

Under Assault: Recent Supreme Court Rulings on the ADA

Over the past decade the Supreme Court has consistently upheld arguments that limit federal authority over the states.

In the case of civil rights and labor laws, a number of Supreme Court decisions have seriously eroded many of the protections previously enjoyed by many citizens. This has been particularly true for state employees (which include the University and State College systems) who have seen their right to sue eliminated under the Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), and now the Americans with Disabilities Act (ADA). Perhaps equally as serious, the Supreme Court's majority opinion places into jeopardy some of the most fundamental civil rights protections enacted by Congress during the last twenty years.

This article examines four recent Supreme Court decisions and their impact on the Americans with Disabilities Act of 1990 (ADA).

Overview and Summary

Table 1 summarizes the Supreme Court's decisions on four recent cases. These four cases can be divided into two categories: (1) challenges to the definition and determination of a person's disability (*Albertson, Murphy and Sutton*), and (2) challenges to the constitutionality of the ADA itself (*Garrett*).

The immediate impact of the four Court decisions is relatively limited. However, they collectively raise troubling questions regarding the constitutionality of key ADA protections.

Although the first category of decisions contain many fact-specific qualifications, they all three address the determination of "disability" under the ADA and raise four key points:

1. The Court rejected the Equal Employment Opportunity Commission's (EEOC) position that mitigating measures should not be considered when determining if an individual

Table 1: Recent ADA Supreme Court Cases

Albertsons v. Kirkingburg (1999): The Court held that for a person to claim disability under ADA that individual must prove substantial limitation based on their own specific impairment, including self-mitigating measures taken to correct the disability (e.g. adjusting to driving with vision in one eye).

Murphy v. United Parcel Service (1999): The Court held that determinations of disability must take into consideration the severity of the disability while using a mitigating measure, rather than the EEOC guideline that a disability should be assessed in the absence any mitigating measures (e.g. medication).

Sutton v. United Air Lines (1999): Similar to *Murphy*, the Court ruled that the determination of whether a person is disabled must take into account whether mitigating measures correct the significant limitation (e.g. glasses and contact lenses).

University of Alabama v. Garrett (2001): The Court ruled that Congress exceeded its Constitutional authority when it applied the ADA to states, which means state employees can no longer sue for monetary damages (such as back-pay) in federal court under the ADA.

qualifies as disabled under the ADA. The Court specifically ruled that the determination of whether an impairment substantially limits a major life activity must take into account the beneficial effects of self-mitigating measures (changing behaviors or actions to adjust to the disability) or external-mitigating measures (such as medication, artificial limbs, eyeglasses, etc.).

2. The Court rejected the argument that a "disability" can exist as a matter of law. Rather, each claim of disability must be evaluated on a case-by-case basis taking into account the specific limitations the impairment has on the individual under that individual's specific circumstances.
3. The Court re-emphasized that the determination of disability must be based on the person's actual condition at the time of the alleged discrimination.
4. The Court strongly suggested that using the limitation on ability to work to prove that an impairment substantially limits a major life activity is problematic at best.

The second category of Court opinions involves the most recent decision (*Garrett*). This decision is also the most troubling. The Court ruled that Congress overstepped its Constitutional authority under the 11th Amendment (see discussion below) by allowing state employees the ability to sue for damages (such as lost income or punitive damages). The immediate impact of *Garrett* is directed toward state employees, who are no longer permitted to sue in federal court for monetary damages under the ADA. As discussed more below, this does not mean state employees with disabilities cannot pursue other options when discriminated against.

The greater threat *Garrett* poses is in its potential impact for Title II of the ADA, which prohibits discrimination in access to public services, and Section 504 of the Rehabilitation Act (1973) which prohibits discrimination by recipients of federal money. In *Garrett*, the Court accepted the argument of "states rights" and held that Congress violated the 11th Amendment when it imposed requirements on states to pay monetary damages under the ADA. Potentially, this "state's rights" argument could be applied to Title II and its mandate that states (and other public entities) not discriminate when they provide services or other accommodations (all which involve financial burden). Section 504 is also potentially under threat by the same argument.

Finally, it is important to note, despite the *Garrett* ruling, most of the ADA's protections still exist:

- The Supreme Court in *Garrett* only ruled on the ability of state employees to sue for damages under the ADA. State employees are still covered by the ADA, but they are restricted in the remedies available when the law is violated. Private suits under ADA by other public employees (city, county and school district) and private sector employees are unaffected by the *Garrett* ruling.
- State employees (and all other employees) can still file complaints with the EEOC, and the federal government can still sue states for damages under the ADA. For now, state employees (and all other eligible employees) may still sue for damages for

discrimination under Section 504 of the Rehabilitation Act or under any applicable state anti-discrimination laws.

