

SUPREME COURT DECISIONS INTERPRETING THE AMERICANS WITH DISABILITIES ACT

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INTRODUCTION

NCD is composed of 15 members, appointed by the President of the United States and confirmed by the U.S. Senate. The overall purpose of the agency is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature or severity of the disability, and to empower them to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society. Part of NCD's statutory mandate is to gather information about the implementation, effectiveness, and impact of ADA.

In the last few years, the Supreme Court has issued a number of decisions that have dramatically changed the way ADA is interpreted, in most cases, contrary to what Congress intended. One decision in particular, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), devastatingly stripped the right of state workers to sue their employers for money damages for violations of Title I of ADA, which prohibits employment discrimination against people with disabilities. In response, NCD convened a series of meetings with disability policy experts to gain their assessment of the breadth and nature of the impact of Supreme Court decisions on ADA and other key civil rights laws.

This paper is intended to increase public awareness of ADA as interpreted by the Supreme Court and to give policymakers and ADA stakeholders an overview of ADA issues addressed by the

Supreme Court, a synopsis of the decisions, and the significant implications of each decision in helping or hindering implementation of ADA. Finally, this paper is intended to assist in the examination of the work that remains to be done to realize the law's promise.

I. OVERVIEW OF ISSUES ADDRESSED BY THE COURT IN ADA CASES

- A. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998).

ISSUE: Whether Title II of ADA covers state prisons and prisoners.

- B. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

ISSUES: Whether a dental patient's asymptomatic HIV infection constituted a disability under ADA, and whether the evidence in the case was sufficient to defeat the dentist's asserted defense that filling the patient's cavity in his office would in his professional judgment have presented a direct threat to health or safety.

- C. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

ISSUE: Whether a general arbitration clause in a collective bargaining agreement requires an employee to use the arbitration procedure to address an alleged violation of ADA.

- D. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

ISSUE: The extent to which application for and receipt of disability benefits precludes a person with a disability from bringing an ADA claim.

- E. *Sutton v. United Airlines*, 527 U.S. 471 (1999).

ISSUES: Whether, in a lawsuit brought by two job applicants with severe nearsightedness (myopia) to challenge an airline's minimum vision requirement for global pilots, corrective and mitigating measures should be considered in determining whether an individual is disabled under ADA, and whether the applicants had stated a valid claim that the airline regarded them as disabled.

- F. *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).

ISSUES: Whether the condition of a mechanic whose high blood pressure was controlled by medication should be considered in a medicated or nonmedicated state in determining whether he has a disability, and whether an employer's belief that the employee's high blood pressure prevented him from satisfying a DOT

health requirement for driving commercial vehicles constituted regarding him as having a disability under ADA.

- G. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

ISSUES: Whether having monocular vision constitutes *per se* disability under ADA and whether a DOT safety regulation justified an employer's visual-acuity job qualification standard, even though the DOT regulation contained a waiver provision under which the standard could be waived in an individual case.

- H. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

ISSUES: Whether ADA requires a state to place people with mental disabilities in community settings rather than in institutions when the state's treatment professionals have determined that community placement is appropriate, and what standard is to be applied in assessing a state's assertion of a fundamental alteration defense to the obligation to afford such community placement.

- I. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

ISSUE: Whether the Eleventh Amendment bars employees of a state from recovering monetary damages from the state for violations of Title I of ADA.

- J. *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835 (2001).

ISSUE: Whether federal statutes that allow courts to award attorney's fees and costs to the "prevailing party" authorize awards of fees to parties whose lawsuits brought about voluntary changes in the defendants' conduct but did not result in judgments on the merits or court-ordered consent decrees.

- K. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001).

ISSUES: Whether Title III of ADA protects qualified entrants with disabilities participating in professional golf tournaments, and whether allowing a golfer with a disability to use a golf cart when all other competitors must walk would "fundamentally alter the nature" of the tournaments.

- L. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002).

ISSUE: whether a worker's carpal tunnel syndrome and other painful conditions of her wrists, elbow, and shoulders substantially limited her in the major life activity of performing manual tasks and thus constituted a disability under the ADA.

- M. *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S.Ct. 754 (2002).

ISSUE: whether an agreement between an employer and an employee to arbitrate any employment-related dispute or claim bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific remedies, such as backpay, reinstatement, and damages, against the employer for allegedly violating the ADA.

- N. *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002).

ISSUE: whether the rights of a worker with a disability who seeks assignment to a particular position as a reasonable accommodation under the ADA take precedence over other workers' rights to bid for the position under the employer's seniority system.

- O. *Chevron U.S.A. Inc. v. Echazabal*, 122 S.Ct. 2045 (2002).

ISSUE: whether the Equal Employment Opportunity Commission regulation that allows employers to refuse to hire applicants because their performance on the job would endanger their health due to a disability is permitted under the ADA.

- P. *Barnes v. Gorman*, 122 S.Ct. 2097 (2002).

ISSUE: whether punitive damages may be awarded in private causes of action brought under either Title II of the ADA or under Section 504 of the Rehabilitation Act of 1973.

II. SYNOPSES OF THE CASES

A. PENNSYLVANIA DEPARTMENT OF CORRECTIONS v. YESKEY

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998).

Ronald Yeskey was convicted of a crime and sentenced to serve 18 to 36 months in a Pennsylvania correctional facility; the sentencing judge recommended that Yeskey be placed in a Motivational Boot Camp for first-time offenders. Successful completion of the boot camp program would have made Yeskey eligible for release on parole in six months. Yeskey was refused admission to the boot camp because he had a history of hypertension. Yeskey sued the Pennsylvania Department of Corrections and several corrections officials under Title II of ADA, alleging that his exclusion from the boot camp constituted discrimination on the basis of disability. The district court dismissed Yeskey's case for failure to state a claim; it ruled that ADA does not apply to inmates in state prisons. The Third Circuit Court of Appeals disagreed and reversed the district court's decision.

In a unanimous opinion delivered by Justice Scalia, the Supreme Court ruled that ADA does cover state prisons and prisoners. The Court considered in turn and rejected several arguments put forth by the correctional officials. First, the officials contended that federal laws should not be interpreted to cover traditional and essential state functions, such as prisons, unless the language of the statute makes the coverage of such functions “unmistakably clear.” *Id.* at 208-09, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). The Supreme Court assumed without deciding that the “unmistakably clear” standard applies to ADA’s coverage of state prisons, but ruled, however, that this requirement is “amply met” by Title II of ADA. 524 U.S. at 209. The Court declared that “the statute’s language unmistakably includes State prisons and prisoners within its coverage.” *Id.*

The prison officials contended that ADA’s prohibition of discrimination in regard to the “benefits of the services, programs, or activities of a public entity,” 42 U.S.C. § 12132, could not apply to state prisons because they do not provide “benefits” of “services, programs, or activities.” The Supreme Court rejected this argument, finding that modern prisons provide inmates with many recreational activities, medical services, and educational and vocational services that prisoners may benefit from. The Court noted that the boot camp that Yeskey was excluded from was described as a “program” in the statute that established it.

The state officials also argued that the term “qualified individual with a disability” in ADA is defined as including those who meet “essential eligibility requirements for the receipt of services or the participation in programs or activities,” *Id.*, § 12131(2), and that the words “eligibility” and “participation” imply voluntariness that does not fit the situation of prisoners. The Supreme Court ruled that these words do not connote voluntariness, as one can be eligible and participate even if participation is required for those prisoners who are eligible. Even if the words did connote voluntariness, said the Court, the use of various services at prisons, including prison law libraries, is clearly on a voluntary basis. Participation in the boot camp program involved in the case was voluntary under Pennsylvania law.

The prison officials argued that the statement of findings and purpose in ADA does not mention prisons or prisoners and that Congress did not envision the law’s application in the context of prisons. The Court questioned the contention that ADA does not mention prisons, since the Act refers to “institutionalization,” *Id.*, § 12101(a)(3), which the Court noted can be thought of as including “penal institutions.” But even if ADA did not mention prisons and Congress never considered them in its ADA deliberations, the Court said that it would not matter because ADA’s text is unambiguous. The Court recited a principle that it had applied in other contexts in which it had declared that “the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’” 524 U.S. at 212, quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

Because it found ADA to be unambiguous as to coverage of prisons, the Court also rejected the state officials’ contentions regarding the implications of Title II of ADA’s title, “Public Services,” and the application of a doctrine called “constitutional doubt.” The Court ruled that these arguments would be applicable only if the statutory language was ambiguous. Ultimately, the Supreme Court affirmed the judgment of the Third Circuit “[b]ecause the plain text of Title II of ADA

unambiguously extends to state prison inmates” 524 U.S. at 213.

B. BRAGDON v. ABBOTT

Bragdon v. Abbott, 524 U.S. 624 (1998).

Sidney Abbott sought dental treatment at the office of Dr. Randon Bragdon in 1994. She had been infected with HIV since 1986 but had not yet experienced any serious symptoms. On the patient registration forms, Ms. Abbott disclosed that she was HIV-infected. Dr. Bragdon performed a dental examination and found that Ms. Abbott had a cavity. He then informed her that he had a policy against filling the cavities of patients with HIV in his office. He offered to fill her cavity at a hospital, and added that she would have to pay for the costs of using the hospital’s facilities. Ms. Abbott declined this offer and filed suit under ADA and state law charging Dr. Bragdon with discriminating on the basis of disability. In particular, Abbott charged Bragdon with violating Title III of ADA which prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ... operates a place of public accommodation.” 42 U.S.C. § 12182(a). Title III defines “public accommodation” to include the “professional office of a health care provider.” *Id.*, § 12181(7)(F).

After the discovery process had been completed, both Abbott and Bragdon filed motions for summary judgment. The federal district court granted summary judgment in favor of Ms. Abbott, ruling that her HIV infection constituted a disability under ADA and that there was no issue of fact left to be decided. The district judge held that Dr. Bragdon could not successfully defend his actions under ADA provision that excuses a covered entity from including an individual on an equal basis if that person poses a “direct threat to the health or safety of others.” *Id.*, § 12182(b)(3). Relying on affidavits submitted in the case by the Director of the Division of Oral Health of the Centers for Disease Control and Prevention (CDC), the district court concluded that it was safe for dentists to treat patients infected with HIV in dental offices so long as “universal precautions” prescribed by the CDC in 1993 were followed.

Dr. Bragdon appealed the decision of the district court, and the United States Court of Appeals for the First Circuit affirmed the lower court’s decision in favor of Ms. Abbott. It agreed with the district court that Abbott’s HIV infection was a disability under ADA even though it was not yet in the symptomatic stage. The Court of Appeals decided not to rely on the CDC official’s affidavits regarding the “direct threat” issue as the district court had, but found that the 1993 CDC Dentistry Guidelines (officially titled “Recommended Infection-Control Practices for Dentistry”) and the American Dental Association’s 1991 Policy on AIDS, HIV Infection and the Practice of Dentistry led to the same conclusion—that dental procedures can be safely performed in dental offices if universal precautions are followed.

The Supreme Court examined the question whether Ms. Abbott’s condition constituted a disability under ADA at great length, and ultimately found that it did. The Court began with the statutory

language in ADA that defines disability:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment.
- 42 U.S.C. §12201(a).

The Court noted that this definition of disability was “drawn almost verbatim” from the definition of “handicapped individual” in the Rehabilitation Act of 1973 and of “handicap” under the Fair Housing Amendments Act of 1988. 524 U.S. at 631. The Court observed that Congress intended the term to be construed consistently with prior regulatory interpretations, and noted ADA’s provision that nothing in ADA is to be construed to apply a lesser standard under ADA than under the Rehabilitation Act of 1973 and the regulations that implement it. 42 U.S.C.

