

# INTERAGENCY COMMITTEE ON EMPLOYEES WITH DISABILITIES

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Barry C. Taylor, Legal Advocacy Director – Equip for Equality

## A. The Supreme Court’s ADA Decisions and Subsequent Lower Court Cases Interpreting Those Decisions

### 1. *Sutton v. United Airlines*, 527 U.S. 421 (1999)

#### a. Summary

In a trio of cases, the Supreme Court ruled that in determining whether a person with a correctable condition is substantially limited in a major life activity, the effects of the person’s corrective measure (e.g. eyeglasses, medication) must be considered.

#### b. Impact

While some plaintiffs who use mitigating measures have been found to have an ADA disability, a high proportion of cases brought by plaintiffs who use mitigating measures have been dismissed. Specifically, courts have found that people living with **epilepsy** [*EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001)], **diabetes** [*Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002)], **depression** [*Boerst v. General Mills*, 2002 WL 59637 (6th Cir. 2002)], **heart disease** [*Taylor v. Nimock’s Oil Co.*, 214 F.3d 957 (8th Cir. 2000)], **hypertension** [*Hill v. Kansas Area Transp. Auth.*, 181 F.3d 891 (8th Cir. 1999)], **cancer** [*EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5th Cir. 1999)], **asthma** [*Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999)], **attention deficit disorder** [*Felten v. Eyemart Express, Inc.*, 241 F. Supp. 2d 935 (E.D. Wis. 2003)], **muscular dystrophy** [*McClure v. GMC*, 2003 WL 124480 (N.D. Tex. Jan. 10, 2003)], **narcolepsy** [*Hoskins v. Northwestern Mem. Hosp.*, 2002 WL 1424562 (N.D. Ill. Jun. 28, 2002)] and, who are **hard of hearing** [*Miller v. Taco Bell Corp.*, 204 F. Supp. 2d 456 (E.D. NY 2002)], were not substantially limited in a major life activity when the person’s mitigating measure was taken into account. Of course, a person may still be able to prove an actual disability if the person can demonstrate a substantial limitation in a major life activity despite the mitigating measure or if the person can show that the side effects that arise from the mitigating measure substantially limit a major life activity.

One recent case indicates how broadly *Sutton* has been interpreted and applied. In *Little v. Texas Department of Criminal Justice*, 2003 WL 1563739 (Tex. App. 1<sup>st</sup> Dist. March 27, 2003), an unsuccessful job applicant whose leg was amputated and who wore a prosthesis, brought a disability discrimination against the employer pursuant to the Texas Commission on Human Rights Act. Although the case was brought under state law instead of the ADA, it is instructive because the definition of disability is the same for both laws. Applying the Supreme Court’s analysis in *Sutton*, the court found that she did not have a disability because she was not substantially limited in a major life activity once her prosthesis was taken into consideration. Specifically, even though the plaintiff

walked considerably slower and had a limp when she used the prosthesis, the court found she was not substantially limited in a major life activity. The court also rejected her claims that she was discriminated against because she was regarded as having a disability and because she had a record of a disability. This case is currently on appeal before the Texas Supreme Court.

***c. Cases Involving Diabetes***

Diabetes is now the leading cause of death in the United States and the number of people with diabetes is growing rapidly. During the last five years, disability discrimination complaints filed with the EEOC by workers with diabetes has increased 13%. (The EEOC has recently developed a fact sheet on diabetes that can be located at: [www.eeoc.gov/facts/diabetes](http://www.eeoc.gov/facts/diabetes) ) Since *Sutton*, a large number of people with diabetes have had their ADA cases dismissed because of their use of the mitigating measure of insulin. However, some courts have found plaintiffs with diabetes are covered by the ADA:

- *Fraser v. Goodale*, 342 F.3d 1032 (9<sup>th</sup> Cir. 2003) A senior account specialist with diabetes showed that she may be substantially limited in the major life activity of eating and that her employer may have failed to provide a reasonable accommodation.
- *North Carolina Department of Health & Human Services v. Maxwell*, 576 S.E.2d 688 (N.C. App. 2003) Court held that diabetes substantially limited an employee's ability to read.
- *Nawrot v. CPC International*, 277 F.3d 896 (7<sup>th</sup> Cir. 2002) Court held that an employee with diabetes was substantially limited in his ability to think and care for himself because he needed to inject himself with insulin three times a day and test his blood sugar level 10 times a day.
- *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (N.D. Ill. 1998) Court held that an employee with diabetes may be disabled because she needed to frequently urinate because of short-term high blood glucose levels.
- *Needle v. Alling & Cory, Inc.* 88 F. Supp. 2d 100 (W.D.N.Y. 2000) Court held that an employee whose diabetes caused amputation of the toes of his right foot and his left heel was substantially limited in his ability to walk.