- State employees (and all other employees) can still sue in federal court for injunctive relief (the prohibition of further harm) for violations of Title I of the ADA. Such injunctive relief might include a court order directing an employer to reinstate a disabled employee, to make a reasonable accommodation for a disabled employee, or to change policies, such as job application questions, that violate the ADA.

Overview of ADA Requirements and Rights

The Americans with Disabilities Act passed Congress in 1990, was signed into law by President Bush, and began a two-year implementation phase in 1992. Currently, the ADA covers all public employers and all private sector employers with 15 or more employees.

There are three parts to the ADA -- Title I, Title II, and Title III. Title I prohibits discrimination on account of a disability in all employment practices. Title II prohibits discrimination on account of a disability for all programs, activities and services of public entities, including employment. Title III requires all public accommodations to be accessible to persons with disabilities. Title III applies not only to all public entities, but also covers a broad range of places of lodging, restaurants, office buildings, retail stores, movie theaters, convention halls, and other public gathering places.

Title I is the critical part of the ADA in recent Supreme Court decisions. Title I prohibits employment discrimination against a qualified person with a disability who, with or without reasonable accommodations, can perform the essential functions of the job. An accommodation is reasonable as long as it does not present an undue hardship on the employer. Below is a brief review of these key concepts.

Person with a disability. A person has a disability under the ADA if that person:

- *has* a physical or mental impairment that substantially limits at least one major life activity (such as walking, talking, seeing, hearing, learning, breathing, performing manual tasks, reproducing, or working); or
- *has a history* of or is recovering from such a physical or mental impairment (such as cancer rehabilitation or mental anguish from a traumatic event); or
- *is perceived to have* such a physical or mental impairment (such as a mistaken belief that an HIV positive person cannot work with food or someone with a very bad stutter is mentally handicapped).

Reasonable accommodations. Any accommodation (subject to the "undue hardship" standard) that modifies the job application, work process, or work

environment such that an individual with a disability can perform the essential functions of the job is a reasonable accommodation.

Essential functions of the job. In short, essential functions are what make the job unique and without which the job would be a significantly different job. Essential functions may include educational background, training, appropriate experience, or specific requirements critical for performing the job (weight-lifting requirements, typing skills, mechanical skills, etc.).

Undue hardship. An accommodation presents an undue hardship when its cost is excessive or its implementation causes undue disruption or difficulty. What constitutes an undue hardship varies significantly from employer to employer depending on a variety of factors, such as employer size, cost of accommodation, financial resources available, type of work, etc. Enforcing this rather vague description is why we have courts.

For a person to qualify for protection under the ADA that person must first meet the tests of being qualified for the job and being disabled. That an individual is impaired in some way does not necessarily meet the disability standard of the ADA, that is, an individual may have an impairment that does not "substantially limit" a major life function. Once a person meets the disability test and is qualified to do the job, the ADA requires employers to provide reasonable accommodations so the employee can perform the essential functions of the job. These accommodations are only subject to the limitation of undue hardship on the employer.

Enforcement of the ADA is done through the Equal Employment Opportunity Commission (EEOC) and the Department of Justice and follows procedures outlined in the Civil Rights Act of 1964, revised in 1991. In brief, a public employee who charges discrimination under the ADA must file a complaint with the EEOC within 180 days of the alleged discrimination. The EEOC investigates, and if a resolution is not achieved within 180 days after the complaint is filed, the EEOC refers the case to the Justice Department, which either files suit or issues a "right to sue" letter. Private sector employees follow the same procedure, except the EEOC issues the "right to sue" letter. The employee then has the right to sue for relief and/or damages in federal court. It is this last provision that *Garrett* overturns for state employees.

Legal Background for the "States' Rights" Argument

There are two competing issues behind the current "states' rights" debate regarding the ADA and other federal civil rights protections. On the one hand, the 14th Amendment, enacted in the wake of the Civil War, guarantees:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... nor deny to any person within its jurisdiction the equal protection of the laws.

This is commonly referred to as the Equal Protection Clause of the 14th Amendment and is the Constitutional basis for virtually all of our civil rights laws.

