told that one of the workers had suffered from a seizure.** I have no reason to doubt that such a seizure had occurred. This unfortunately is common with Down syndrome and with some other severe disabilities. Sometimes emergency medical services have to be summoned to deal with the seizure. I don't know whether that was the case this time. But a parade of Commissioners and Commission staff members would only have been in the way. I don't recall Commissioner Kladney or anyone else suggesting otherwise.

Kladney also complains that MVLE did not "allow us to see" its day care facilities. This is nonsense. First, our entourage did get to see a rehearsal of "Everyday Oz" there at the MVLE offices, which is part of the daycare program (and was really quite a treat). "Everyday Oz" is described on the [Kennedy Center web site](#) this way:

Everyday Oz is a family-friendly performance and demonstration that partners individuals with disabilities with professional performers for an engaging show. Equal parts zany and poetic, Everyday Oz include active audience participation to reveal the many ways that we are smart, compassionate, brave, and creative ... every day!

It was extremely touching to see the professional actors and volunteer director working together with disabled individuals to make this drama come alive. We were told that they were preparing for performances in Springfield and Chantilly. Given the pandemic, I assume these performances were cancelled. But it's a shame.

Second, I spoke with April Pinch-Keeler, MVLE's president and CEO, about the accusation that MVLE "did not allow" us access to its day care facilities. She was stunned. MVLE had been repeatedly told that our group was on a very tight schedule and that we absolutely had to be able to catch a plane for Burlington, Vermont that afternoon. Bear in mind that in planning our visit MVLE had logistical concerns (the rest of the day care operations were in a different building) as well as HIPAA

colleagues on the Commission must know it's absurd. Why else bury the fact that 98% of the commenters were in favor of 14(c)?

It is elementary economics that if the price of something is increased, the quantity demanded will tend to decrease. Labor is no exception.³ This is particularly true for unskilled labor. Modern history has been unkind to unskilled workers. Where restaurants used to need armies of dishwashers, now they need only a few to operate their highly efficient dishwashing machines.⁴ Where fast food outlets used to need many cashiers, now they get by without them and take orders with tablets. It doesn't take a labor economist to tell you that the demand for unskilled labor of Down syndrome adults is not infinitely inelastic. If the price goes up, the number of jobs will go down.⁵

considerations. MVLE thought it was doing a good job of satisfying the Commission's last minute requests (or as many of them as possible) and still staying within the quick time frame we gave them.

By the way, Ms. Pinch-Keeler assured me that Commissioner Kladney is wrong to suggest that MVLE's scanning and paper shredding work site does not employ Section 14(c) workers. Some of the workers there are indeed employed pursuant to Section 14(c). Commissioner Kladney suggested that the mother we talked to who pointed to the paper-shredding operation as a reason to retain the 14(c) program must have been misinformed. But it is apparently Commissioner Kladney who is misinformed.

³ If we could raise the minimum wage without increasing unemployment, we'd have long ago set the minimum wage to \$1,000,000 an hour and made everyone rich. But it just doesn't work that way.

⁴ Commissioner Kladney reports that he was impressed with the dishwashers he saw and points out that he was once a dishwasher himself. *Exactly*. At one point in his life, Commissioner Kladney, a future distinguished trial attorney, would have been counted as among the competitors for the job of dishwasher. **If the choice is between a young David Kladney and a young man or woman with Down syndrome at the same wage, just who do you think will get the job?** This is especially so in places like Washington, D.C. (\$14/hour), Seattle (\$16.39/hour for large employers, \$15.75/hour for small employers), and Portland, Oregon (\$13.25/hour). I note for the record that the supervisor that we talked to at Greenspring ("Jason" according to my barely legible handwritten notes) told us that it also hires high school students for some of its unskilled labor requirements. I suspect that some of those high school students are future distinguished trial attorneys—much like a 17-year-old David Kladney—and pretty quick on the uptake.

Kladney also points to the individuals who were "preparing the setups for the next meal." He states that "anyone else would be fully compensated in a competitive environment" for doing these jobs. Not quite. Remember that we were at a senior/assisted living facility. A few years ago my late mother was at such a facility, where nearly all the residents had the kind of small or moderate cognitive deficits common to extreme old age. The facility was expensive and most Americans could not have easily afforded such care. The facility had the residents helping with the setups. It kept costs down, and I'm sure the families of many of the residents were grateful for that and for furnishing the residents who volunteered with something useful to do.

⁵ I am baffled by Commissioner Kladney's assertion that some of the providers "run very profitable businesses" and that "the foundation of much of that profit is the lower labor costs." **Businesses that hire Down syndrome workers tend to do so because they are trying to be good citizens, not because this will save them a bundle of money.** Kladney seems to be suggesting that MVLE is rolling in cash because it had gross revenues of \$14 million in 2017. This, of course, is not profit. It is

Even zealous advocates of terminating the so-called “subminimum wage program” admit that its elimination results in lost jobs. Vermont has eliminated sheltered workshops and Section 14(c) wages. The subcommittee had a roundtable meeting with various advocates of Vermont’s decision in Burlington, Vermont on March 3, 2020. At that meeting, I asked whether fewer individuals had jobs after Vermont’s eliminated sheltered workshops and Section 14(c) wages. It took a while to get a coherent answer. Finally, Monica Hutt, the Commissioner at the Vermont Department of Disabilities, Aging, and Independent Living told us:

I think maybe the piece that we didn’t articulate because it’s really obvious to us ... [W]e didn’t close the sheltered workshops and ... everybody that was working in the sheltered workshop went to work in the community. That would be an impossibility. ... But people’s hours were still filled. They were not just left abandoned because there wasn’t some minimum wage to keep them busy at an employment somewhere.