***d. Substantial limitations arising from the mitigating measure***

In *Sutton*, the Court held that if the mitigating measure results in a person being substantially limited, the person would be covered under the ADA. However, few plaintiffs have raised this issue. See, *McAlindin v. County of San Diego*, 192 F.3d 1226 (9<sup>th</sup> Cir. 1999) for a case in which this argument was raised successfully.

***e. The ADA may not protect impairments that potentially could be mitigated***

ADA coverage has been denied to plaintiffs who have substantially limiting impairments, but whose impairments arguably *could* be mitigated by medication or other measures. Although these plaintiffs are substantially limited in major life activities, courts have ruled that these plaintiffs have not availed themselves of medication or other corrective devices, and thus, are not entitled to the ADA's protections. These cases ignore the Supreme Court's requirement that plaintiffs be evaluated as they currently are and not how they may be in a mitigated state.

- ***Tangires v. Johns Hopkins Hospital*, 79 F. Supp. 2d 587 (D. Md. 2000), *aff'd by unpublished opinion*, 230 F.3d 1354 (4th Cir. 2000)** (a hospital employee with asthma refused to take steroids prescribed by her physician because she feared such medication would adversely affect her health. The court ruled that because her asthma most likely could have been mitigated by medication, she was not substantially limited in the major life activities of breathing or working, and therefore could not bring suit under the ADA.)
- ***Hein v. All Am. Plywood Co.*, 232 F.3d 482 (6th Cir. 2000)** (truck driver with hypertension who refused to drive a delivery run since he was unable to obtain a medication refill prior to the trip was not substantially limited; driver's condition should be viewed in its mitigated state since he voluntarily failed to take his medication)
- ***Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d 183 (N.D. NY 2001)** (fork lift truck driver with post-traumatic stress disorder was not substantially limited where PTSD could be mitigated by medication, which truck driver voluntarily chose not to take)
- ***Spradley v. Custom Campers, Inc.* 68 F. Supp. 2d 1225 (D. Kan. 1999)** (maintenance worker with epilepsy and active seizures was not substantially limited where probability of seizures would have been much lower if worker had taken prescribed medication)
- ***Hooper v. Saint Rose Parish*, 205 F. Supp. 2d 926 (N.D. Ill. 2002)** (employee with laryngeal dysphonia was not substantially limited in major life activity of talking where court found that the employee could have ameliorated her difficulty in speaking by taking Botox injections)

***2. Board of Trustees University of Alabama v. Garrett***

***a. Summary***

In *Garrett*, 531 U.S. 356 (2001), the Supreme Court ruled that suits in federal court by state employees to recover money damages under Title I of the ADA are barred by the 11th Amendment. The Court stated that the ADA's legislative record failed to show that Congress identified a history and pattern of irrational employment discrimination by the states against people with disabilities to justify a waiver of sovereign immunity. However, the Court held that state employees are permitted to bring suits against the state seeking injunctive (non-monetary) relief.

***b. Legislative Response***

In the wake of the *Garrett* decision, many disability advocates have worked on state legislation that waives State immunity from ADA suits for damages in state court.

Recently, this type of sovereign immunity waiver legislation was passed by the Illinois legislature so state employees can bring ADA suits for money damages in state court.

### ***c. Section 504***

Because of the limitations the Supreme Court has placed on the ADA, many plaintiffs suing a state entity are bringing claims under Section 504 of the Rehabilitation Act. In response, states are now arguing immunity under Section 504 as well. Some courts have found that states are not immune from Section 504 suits by accepting federal funds. [See, *Douglas v. California Department of Youth Authority*, 271 F.3d 812 (9<sup>th</sup> Cir. 2001), *Bruggeman v. Blagojevich*, 324 F.3d 906 (7<sup>th</sup> Cir. 2003), *Shepard v. Irving*, 2003 WL 21977963 (4<sup>th</sup> Cir. Aug. 20, 2003), *Jim C. v. U.S.*, 235 F.3d 1079 (8<sup>th</sup> Cir. 2000), and *Robinson v. Kansas*, 295 F.3d 1183 (10<sup>th</sup> Cir. 2002)] A minority of courts have held that states can be immune from suits under Section 504 [See, *Reickenbacker v. Foster*, 274 F.3d 974 (5<sup>th</sup> Cir. 2001), *Garcia v. SUNY*, 280 F.3d 98 (2d Cir. 2001)]