§ 12201(a). The Court ruled that Ms. Abbott’s HIV infection was a disability under subsection (A)—the actual disability prong—of ADA definition, and that, therefore, the Court did not need to consider the second and third subsections of the definition.

The Court went through a methodical analysis of each of the elements of the first prong of ADA definition: physical or mental impairment, major life activity, and substantially limiting. In considering whether HIV infection is a physical impairment, the Court examined in some detail the process through which the infection progresses. The opinion describes how, when a person is infected with HIV, the virus invades cells in the blood and body tissues, particularly certain white blood cells, and eventually kills the cells it invades. The initial phase of HIV infection is known as the “acute or primary” stage, typically lasting about three months, and, during this phase, the virus concentrates in the blood and assaults the white blood cells. Fever, headaches, muscle pain, rash, and other symptoms may appear, but typically go away after two or three weeks. The Court’s opinion observes that after these symptoms have subsided, the disease enters what is sometimes called the “asymptomatic phase.” The term is somewhat misleading because enlarged lymph nodes, skin disorders, oral lesions, and bacterial infections may continue to be present. During this phase, which usually lasts from 7 to 11 years, the virus switches its focus from the blood cells to the lymph nodes. Finally, the immune system of the individual is sufficiently damaged that the disease enters the AIDS stage, in which a variety of serious symptoms usually appear.

Based upon its review of the course of HIV infection, the Court reached the following conclusion:

In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold that it is an impairment from the moment of infection.
524 U.S. at 637.

Having ruled that Ms. Abbott’s condition was a physical impairment, the Court next turned to the issue of whether it was an impairment that affects a major life activity. This question was narrowed somewhat by the fact that Abbott’s claim throughout the litigation was that the major life activity

affected was the ability to reproduce and bear children. The Court noted that “[g]iven the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry,” and that there was little doubt that “had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.” *Id.* The Court felt constrained, however, in the circumstances in which the case had been brought and litigated, to consider only the question whether reproduction is a major life activity. Despite arguments on behalf of Dr. Bragdon that Congress intended ADA to apply only to limitations on a person that have a public, economic, or daily character, the Court had little trouble finding reproduction was a major life activity, observing that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.” *Id.* at 638.

Finally, the Court considered whether HIV infection “substantially limits” the major life activity of reproduction. The Court found that Ms. Abbott’s condition substantially limited her ability to reproduce in two independent ways—by causing a significant risk that male sexual partners would be infected and by the significant risk that the disease will be transmitted to her child during pregnancy and childbirth. The Court ruled that these effects amounted to substantial limitations even though they did not make it totally impossible for a woman with HIV infection to reproduce, observing that “[t]he Act addresses substantial limitations on major life activities, not utter inabilities.” *Id.* at 641.

In light of its conclusions regarding each of the elements of the definition, the Court affirmed the rulings of the district court and the Court of Appeals that Ms. Abbott’s HIV infection was a physical impairment that substantially limited a major life activity under ADA. Having ruled that Ms. Abbott’s condition met the statutory definition, the Court added that it did not need to address the question whether HIV infection is a *per se* disability under ADA. Designation as a *per se* disability means that every person who has the condition automatically meets the definition of a person with a disability and does not have to prove the effect on major life activities in her or his particular circumstances. Having announced that it was not going to reach the issue, however, the Court then devoted several pages of its opinion to a discussion of regulations, administrative interpretations, and prior court decisions supporting the Court’s conclusion that “HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction.” *Id.* at 647.

The Court next turned to the other question upon which it had granted an appeal—whether the courts should defer to a health care provider’s reasonable professional judgment that a procedure involves a direct threat to health or safety. The Court noted that this issue involves two separate inquiries: whether the courts should defer to Dr. Bragdon’s professional judgment, and whether Dr. Bragdon’s assessment of the situation was reasonable. The Court ruled that a health care professional’s view regarding the existence of a direct threat is not entitled to special deference and that courts should assess the objective reasonableness of the risk based upon the objective, scientific information available to members of the profession. Therefore, Dr. Bragdon’s “belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability.” *Id.* at 649.

Regarding the reasonableness of Dr. Bragdon’s belief that treating Abbott would pose a direct threat

in light of the available medical evidence, the Court found the record and briefings before it to be insufficient to allow it to resolve the issue. In particular, the Court had reservations regarding the conclusiveness of the 1993 CDC Dentistry Guidelines relied on by the Court of Appeals and regarding the significance of the American Dental Association's 1991 Policy, in the absence of additional information on the manner in which the Association developed this Policy. The Court noted, however, that there was other evidence in the record that might support affirmance of the district court's ruling, but that the record did not make clear which of these pieces of evidence was based on information that was available when Dr. Bragdon refused to treat Abbott in his office in September of 1994. Because the briefs and arguments to the Supreme Court did not focus on the question of the sufficiency of all the evidence submitted by the parties to the district court on the cross motions for summary judgment, the Supreme Court felt constrained from trying to resolve such issues at this juncture. The Court concluded that the best course was to remand the case to the Court of Appeals to explore the issues more fully and to clarify the significance of the various pieces of evidence in the record. The Court noted that it was not foreclosing the possibility that the Court of Appeals would reach the same conclusion as it had earlier, and observed that there were "reasons to doubt whether [Bragdon] advanced evidence sufficient to raise a triable issue of fact on the significance of the risk." *Id.* at 653.

Accordingly, the Supreme Court affirmed the ruling of the Court of Appeals that Abbott's HIV infection was a disability under ADA, and remanded the case to the Court of Appeals to allow it to reconsider the evidence on the direct threat issue. The ruling of the Supreme Court was by a 5-4 margin, with Justice Kennedy delivering the majority decision in which he was joined by Justices Stevens, Souter, Ginsburg, and Breyer. In a concurring opinion, Justices Stevens and Breyer indicated that they would have preferred fully affirming the decision of the Court of Appeals and not remanding the case for further consideration of the direct threat issue. Justices Rehnquist, Scalia, Thomas, and O'Connor all concurred with the majority on the necessity of remanding the direct threat issue, but dissented from the majority on the determination that Ms. Abbott's condition constitutes a disability under ADA.

On remand, the First Circuit reconsidered its earlier summary judgment ruling on the issue of direct threat. *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998). It first considered whether Ms. Abbott had provided adequate evidence to warrant summary judgment in her favor, and, as the Supreme Court had directed, reexamined the evidentiary impact of the CDC Guidelines and the American Dental Association Policy. The Court of Appeals found that the 1993 Guidelines were an update of earlier versions that had explicitly declared that universal precautions were effective in preventing HIV infection and made other additional precautions unnecessary. Accordingly, the court determined that the Guidelines were competent evidence that public health authorities considered treatment of the kind that Ms. Abbott needed safe if performed using universal precautions. Similarly, the First Circuit reviewed the weight to be accorded the American Dental Association Policy and considered the "cornucopia of information" it received in supplemental briefings. *Id.* at 89. The court concluded that the Policy had been drafted by the Association's scientific component, in contrast to ethical policies drafted by its ethics component. Thus, the Policy had an adequate scientific foundation and was appropriately relied on for summary judgment. The Court of Appeals found that the Guidelines and Policy were likely sufficient "in and of themselves," to support summary judgment, and noted

that they represented “only a fraction of the proof advanced to support Ms. Abbott’s motion.” *Id.*

Having concluded upon reexamination that Ms. Abbott’s evidence was sufficient to support her motion for summary judgment, the First Circuit proceeded to reconsider the evidence of direct threat offered by Dr. Bragdon. The Supreme Court had directed the Court of Appeals to reexamine a particular piece of evidence that Dr. Bragdon had offered, to the effect that CDC had identified seven “possible” cases of patient-to-dental-worker HIV transmission prior to the time that Dr. Bragdon refused to treat Ms. Abbott in his office, and to determine whether this evidence might provide sufficient proof of direct threat to avoid summary judgment on that issue. Citing articles in scientific journals published before Ms. Abbott came to Dr. Bragdon’s office, the First Circuit found that the CDC’s use of the word “possible” meant no more than that the CDC could not determine whether workers were infected occupationally, including the possibility that such workers had simply failed to present themselves for testing after being exposed to the virus at work. *Id.* at 90. The First Circuit also rejected Dr. Bragdon’s attempts to extrapolate from reports of documented cases of occupational transmissions of HIV to health care workers outside the dental field, because of the absence of any showing that risks in dental and non-dental settings are comparable. Ultimately, the court found that each piece of evidence offered on behalf of Dr. Bragdon was, upon reexamination, “still ‘too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact.’” *Id.*, quoting *Abbott v. Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997).

Based upon its review of the evidence and arguments, the First Circuit again affirmed the district court’s entry of summary judgment in favor of Ms. Abbott. Dr. Bragdon filed an appeal of the decision on remand to the Supreme Court. On May 24, 1999, the Supreme Court denied his petition for certiorari. *Bragdon v. Abbott*, 526 U.S. 1131 (1999).

C. WRIGHT v. UNIVERSAL MARITIME SERVICE CORPORATION

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998).

In 1992, Ceasar Wright, a longshoreman in Charleston, South Carolina, injured his heel and back while working for the Stevens Shipping and Terminal Company. Mr. Wright was a member of Local 1422 of the International Longshoreman’s Association (AFL-CIO). The Stevens company was represented by the South Carolina Stevedores Association. The union and the Stevedores Association had entered into a collective bargaining agreement that established an arbitration process for addressing matters under dispute between the union local and an employer.

Mr. Wright sought compensation for his injuries from the Stevens company in the form of permanent disability under the Longshore and Harbor Workers’ Compensation Act. The claim was settled for \$250,000 plus \$10,000 in attorney’s fees. He was also able to obtain Social Security disability benefits. In 1995, Mr. Wright, cleared by his physician, returned to the hiring hall and asked for a referral for work. For nine days, in early 1995, Mr. Wright worked for four stevedore companies, without any reported complaints regarding his performance. Upon learning that Mr. Wright had previously settled a claim for permanent disability, however, the stevedore companies informed the

union that they no longer would hire Mr. Wright because they regarded him as having been certified as permanently disabled and thus as no longer qualified to work as a longshoreman under the collective bargaining agreement. The union responded that the companies were misconstruing the collective bargaining agreement, that ADA entitled Mr. Wright to return to work if he could perform his duties, and that refusing him employment would constitute a “lockout” under the collective bargaining agreement. When Mr. Wright contacted the union and asked how he could get back to work in the face of the companies’ refusal to accept him for employment, the union suggested that he hire an attorney and file a claim under ADA. He did so, and filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and the South Carolina State Human Affairs Commission. After receiving a “right to sue” letter from the EEOC, Mr. Wright filed suit in federal court against the Stevedores Association and six individual companies alleging that they had violated ADA by refusing him work.

The trial court dismissed Mr. Wright’s case without prejudice on the ground that he had failed to pursue the arbitration procedure for resolving complaints provided by the collective bargaining agreement. Mr. Wright appealed and the Fourth Circuit affirmed.