Section 5 of the 14th Amendment then specifically grants Congress "*the power to enforce, by appropriate legislation, the provisions of this article.*"

On the face of it, the 14th Amendment appears to specifically grant Congress the authority to pass civil rights laws that prohibit states from discriminating on account of race, gender, disability, age, or any other protected class. However, the debate centers on three key words in Section 5 -- the phrase "*by appropriate legislation.*"

Key to this discussion is the concept of Federalism -- the fundamental premise that in the United States the federal government is a government of limited powers. That is, Congress only has the authority to legislate what the Constitution specifically grants it the authority to legislate.

It is here that the 11th Amendment becomes important. Without going through how this Amendment has come to be interpreted as such, in short, it means that individuals cannot ordinarily sue states in federal court for monetary damages, unless the state consents to being sued or the individual sues under a civil rights law passed under the 14th Amendment.

The battleground for the past several years has been over this last point. The ADA clearly gives individuals the right to sue for damages in federal court. This is, in fact, the principle means for enforcing the ADA. However, for state employees to recover monetary damages they must sue their employer -- the state -- which is under the protection of the 11th Amendment, which prohibits private citizens from suing states for monetary damages. The way out of this circular argument is the authority granted Congress under the 14th Amendment, but the 14th Amendment conditions Congress's authority to enforce civil rights protections on "*appropriate legislation.*" It is the appropriateness of certain civil rights laws that is now being challenged by states' rights advocates.

In 1997, the Supreme Court ruled in *City of Boerne v. Flores* that the 14th Amendment only grants Congress the power to impose civil rights legislation on states under two limited circumstances: (1) it remedies a history of unconstitutional conduct; and (2) the remedy is proportionate to the Constitutional violations.

In subsequent years, the Supreme Court has used the argument of states' rights to overturn provisions in a number of important labor and civil rights laws. In *Alden v. Maine* (1999) the Court claimed that the Fair Labor Standards Act (FLSA) could not be enforced on states and denied state employees the right to sue their state employers for violations of the FLSA. In *Kimel v. Florida Board of Regents* (2000) the Court ruled that the Congress has no authority under the 14th Amendment to impose on states the 1967 Age Discrimination in Employment Act (ADEA). Recent U.S. Court of Appeals decisions in the Eighth and Fourth Circuits have found Title II of the ADA unconstitutional on similar grounds. It is only a matter of time that these decisions will be reviewed by the Supreme Court.

Discussion of Four Recent ADA Supreme Court Cases

Below is a brief overview of the key issues raised in each of the four recent ADA decisions.

1. ***Albertson v. Kirkingburg***. Kirkingburg was a truck driver could see out of only one eye (monocular vision). His vision problem was initially missed, but when he was correctly diagnosed, his employer fired him under a Federal Department of Transportation (DOT) regulation that required vision in both eyes. Under a new program, Kirkingburg sought and received a DOT waiver, but his employer refused to rehire him. Kirkingburg sued for discrimination under the ADA.

The issue before the District Court was solely whether or not the DOT waiver was valid. The District Court ruled the waiver valid since it was "experimental." At the Court of Appeals, the employer introduced a new argument: Kirkingburg was not in fact disabled, since his perfect driving record proved he had adjusted to his vision problem and it did not severely restrict a major life activity. The Appeals Court rejected this argument and ruled in Kirkingburg's favor stating there is a "significant difference" between vision that is monocular versus binocular.

The Supreme Court, however, overturned the Court of Appeals decision and ruled that a "significant difference" is not the same as a "significant restriction," and therefore Kirkingburg's impairment did not qualify as a disability under the definition of disability in the ADA. The Court held that Kirkingburg had not proven that his monocular vision, including his adjustments to his impairment, substantially limited a major life activity.

2. ***Murphy v. United Parcel***. Murphy was a mechanic whose job required him to road test commercial vehicles after he finished repairing them. Like Kirkingburg, Murphy's impairment of high blood pressure (which he controlled through medication) was originally misdiagnosed, and when it was correctly diagnosed later, Murphy was terminated under a DOT regulation.

Murphy sued for discrimination under the ADA claiming that the severity of his disability should be assessed in the absence of any mitigating measures, such as his medication (which was the EEOC guideline). The Court rejected Murphy's claim that his high blood pressure substantially limited his ability to perform the major life activity of work, since under medication, he was in fact able to perform his job. What the Court did not address (because the question was not before it) was whether or not Murphy was disabled "in spite of" his medication (i.e. taking the medication substantially limited a major life activity other than work). The Court also did not rule on the DOT regulation, since that question was not before it.