Besides the ADA claim, the plaintiffs in *Garrett* also sued the State of Alabama under Section 504 of the Rehabilitation Act. After the Supreme Court's decision that the State was immune from damages under Title I of the ADA, the case was returned to the lower court where the State then argued that it was also immune from the Section 504 claim. The trial court ruled in favor of the State, but the 11<sup>th</sup> Circuit reversed holding that the State consented to suit under Section 504 when it accepted federal funds, and thus, waived its immunity. *Garrett*, 344 F.3d 1288 (11<sup>th</sup> Cir. 2003) This decision is a good reminder for other plaintiffs who seek to sue the State for employment discrimination that Section 504 may be a viable option even when the ADA is not.

## **3. *Chevron v. Echazabal*, 536 U.S. 73 (2002)**

### ***a. Summary***

In *Echazabal*, plaintiff was offered a job contingent on passing a medical examination. The examination revealed elevated liver enzymes and he was eventually diagnosed as having asymptomatic chronic active hepatitis C. Accordingly, his employer rescinded the employment offer on the basis that plaintiff would pose a direct threat to his own health and safety. Issue was whether the defense of direct threat was limited to "threat to others" as set forth in the ADA or if it also included "threat to self" as defined in the EEOC's regulations. The Supreme Court held that direct threat included "threat to self" and thus, the employer's actions were deemed valid under the ADA. The Court emphasized that under the ADA's direct threat analysis, employers will have to rely upon objective medical knowledge and conduct an individualized assessment of the employee's present ability to safely perform the essential functions of the job instead of relying on stereotypes or paternalistic perspectives. Following the Supreme Court's decision, the case was remanded to the 9th Circuit to apply this new standard. Despite the Supreme Court's ruling on direct threat, the 9th Circuit still found that there were material issues of fact as to whether Chevron successfully raised the direct threat defense. Among other factors, the court focused on the lack of credentials of Chevron's doctors to adequately assess the potential impact on Echazabal's liver. [See, *Echazabal v. Chevron*, 336 F.3d 1023 (9th Cir. 2003)] The case will now proceed to trial.

### ***b. Impact***

To date, only a handful of lower courts have applied *Echazabal*. Advocates, however, fear that the decision will be used in the lower courts as a justification for paternalistic and discriminatory employment decisions.

- In ***Orr v. Wal-Mart Stores*, 297 F.3d 720 (8<sup>th</sup> Cir. 2002)** the Eighth Circuit ruled that the plaintiff, a pharmacist with diabetes, was not a person with a disability as defined by the ADA. In *dicta*, however, the court suggested that even if the pharmacist had established a prima facie case of actual disability under the ADA, Wal-Mart could have successfully raised the "threat to self" defense. The pharmacist had argued that because of his diabetes, he needed to eat on a regular schedule, and that failure to do so could result in his experiencing symptoms of hypoglycemia. As a reasonable accommodation, he asked that he be allowed to routinely close the pharmacy for thirty minutes at the noon hour in order to eat an uninterrupted lunch. Citing *Echazabal*, the Eighth Circuit ignored plaintiff's request for a reasonable accommodation and instead suggested that Wal-Mart was justified in not continuing the plaintiff's employment. The court relied on the fact that working in a single pharmacist pharmacy that did not provide for uninterrupted meal breaks posed a direct threat to the plaintiff's health.
- ***Hammel v. Eua Galle Cheese Factory*, 2003 U.S. Dist. LEXIS 7515 (W.D. Wis. 2003)** The plaintiff was employed in a cheese factory. He was legally blind in one eye and had a restricted field of vision in the other eye. After his employment began, plaintiff's supervisors said that because of his disability they were concerned for the plaintiff's safety and the safety of other factory workers, and he was terminated. The court denied the employer's motion to dismiss based on direct threat finding that the employer failed to show that the employee posed a *significant* risk to himself or others. The court also reiterated that direct threat must be based on objective evidence, not unfounded fear or generalizations and stereotypes about a particular disability.

### ***c. Threat to Others***

Although the *Echazabal* case focused on "threat to self," defendants continue to argue that an adverse action is justifiable if the plaintiff poses a "threat to others."