In a unanimous opinion delivered by Justice Scalia, the Supreme Court disagreed with the rulings of the lower courts. The Court characterized the Fourth Circuit’s ruling as involving two conclusions: (1) that the general arbitration provision in the collective bargaining agreement at issue in *Wright* was broad enough to encompass a statutory claim under ADA, and (2) that such a provision was enforceable. The Supreme Court observed that addressing the second issue would necessarily involve resolving the tension between two lines of cases. The first line of cases is represented by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which the Court held that there can be no prospective waiver of an employee’s right under Title VII to a judicial forum for alleged discriminatory discharge, because “there can be no prospective waiver of an employee’s rights under Title VII.” *Id.* at 51. The second line of cases is represented by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in which the Court ruled that a claim under the Age Discrimination in Employment Act could be subject to compulsory arbitration pursuant to a collective bargaining agreement provision. In *Wright*, however, the Court found it unnecessary to sort out these conflicting precedents about the validity of a union-negotiated waiver of statutory rights, because the Court found that on the facts before it no such waiver had occurred.

The Court recognized that there is “a presumption of arbitrability” in collective bargaining agreements, *Wright*, 525 U.S. at 78, but ruled that the presumption extends only to interpreting or applying the terms of the collective bargaining agreement. *Id.* Mr. Wright’s cause of action, said the Court, arises not out of the labor contract but out of ADA. *Id.* Moreover, the Court found that any union-negotiated waiver of employees’ statutory right to a judicial forum for claims of employment discrimination, if valid at all, must be “clear and unmistakable.” *Id.* at 80. The Supreme Court could not find such a clear and unmistakable waiver in the facts before it, neither in the collective bargaining agreement nor in the Longshore Seniority Plan. Accordingly, the Court vacated the judgment of the Fourth Circuit and remanded the case for proceedings consistent with the Supreme Court’s opinion.

D. CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORPORATION

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999).

Carolyn Cleveland was employed by the Policy Management Systems Corporation to perform background checks on employees. In 1994, she suffered a stroke that resulted in loss of concentration, memory, and language skills. Three weeks after the stroke, Ms. Cleveland filed for Social Security Disability Insurance (SSDI) benefits with the Social Security Administration (SSA); in her application she stated that she was “disabled” and “unable to work.” About three months later, Ms. Cleveland’s condition had improved and she returned to work. She notified SSA that she had returned to work, and, noting that fact, the SSA denied her SSDI application. Three months after Ms. Cleveland returned to work, Policy Management Systems fired her. She thereafter asked SSA to reconsider its denial of her SSDI application, and stated that she had been terminated due to her condition and that she had “not been able to work since.” Later, in SSA administrative proceedings, Ms. Cleveland declared, “I am unable to work due to my disability.” In September, 1995, Ms. Cleveland filed an ADA lawsuit against Policy Management Systems alleging that the company had terminated her employment without reasonably accommodating her disability. A week after she filed her ADA suit, the SSA awarded her SSDI benefits retroactive to the day of her stroke.

The district court did not consider Ms. Cleveland’s ADA reasonable accommodation claim on the merits; instead, it granted summary judgment to the defendant. The district court viewed Ms. Cleveland’s applying for and receiving disability benefits as a concession on her part that she was totally disabled. And the court considered that fact as estopping her from proving an essential element of her ADA claim—that she could “perform the essential functions” of the job. 42 U.S.C. § 12111(8).

The Fifth Circuit affirmed the trial court’s grant of summary judgment. It reasoned that the application for or receipt of social security disability payments creates a rebuttable presumption that the individual is estopped from asserting that she or he is “qualified” under ADA. The Fifth Circuit indicated that the situations in which the presumption might be rebutted was “theoretically conceivable” and would involve “some limited and highly unusual set of circumstances.” *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 517 (5th Cir. 1997). In Ms. Cleveland’s case, however, the Court of Appeals felt that because she had consistently represented to the SSA that she was totally disabled, she was judicially estopped from asserting that she was a qualified individual with a disability.

The Supreme Court noted that there was disagreement among the circuit courts about the legal effect upon an ADA suit of the application for and receipt of disability benefits. 526 U.S. at 800. The Court explained that it had granted certiorari in the *Cleveland* case in an effort to settle this disagreement among the circuit courts. In a unanimous decision delivered by Justice Breyer, the Court vacated the Fifth Circuit’s decision and remanded the case for further proceedings.

The Court observed that a representation that one has a total disability in seeking social security disability benefits often implies “a context-related legal conclusion, namely, ‘I am disabled for

purposes of the Social Security Act.” *Id.* at 802. The Court distinguished this type of statement from statements about purely factual matters, regarding which a person might be estopped from later contradicting in legal proceedings. The Court characterized the Fifth Circuit as having applied “a special judicial presumption” to prevent Ms. Cleveland from asserting what the Court of Appeals viewed as “two directly conflicting propositions, namely, ‘I am too disabled to work’ and ‘I am not too disabled to work.’” *Id.* In the Supreme Court’s view, however, ADA suits and disability benefits claims do not inherently conflict to the point that courts should apply such a special negative presumption. This is because “there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.” *Id.* at 802-03.

The Court identified five different rationales for claimants’ making legitimate representations of total disability in seeking disability benefits while simultaneously pursuing ADA claims. One such rationale, applicable in Ms. Cleveland’s case, is that the Social Security Act does not take into account the possibility of reasonable accommodation, while this is an express statutory right under ADA. An allegation in an ADA suit that the plaintiff can perform her job with reasonable accommodation may, therefore, be consistent with an SSDI claim that the plaintiff could not perform her job or other jobs without such accommodation. Second, the Court found that the Social Security Administration administers the SSDI through a five-step procedure that embodies a set of presumptions that grow out of administrative efficiency in managing the program rather than accounting for the details of each individual’s ability to perform particular jobs. One of the steps in the SSDI procedure (accounting for about 60 percent of SSDI awards) merely compares the applicant’s condition with a list of impairments and automatically, without any additional evidence, accepts individuals with one of the listed conditions as permanently disabled and entitled to disability benefits. Thus, a person can qualify for SSDI and still be able to perform the essential function of her or his job. Third, the Court observed that the Social Security Administration sometimes grants benefits to people who are employed, including under trial work programs; under some such programs, individuals can continue to receive benefits for up to 24 months, despite working at a job. Fourth, the Court noted that the nature of a person’s disability can change over time, so that a statement about disability at the time of applying for SSDI benefits may not reflect the person’s capacities at the time of the employment decision subject to an ADA complaint. Fifth, the Court declared that for individuals who have applied for but not yet been awarded disability benefits, the inconsistency in statements in SSDI and ADA claims is of the type normally permitted in our legal system under the theory that parties are allowed to assert legal theories whether or not they are consistent. The Court quoted Federal Rule of Civil Procedure 8(a)(e) which permits parties to “set forth two or more statements of a claim or defense alternately or hypothetically,” and to “state as many separate claims or defenses as the party has regardless of consistency.” *Id.* at 805.

In light of these examples, the Court found it inappropriate to apply a special legal presumption that would permit applicants for or recipients of SSDI benefits to pursue ADA claims only in “some limited and highly unusual set of circumstances.” *Id.*, quoting 120 F.3d at 517. The proper standard, the Supreme Court ruled, is to require an ADA plaintiff not to rebut a presumption of estoppel but instead only to “proffer a sufficient explanation” of the apparent contradiction that arises out of an earlier SSDI total disability assertion. 526 U.S. at 806. To defeat summary judgment, a plaintiff must offer an explanation that would permit a reasonable conclusion that, assuming the earlier assertion

was true or asserted by the plaintiff in good faith, the plaintiff would nonetheless be able to perform the essential functions of the job. The Court found that Ms. Cleveland had explained the discrepancy between her SSDI assertions and her ADA allegations by stating that the SSDI statements were made in a forum where reasonable accommodations were not considered, and that her SSDI statements were accurate if examined in the time period in which they were made. Accordingly, the Court vacated the judgment of the Fifth Circuit and remanded the case to permit the parties to present or contest these explanations before the trial court.

E. SUTTON v. UNITED AIRLINES

Sutton v. United Airlines, 527 U.S. 471 (1999).

In 1992, twin sisters, Karen Sutton and Kimberly Hinton, applied to United Airlines for jobs as commercial airline pilots. They met United's basic age, education, and experience requirements, and had obtained the appropriate Federal Aviation Administration pilot certifications. Both of the women, however, were severely nearsighted (myopic). Their visual acuity tested at 20/200 or worse in the right eye and 20/400 or worse in the left eye without corrective lenses; with lenses, their visual acuity improved to 20/20 or better. With glasses or contact lenses, therefore, their vision was functionally the same as people without myopia, but without glasses or contacts, they could not see well enough to drive or watch television. After United received their applications for employment, it invited the sisters to an interview and flight simulator tests. During their interviews, however, United informed each of the women that a mistake had been made in inviting her to interview because she did not meet United's minimum vision requirement of uncorrected visual acuity of 20/100 or better. At that point, United terminated the job interviews.

After pursuing complaint procedures with the Equal Employment Opportunity Commission (EEOC), the sisters filed an ADA suit in federal court alleging that United Airlines had violated ADA by discriminating against them on the basis of their disability, or, alternatively, that United discriminated against them because it regarded them as having a disability. The federal district court dismissed their complaint for failure to state a claim upon which relief could be granted, on the grounds that they had not shown that they had a disability under ADA, and the Court of Appeals for the Tenth Circuit affirmed the district court's judgment. *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997). Both of the lower courts ruled that the sisters were not actually substantially limited in any major life activity because they could fully correct their visual impairments. The courts also determined that they had not made allegations sufficient to support their claim that they were "regarded" by United as having an impairment that substantially limits a major life activity, as they had alleged only that United regarded them as unable to satisfy the requirements of a particular job, global airline pilot, and not that it regarded them as foreclosed more generally in the activity of employment.

The Supreme Court noted that the Tenth Circuit's ruling that the determination of disability should take mitigating measures into account was "in tension with the decisions of other Courts of Appeals." *Sutton*, 527 U.S. at 477. The Court, however, affirmed the decision of the Tenth Circuit

in *Sutton*, by a vote of 7 to 2, with Justice O'Connor writing the Court's opinion for the majority. The Supreme Court began its analysis of the case with the definition of disability in ADA:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

"Accordingly," the Court observed, "to fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C))." 527 U.S. at 478.

ADA gives the EEOC the responsibility for issuing regulations to carry out the employment requirements found in Title I of ADA. *Id.*, § 12116. Because the definitions section of ADA precedes the substantive Titles (I-V) of ADA, the Court suggested that "no agency has been delegated authority to interpret the term 'disability.'" 527 U.S. at 479. However, because both parties in *Sutton* accepted the EEOC regulations defining "disability" as valid, and because the Court determined that the validity of the regulations was not necessary to decide the case, it declined to determine what deference, if any, should be accorded these regulations. The Court also noted that EEOC had issued an "Interpretive Guidance" providing that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt.1630, App. § 1630.2(j) (1998) (describing § 1630.2(j)). The Court again declined to determine how much deference was due to the Interpretive Guidance, but in this instance did so because it found that EEOC's position on mitigating measures was "an impermissible interpretation of ADA." 527 U.S. at 482.

The Court viewed three provisions of ADA as supporting the conclusion that mitigating measures should be considered when determining whether a disability exists. First, because the phrase "substantially limits" appears in the present tense in ADA definition of disability, the Court construed it as requiring a present substantial limitation, not a potential or hypothetical one: "A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." *Id.* Second, the Court noted that the definition of disability under ADA requires an individualized inquiry, while evaluating impairments in their uncorrected or unmitigated state would, in the Court's view, require courts and employers to speculate about a person's condition and to make determinations based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. This "would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals." *Id.* at 483-84. The Court added that the failure to focus on individualized circumstances of actual impairment would mean courts and employers could not consider negative side effects of mitigating measures on a particular individual, even if those side effects were very severe.

