UPDATE ON THE AMERICANS WITH DISABILITIES ACT AND EMPLOYMENT DISCRIMINATION

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Although the Americans with Disabilities Act of 1990 has been in effect for less than a decade,[1] it has spurred a flurry of enforcement and litigation activity. According to EEOC data, nearly 109,000 disability discrimination charges were filed with the EEOC between July 26, 1992 and September 30, 1998. In addition, several hundred ADA lawsuits have been decided by the federal courts, and many await judicial disposition. The U.S. Supreme Court issued one ruling in an ADA case in 1998 and four rulings in 1999. Although two of these rulings interpret the ADA somewhat expansively, the other three have narrowed the protections of the law and made it more difficult for plaintiffs to prevail. One effect of the Supreme Court rulings appears to be that plaintiffs may have more success if they allege a "perceived disability" claim than if they assert that they are actually disabled.

[1] Although the law was enacted in 1990, it did not become effective until mid-1992 for large private sector employers and all covered public employers, and until mid-994 for private sector employers with 15-24 employees.

Supreme Court Rulings

The U.S. Supreme Court has issued five decisions interpreting the employment provisions of the ADA and one involving the definition of disability. The first, issued in 1998, dealt with the issue of whether asymptomatic HIV qualified as a disability under the ADA's definition: "a physical or mental impairment that substantially limits one or more . . . major life activities" (42 U.S.C. sec. 12102(2)(A), "a record of such an impairment" (sec. 12102(2)(B), or "being regarded as having such an impairment" (sec. 12102(2)(C). In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the court ruled that HIV, whether or not the individual has symptoms of the disease, substantially limits an individual's ability to procreate (a major life function), and thus constitutes a disability for ADA purposes. Although *Bragdon* was brought under the public accommodation provisions of the ADA rather than the employment provisions, the definition of disability is common to all of the ADA's provisions.

The developing definition of disability. In *Bragdon*, the plaintiff, a dental patient, was told by her dentist that because she was HIV positive, he would only perform oral surgery on her in a hospital setting—a decision that increased the cost of the procedure. Bragdon sued the dentist under the ADA's public accommodation provision (Title III of the Act), and the dentist defended against her claim by asserting that asymptomatic HIV was not a disability under the ADA's definition.

The Supreme Court examined the effects of being HIV positive on various "life functions" of the plaintiff, and agreed with the plaintiff's argument that individuals who are HIV positive are severely constrained in procreation, since the disease can be passed both to the individual's sexual partner and to the offspring. Ruling that procreation was a

"major life function," the Court rejected the defendant's argument that the plaintiff was not disabled.

The use of "mitigating measures" to determine disability. The Court issued four opinions interpreting the ADA in 1999, all of which involved employment, and three of which dealt with the issue of "mitigating measures." Both the legislative history of the ADA and the EEOC's Interpretative Guidance[2] state that the existence of a disability is to be determined without regard to any mitigating measures that the individual may have taken to ameliorate the condition (for example, medication to control the effects of a disease, or devices, such as corrective lenses, to improve poor eyesight). Several appellate courts had refused to follow the EEOC's guidance on this issue, stating that the statutory language made it clear that if the disorder did not "substantially limit" the individual in some major life activity, then the individual did not meet the statute's definition of disability. Other appellate courts followed the EEOC's guidance; the high court agreed to review three cases to resolve the dispute among the circuits.

In *Sutton v. United Air Lines, Inc.* , 119 S. Ct. 2139 (1999), two plaintiffs challenged the airline's refusal to hire them as commercial pilots because they were nearsighted, even though their vision with corrective lenses was within airline guidelines. They sought to establish that myopia was a disorder that met the ADA's definition. In *Albertsons, Inc. v. Kirkingburg* , 119 S. Ct. 2162 (1999), a truck driver with monocular vision challenged his discharge by a grocery store because he could not meet the basic vision standards of the U.S. Department of Transportation, despite the fact that he had received a waiver from the DOT and had been driving safely for many years. And in

[2] 29 C.F.R. §1630.2(j) (Interpretive Guidance).

Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999), a mechanic with high blood pressure challenged his termination, stating that despite the fact that his blood pressure was controllable with medication, he was protected by the ADA because his disability should be assessed in its uncorrected state.

In each of these cases, the Court ruled that, because the definition of "disability" states that the disorder must "substantially limit one or more major life activities," a corrected or correctable disorder would not necessarily limit the individual, and thus the definition would not be met. The Court expressly rejected the EEOC Guidelines because the Court believed that the Guidelines contradicted the clear wording of the statute. And because the Court determined that the ADA's language was clear, it did not consider the law's legislative history, which also stated that disorders were to be considered in their unmitigated state. The Court commented that an individual might be able to meet the definition even if the disorder were considered in its mitigated or corrected state if the disorder still limited the individual in a significant way.

In *Sutton*, twin sisters who were licensed airline pilots applied for commercial pilot positions with United Airlines. Both sisters had severe myopia (nearsightedness), but their vision was normal when they used corrective lenses. United Airlines requires its pilots to have uncorrected vision that is better than the vision of either of the applicants, and denied their applications. The trial court dismissed the plaintiffs' complaint, saying that they were not disabled under the ADA's definition because their impairment was fully correctable. Nor were they regarded as disabled by United, according to the trial court, but were merely unable to satisfy the physical requirements of the job of a global airline pilot. The U.S. Court of Appeals for the Tenth Circuit affirmed, using the same

reasoning. The Supreme Court concurred, assuming without deciding that work was a major life activity, and stating that the plaintiffs were not precluded from a wide range of jobs, but only from one—that of global airline pilot.

In *Murphy*, the plaintiff had been hired by United Parcel Service as a mechanic. UPS required its mechanics to drive its trucks as part of their job. Because of this job requirement, all mechanics had to satisfy U.S. Department of Transportation regulations in order to obtain a commercial driver's license. Murphy was originally certified by a company doctor as within DOT guidelines for blood pressure, even though his blood pressure exceeded federal limits. When UPS discovered the error, they terminated Murphy; he obtained another mechanic's position quickly.

Affirming the rulings of the trial and appellate courts, the Supreme Court ruled that Murphy's hypertension did not substantially limit a major life activity because it was controlled with medication. Because the DOT regulations only precluded him from mechanics' jobs that required driving, his disorder did not exclude him from a wide range of jobs.

In *Kirkingburg*, the plaintiff was a truck driver with monocular vision. Albertson's had hired him under the mistaken belief that he could meet the DOT's vision standards for drivers of commercial vehicles. When the company learned that the plaintiff only had vision in one eye, they told him to obtain a waiver of the DOT requirements. Kirkingburg did so, but Albertson's fired him anyway.

Although the trial court ruled that the plaintiff was not qualified because he could not meet the DOT standards, the U.S. Court of Appeals for the Ninth Circuit reversed. Because of the waiver provision, said the court, the company could not impose the DOT

standards without linking them to the requirements of the job. The Supreme Court reversed, ruling that the plaintiff was not disabled because his disorder did not substantially limit a major life activity. Furthermore, because the waiver program was experimental, Albertson's was not required to participate in it, and was justified in insisting that its employees meet federal safety standards.

Social security benefits and the ADA. The results in the trio of "mitigation" cases may reduce the number of ADA lawsuits brought by individuals whose disorders are controlled or controllable by medication or other devices. But a fifth Supreme Court opinion may have the opposite effect, for it may allow more individuals to maintain ADA lawsuits. In *Cleveland v. Policy Management Systems Corporation et al.*, 119 S. Ct. 1597 (1999), the court ruled that an individual's representation that he or she is too disabled to work for purposes of receiving Social Security Disability Insurance does not necessarily estop an individual from pursuing an ADA claim. Federal appellate courts were split on this issue; several had ruled that an individual's assertion that he or she could not work for SSDI purposes precluded an argument that the individual was a "qualified individual with a disability" who could perform the essential functions of a job if a reasonable accommodation were provided. Applying judicial estoppel to these claims, trial judges were dismissing plaintiffs' ADA claims based on their SSDI assertions. Because the ADA requires that the court determine whether an individual is qualified to perform a job with accommodation, an inquiry which is not part of the SSDI evaluation, the Court ruled that ADA plaintiffs should be given an opportunity to explain the discrepancy between their SSDI assertions and their ADA claims.