- In ***Gajda v. Manhattan and Bronx Surface Transit Operating Authority*, 2003 WL 22939123 (SDNY 2003)**, plaintiff bus operator forced to undergo a medical exam after his employer discovered that he was HIV positive. The city argued that the medical exam was needed to ensure public safety. The court said this request for medical information was reasonable and did not violate the ADA.
- In a similar case, a performer for Cirque du Soleil who has HIV was terminated and the employer alleged that that the termination was permissible because it would be a threat to the other performers to have a person with HIV perform in the show. After extensive publicity, the case settled and the employee was reinstated.

#### **4. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002)**

##### **a. Summary**

In *Barnett*, Robert Barnett worked for U.S. Airways, which had a policy allowing employees to change jobs under a seniority system. Barnett sustained a back injury and he was placed in a position that did not require heavy lifting. Subsequently, employees with more seniority “bumped” Barnett out of his job, resulting in him being placed in a job that required heavy lifting. Barnett sought the reasonable accommodation of reassignment to return to the job without heavy lifting. The Supreme Court did not find that the seniority policy would always trump the ADA. However, the Court did hold that the fact that the accommodation request would violate the rules of a seniority system ordinarily would make it unreasonable. Thus, employees seeking such an accommodation have to show special circumstances that the requested accommodation is reasonable in a particular case. For instance, if an employer retained the right to change the seniority system unilaterally and frequently exercised that right, there would be a stronger argument that it would not be an undue hardship to make an exception for an employee with a disability.

##### **b. Impact**

Thus far there have been very few cases interpreting *Barnett*:

- In *Mays v. Principi*, **301 F. 3d 866 (7th Cir. 2002)** a nurse with a back injury sought reassignment to another nursing position that did not require patient care, but instead was reassigned to a clerical job, at a much lower salary and with fewer benefits. The 7th Circuit held that the hospital did not have to reassign the plaintiff to the administrative nursing position, even if she was qualified to perform the job. The hospital did not violate its duty of reasonable accommodation by giving the job to better-qualified applicants instead of to her. The 7th Circuit relied on *Barnett* and held that the ADA did not require an employer to alter its normal method of filling vacancies. Thus, the court found that an employer must only allow the employee the *right to apply* for an available position and is not required to place an employee in a position as a reasonable accommodation under the ADA. This case extends *Barnett* beyond the context of a conflict between seniority systems and the ADA’s reasonable accommodation requirement. [See also, *Stamos v. Glen Cove School District*, **2003 WL 22429054 (2nd Cir. Oct. 24, 2003)** the ADA does not require an employer to disregard the entitlements of other employees in order to offer a reasonable accommodation to a disabled employee.]
- In *Banks v. Brown-Forman Corporation*, **2003 WL 23140070 (6th Cir. 2003)** Plaintiff could not perform a broad range of physical labor because he could not lift over 35 pounds after his shoulder surgery. His lifting restrictions were permanent and he was terminated. In addressing the issue of seniority, plaintiff argued he should have been allowed to take a driving job that involved no lifting. Citing to *Barnett*, the court simply said, “defendant showed that this position was filled under a seniority system which it is not required to violate to accommodate Banks [plaintiff].” Thus, the Sixth Circuit affirmed the district court’s decision granting summary judgment for the defendant.

- In *Shapiro v. Lakewood*, 292 F.3d 356 (3d Cir. 2002) an EMT with a back injury sought reassignment to a police dispatcher position that was open and he was qualified to do. The Village of Lakewood refused to consider him for the position and he sued under the ADA. The Village claimed that Shapiro failed to follow its policy of application for open positions. Relying on *Barnett*, the 3rd Circuit held that the District court failed to apply the required analysis for transfer of a reasonable accommodation. Employers must show that it has an established policy that would pre-empt the traditional reasonable accommodation process and to grant an accommodation would violate that policy and constitute an undue hardship. If an employer can establish that, then the employee has an opportunity to demonstrate that there are special circumstances that warrant finding the accommodation is reasonable. Thus, this case confirms that after *Barnett* an employer cannot simply rely on a policy that contradicts the ADA's provision of reasonable accommodations.

## **5. *Toyota Manufacturing v. Williams*, 534 U.S. 184 (2002)**

### ***a. Summary***

In *Williams*, plaintiff developed carpal tunnel syndrome working at the defendant's plant. She sought to be reassigned to a position that did not require her to perform activities, which exacerbated her condition. Employer refused and plaintiff was terminated and filed suit under the ADA claiming that she was substantially limited in several major life activities including performing manual tasks. The 6th Circuit held that plaintiff had put on sufficient evidence that her condition substantially limited her in performing manual tasks at work, and the fact that she could perform certain personal manual tasks at home was not determinative. The Supreme Court reversed and found that the 6th Circuit only analyzed the manual tasks of her specific job, and failed to ask whether Williams' impairments prevented or restricted her from performing tasks that are of a "central importance to most people's daily lives." The Supreme Court also stated that that the definition of disability is to be interpreted strictly to create a demanding standard for who is covered by the ADA.