Finally, the Court relied heavily on the statement in ADA findings that “some 43,000,000 Americans have one or more physical or mental disabilities,” 42 U.S.C. § 12101(a)(1), and concluded that the finding means that Congress did not intend to have ADA protect all individuals whose uncorrected conditions amount to disabilities. The Court noted that the version of ADA introduced in Congress in 1988 had included a figure of 36 million persons with disabilities, an estimate drawn from the NCD’s report *Toward Independence* (1986). NCD had declared that 35 or 36 million was “the most commonly quoted estimate” of the number of people with disabilities in the United States, and had contrasted it with a “health conditions approach” that looks at all conditions that impair the health or normal functional abilities of an individual and a “work disability” approach that focuses on individuals self-reporting of limitations on their ability to work. *Id.* at 3. The Supreme Court concluded that the 36 million figure more closely reflects a work disabilities approach than the health conditions approach to defining disability. NCD’s 1988 report *On the Threshold of Independence* had quoted a Census Bureau study finding that 37.3 million individuals have difficulty performing one or more basic physical activities such as seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed. *Id.* at 9. The Court speculated that the 43 million figure included in the 1989 versions of ADA legislation may have resulted from “an effort to include in the findings those who were excluded from the National Council figure.” 527 U.S. at 486.

Regardless of the exact source of the 43 million figure, however, the Court found that it could not include persons whose impairments are corrected by medication or other devices. The Court reasoned that the magnitude of the figure aligned it with estimates of disability based on what the Court called “a functional approach to determining disability” as opposed to “nonfunctional approaches to defining disability” that produce significantly larger numbers. *Id.* at 486-87. Thus, the Court declared, “had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings.” *Id.* at 487. The Court recognized that people who make use of corrective devices may still have a disability because the device does not correct the condition sufficiently to prevent a substantial limitation on a major life activity. Moreover, an individual whose impairment is effectively corrected may nonetheless be regarded as disabled by a covered entity, and thus disabled under subsection (C)—the “regarded as” prong—of the definition. But such persons, ruled the Court, do not have an impairment that is *actually* substantially limiting.

Having decided that determinations of disability under ADA are to take corrective measures into account, the Supreme Court agreed with the lower courts that Karen Sutton and Kimberly Hinton had not stated a valid claim that they were substantially limited in any major life activity.

The remaining question was whether the sisters had stated a valid claim that they were “regarded as” having a disability within the meaning of subsection (C) of the definition of disability in ADA. 42 U.S.C. § 12102(2)(C). The Court suggested that there are two apparent ways in which individuals may be “regarded as” having a disability: (1) a covered entity may mistakenly believe that a person has an impairment that substantially limits a major life activity, or (2) a covered entity may mistakenly believe that an actual, nonlimiting impairment substantially limits a major life activity. Both situations entail a covered entity entertaining misperceptions, either that there is a substantially

limiting impairment when there is not or that an impairment is substantially limiting, when in fact it is not. Such misperceptions, the Court noted, often result from stereotypic assumptions not truly indicative of individual ability.

There was no dispute in *Sutton* that the plaintiff sisters had a physical impairment, and they contended that United Airlines mistakenly believed their impairment substantially limited them in the major life activity of working and that it had a vision requirement based on myth and stereotype. The Court ruled, however, that United's having a vision requirement did not establish that it regarded the sisters as substantially limited in the major life activity of working. The Court interpreted ADA as allowing employers to prefer some physical attributes over others and to establish physical criteria, so long as the employer does not make an employment decision based on a physical or mental impairment, real or imagined, that the employer regards as substantially limiting a major life activity. Consistent with EEOC regulations, the Court held that when the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires, "at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." 527 U.S. at 491; *see* 29 C.F.R. § 1630.2(j)(3)(i).

The Supreme Court suggested that there may be "some conceptual difficulty" in ADA's inclusion of working as a major life activity (a difficulty the Court illuminates by quoting a somewhat confused statement of the Solicitor General of the United States during oral argument in a Section 504 case, *School Bd. of Nassau Co. v. Arline*), but the Court found it unnecessary to determine the validity of the relevant EEOC regulations because the parties in *Sutton* accepted that "major life activities" includes working. 527 U.S. at 492. In these circumstances, the Court assumed without deciding that working is a major life activity and that the EEOC regulations interpreting the term "substantially limits" are reasonable. Accordingly, for purposes of this case, the Court accepted and applied the EEOC regulatory declaration that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i)(1998). The Court found that the plaintiff sisters' allegation that United regarded their poor vision as precluding them from positions as a "global airline pilot" was not sufficient to support the claim that United regarded them as having a substantially limiting impairment. The Court indicated that a number of other positions utilizing the sisters' skills, such as regional pilot and pilot instructor, were available to them, and quoted from a statement in the EEOC's Interpretive Guidance that "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 527 U.S. at 493, quoting 29 C.F.R. pt. 1630, App. § 1630.2 (1998).

Because the Court found that Karen Sutton and Kimberly Hinton had not claimed that United's vision requirement reflected a belief that their vision substantially limits them, the Supreme Court agreed with, and affirmed, the decision of the Court of Appeals affirming the dismissal of their claim that they were regarded as having a disability.

Justice Ginsburg filed a concurring opinion in which she agreed with the majority that the actual disability prong of ADA definition of disability "does not reach the legions of people with

correctable disabilities.” 527 U.S. at 494. She explained that she found the “strongest clues” to congressional intent on this issue in the 43 million figure and the finding that “individuals with disabilities are a discrete and insular minority who have been ... subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.” 42 U.S.C. § 12101(a)(7). She believed that these declarations are inconsistent with “the enormously embracing definition of disability” that would result from including correctable conditions. 527 U.S. at 494.

Justices Stevens and Breyer dissented. Justice Stevens, in an opinion joined by Justice Breyer, wrote that the application of customary tools of statutory construction make it “quite clear” that the existence of disability should focus on an individual’s condition “without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication.” *Id.* at 495. He noted that this was the view of eight of the nine circuit courts to address the issue, and of all three of the executive agencies that had issued regulations or interpretive bulletins construing ADA definition. Examining the text of ADA definition of disability, Justice Stevens argued that the three parts of the definition do not identify mutually exclusive, discrete categories, but, rather, furnish three overlapping formulas aimed at ensuring that individuals who now have, or ever had, a substantially limiting impairment are protected. He cites the example of a person who has lost a limb, but who, with prostheses, can perform all major life activities. Under the majority’s reasoning, he argues, persons with such conditions would not be disabled under ADA, though he believes the sweep of the three-pronged definition makes it clear that Congress intended the Act to cover such persons.

In Justice Stevens’ view, the three parts of the definition should be read together not to focus solely on current functional limitations, but instead to inquire whether any present or past impairment substantially limits, or did limit, the individual’s performance of major life activities. Such a reading would avoid “the counterintuitive conclusion that ADA’s safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.” *Id.* at 499. Justice Stevens contended that any ambiguity about this conclusion is removed by looking at ADA’s legislative history, and he quoted from several statements in ADA committee reports indicating that determinations of disability should be made without regard to mitigating measures. He noted that the EEOC, the Department of Justice, and the Department of Transportation had all reached the same conclusion.

Justice Stevens clarified that the question raised in the *Sutton* appeal was not whether the sisters were qualified to be pilots, nor whether their condition might endanger passengers and crew, but only the threshold question whether they are protected by ADA. He believed it was “quite wrong” for the majority to restrict the coverage of the Act, when remedial legislation such as ADA should be construed broadly to effectuate its purposes. *Id.* at 504. He considered it appropriate to require United to clarify why having, for example, 20/100 uncorrected vision or better is a valid job requirement. He noted that the sisters’ condition of having 20/200 vision in the better eye is a significant hindrance that precludes a person from driving, shopping in a public store, or viewing a computer screen from a reasonable distance. To the fear that considering as “disabilities” impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses might cause a flood of litigation, Justice Stevens responded that whether or not workers wear glasses

is a matter of complete indifference to most employers and thus will not give rise to legal actions. Moreover, he pointed out that all individuals can already file employment discrimination claims based on their race, sex, or religion, and—provided they are at least 40 years old—their age, and yet this has never been found to be a reason to restrict classes of antidiscrimination coverage. To the extent that the Court is concerned that employers will be required to answer in litigation for every employment practice that draws distinctions based on physical attributes, Justice Stevens suggested that such problems should be addressed in the context of employers’ affirmative defenses, not of the scope of applicants or employees protected by the Act.

Justice Stevens contended that, in the end, the majority is “left only with its tenacious grip on Congress’ finding that ‘some 43,000,000 Americans have one or more physical or mental disabilities.’” *Id.* at 511. He argued that the majority’s interpretation of this figure will have “the perverse effect of denying coverage for a sizeable portion of the core group of 43 million.” *Id.* at 512. And he asserted that 43 million cannot be a fixed cap, since Congress included the “record of” and “regarded as” categories in the definition, with the expectation that the Act would protect individuals who do not have “actual” disabilities and therefore are not counted in the number.

While joining in Justice Stevens’ dissenting opinion, Justice Breyer wrote separately to suggest that if the broad interpretation of the definition of disability led to too many lawsuits that ultimately proved without merit or drew time and attention away from those whom Congress clearly sought to protect, the EEOC could remedy this problem through regulations drawing finer definitional lines, thereby preventing the overly broad extension of the statute that the majority feared.

F. MURPHY v. UNITED PARCEL SERVICE

Murphy v. United Parcel Service, 527 U.S. 516 (1999).

In August, 1994, United Parcel Service (UPS) hired Vaughn L. Murphy as a mechanic. The job required Mr. Murphy to drive commercial motor vehicles. The Department of Transportation (DOT) has established health requirements for drivers of commercial vehicles. *See* 49 C.F.R. § 391.41(a) (1998). Among other requirements, the DOT regulations mandate that the driver of a commercial motor vehicle in interstate commerce have “no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.” *Id.*, § 391.41(b)(6). Mr. Murphy had a history of hypertension (high blood pressure) dating from an initial diagnosis when he was 10 years old. With medication, however, Mr. Murphy’s condition was controlled so that he could function normally without any significant restrictions on his activities, except that he was restricted from lifting heavy objects. At the time UPS hired him, Mr. Murphy’s blood pressure was too high for Mr. Murphy to qualify for DOT health certification, but, due to an error, he was erroneously granted certification and started working for UPS. About a month later, a UPS medical supervisor discovered the error while reviewing Murphy’s medical files and requested that he have his blood pressure retested. Upon retesting, Murphy’s blood pressure, at 160/102 and 164/104, was not low enough to qualify him for the 1 year certification that he had incorrectly been issued, but it was sufficient to qualify him for an optional temporary DOT health certification. UPS fired Mr.

Murphy because it believed that his blood pressure exceeded DOT's requirement, and UPS did not allow him to attempt to obtain the optional temporary certification.

Mr. Murphy filed suit against UPS under Title I of ADA. The federal district court granted UPS's motion for summary judgment on the grounds that Mr. Murphy was neither "disabled" nor "regarded as" disabled under ADA. 946 F.Supp., at 881-82. The Court of Appeals for the Tenth Circuit affirmed the district court's judgment. Both the district court and the Court of Appeals declared that the determination whether Mr. Murphy had a disability should be based on an evaluation of his condition in its medicated state, and both found that when he was under medication Mr. Murphy functioned normally.