Progeny of the Supreme Court Rulings

As of the end of 1999, six federal appellate courts and thirteen trial courts had ruled in ADA cases in which the issue of "mitigating measures" had arisen under the rules elaborated by the Supreme Court. The influence of the Supreme Court rulings is clear in the cases at both levels.

Appellate cases. In two of the six appellate cases, verdicts or rulings for the plaintiff were reversed in light of the requirement that the individual's disorder be evaluated in conjunction with mitigating factors. In *Ivy v. Jones*, 192 F.3d 514 (5th Cir. 1999), a child protective services worker with a hearing impairment was terminated six weeks after she was hired when her employer discovered that she was having difficulty hearing the content of training courses. Although the trial court had determined that Ivy was disabled, the appellate court vacated that determination, remanding the case to the trial court to consider the plaintiff's hearing impairment in its mitigated state (with hearing aids). Since the court commented that the plaintiff's hearing could be corrected to 92 percent with one aid and to 96 percent with two aids, it is unlikely that the plaintiff will be able to demonstrate that the impairment substantially limits a major life activity.

The second case in which the appellate court vacated a ruling for the plaintiff seems to be an anomaly, because it does not appear to follow the guidance of *Sutton* and its companion cases. In *Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946 (8th Cir. 1999), the plaintiff, a customer service representative, applied for the position of customer service technician (CST). CSTs maintain underground and overhead telephone cables. The job requires the CST to climb into and out of manholes and to climb telephone poles. The plaintiff, who had polio as a child, wears a leg brace and walks with

a limp. Although the plaintiff received some accommodation in the standard physical testing for the CST position, the company refused to modify the "leg press" test and plaintiff failed it. He was not offered the CST position.

Although a jury found that the company discriminated against Belk on the basis of his disability, it refused to award damages or reinstatement because it found that the company would have made the same decision to reject Belk irrespective of his disability. The judge had refused to instruct the jury on the issue of the business necessity defense.

The company argued on appeal that, under the *Sutton* standard, Belk was not disabled, given the fact that he coached a Little League team, hunts, fishes, and built a garage and an addition to his home. The appellate court rejected that argument, stating that simply because Belk used a leg brace did not defeat his claim to be disabled. Said the court, "it can hardly be disputed that Belk is disabled in the major life activity of walking. The full range of motion in his leg is limited by the brace, and his gait is hampered by a pronounced limp . . . Unlike the petitioners in *Sutton*, Belk's brace does not allow him to function the same as someone who never had polio. Therefore he is clearly "disabled" as defined by the ADA" (194 F.3d at 950). The court did not discuss to what degree the lingering effects of Belk's polio, or the use of the leg brace, "substantially limited" his ability to walk. Furthermore, the court did not consider whether Belk could be determined to be a "qualified individual with a disability" with respect to the CST position, since his disorder did interfere with his ability to climb into and out of manholes, and he had stated that he could not climb a telephone pole.

The appellate court returned the case to the trial court because it found that the trial judge should have instructed the jury on the business necessity defense. This ruling

appears to be correct, given the ADA's language that an employer's use of validated selection devices may be a defense to a claim of disability discrimination as long as the requirement or test is "job-related for the position in question and consistent with business necessity."[3] But the court's ruling on the issue of whether Belk was disabled appears to be inconsistent with the *Sutton* trilogy, in that the court assumed, without analysis, that Belk's impairment was a disability for ADA purposes.