### ***b. Impact***

The Supreme Court's adoption of the new standard that the major life activity has to be of central importance to most people's lives has had a significant impact on limiting who is covered by the ADA. Some of these cases have also extended the *Williams* ruling beyond the major life activity of performing manual tasks:

- *Mack v. Great Dane Trailers*, 308 F.3d 776 (7th Cir. 2002). The court held that an employee was not disabled because his lifting limitations did not interfere with the central functions of his daily life. [*But see, Gillen v. Fallon Ambulance Service*, 283 F.3d 11 (1st Cir. 2002) holding that amputee's limitations on lifting was an integral part of his daily life and denying employer's motion to dismiss.]
- *Fultz v. City of Salem*, 2002 WL 31051577 (9th Cir. 2002). The 9th Circuit held that a police officer who suffered a work-related injury to his left ring finger, and who was fired as a result, was not protected by the ADA. The court found that the injury did not prevent or severely restrict Plaintiff from doing activities that are of central importance in most people's daily lives. The court agreed that

plaintiff could no longer perform law enforcement jobs that required forcible arrests or involvement with potentially combative situations, and had difficulty performing manual tasks such as buttoning his shirt. However, he did not satisfy the ADA's definition of disability, as he still could do most of his daily life activities.

- ***Philip v. Ford Motor Co.*, 328 F.3d 1020 (8th Cir. 2003)** Plaintiff failed to show how his limitations in gripping, reaching, lifting, standing, sitting, and walking – such as operating a glue gun or vibrating tools – impacted tasks “central to most people’s daily lives.”
- ***Thornton v. McClatchy Newspapers, Inc.*, 292 F.3d 1045 (9th Cir. 2002)** Court held that continuous keyboarding and handwriting are not activities of central importance to most people’s daily lives, and therefore plaintiff with carpal tunnel syndrome was not covered by the ADA.

### **6. *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003)**

In *Hernandez*, at issue was whether a company’s “no rehire” policy violated the ADA’s provisions prohibiting discrimination against former drug addicts. Hernandez was a technician for Raytheon. He resigned in lieu of termination after he tested positive for cocaine use. Two years later, Hernandez was no longer using drugs and he reapplied for a position with the company, but Raytheon refused to rehire him. Hernandez argued that Raytheon’s policy discriminated against him and other former drug addicts who had successfully rehabilitated themselves. The 9th Circuit held that the employer's policy against rehiring former employees who were terminated for any violation of its misconduct rules violated the ADA because Hernandez had a record of drug addiction and therefore was covered by the Act. The Supreme Court reversed holding that the policy was neutral on its face and the employer had a legitimate non-discriminatory reason to refuse to rehire workers who break rules, including former employees with addictions. The Court indicated that the plaintiff could have argued that the policy has a discriminatory impact on people with disabilities, but failed to do so. It was hoped that the Supreme Court could use this case to better define the “record of impairment” prong of the ADA’s definition of disability, but because the Court found the policy valid, it did not address the plaintiff’s underlying arguments of record of impairment. This case does not mean that the ADA does not apply to former drug users. Instead, it merely upheld a policy that excluded former employees terminated for misconduct.

The case was remanded to the Ninth Circuit which found a genuine issue of fact as to whether the decision not to rehire Hernandez based on his record of addiction or because of a neutral policy barring re-hire of employees previously terminated for misconduct. The Ninth Circuit held that a reasonable juror could find that the hiring official did in fact base her decision on Hernandez’s status as a former substance abuser. The court also found that it was possible that the unwritten company policy the defendant relied upon was simply a pretext for its discriminatory actions. Accordingly, if the case does not settle, it will go to trial, despite what the Supreme Court ruled.

## **B. Emerging ADA Legal Issues**

### **1. Disability Harassment**

Courts are beginning to recognize that claims for disability-based harassment can be made under the ADA, similar to how sexual harassment claims are recognized under Title VII.

To establish a hostile work environment claim under ADA, plaintiff must prove:

- a. She is a qualified individual with a disability,
- b. She was subjected to unwelcome harassment,
- c. The harassment was based on her disability,
- d. The harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment,
- e. Employer knew or should have known about the harassment, but failed to take proper action to end it.