By a vote of 7 to 2, the Supreme Court affirmed the decisions of the lower courts, largely based on the decision it issued on the same day in *Sutton v. United Airlines*, 527 U.S. 471 (1999). The first question the Court addressed in *Murphy* was whether the determination of disability should be made with reference to the mitigating measures Mr. Murphy employed, a question that it had already answered in the affirmative in *Sutton*. The Court of Appeals had concluded that, when medicated, Mr. Murphy's high blood pressure did not substantially limit him in any major life activity, a conclusion that Mr. Murphy had not challenged on appeal. Therefore, the Supreme Court ruled that the grant of summary judgment in UPS's favor on the claim that Mr. Murphy was substantially limited in one or more major life activities, and thus disabled under ADA, was correct.

The other issue the Supreme Court considered was whether UPS had regarded Mr. Murphy as having a disability. Mr. Murphy argued that UPS regarded his hypertension as substantially limiting him in the major life activity of working, even though in fact it did not. The Court viewed this issue as again having been largely resolved by its opinion in *Sutton*. As in *Sutton*, the Court assumed for the purposes of argument that the Equal Employment Opportunity Commission (EEOC) regulations regarding the disability determination are valid, and quoted the EEOC definition of "substantially limits" in regard to the major life activity of working: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (1998). The Court also noted EEOC's clarification that "[T]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* Applying these standards, the Court found that evidence that UPS regarded Mr. Murphy as unable to meet the DOT regulations was not sufficient to create a genuine issue as to whether he was regarded as unable to perform a class of jobs utilizing his skills. At most, Mr. Murphy was regarded as unable to perform the job of mechanic only when that job required driving a commercial motor vehicle, and otherwise was generally employable as a mechanic. Consequently, the Court found that Mr. Murphy had failed to show that he was regarded as unable to perform a class of jobs, but had demonstrated only that he was regarded as unable to perform a particular job. The Supreme Court found this evidence insufficient, as a matter of law, to prove that he was regarded as substantially limited in the major life activity of working.

Justice Stevens, joined by Justice Breyer, dissented from the Court's decision, for reasons he had explained in his dissenting opinion in *Sutton v. United Airlines*, 527 U.S. at 495. In his view, Mr.

Murphy had a “disability” under ADA because his hypertension—in its unmedicated state—“substantially limited” his ability to perform several major life activities, and would likely cause him to be hospitalized if he was not medicated. Indeed, Justice Stevens viewed Mr. Murphy’s situation even more clearcut than that considered in *Sutton*: “Severe hypertension,” in his view, “easily falls within ADA’s nucleus of covered impairments.” 527 U.S. at 525.

G. ALBERTSON’S, INC. v. KIRKINGBURG

Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

In August 1990, Albertson’s, Inc., a grocery-store chain, hired Hallie Kirkingburg as a truckdriver to be based at its warehouse in Portland, Oregon. Mr. Kirkingburg had more than ten years driving experience and Albertson’s transportation manager found that he performed well on a road test. Mr. Kirkingburg had an uncorrectable vision condition (amblyopia), that involves weakened vision in one eye—20/200 vision in the left eye in Kirkingburg’s case—so that the individual in effect sees only with the other eye. When a person uses only one eye to see, the condition is referred to as “monocular” vision. Before he started working, Albertson’s required Kirkingburg to be examined by a doctor to see if he met federal standards for commercial truckdrivers. These standards, issued by the United States Department of Transportation (DOT), include a “basic vision” requirement that corrected distant visual acuity be at least 20/40 in each eye and distant binocular (two-eye) acuity be at least 20/40. Despite Kirkingburg’s weak left eye, the doctor who examined him certified, erroneously, that he met the DOT basic vision standard.

In December 1991, Kirkingburg took a leave of absence after injuring himself on the job. Albertson’s required returning employees to undergo a physical examination, so, in November 1992, Kirkingburg went for a physical. This time, the examining physician correctly assessed Kirkingburg’s vision and found that his eyesight did not meet the basic DOT standards. Either the physician, or his nurse, told Kirkingburg that he would have to obtain a waiver of the basic vision standards. DOT had a process for giving certification to applicants who had three years of recent experience driving a commercial vehicle with a clean driving record (as defined by DOT). A waiver applicant had to agree to have his or her vision checked annually, and to submit reports regarding his or her driving experience to DOT’s Federal Highway Administration. Mr. Kirkingburg applied for a waiver, but while his application was pending, Albertson’s fired him from his job as truckdriver because he could not meet the basic DOT vision standard. Ultimately, Mr. Kirkingburg received a DOT waiver, but Albertson’s refused to rehire him. Mr. Kirkingburg brought suit alleging that Albertson’s violated ADA by firing him.

The district court granted summary judgment for Albertson’s, ruling that the company had reasonably concluded that Mr. Kirkingburg was not qualified without an accommodation because he could not meet the basic DOT vision standards, and that Albertson’s was not required, as a reasonable accommodation, to give him time to get a DOT waiver. The Court of Appeals for the Ninth Circuit reversed the district court’s decision. The Court of Appeals held that Albertson’s could not use the DOT vision standard as the justification for its vision requirement and yet disregard the

waiver program which was a legitimate part of the DOT program. Albertson's argued for the first time before the Ninth Circuit that it was entitled to summary judgment because Mr. Kirkingburg did not have a disability within the meaning of ADA. The Court of Appeals rejected this contention because it concluded that Mr. Kirkingburg had presented evidence that his vision was effectively monocular, and thus that the manner in which he sees differs significantly from the manner in which most people see.

The Supreme Court granted review of both the question whether Mr. Kirkingburg had a disability and whether he was qualified. In a unanimous ruling, the Court reversed the judgment of the Ninth Circuit. Because the Supreme Court decided that Kirkingburg was not "qualified" under ADA, the Court did not have to resolve the issue of whether he was an individual with a disability. The Court decided to address the issue of standards for determining the existence of disability, however, because of what it called "three missteps the Ninth Circuit made" in its discussion of the issue. 527 U.S. at 562. Although Mr. Kirkingburg had originally alleged both that he had a disability and that Albertson's had regarded him as having a disability, the Supreme Court discussed only the issue of actual disability, because Kirkingburg did not raise the "regarded as" issue in his petition to the Supreme Court. In assessing whether Mr. Kirkingburg's vision impairment substantially limited the major life activity of seeing, the Court considered the Ninth Circuit as having been "too quick to find a disability." *Id.* at 564. The Supreme Court ruled that the Court of Appeals had accepted as sufficient to establish disability Mr. Kirkingburg's evidence that the manner in which he sees differs significantly from the manner in which most people see. In the Supreme Court's view, the Ninth Circuit had accepted a mere difference in manner instead of requiring a showing of significant restriction in order to establish substantial limitation.

Second, the Court found that the Ninth Circuit had not taken sufficient account of evidence that Mr. Kirkingburg had developed subconscious mechanisms for compensating and coping with his visual impairment, suggesting that the Court of Appeals believed that in gauging whether an individual has a disability a court need not consider the individual's ability to compensate for the impairment. The Supreme Court found this approach to be inconsistent with its ruling in *Sutton v. United Airlines*, *supra*, that mitigating measures must be taken into account in judging whether an individual has a disability, and the Court saw no "basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems." 527 U.S. at 565-66.

Third, the Court observed that the Ninth Circuit did not sufficiently heed the statutory obligation to determine the existence of disabilities on a case-by-case basis. While recognizing that there may be some impairments that invariably cause a substantial limitation of a major life activity, the Court did not consider monocularity to be such a condition, because people with monocularity may have variations in the degree of visual acuity in the weaker eye, in the age at which they suffered their vision loss, in the extent of their compensating adjustments in visual techniques, and in the ultimate scope of the restrictions on their visual abilities. The Court of Appeals did not identify the degree of loss suffered by Mr. Kirkingburg, and the Supreme Court could find no evidence in the record specifying the extent of his visual restrictions. The Court declared that it was not suggesting that monocular individuals have an onerous burden in trying to show that they have a disability; indeed,

it recognized that “people with monocular vision ‘ordinarily’ will meet the Act’s definition of disability.” *Id.* at 567. But it held that, as with other persons who seek ADA’s protection, individuals with monocular vision must offer evidence that the extent of the limitation, as in loss of depth perception and visual field, is substantial in their personal situation.

The Court then turned to Albertson’s’ primary contention—that Mr. Kirkingburg was not qualified. Mr. Kirkingburg and the United States argued that in applying a qualification standard, grounded in safety concerns, that screens out applicants with a disability, Albertson’s was required to demonstrate that the standard was “job-related and consistent with business necessity, and ... performance cannot be accomplished by reasonable accommodation,” and that the standard was necessary to prevent “a direct threat to the health or safety of other individuals in the workplace,” 42 U.S.C. § 12113(a), 12113(b).

The Court found it significant that Albertson’s was applying a job qualification imposed upon it by federal law rather than a criterion it had devised. The Court declared that Albertson’s had both a “right” and an “unconditional obligation” to follow the DOT commercial truckdriver regulations. *Id.* at 570. The Court of Appeals had considered the regulatory provisions for the waiver program in conjunction with the basic visual acuity provision. The Supreme Court ruled, however, that the regulations establishing the waiver program did not modify the general visual acuity standards, and that DOT had no evidentiary basis for concluding that the pre-existing standards could be lowered consistent with public safety. The Court found that DOT had developed the waiver scheme as a means of obtaining data to be considered in exploring whether the existing vision standards should be revised. As DOT was giving waivers solely to collect information, “[t]he waiver program was simply an experiment with safety” and did not purport to modify the substantive content of the general acuity regulation.

The Court ruled that the DOT regulation does not require employers of commercial drivers to participate in the waiver program, so that Albertson’s was free to decline to do so unless ADA is “read to require such an employer to defend a decision to decline the experiment.” *Id.* at 577. In the Court’s view, such an interpretation would require employers to justify a safety regulation issued by the Government, to “reinvent the Government’s own wheel,” on a case-by-case basis. *Id.* As Congress had enacted ADA before there was any waiver program, the Court ruled that it was not credible that Congress intended that employers choosing to abide by the DOT’s visual acuity regulation would be required to defend the regulation’s application in the face of an experimental waiver program. Accordingly, the Court reversed the judgment of the Ninth Circuit.

Justice Thomas wrote a concurring opinion. While agreeing with the majority that Albertson’s was legally entitled to apply the DOT visual acuity standard, he wished to add that the regulation applied to Mr. Kirkingburg as well as to Albertson’s and it operated to render him not qualified to be a commercial truckdriver as a matter of law. He added that requiring Albertson’s to permit Mr. Kirkingburg to obtain a waiver as an accommodation would have been “unreasonable.” *Id.* at 580. Justices Stevens and Breyer did not join in the portion of the Court’s opinion (part II) that discussed the definition of disability and the standards for determining whether Mr. Kirkingburg’s condition qualified as a disability. Their reasons for not joining that part of the opinion presumably were

related to their rationale for dissenting in the *Sutton* and *Murphy* cases, but they did not write separately in *Kirkingburg* to explain their thinking.

H. OLMSTEAD v. L.C.

Olmstead v. L.C., 527 U.S. 581 (1999).