3. ***Sutton v. United Air Lines***. The two Sutton sisters were airplane pilots with severe myopia in both eyes, which they corrected with glasses to 20/20 vision. At the time of the suit they were flying commuter jets, but wanted to fly larger commercial jets. They qualified under FAA guidelines that set limits on *corrected* vision, but they did not meet the more stringent United Air Lines (UAL) policy that set limits on *uncorrected* vision.

The Sutton pilots claimed that the UAL policy violated the ADA because it required uncorrected vision standards. The District Court ruled that they were not disabled under the ADA, because with glasses they were no longer disabled. The Supreme Court upheld the District Court ruling, arguing that although the pilots were clearly impaired, they were not substantially limited in regards to the major life activity of work, as they had claimed.

The Court based their decision on two premises: (1) a substantial limitation in ability to work does not equate to the inability to perform a single job (e.g. flying large commercial jets). The Court reasoned that the pilots could continue to fly commuter planes or courier planes and were therefore not substantially limited in their ability to work as pilots; (2) the pilots never claimed that their vision substantially limited other major life activities, such as seeing. If this latter issue had been raised, the Court may have been forced to rule on the validity of the UAL policy itself.

A critical sidebar to the *Sutton* case is Justice O'Connor's skepticism over justifying any disability claim that relies on work as a major life activity. She characterizes such logic as an essentially circular argument: "*to say that if one is excluded ... that the exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.*"

4. ***University of Alabama v. Garrett.*** The *Garrett* case involves two cases that were combined. In the first, Garrett, a registered nurse at the University of Alabama Medical Center, sued under the ADA after her employer demoted and transferred her upon her return following breast cancer treatment. The second case, Ash, involved a corrections officer with severe asthma who sued Alabama's Youth Corrections Agency after it refused to enforce its own no-smoking rule and fix the cars he drove to reduce noxious exhaust.

The issue before the Supreme Court was: "*Does the Eleventh Amendment to the United States Constitution bar suits by private citizens in federal court under the Americans with Disabilities Act against non-consenting states.*"

The Court ruled that Congress did not have authority under the 14th Amendment to waive the 11th Amendment's guarantee of immunity for states. To determine whether Congress met the requirements of Section 5 of the 14th Amendment (that Congress has the authority to enforce on states civil rights requirements "*by appropriate legislation.*"), the Court applied the two tests it had earlier developed in *City of Boerne v. Flores* (1997). The Court asked: Did the ADA remedy a history of unconstitutional conduct and was the remedy proportionate to this history?

The Court ruled negatively on both tests. On the first test, the Court applied a very strict standard of proof to Congress. The Court's majority held that Congress must find a widespread history of discrimination by states themselves and at the time the ADA was passed they had not made such a finding. To come to this conclusion the Court ignored an extensive record of evidence which included over 300 incidents of

discrimination by states and the findings of a Congressional task force that held hearings in every state attended by over 30,000 people. It was also not sufficient to the Court that Congress found systemic discrimination in society at large. On this basis, the Court ruled that the ADA did not meet the first test of "*appropriate legislation.*"

However, the Court went further and ruled that, even if the first test had been met, the ADA went overboard in its remedy, since it "*makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer.*"

Here the Court applied a very loose "rational-basis" standard to determine whether disparate treatment constituted discrimination by states under the 14th Amendment. That is, as long as there is a rational basis (meaning "*some legitimate governmental purpose*") for the state's disparate treatment of the disabled it is not discrimination under the 14th Amendment's Equal Protection Clause. Justice Rehnquist, in his opinion for the majority, writes it would be "*entirely rational and therefore constitutional for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities*" without the accommodations required under the ADA. However "*hard-headedly*" or "*hard-heartedly*" such refusal to make allowance might be, it is not illegal "*so long as [the state's] actions toward such individuals are rational.*"

What Do These Decisions Mean?

In the immediate sense, *Garrett* means that state employees can no longer sue for monetary damages in federal court under the ADA. They can still sue for injunctive relief (such as job reinstatement or reasonable accommodation) and can still file complaints so the federal government can file suit. State employees may also still sue for damages under Section 504 of the Rehabilitation Act that covers entities that receive federal monies.