In most cases, the cases are won or lost on whether the harassment was sufficiently severe or pervasive.

The following are cases recognizing claims for disability harassment under the ADA:

- *Flowers v. Southern Regional Services*, 247 F.3d 229 (5th Cir. 2001) Employee alleged that she was harassed because she had HIV and the court held that the ADA's prohibition of discrimination in the terms conditions and privileges of employment encompasses a prohibition on disability harassment.
- *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001) Employee with back impairment at automobile manufacturing plant held to have a valid cause of action under ADA against his employer for a hostile work environment after being subjected to numerous instances of harassment by co-workers and his supervisor.
- *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8<sup>th</sup> Cir. 2003) Employee was subjected to harassment because of his disability of epilepsy. Employee's supervisor had revealed to co-workers that the employee had a metal plate in his head, which resulted in co-workers regularly calling him "Platehead." The Eighth Circuit first found that employees with disabilities can bring claims for hostile work environment under the ADA. However, in this case, the court ruled that the alleged harassing conduct was not sufficiently severe or pervasive to be actionable under the ADA.

### **2. Retaliation**

The ADA specifically states that it is unlawful for an employer to retaliate against an employee based upon the employee's filing of a charge of discrimination with the EEOC.

**a. Who Can Bring Retaliation Claims?**

In *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183 (3d Cir. 2003), the employee claimed she was terminated because she filed an ADA charge with the EEOC. The employer argued that because the employee did not have an ADA disability, that she could not pursue a cause of action for retaliation. The 3d Circuit held that a person's status as a 'qualified individual with a disability' is not relevant in assessing the person's claim for retaliation under the ADA.

**b. Are Damages Available?**

In *Kramer v. Banc of America Securities*, 355 F.3d 961 (7<sup>th</sup> Cir. 2004), following a demotion, employee with multiple sclerosis filed a charge of ADA discrimination with the EEOC. Six days after her employer learned about the EEOC charge, she was terminated. She then filed a second charge with the EEOC claiming the employer retaliated against her following the first charge she filed with the EEOC. Among the remedies she sought were compensatory and punitive damages. The Seventh Circuit agreed she could bring a claim based on retaliation under the ADA, but because of the way that the ADA was structured, her remedies were limited to injunctive relief. The implications of this decision go beyond limiting the possible monetary relief for plaintiffs. It also limits access to jury trials for plaintiffs since jury trials under the ADA are only available when there is a possibility of a monetary recovery. *See also, Johnson v. Bozarth Chevrolet*, 297 F. Supp. 2d 1286 (D. Colo. 2004), agreeing that no monetary relief or jury trial is available for retaliation claims. *But see, Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196 (E.D. Cal. 1997), finding that compensatory and punitive damages are available for ADA retaliation claims.

**c. Are Informal Complaints Protected under the ADA?**

It is clear that employees with disabilities are entitled to bring a separate claim under the ADA if they are retaliated against after taking some formal action to protect their rights (such as filing a claim with the EEOC). What is less clear is whether retaliation claims are available when an employee makes an informal or internal complaint. A recent decision recognizes the right to a retaliation claim even when an employee does not take a formal action, but instead makes an informal complaint. In *Wiggen v. Leggett & Platt*, 2004 WL 534449 (N.D. Ill. Feb. 23, 2004), an employee with migraine headaches complained to the head of the company about her supervisor's denial of a reasonable accommodation request. After making the informal complaint, the employee was terminated. The employee filed suit under the ADA and included a claim for retaliation. The Seventh Circuit held that the employee's informal complaints of discrimination amounted to a protected activity and therefore she could proceed with a retaliation claim.

**d. Does Retaliation include Coerced Waivers?**

In one of the largest ADA retaliation claims ever brought, the EEOC filed suit on behalf of 6000 insurance agents of Allstate Insurance Co. claiming that the employer unlawfully retaliated against the insurance agents by requiring that they sign a release waiving all workplace discrimination rights in order to be retained. The EEOC claimed

that the waivers prevented Allstate workers from participating in activities protected by federal antidiscrimination laws. A federal judge recently voided these coerced waivers on the basis that they constituted unlawful retaliation. *Romero v. Allstate Insurance Co.*, 2004 WL 692231 (E.D. Pa. March 30, 2004).