In 1992, L.C., a woman with mental retardation and diagnosed as having schizophrenia, was voluntarily admitted to the Georgia Regional Hospital at Atlanta (GRHA), a state psychiatric hospital. A year later, L.C.'s treatment team at the hospital determined that her psychiatric condition had stabilized, and that her needs could be met appropriately in one of the community-based programs supported by the State of Georgia. This evaluation did not result, however, in any change in her placement. In 1995, L.C. filed suit in federal court against the hospital's superintendent, the Commissioner of the Georgia Department of Human Resources, and the executive director of a county regional board, challenging L.C.'s continued confinement in a segregated environment. She alleged that the failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated Title II of ADA. To remedy this ADA violation, L.C. asked that the State place her in a community care residential program, and provide her treatment with the ultimate goal of integrating her into the mainstream of society. In January 1996, E.W., a woman with mental retardation and diagnosed as having a personality disorder, entered the case as an additional plaintiff. She had been voluntarily admitted to GRHA in February 1995, and remained there even after her treating psychiatrist concluded that she could be treated appropriately in a community-based setting.

While the lawsuit and appeals were still pending, both women were eventually transferred to community-based treatment programs. The courts elected, however, to decide the issues raised in the case, because multiple institutional placements was a problem that is "capable of repetition, yet evading review"—an exception to the situations in which courts dismiss cases as "moot." The State could keep such an issue from ever being resolved by the courts by simply transferring the plaintiffs to community-based facilities whenever such a lawsuit is filed, so courts are authorized to decide such issues despite the subsequent changes in placement.

The district court granted partial summary judgment in favor of L.C. and E.W., ruling that the State's failure to place the two women in an appropriate community-based treatment program violated Title II of ADA. The district court rejected the State's argument that inadequate funding, not discrimination against L.C. and E.W. by reason of their disabilities, accounted for their retention at GRHA. The district court ruled that under Title II unnecessary institutional segregation of individuals with disabilities constitutes discrimination *per se*, that cannot be justified by a lack of funding. The district court also rejected the State's contention that requiring immediate transfers in cases of this type would "fundamentally alter" the State's activity, a defense to obligations imposed under Title II. The court observed that existing state programs provided community-based treatment of the kind for which L.C. and E.W. qualified, and community-based service programs would cost considerably less than maintaining them in an institution.

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court, but remanded for reassessment of the State's cost-based defense. The appeals court directed the lower court to consider "whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget." 138 F.3d at 905.

The Supreme Court viewed the central issue in the case as whether the prohibition of discrimination in ADA may require placement of persons with mental disabilities in community settings rather than in institutions. The Court's answer was "a qualified yes." 527 U.S. at 587. Six Justices agreed that Title II's integration provision requires states to place individuals with mental disabilities in community-based facilities in some circumstances. No single opinion in its entirety, however, garnered the votes of a majority. Justice Ginsburg delivered the judgment of the Court, and authored the opinion of the Court in three of its parts, in which she was joined by Justices Stevens, O'Connor, Souter, and Breyer. The fourth part of Justice Ginsburg's opinion, dealing primarily with the fundamental alteration defense, garnered only four votes, as Justice Stevens did not join. Justice Kennedy did not agree to join in any part of Justice Ginsburg's opinion, but concurred in the judgment of the Court; essentially this means that he agreed with the result but not the reasoning of the majority. Justice Thomas wrote a dissenting opinion in which he was joined by Chief Justice Rehnquist and Justice Scalia.

Justice Ginsburg began her opinion for the Court on the issue of the integration requirement's application to institutionalization by noting that "the opening provisions of ADA" contain findings that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"; "discrimination against individuals with disabilities persists in such critical areas as ... institutionalization"; and "individuals with disabilities continually encounter various forms of discrimination, including ... segregation" *Id.* at 588-89, quoting 42 U.S.C. § 12101(a)(2), (3), (5). The Court declared that ADA was the first statute in which Congress referred expressly to segregation of persons with disabilities as a form of discrimination and to discrimination in the area of institutionalization. 527 U.S. at 589 n. 1.

The Court noted that in authorizing the Attorney General to issue regulations to implement Title II, ADA directed that such regulations were to be consistent with the coordination regulations under Section 504 of the Rehabilitation Act applicable to recipients of federal financial assistance. One provision of the coordination regulations requires recipients of federal funds to administer programs and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities. 28 C.F.R. § 41.51(d) (1998). Accordingly, in issuing ADA Title II regulations, the Attorney General included a provision that the Supreme Court referred to as the "integration regulation." It states: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1998). The preamble to the Title II regulations elaborates that "the most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. pt. 35, App. A, p. 450 (1998). The Court also noted that another provision of the Title II regulations requires public entities to make "reasonable

modifications” to avoid discriminating on the basis of disability, unless the public entity can show that the modifications would “fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7) (1998). The Court viewed the Attorney General’s Title II regulations as reflecting “two key determinations”—(1) that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II; and (2) that the states’ obligation to avoid unjustified isolation of individuals with disabilities does not require states to make modifications that would involve a fundamental alteration. 527 U.S. at 596-97. The issue before the Court was whether the Attorney General was correct in these “key determinations,” and, if so, whether the Eleventh Circuit had applied them correctly.

The state officials had argued that L.C. and E.W. were not subjected to discrimination “by reason of” their disabilities because they were not denied community placement on account of those disabilities, and they could not identify any similarly situated individuals given preferential treatment. The Court responded: “We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in ADA.” *Id.* at 598. Comparing ADA with prior statutes such as the Developmentally Disabled Assistance and Bill of Rights Act of 1975 and Section 504 of the Rehabilitation Act, the Court viewed ADA as having “stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.” *Id.* at 599. Relying on ADA “Findings” quoted above, the Court ruled that in ADA Congress not only required all public entities to refrain from discrimination, but it had explicitly identified unjustified “segregation” of persons with disabilities as a form of discrimination. The Court observed that this recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two judgments: (1) that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life;” and (2) that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 600-01. Therefore, despite the Georgia officials’ arguments to the contrary, the Court found that dissimilar treatment had been established: “In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.” *Id.* at 601.

The Georgia officials contended that the findings in ADA should not outweigh the Medicaid statute’s congressional policy preference for treatment in institutions over treatment in the community. The Court responded that, while that may have been true in the past, since 1981 Medicaid has provided funding for state-run home and community-based care through a waiver program, and the Department of Health and Human Services (HHS) has encouraged states to take advantage of it to fund community-based placements.

The key ruling of the Court in *Olmstead* was that “[u]njustified isolation ... is properly regarded as discrimination based on disability,” *id.* at 597, and the Court therefore affirmed the ruling of the Eleventh Circuit on this issue. The Supreme Court added, however, some clarifications regarding

how that principle should be applied. First, the Court stated that nothing in ADA or the regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Second, a state generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets essential eligibility requirements for placement in a community-based program, and should not remove individuals from the more restrictive setting if they do not qualify for community-based placement. Third, federal law does not create any requirement that community-based treatment be imposed on persons who do not desire it. *Id.* at 601-02. In regard to L.C. and E.W., there was no genuine dispute that they were qualified for noninstitutional care, the State's own professionals determined that community-based treatment would be appropriate for them, and both women sought community-based placements.

On the second issue addressed by the Court in *Olmstead*—the standard of “fundamental alteration” that should be applied to the cost-based defense asserted by the Georgia officials—none of the various opinions filed by the Justices garnered a majority. It is significant, however, that a total of eight Justices (all except Justice Stevens) concluded that the Eleventh Circuit had applied too restrictive an interpretation of the defense. Justice Stevens would have affirmed the Eleventh Circuit's decision as to the fundamental alteration defense.

Justice Ginsburg's opinion on the fundamental alteration defense issue, in which she was joined by Justices O'Connor, Souter, and Breyer, declares that a state's responsibility to provide community-based treatment to qualified persons with disabilities is not boundless, and is subject to the “fundamental alterations” limitation. The Eleventh Circuit, however, construed this limitation as permitting a cost-based defense “only in the most limited of circumstances,” and remanded to the district court to consider, among other things, “whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget.” 138 F.3d at 902, 905. Justice Ginsburg believed that such a standard would leave the State “virtually defenseless,” because measuring the expense entailed in placing one or two people in a community-based treatment program against the State's entire mental health budget would make it unlikely that a state could ever succeed in establishing a fundamental alteration defense. 527 U.S. at 603. In Justice Ginsburg's view, a sensible construction of the fundamental alteration concept would allow the State to show that immediate relief for the plaintiffs would be inequitable in light of the responsibility the State has undertaken, and the allocation it has made of available resources, for the care and treatment of persons with mental disabilities. The district court simply compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution, and concluded that community placements cost less than institutional confinements. Justice Ginsburg stated that such a comparison overlooks the increased overall expenses involved in funding community placements while still incurring the costs of maintaining institutions. And even if states eventually were able to close some institutions in response to an increase in the number of community placements, the States would still incur the cost of running partially full institutions in the interim. Justice Ginsburg does not believe that ADA can be reasonably read to force states to phase out institutions, nor to move institutionalized patients into an inappropriate setting, such as a homeless shelter. To maintain a range of facilities and to administer services with an even hand, therefore, she believes the State must have more leeway than under the lower courts' interpretation of the fundamental-alteration defense. In her view, a state

could meet ADA reasonable modification requirement by having a “comprehensive, effectively working plan” for placing qualified persons with mental disabilities in less restrictive settings. *Id.* at 605-06. And this would be sufficient even if the plan involved a waiting list, so long as the waiting list “moved at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated” *Id.* at 606.

While holding that unjustified isolation is properly regarded as discrimination based on disability, Justice Ginsburg would also recognize the states’ need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the states’ obligation to administer services with an even hand. In evaluating a state’s fundamental alteration defense, she believed the proper standard is to consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the state provides others with mental disabilities, and the State’s obligation to mete out those services equitably.

Justice Stevens concurred in the judgment of the Court and entered a separate opinion explaining why he concurred in part in Justice Ginsburg’s opinion. He believed that the Eleventh Circuit had been correct in ruling that unjustified institutionalization constitutes a violation of the integration mandate of ADA, so he joined that part of Justice Ginsburg’s opinion that affirmed that portion of the Eleventh Circuit’s ruling, thus making a fifth vote so that that part of the opinion represented a majority of the Court. On the fundamental alteration defense issue, Justice Stevens thought the Eleventh Circuit had made a correct ruling, so he would have voted to affirm the Eleventh Circuit’s ruling in its entirety. Therefore, he did not join Justice Ginsburg’s opinion on that issue.

Justice Kennedy concurred in the judgment of the Court. He wrote a separate opinion emphasizing his views on both the integration/deinstitutionalization issue and the fundamental alteration defense. He began his opinion by noting that insufficient resources are devoted to treating mental disorders. He also observed that “persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility.” *Id.* at 608. He went on to discuss what he called the “dark side” of deinstitutionalization, and declared that “it would be a tragic event ... were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that states had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.” *Id.* at 610. Accordingly, he believed that the principle of liability for unjustified segregation must be applied with caution and circumspection, or states might be pressured into attempting compliance “on the cheap,” placing persons with mental disabilities in settings not offering needed services. *Id.* Accordingly, he cautioned lower courts to apply the Court’s decision with great deference to medical decisions of treating physicians and to the program funding decisions of state policymakers.