Transcript at 135.

She’s right, of course. It was obvious this was going to happen. Once the option of a sheltered workshop at a subminimum wage was taken away, disabled individuals were going to lose jobs in Vermont. At the time we spoke with Ms. Hutt,

gross receipts; it includes money that goes straight into the pockets of Down Syndrome workers in Section 14(c) programs. MVLE is a nonprofit.

At our November 15, 2019 hearing, Congressman Glenn Grothman testified to his high regard for the people in his district who work with and provide jobs for the severely disabled under Section 14(c) programs:

The people who work there, if you get to know them, are saints. As I understand it, before I [arrived at this briefing] some people were denigrating them a little bit. People who spend their life working with handicapped, working with people who are non-verbal, working with people who have to be toileted, are saints. They’re not doing it to make money; they are not doing it to take advantage of people

Tr. at 269.

I was very surprised when our Chair declared that she “took exception” to Grothman’s use of the word “saint” in this context. That’s when I knew the Commission was likely to produce the kind of short-sighted report that it has now produced.

If anyone thinks that hiring Down syndrome employees under Section 14(c) is a good way to get rich, I would challenge them to hire a number of Down syndrome workers and let me know how things turn out.

Apart from repealing the Section 14(c) program altogether, I can think of no better way to cause jobs for Down syndrome workers to dry up than to denigrate the employers who hire them under that program. They say no good deed goes unpunished. I used to think that was just a joke. Maybe I was naïve.

the United States was enjoying unusually low unemployment rates, so optimism may have been running unusually high, even though we all know that good times never last forever. What struck me as inappropriate throughout this investigation is how hard people try to avoid saying so plainly: ***Eliminating Section 14(c) programs will cause disabled individuals to lose their jobs.*** Ms. Hutt put it differently--that some previously employed disabled individuals “decided that they were going to retire or arrange other services”—but the point was nevertheless made plain by the time the roundtable adjourned.

Why is it okay to take away a job that a person with Down syndrome wanted and instead put him in daycare? Such a move will take money out of that person’s pocket and create the need for a larger, taxpayer-subsidized daycare/rehabilitation bureaucracy. Alas, I fear that, for some, the bureaucracy’s expansion is not a bug but a feature. Bureaucracies have a tendency to expand; one effective way to do that is to edge out one’s competition (in this case the Section 14(c) job market).⁶

I gather that for others the issue may be dressed up in the language of morality, but it is basically aesthetic. They don’t like the *look* of Down syndrome adults performing menial tasks in return for a wage that is below what any nondisabled individual would be permitted to work for. It makes them feel uncomfortable.

Generations ago it was more common for people to feel uncomfortable around the severely disabled. They wanted to keep disabled persons out of sight, because ... well ... disabled persons offended their sense of aesthetics. Today those who want to abolish sheltered workshops and Section 14(c) believe themselves to

⁶ Part of Commissioner Kladney’s Statement is devoted to suggesting that the problem with the 14(c) program is that there isn’t sufficient oversight. He calls it the “wild west.” Commissioner Kladney needn’t worry. As MVLE’s Senior Director of Program Services Michelle Lotrecchiano pointed out during our March meeting, “We are heavily regulated in this industry as I’m sure you all know.” Tr. at 16.

She was being accurate. As James Clark, MVLE’s Quality Manager, told us, “the Department of Labor oversees everything we do. An organization has to be ready at all times to get that drop-in inspection from DOL.” Tr. at 40. In addition, every two years MVLE must re-apply for 14(c) certification. To be re-certified, the Department of Labor “look[s] whether you’re using the correct techniques for measuring, time-measuring workers, whether your time studies are being completed on time, which is a requisite of every six months.” Tr. at 40. According to Mr. Clark, “they’re pretty serious audits.”

But that is just the beginning. Twice a year MVLE must also do a report to the Commonwealth of Virginia’s Department of Behavioral Health and Developmental Services to maintain its license. And in order to qualify for its contracts with state authorities, it must keep up its accreditation with the Commission on the Accreditation of Rehabilitation Services (CARF). That entails submitting to a thorough inspection from a team of experts every few years. MVLE is also an approved vendor of the federal government’s Ability One program, an authorized vendor for the Virginia Department of Rehabilitative Services and for the Virginia Department of Medical Assistance Services. It is also a recipient of United Way funding. **Put only slightly differently, there is always someone looking over MVLE’s shoulder.** The Commission is just one among many government agencies MVLE must deal with.

be a universe apart from those earlier generations. But they are the same. In both cases, it is all a matter of appearances ... of what looks good. What is actually in the best interests of the disabled individuals doesn't enter their minds.

I concur with Commissioner Kirsanow that the Commission shouldn't be judging issues based on appearances. We're supposed to do better than that.