### **3. Nexus between Major Life Activity and Reasonable Accommodation**

Traditionally, when analyzing an accommodation request, courts have not required a nexus between the major life activity and a request for an accommodation. Instead, plaintiffs would first prove they have a physical or mental impairment that substantially limits a major life activity, and then the focus would shift to the reasonable accommodation dispute. For instance, in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), the plaintiff was a person with depression who claimed he was covered by the ADA because the side effects of the medication he used substantially limited him in the major life activity of sexual activity (e.g. his psychiatric medication caused impotence). Because of stress associated with his mental illness, he had requested the reasonable accommodation of a transfer to a different position, which his employer denied. In analyzing this case, the court did not require that there be a nexus between the major life activity that he was substantially limited in (sexual activity) and the accommodation request (job transfer).

Recently, however, two Circuit Courts of Appeal have imposed a requirement that employees must establish that the accommodation they seek relates to the substantially limited activity. In *Felix v. New York City Transit Authority*, 324 F. 3d 102 (2d Cir. 2003), a railroad clerk was diagnosed with post-traumatic stress disorder after a co-worker was killed. She requested a reasonable accommodation to be transferred to a clerical position. Her employer terminated her instead of providing the requested accommodation. She sued under the ADA and alleged that she was substantially limited in the major life activity of sleeping. The Second Circuit held that she could not maintain her ADA reasonable accommodation claim because her inability to sleep was not causally related to the accommodation she requested. In other words, because her inability to sleep was separate from her inability to work, she was not deemed entitled to the requested accommodation.

Similarly, in *Wood v. Crown Redi-Mix, Inc.*, 339 F. 3d 682 (8<sup>th</sup> Cir. 2003), an employee injured his back at work and had permanent nerve damage. He requested a different position, but was denied, so he sued under the ADA arguing that the injury substantially limited his ability to procreate, among other activities. Because it was ultimately determined that he was not substantially limited in any other activities, he was only able to pursue his claim based on the major life activity of procreation. Accordingly, the court said that Wood needed to prove that his inability to procreate was causally connected to his request for a different position, which he could not do.

Although there is no statutory language that requires a nexus between the accommodation and the impact on a major life activity, it appears that some courts may be requiring plaintiffs to do so, and this should be considered when filing future ADA suits.

## 4. Association Discrimination

In *Larimer v. International Business Machines Corp*, 370 F. 3d 698 (7<sup>th</sup> Cir. 2004), an employee was discharged shortly after his twin daughters returned from a long hospital stay due to prematurity-related medical conditions. The employee filed suit claiming that IBM violated the ADA by firing him because of his association with persons with disabilities (i.e. his daughters).

The Seventh Circuit identified three situations a claim of association discrimination under the ADA that can be raised by an employee who is associated with someone:

- a) whose disability is costly to the employer because of health care coverage;
- b) who has a disabling medical condition that the employer fears will infect the employee because of contact between them or because of a shared genetic component; or
- c) whose disability distracts the employee from his work.

Because the plaintiff's situation did not fall within any of these three categories, the court found that the discharge did not violate the association section of the ADA. It is unclear how the court reached this decision. Neither the ADA, nor its implementing regulations, limits association claims to the three categories articulated by the court. In any event, plaintiffs raising association claims, especially in the Seventh Circuit (Illinois, Indiana and Wisconsin), should try to fit within one of these three categories.

## 5. Examinations

### a. Medical Examinations

Section 12112(d) of the ADA prohibits employers from requiring applicants or employees from taking medical examinations at certain periods of the employment process. An issue in which the courts have differed over the years is whether this provision of the ADA protects only people with disabilities, or if it would apply to all employees. In other words, can people who cannot prove that they have an ADA disability, still be protected by the ADA's prohibition against medical examinations?

Over the years, the majority of courts have held that any applicant or employee who is subjected to an improper medical examination has standing to challenge illegal medical examinations. *See, Cossette v. Minnesota Power & Light*, 188 F.3d 964, 970 (8th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 (10th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999); *Fredenburg v. Contra Costa Co. Dept. of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999).

The reasoning supporting this line of cases is threefold. First, since Congress used the specific term "qualified individual with a disability" throughout much of the ADA, using the general terms "job applicant" and "employee" in §12112(d) evidences an intent to broaden the class of individuals covered in the specific section addressing disability-related inquiries and examinations. Second, since the purpose of the ADA was to put an end to discrimination against people with disabilities, courts have held that the

best way to effectuate this purpose is to allow all job applicants to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled. Third, courts have held that it would be both circular and repugnant to the purpose of reducing the stigma attached to disabilities to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.