Justice Kennedy embraced a theory of discrimination on the basis of disability that focused on a showing of “animus or unfair stereotypes regarding the disabled” or of “differential treatment” vis-a-vis some other group, and suggested that the prohibition of discrimination in Title II might forbid as “irrational” distinctions by reason of disability made by a state entity that without adequate justification exposed a person or persons with disabilities to more onerous treatment than others in the provision of services or the administration of existing programs. *Id.* at 611. He added that a state

is not required to create community-treatment programs that do not exist, and that states are entitled to “make hard decisions on how much to allocate to treatment of diseases and disabilities.” *Id.* at 612. In the case before the Court, he believed that L.C. and E.W. had not identified a class of similarly situated individuals nor shown how such a class had been given preferential treatment. Accordingly, he would have ruled that the lower courts should have required additional factual showings to establish a violation of Title II. He also indicated his agreement with Justice Ginsburg’s opinion that the lower courts had overly restricted the State’s cost defense. In his view, the State should have wide discretion in adopting its own systems of cost analysis for allocating health care resources, including determinations based on fixed and overhead costs for institutions and programs.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented. He took issue with the majority’s finding that the plaintiffs had established discrimination by showing that they were kept in an institutional setting after they became eligible for community placement. He argued that discrimination must involve differential treatment vis-a-vis members of a different group on the basis of a statutorily described characteristic, such as disability. In his view, the majority’s more comprehensive interpretation of discrimination under Title II of ADA, to include institutional isolation of persons with disabilities, is not adequately supported by the segregation and institutionalization findings of ADA, without any other clear directive in the statutory language. Justice Thomas further contended that there had been no showing that the plaintiffs were treated differently compared to otherwise similarly situated persons, except for dissimilar treatment resulting from the fact that different classes of persons receive different services, which in his eyes does not constitute discrimination as traditionally defined. Finally, he argued that any differential treatment was not by reason of disability, since community placement is not available to those without disabilities. He concluded that the denial of community placements for L.C. and E.W. occurred not “by reason of” their disability, but, rather, because the State of Georgia defendants had limited resources.

I. BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

This case involved separate lawsuits, one filed by Patricia Garrett and another by Milton Ash, that were consolidated on appeal. Patricia Garrett, a registered nurse, was employed as Director of Nursing, OB/Gyn/Neonatal Services, for the University of Alabama in Birmingham Hospital. In 1994, she was diagnosed with breast cancer and subsequently underwent a lumpectomy, radiation treatment, and chemotherapy. These treatments necessitated her taking leave from work. When she returned to work in July 1995, her supervisor notified her that she would have to give up her position as director. She thereafter applied for and received a transfer to another, lower paying position as a nurse manager.

Milton Ash was a security officer with the Alabama Department of Youth Services. When he began his job, he informed the Department that he had chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke. Mr. Ash requested that the Department modify his

duties to minimize his exposure to these substances. Later, he was diagnosed with sleep apnea and, upon the recommendation of his doctor, asked to be reassigned to daytime shifts to accommodate his condition. The Department refused to make any of the changes Mr. Ash requested. After he filed a discrimination claim with the Equal Employment Opportunity Commission, his performance evaluations started being lower than those he had received previously.

Eventually both Ms. Garrett and Mr. Ash filed lawsuits in federal court, seeking monetary damages under ADA. In each case, the Alabama state agency employers moved for summary judgment, claiming that they were shielded by the Eleventh Amendment and that in enacting ADA Congress had exceeded its authority to abrogate states' immunity under that Amendment. The district court decided to address both cases in a single opinion, and granted the defendants' motions for summary judgment. The cases were then formally consolidated on appeal to the U.S. Court of Appeals for the Eleventh Circuit. The Eleventh Circuit reversed, ruling that ADA validly abrogates the states' Eleventh Amendment immunity.

In a 5-4 decision, the Supreme Court ruled that suits by employees of a state to recover money damages from a state for violations of Title I of ADA are barred by the Eleventh Amendment. The majority opinion was written by Chief Justice Rehnquist. Early in the opinion, he acknowledged that the wording of the Eleventh Amendment applies only to suits against a state by citizens of another state, and explained that the Court's decisions extended the Amendment's applicability to suits by citizens against their own states. Ultimately, the Eleventh Amendment has come to mean that states may not be sued by private individuals in federal court without the state's consent. Prior to its *Garrett* decision, the Court's most recent ruling on the Eleventh Amendment was *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), in which the Court ruled that the Age Discrimination in Employment Act did not validly abrogate states' Eleventh Amendment immunity from suits by private individuals.

In *Garrett*, the Court observed that Congress may abrogate the states' Eleventh Amendment immunity, but to do so it must comply with two conditions: (1) that it abrogates such immunity unequivocally, and (2) that it acts pursuant to a valid constitutional grant of authority. In ADA, Congress expressly declared that states are not to be immune under the Eleventh Amendment to court actions under the Act, 42 U.S.C. § 12202, so the first requirement was not in dispute. The question left for the Court was whether Congress acted within its constitutional authority by subjecting the states to suits in federal court for money damages under Title I of ADA. The Court declared that ADA could limit state sovereignty under the Eleventh Amendment only if it is appropriate legislation under § 5 of the Fourteenth Amendment, which gives Congress the power to enact "appropriate legislation" to enforce the requirements of that amendment. The Court recognized that under § 5 Congress is not limited to merely repeating the requirements of the Fourteenth Amendment as delineated in court decisions, but is given the power to remedy and to deter violations of rights guaranteed under the Amendment by prohibiting "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." 531 U.S. at 963, quoting *Kimel, supra*, at 81; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). On the other hand, the Court considered it a settled principle that it is the province of the Court, not the Congress, to define the substance of constitutional guarantees. To identify the limit of congressional authority

under § 5, the Court referred to its decision in the *City of Boerne v. Flores* case in 1997, which had established a requirement that § 5 legislation reaching beyond the scope of the Fourteenth Amendment’s guarantees must exhibit “congruence and proportionality” between the constitutional injury being addressed and the means adopted to address it. *Garrett*, at 963, quoting *City of Boerne*, *supra*, at 520.

In applying these principles to the coverage of states by Title I of ADA, the Court took a narrow view of what constitutes a Fourteenth Amendment violation against persons with disabilities. For many years, a key factor in equal protection analysis in the Court’s decisions has been which of the levels of scrutiny—strict, moderate, or low—a particular type of unequal treatment will be evaluated under. The Court viewed its decision in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which involved a group home for individuals with mental retardation, as having essentially settled the issue that disability is neither a suspect or quasi-suspect classification under the Equal Protection Clause. Accordingly, state discrimination on the basis of disability challenged as violating equal protection would merit only “rational-basis review”—the lowest level of equal protection analysis. Under this standard, a state will not be held to have violated the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Moreover, the Court declared that a state does not need to articulate its reasoning at the moment a particular decision is made. Instead, the party bringing an equal protection challenge has the burden of showing that there is no reasonably conceivable state of facts that could provide a rational basis for the classification.

In an ominous paragraph, the Court described the conclusions it derived from its rational basis analysis:

Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.
Garrett, at 964.

Having severely restricted the constitutional dimensions of disability-based discrimination, the Court then examined whether Congress had identified a history and pattern of unconstitutional employment discrimination by the States against individuals with disabilities. The Court discounted any examples from the legislative history that involved discrimination by cities and counties, because the Eleventh Amendment does not extend immunity to such local governmental entities. The Court also disregarded broad findings of societal discrimination in ADA because it viewed most such discrimination as not involving the activities of states. The Court also found unpersuasive what it termed “half a dozen examples from the record” cited in the brief on behalf of *Garrett* that did involve states. *Id.* at 965. While the Court accepted that several of the cited incidents evidenced an unwillingness on the part of state officials to make the sort of accommodations for disability required by ADA, it considered it “more debatable” whether they were irrational under the decision in

Cleburne. Id. But even if they were determined to show unconstitutional action on the part of the states, the Court found that these incidents fell far short of showing the pattern of unconstitutional discrimination on which § 5 legislation must be based. In light of ADA finding that some 43,000,000 Americans have one or more disabilities, and statistics indicating that in 1990 the states employed more than 4.5 million people, the Court found that the evidence Congress assembled of unconstitutional state discrimination in employment was inadequate.

The Court added that even if the examples were accepted as demonstrating a pattern of unconstitutional discrimination by the states, the rights and remedies created by ADA against the states would still raise problems of “congruence and proportionality” of the kind the Court had found in its *City of Boerne* ruling. The Court particularly singled out, as exceeding what is constitutionally required, ADA facility accessibility and reasonable accommodation requirements, and the prohibition against standards, criteria, or methods of administration that have the effect of discrimination. The Court contrasted ADA legislative record with congressional documentation of “a marked pattern of unconstitutional action by the States,” addressed by “a detailed but limited remedial scheme” in enacting the Voting Rights Act of 1965. *Id.* at 967.

Ultimately, the Court found that in enacting ADA Congress had fallen short of the constitutional prerequisites to authorizing private individuals to recover money damages against the states: demonstrating a pattern of discrimination by the states which violates the Fourteenth Amendment, and imposing a remedy that is congruent and proportional to the targeted violation. Accordingly, the Court reversed the judgment of the Eleventh Circuit.

The Court added a footnote (number 9) at the end of its opinion to clarify that its ruling did not mean that persons with disabilities have no federal recourse against discrimination. The Court noted that states are still subject to Title I standards, and those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief. In addition, state laws protecting the rights of persons with disabilities in employment may provide additional avenues of redress. In a different footnote (number 1) at the beginning of its opinion, the Court stressed that it was not addressing whether Title II, “which has somewhat different remedial provisions from Title I,” is appropriate legislation under § 5. *Id.* at 960 n.1. Of course, some of the analysis the Court applies to Title I in *Garrett* might greatly affect the analysis of Eleventh Amendment immunity under Title II in future court challenges.

Justice Kennedy wrote a concurring opinion, in which Justice O’Connor joined. While recognizing that persons with disabilities encounter prejudice stemming from indifference or insecurity and from malicious ill will, and that ADA “will be a milestone on the path to a more decent, tolerant, progressive society,” *Id.* at 968 (Kennedy, concurring). Justice Kennedy wrote separately primarily to stress that states should not be subjected to the same standards of discrimination as citizens. He challenged the prospect of states being held in violation of the Constitution for embodying “the misconceived or malicious perceptions of some of their citizens.” *Id.* He also noted his belief that if discrimination by states represented a serious constitutional problem he would have expected substantial litigation of these issues in state and federal courts, which he believed had not occurred.

Justice Breyer wrote a forceful dissenting opinion, in which he was joined by Justices Stevens, Souter, and Ginsburg. He took strong issue with the Court's second-guessing of the congressional record of ADA "as if it were an administrative agency record." *Id.* at 969 (Breyer, dissenting). He responded to the majority's finding that Congress had assembled only minimal evidence of unconstitutional state discrimination in employment by contending that Congress had, in fact, compiled a "vast legislative record" documenting massive, society-wide discrimination against persons with disabilities. *Id.* In Justice Breyer's view, the evidence and findings of society-wide prejudice and discrimination implicated the states because "[t]here is no particular reason to believe that they are immune from the 'stereotypic assumptions' and pattern of 'purposeful unequal treatment' that Congress found prevalent." *Id.* Moreover, contrary to the "half a dozen" examples of employment discrimination recognized by the majority, Justice Breyer argued that there were approximately 300 such examples in ADA legislative record, and he attached an appendix to his opinion identifying them. In addition, he discussed various ADA findings and specific examples of discrimination by state and local government entities at some length in his opinion.

In addition to disagreeing with the majority about the quantity of evidence of a constitutional problem amassed by Congress, Justice Breyer also argued that the majority had used the wrong standard in evaluating such evidence in that it had afforded insufficient deference to and respect for Congress. In his view, the Court's application of the rational basis standard was misguided. Rational basis analysis, he argued, is a manifestation of judicial restraint that is appropriate to courts, not to Congress: "a legislature is not a court of law," *Id.* at 971; "the Congress of the United States is not a lower court," *Id.* at 973. In applying a rule designed to restrict courts as if it restricted the legislative power of Congress, he believed the Court had stood the underlying principle—a principle of judicial restraint—on its head.