The *Sutton* trilogy persuaded a panel of appellate judges in the Third Circuit to give a plaintiff a second chance to demonstrate disability discrimination. In *Taylor v. Phoenixville School District*, 184 F.3d 296 (3d Cir. 1999), a school secretary with bipolar disorder charged the school district with failure to provide a reasonable accommodation for her disability in that it failed to engage in the interactive process required by the ADA regulations when the employee requests a reasonable accommodation. Although the trial court awarded summary judgment to the employer, the appellate court reversed on two grounds. The court ruled that there were genuine factual disputes with respect to whether Taylor's impairment substantially limited a major life function, and also with respect to whether the employer had engaged in the interactive process in good faith.

Another post-*Sutton* case fulfills the prophecy of some legal experts who predicted that the trilogy would make it more difficult for plaintiffs to prevail on claims of disability discrimination, and thus would encourage them to use the "perceived disability" portion of the law instead. *Equal Employment Opportunity Commission v. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999) is a good example of this outcome. The facts of *Gallagher* are dramatic and extreme, and decision of the EEOC to litigate this case

[3] 42 U.S.C. §12112(b)(6).

demonstrates its potential significance and its egregiousness. Michael Boyle worked for Gallagher for over twenty years, starting as a sales representative and ending as the company's president. Robert Gallagher Jr. was chief executive officer and chairman of the board. Boyle had a one-year contract that was renewed annually and provided for automatic renewal unless either party notified the other of intent not to renew.

Ten months after being promoted to president, Boyle was diagnosed with a form of blood cancer. He received chemotherapy for one month in a hospital, but continued to work off-site. Although Boyle's doctor declared the cancer to be in complete remission after the course of chemotherapy, Gallagher told Boyle that he did not believe Boyle could continue to work, and he demoted Boyle to executive vice president, and then to vice president of sales, and cut his salary in half. This demotion was to a lower position than Boyle had occupied in the prior fifteen years.

Boyle refused to accept the demotion, and Gallagher then informed him that his contract had expired and that his health benefits would terminate at the end of the next month. Gallagher also refused to accept Boyle's doctor's certification that he was free to return to work with no restrictions.

The proceedings in the trial court are lengthy and complex. The trial court ultimately awarded summary judgment to Gallagher, concluding that Boyle was not disabled because his doctor certified that he was able to work. While the legal skirmishing was unfolding, Boyle died, and his widow pursued the appeal.

The appellate court agreed that Boyle was not disabled because the cancer, after chemotherapy, did not substantially interfere with his ability to work. The fact that Boyle needed to return for periodic chemotherapy treatments of one day per month was not a

substantial interference with his job, said the court. But the court ruled that the trial court should have allowed Boyle's estate to demonstrate that he was discriminated against by Gallagher because he had a record of a disability, and because Gallagher regarded him as disabled. Given the behavior of Gallagher and his refusal to discuss whether Boyle was able to return to work as the company president, the court ruled that a factfinder could agree with Boyle's theory of discrimination on the basis of a perceived disability.

Gallagher demonstrates the usefulness of the "perceived disability" theory to plaintiffs who may have recovered sufficiently from a previous disorder such that there are no, or few, present effects of the disorder. Given the Supreme Court's ruling that mitigating measures such as medication, devices, or treatment such as chemotherapy must be considered in the determination of whether an individual fits the ADA definition of disability, the task of demonstrating that one is perceived as disabled may be viewed as easier. The individual need not be disabled or impaired at all—but the plaintiff will have to prove that the employer was motivated by improper stereotypes about the capabilities of individuals with the perceived disorder that the plaintiff is claiming. Evidence such as comments by management representatives about the capabilities of individuals with certain impairments, statements by management employees that individuals with certain disorders cannot perform specific tasks or hold certain jobs, or the refusal of a management official, such as in *Gallagher*, to even consider allowing a formerly impaired worker to return to work, may be used to demonstrate discrimination on the basis of a perceived disability.