A recent decision in Illinois supports not limiting protection under this provision to people with disabilities. In *Jackson v. Lake County*, 2003 WL 22127743 (N.D. Ill. Sept. 15, 2003), an employee refused to take a medical examination and was terminated. Even though he did not have a disability, the court agreed with the majority approach that he could bring a claim under the ADA to redress the illegal medical examination request.

### ***b. Personality Tests***

Although the ADA expressly prohibits medical tests at the pre-employment stage, many employers administer “personality” tests to allegedly obtain information about the applicant, such as honesty and temperament, as a way to determine if the person would be a good hire. These tests have become widespread and studies have found that approximately 44% of all private employers administer some type of personality test as part of the application or promotion process.

Mental health advocates have raised concerns about these types of tests because they can be used to identify psychiatric disabilities resulting in the screening out of people with certain diagnoses. Accordingly, some employers are using personality tests as a way to obtain illegal disability-related information in a more indirect way.

In *Karraker v. Rent-A-Center*, 316 F. Supp. 2d 675 (C.D. Ill. 2004), a group of current and former employees filed a class action alleging that the employer’s policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. The plaintiffs alleged that the MMPI can identify such conditions as depression, paranoia, schizoid tendencies and mania. The court found that although the MMPI can be used for “clinical” purposes to identify various psychiatric disorders, the employer in this case was using the test for “vocational” purposes to identify personality traits in order to predict future job performance and compatibility. Thus, the court held that the employer did not violate the ADA. The plaintiffs have appealed this case to the Seventh Circuit.

## **6. Working at Home as a Reasonable Accommodation**

The EEOC recently issued a new fact sheet addressing working at home as a reasonable accommodation under the ADA. The EEOC does not interpret the ADA to require an employer to create a teleworking policy. However, the EEOC did find that the people with disabilities should be able to participate in such a program if it exists and an employer may have to make modifications to such a policy to accommodate a person with a disability. Also, if an employer does not have a teleworking policy, the EEOC’s position is employers have to consider such an accommodation for a person with a disability. However, many courts have not been receptive to this type of policy:

- **6th Circuit** – *Smith v. Ameritech Publishing, Inc.*, 129 F.3d 857 (6<sup>th</sup> Cir. 1997) (it would take an “exceptional case” for working at home to be appropriate.)
- **7th Circuit** – *Vande Zande v. State of Wisconsin*, 44 F.3d 538 (7<sup>th</sup> Cir. 1995) (it would take an extraordinary case for an employee to succeed in an ADA case on the basis that the employer did not permit working from home.) *See also, Rauert v. U.S. Tobacco Mfr. L.P.*, 319 F.3d 891 (7<sup>th</sup> Cir. 2003), employee’s request to work entirely at home was not reasonable because her job required teamwork, interaction, and coordination and because she could perform the essential functions of her job at the worksite, without accommodation.
- **8th Circuit** – *Heaser v. Toro Co.*, 247 F.3d 826 (8<sup>th</sup> Cir. 2001) (working from home may in some circumstances be a reasonable accommodation), *But see, Morrissey v. General Mills, Inc.*, 2002 WL 1339850 (8<sup>th</sup> Cir. 2002) (telecommuting would be undue hardship on employer)

## **7. Requirement to be “Whole” or “100% Healed” to Return to Work**

Many employers have policies that require that employees seeking to return to work can only do so with no restrictions on work duties. A recent federal court decision demonstrates that those policies may be deemed a violation of the ADA:

- *EEOC v. Yellow Freight System, Inc.*, 2002 WL 31011859 (S.D. NY 2002), court held that employer violated the ADA by applying a “100 percent healed” policy to a trucking company worker with a back condition. The judge awarded approximately \$157,000 in back pay and \$50,000 in punitive damages. The judge found that a policy requiring workers to be completely healed before returning to work clashes with the ADA’s reasonable accommodation requirements.
- *See also, McGregor v. National Railroad Passenger Corp.*, 187 F.3d 1113 (9<sup>th</sup> Cir. 1999), 100% healed policy wrongfully substitutes a determination of whether the worker is completely healed for the required individual assessment of whether he can perform the essential job requirements.

## **8. ADA’s Application to Temporary Workers**

EEOC guidance has made it clear that employers have to follow the ADA even when it contracts with temporary workers. Recently, EEOC settled a case in Illinois against R.R. Donnelley & Sons for failing to accommodate a temporary worker who experienced incontinence problems. The employer permitted the worker to go home to address the problem, but it also called the temporary agency and informed it that it would not permit the worker to return. Because the employer decided to terminate the worker without considering possible accommodations, the EEOC alleged the employer violated the ADA. The case settled with the worker getting \$150,000.