In the long term, it is virtually certain that Title II of the ADA, which prohibits public entities from discriminating against persons with disabilities, will be reviewed by the Supreme Court. Given the recent rulings, it is quite possible the Court will find the enforcement of Title II on states similarly unconstitutional.

The 1999 Supreme Court decisions pose fewer immediate threats, but they still have significant repercussions for filing ADA claims. The Court emphasized four key points that may change how advocates and those individuals facing discrimination describe their claims. Below are a few questions that should be asked in light of the recent Court decisions.

1. The Court rejected the Equal Employment Opportunity Commission's (EEOC) position that mitigating measures should not be considered in determining whether an individual qualifies as "disabled" under the ADA. This means that when determining

whether an individual qualifies as disabled several additional questions need to be asked about the impact mitigating measures have on the impairment:

- Does the mitigating measure fully or only partially control the limitations of the impairment?
 - What symptoms and limitations does the person experience before using the mitigating measure?
 - Does the mitigating measure control the impairment's limitations always, or simply reduce them, or does the measure help only sporadically?
 - How well do adaptive measures by the individual control the limitation? Do these modifications or adaptations present their own limitations or side effects?
 - Do certain types of conditions make the behavior adaptations or other mitigating measures less effective?
 - Does the mitigating effect of the measure last or is it temporary?
 - Has the individual changed mitigating strategies to make them more effective?
 - Are there symptoms or limitations that remain unaffected by adaptive or mitigating measures?
 - Has the impairment caused other symptoms that are not controlled by the mitigating measure but which restrict a major life activity?
 - Does the mitigating measure or adaptive behavior itself restrict major life activities?
2. The Court rejected the argument that a "disability" can exist as a matter of law. Rather, each claim of disability must be evaluated on a case-by-case basis taking into account the specific limitations the impairment has on the individual under that individual's specific circumstances.
- What specific ways does the impairment limit a major life activity?
 - How does the impairment restrict the specific individual's ability to perform a major life activity?
 - What mitigating measures have been taken and how do they specifically alter the limitation for the particular individual?
3. The Court re-emphasized that the determination of disability must be based on the person's actual condition at the time of the alleged discrimination. Speculation that a mitigating measure or adaptive strategy might become effective at some future date is only speculation and is rejected.
- What mitigating measures were being used at the time of the alleged discrimination?
 - Were the mitigating measures effective at the time of the alleged discrimination?
 - What were the specific conditions under which the limitation occurred?
 - What history does the person have with the impairment?
4. The Court strongly suggested that using the limitation on ability to work to prove that a disability substantially limits a major life activity is problematic at best. It might be

best to address the activity of work last, rather than first, when making the determination of whether or not a person qualifies as disabled.

- What other major life activities, besides working, might be limited by the impairment or by the mitigating measure (such as thinking, concentrating, other cognitive functions, walking, standing, lifting, eating, caring for oneself, sleeping, performing manual tasks, or reproduction)?

Citations

In addition to the web resources listed below, assistance was provided by Luther Granquist, Attorney at the Disability Law Center, Minneapolis, MN.

"Fighting for the Rights of Employees with Disabilities: An AFSCME Guide" (see: <http://www.afscme.org>)

"The Garret Case: New Challenge to the ADA," by the Bazelon Center for Mental Health Law (see: <http://www.bazelon.org/garrettcase.html>)

"Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified," issued to the EEOC Field Offices, July 26, 1999 (see: <http://www.eeoc.gov/docs/field-ada.html>)

"Legal Theories Behind State Challenges to the Constitutionality of Title II of the ADA (and Section 504)," Ira Burnim, Jennifer Mathis & Mary Giliberti, Bazelon Center for Mental Health Law (see <http://www.bazelon.org/garrettmemo.html>)

"Recent Supreme Court ADA Rulings: Mixed Messages from the Court," Arthur Gutman, Florida Institute of Technology, published by The Society for Industrial and Organizational Psychology (see: <http://www.siop.org/tip/backissues/TipJan00/2Gutman.html>)

"Supreme Court ADA Rulings," Washington Watch: Special Edition, Fall 2000 (see: http://www.ucpa.org/ucp_printdoc.cfm/1/8/33/33-10821/377)

"Supreme Court Issues Ruling in *University of Alabama v. Garrett*," ATTAC Update, March 2001.

Supreme Court Opinions -- *Albertsons v. Kirkingburg*; *Murphy v. United Parcel Service*; *Sutton v. United Air Lines*; *University of Alabama v. Garrett* (see: <http://www.findlaw.com>)