Two other appellate cases suggest that some plaintiffs may be using the ADA in an attempt to cushion them from an otherwise justified termination decision. In *Weber v.*

Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), the plaintiff was the international sales manager for Strippit, and worked out of an office in his home in Minnesota. At the age of 54, Weber suffered a major heart attack and was out of work for two months. After returning from medical leave, he continued to have heart problems, and was hospitalized several times, although he continued to perform his job duties. About ten months after his heart attack, Weber was notified by the company that they would like him to relocate to Akron, New York (where the company headquarters was located) from Minnesota. Weber resisted the company's relocation request, stating that he needed to be near his doctor for another six months. The company refused to wait, and terminated Weber.

At the conclusion of the trial, the jury awarded a verdict for the company on Weber's perceived disability claim, and the trial judge awarded summary judgment to the company on Weber's actual disability claim. The appellate court affirmed, noting that there was no evidence of discrimination in either form—the company was attempting to persuade Weber to relocate, which does not suggest that it viewed him as disabled. And despite the fact that Weber needed continuing treatment for his heart disease, the court ruled that he had not established that his disorder substantially limited his ability to work in a wide range of jobs.

In the last post-*Sutton* appellate case, *Spades v. City of Walnut Ridge*, 186 F.3d 897 (8th Cir. 1999), a police officer with depression attempted suicide with his service revolver. Spades was treated for depression and sought to return to work, but the city refused, citing legal advice it had received that, given its knowledge of Spades' prior violent use of a handgun, its liability exposure would increase. Spades was terminated, and filed claims under the ADA and the Family and Medical Leave Act.

The trial court awarded summary judgment to the employer, ruling that Spades was not disabled because his mental impairment was controlled with medication. Furthermore, ruled the trial court, the city provided a legitimate nondiscriminatory reason for his termination—concern about increased liability exposure. The appellate court affirmed on both theories.

Trial court opinions. A LEXIS search revealed thirteen published opinions of trial courts that dealt with the "mitigating measures" issues of the *Sutton* trilogy. Eight of the cases resulted in summary judgment for the employer because the court ruled that the employee was not substantially limited and thus was not disabled.[4] In the remaining five cases, plaintiffs could not convince the trial court that they should be given the opportunity to demonstrate an actual disability, but the court refused to award summary judgment on the issue of perceived disability. In the fifth case, the court said the plaintiff should be allowed to demonstrate either or both claims. In *Harman v. Village of Fox Lake*, 55 F. Supp. 2d 886 (N.D. Ill. 1999), comments made by the plaintiff's supervisor convinced the court that the plaintiff might have been perceived as disabled, even though the court ruled that her impairment did not substantially limit her ability to work, and thus her actual disability claim failed. The supervisor had said that the plaintiff was unreliable because she had been on medical leave, and that she could not work part-time for a few weeks because the supervisor only wanted her back when she was well and could work

[4] The cases resulting in an award of summary judgment for the employer on the issue of disability discrimination are: *Taylor v. Blue Cross and Blue Shield of Texas*, 55 F. Supp. 2d 604 (N.D. Tex. 1999); *Hoffman v. Town of Southington*, 62 F. Supp. 2d 569 (D. Conn. 1999); *McClurg v. Gtech Corporation*, 61 F. Supp. 2d 1150 (D. Kan. 1999); *Matuska v. Hinckley Township*, 56 F. Supp. 2d 906 (N.D. Ohio 1999); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999); *Finical v. Collections Unlimited, Inc.*, 65 F. Supp. 2d 1032 (D. Ariz. 1999); *Robb v. Horizon Credit Union*, 66 F. Supp. 2d 913 (C.D. Ill. 1999); and *McCleary v. National Cold Storage, Inc.*, 67 F. Supp. 2d 1288 (D. Kan. 1999).

full-time. Those comments earned the plaintiff a trial on the issue of perceived disability discrimination.

In *Matlock v. City of Dallas*, 1999 U.S. Dist. LEXIS 17953 (November 12, 1999), the court awarded summary judgment on the plaintiff's claim of actual discrimination, but reserved the issue of perceived disability discrimination for trial. The plaintiff, a hearing-disabled applicant for a police officer's job, had been told by the police department that he couldn't wear a hearing aid and be a police officer. No defense of business necessity had been articulated. The outright rejection of the plaintiff without an analysis of the essential functions of the position gave the plaintiff the right to a trial on the issue of perceived disability discrimination.

Similarly, in *Hall v. Masterlock Company, Inc.*, 1999 U.S. Dist. LEXIS 13119 (M.D. Ala., August 12, 1999), the court stated that there was insufficient evidence to suggest that the plaintiff was disabled at the time he was terminated for threatening to harm his supervisor. But the court said that the plaintiff should be given the opportunity to demonstrate at trial that management officials regarded him as disabled. They had originally told the plaintiff that he could return to work if cleared by a psychiatrist. When the employer-selected psychiatrist cleared the plaintiff to return to work, the company fired him anyway for violating a rule against bringing guns onto company property, although it gave him a six month leave at 50 percent pay prior to terminating him. This inconsistent behavior could establish that the executives perceived the plaintiff as disabled, and the court refused to award summary judgment on that issue.

In two of the thirteen trial court opinions, plaintiffs earned the right to demonstrate both actual and perceived disability discrimination. In *Rolff v. Interim*

Personnel, Inc., 1999 U.S. Dist. LEXIS 18096 (E.D. Mo., November 4, 1999), the plaintiff had contracted hepatitis C, a blood-borne disease with lasting effects. His supervisor and co-workers reacted very negatively to his condition, and behaved as though he were contagious (the disease is transmitted by blood exchange, just as HIV is). Using the theory of *Bragdon*, the court ruled that hepatitis C is a disabling condition because it limits the individual's ability to procreate, as does HIV. The court ruled that the stereotyping of Rolff in which his coworkers and supervisors engaged was sufficient to allow him to proceed to trial.

In *Wheaton v. Ogden Newspapers, Inc.*, 66 F. Supp. 2d 1053 (N.D. Iowa 1999), the plaintiff was aided considerably by a vocational expert. The plaintiff had various back problems which, the expert testified, precluded her from performing a wide range of jobs involving medium and heavy labor. This testimony convinced the court that summary judgment was inappropriate because a reasonable factfinder could conclude that Wheaton's impairment substantially limited her ability to work. The court also allowed Wheaton to go to trial on the issue of perceived disability and a record of a disability.

Analysis of trial court opinions demonstrates that the *Sutton* trilogy is making it difficult for plaintiffs to get to trial on the issue of actual disability, but that some, at least, are able to convince a judge to allow a trial on the issue of perceived disability. Particularly in situations where management representatives apply stereotypes or refuse to engage in the required interactive process to determine whether some accommodation is reasonable, plaintiffs may avoid summary judgment.

Conclusions

Although there was substantial press attention to the *Sutton* trilogy, it must be remembered that these cases addressed one relatively narrow issue—whether or not an individual's disorder should be evaluated in its mitigated or unmitigated state. It is clear that fewer individuals can demonstrate that they meet the ADA definition of disability when their impairment is evaluated in its mitigated state. However, other interpretative issues were not addressed by the Supreme Court. Issues remaining for the high court include: whether a collective bargaining agreement that limits the employer's discretion to make reassignment decisions "trumps" the ADA's accommodation language that includes reassignment; whether an individual who is not qualified to perform his or her own job, even with accommodation, is entitled to accommodation in another position; what a "broad class of jobs" actually means with respect to the plaintiff's experience, education, and skills, and what the contours of a financial "undue hardship" are. These issues and others have divided the appellate courts, and will continue to do until the Supreme Court agrees to take another look at this well-intentioned but complex piece of legislation.