Justice Breyer also disagreed with the majority that ADA's damages remedy was not "congruent" with and "proportional" to the equal protection problem that Congress found. He defended ADA's reasonable accommodation requirement by arguing that it is appropriate for Congress to impose a remedy that, in response to unreasonable employer behavior, requires an employer to make accommodations that are reasonable. And he believed that the Court had repeatedly confirmed that § 5 grants to Congress just this kind of power to require more than the minimum. He believed that Congress should be permitted to use any rational means to implement the constitutional prohibition, and the Court should merely determine if it could perceive a basis upon which the Congress might have addressed the problem as it did, not to reassess the congressional resolution of conflicting considerations including the risk or pervasiveness of the discrimination, the adequacy or availability of alternative remedies, and the effect upon state interests. While professing to follow the principle of deference to Congress, the Court in its recent cases "sounds the word of promise to the ear but breaks it to the hope." *Id.* at 975.

Ultimately, Justice Breyer concluded that the Court, "through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress." *Id.* at 975-76. This outcome, in his view, effectively saps the independent force of § 5.

J. BUCKHANNON BOARD AND CARE HOME, INC. V. W. VA. DEP'T OF HEALTH AND HUMAN RESOURCES

Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598, 121 S.Ct. 1835 (2001).

The Buckhannon Board and Care Home, Inc. operates residential care homes that provide assisted living services to their elderly residents. The care homes failed an inspection by the West Virginia Office of the State Fire Marshal because some of the residents were found incapable of “self-preservation” as required under state law, because they could not get to a fire exit without aid. Provisions of the West Virginia Code required that all residents of residential board and care homes be capable of “self-preservation,” or capable of moving themselves “from situations involving imminent danger, such as fire.” W. Va. Code § 16-5H-1, 16-5H-2 (1998). After receiving cease and desist orders requiring the closure of its facilities within 30 days, Buckhannon Board and Care Home, Inc., commenced a lawsuit in federal court in October 1997, on behalf of itself and other similarly situated homes and residents against the State of West Virginia, two of its agencies, and 18 individual officials. In the lawsuit, Buckhannon was joined as a plaintiff by Dorsey Pierce, a 102-year-old Buckhannon resident, along with another resident and an organization of residential homes. The plaintiffs charged that the “self-preservation” requirement violated the Fair Housing Amendments Act of 1988 (FHAA), and the Americans with Disabilities Act of 1990 (ADA).

The defendants agreed to delay enforcement of the cease and desist orders pending resolution of the case, and the parties began discovery. In 1998, the West Virginia Legislature passed legislation eliminating the “self-preservation” requirement, and the defendants moved to dismiss the case as moot. The district court granted the motion, finding that the 1998 amendments had eliminated the problematic provisions and that there was no indication that the West Virginia Legislature would repeal the amendments. The plaintiffs asked the court to award it attorney’s fees as the “prevailing party” under the FHAA and ADA. The FHAA has a provision stating that “the court, in its discretion, may allow the prevailing party ... a reasonable attorney’s fee and costs.” 42 U.S.C. § 3613(c)(2). ADA, likewise, has a provision stating that “the court ..., in its discretion, may allow the prevailing party ... a reasonable attorney’s fee, including litigation expenses, and costs.” 42 U.S.C. § 12205. The district court denied the plaintiffs’ request for attorney’s fees on the grounds that one cannot be a “prevailing party” without having obtained an enforceable judgment, a consent decree, or a settlement giving some of the legal relief sought in the lawsuit, and the Fourth Circuit affirmed the district court’s judgment.

The Supreme Court noted that most of the U.S. Courts of Appeals had authorized the awarding of attorney’s fees under what is called the “catalyst theory.” Under this approach a plaintiff is considered a “prevailing party” if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct. Both in its *Buckhannon* ruling and previously, the Fourth Circuit had rejected the catalyst theory and required a judgment, consent decree, or settlement in a party’s favor before the party would be eligible for attorney’s fees. In a 5-4 decision, the Supreme Court agreed with the Fourth Circuit and rejected the catalyst theory.

Justice Rehnquist delivered the opinion for the Court. He began by discussing what is known as the “American Rule,” under which parties in the United States courts are ordinarily required to pay for their own attorneys; the prevailing party is not entitled to collect attorney’s fees from the loser. Accordingly, U.S. courts generally do not award fees to a prevailing party unless there is a statute that explicitly authorizes them to do so. Congress has authorized the award of attorney’s fees to the “prevailing party” in a variety of statutes, including the FHAA, ADA, the Civil Rights Act of 1964, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney’s Fees Awards Act of 1976, and numerous others. The Supreme Court had not previously ruled on the precise definition to be accorded the term “prevailing party.”

To ascertain the meaning of this legal term of art, the Supreme Court looked to *Black’s Law Dictionary*. This legal dictionary defines “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorney’s fees to the prevailing party).—Also termed successful party.” *Black’s Law Dictionary* 1145 (7th ed. 1999). The Court stated that its prior decisions were consistent with this definition’s view that a “prevailing party” is one who has been awarded some relief by the court. The Court characterized its prior decisions as having not ever reached or as expressly reserving the issue of the validity of the “catalyst theory.” The prior cases had determined that attorney’s fees could be awarded in three sets of circumstances: (1) where plaintiffs had prevailed on the merits of at least some of their claims and received at least some judicial relief; (2) where plaintiffs had established their entitlement to some relief through settlement agreements enforced through a court-ordered consent decree; and (3) possibly, where plaintiffs had established their entitlement to some relief through private settlement agreements, provided the terms of the agreement are incorporated into the order of dismissal.

The Court ruled that the catalyst theory fell outside these categories. It identified the critical criterion as whether there is “judicially sanctioned change in the legal relationship of the parties,” and held that a defendant’s voluntary change in conduct, even if it accomplishes what the plaintiff sought to achieve by the lawsuit, lacks the necessary “judicial *imprimatur*” on the change. 121 S.Ct. at 1840. Such a result, the Court stated, was consistent with its prior rulings, which had never awarded attorney’s fees for a nonjudicial alteration of actual circumstances.

Addressing the plaintiffs’ arguments that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney’s fees, and that rejection of the theory would deter plaintiffs with meritorious but expensive cases from bringing suit, the Court was skeptical that these were real problems, calling them “entirely speculative and unsupported by any empirical evidence.” *Id.* at 1842. And such concerns, said the Court, are counterbalanced by the disincentive the catalyst theory can have upon a defendant’s decision to voluntarily change its conduct, whether that conduct is or is not illegal, because a defendant will be dissuaded from changing its conduct if it believes it may incur attorney’s fees as a result. In any event, such mooting of the action by voluntary change is not a possibility in lawsuits involving claims for monetary damages, and courts have the authority not to dismiss a case for mootness unless it is clear that the allegedly wrongful behavior could not reasonably be expected to recur. The Court also noted that the catalyst theory would result in substantial secondary litigation on the

attorney's fees issue, involving demanding, heavily fact-dependent proceedings.

Ultimately, however, the Court discounted all such policy-based considerations, ruling that the "clear meaning" of "prevailing party" in the fee-shifting statutes was determinative. The Court affirmed the judgment of the Fourth Circuit.

Justice Scalia, who joined in the opinion for the Court, wrote a separate concurring opinion in which he was joined by Justice Thomas. Justice Scalia noted that he wanted to respond in greater detail to various arguments made by the dissent. He began by tracing the history of the use of the term "prevailing party" and of the judicial decisions interpreting it. He concluded that at the time the term was used in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, he knew of no case in which the catalyst theory was used as the basis for the awarding of costs. He stated that the dissent cited no Supreme Court case nor any other federal court case prior to 1976 interpreting federal law in which the court "regarded as the 'prevailing party' a litigant who left the courthouse emptyhanded." 121 S.Ct. at 1844-45. Justice Scalia accused the dissent of distorting the term "prevailing party" beyond its normal meaning to permit awards of attorney's fees when the merits of plaintiff's case remain undetermined and the defendant may only have abandoned the fray to avoid the financial or public relations costs of continuing the litigation. He doubted that Congress intended to reward a party because it had greater strength in financial resources, or superiority in media manipulation, instead of superiority in the legal merits of its case.

Justice Scalia recognized that the Court's position will sometimes result in a denial of fees to plaintiffs "with a solid case whose adversary slinks away on the eve of judgment," while he believes that the dissent's position would sometimes reward plaintiffs "with a phony claim." *Id.* at 1847. But he considers the latter situation—in which the law would be the instrument of wrong in exacting attorney's fees for the "extortionist"—much worse than the former—in which the law would deny "the extraordinary boon of attorney's fees" to some plaintiffs who are no less "deserving" of them than others who receive them. *Id.*

Justice Scalia had no problem with the fact that the Court's decision rejected the position that had been taken by most of the Courts of Appeals. He suggested that it is not uncommon for the Court to disagree with the predominant position of the Circuits, sometimes even when they are unanimous. And he argued that the Court's clarification was particularly appropriate since the majority view among the Circuits had been "nurtured and preserved" by "misleading dicta" in some of the Court's prior decisions (to which Justice Scalia admits, he had contributed): "enshrining the error that we ourselves have improvidently suggested and blaming it on the near-unanimous judgment of our colleagues would surely be unworthy." *Id.* at 1849. Justice Scalia concluded by observing that Congress is free to revise the attorney's fees provisions, but added his expectation that, if it did, it would not simply adopt the catalyst theory, but would require courts to determine that there was at least a substantial likelihood that the party requesting fees would have prevailed.

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. She began her dissenting opinion by characterizing the Court's ruling as holding that a plaintiff whose suit prompts the precise relief the lawsuit seeks does not "prevail," and cannot obtain an award of attorney's fees, unless the

plaintiff secures a court entry memorializing the plaintiff's victory. The court entry does not have to be a judgment on the merits or involve any finding of wrongdoing; a court-approved settlement will do. In Justice Ginsburg's view, the Court's insistence on a document filed in court involves an "anemic construction" of the term "prevailing party," and rejects "a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights"—the catalyst theory; the result is a decision that is unwarranted in "history, precedent, or plain English." *Id.* at 1850.

Justice Ginsburg pointed out that, prior to 1994, the Courts of Appeals were unanimous (except the Federal Circuit, which had not addressed the issue) in accepting the catalyst theory and permitting plaintiffs to obtain fee awards even if they did not obtain a judgment or consent decree. In 1994, the Fourth Circuit deviated from its prior stance and broke ranks from the other Circuits by holding that a plaintiff could not become a "prevailing party" without an enforceable judgment, consent decree, or settlement. Subsequently, the nine other circuits reaffirmed their endorsement of the catalyst approach.

Justice Ginsburg outlined three conditions the lower courts had imposed for a party to qualify as a prevailing party under the catalyst theory: (1) a plaintiff had to show that the defendant provided some of the benefit sought by the lawsuit; (2) a plaintiff had to demonstrate that the suit stated a genuine claim—one that was at least "colorable," not frivolous, unreasonable, or groundless; and (3) the plaintiff had to establish that the suit was a "substantial" or "significant" cause of the defendant's action providing relief. In contrast to this accepted interpretation of "prevailing party," she complained that the Court had found a "clear meaning" of the term that "has heretofore eluded the large majority of courts construing those words." *Id.* at 1853. While agreeing with *Black's Law Dictionary* that a party in whose favor a judgment is rendered prevails, she saw no reason to conclude that *only* such a party prevails. Moreover, she observed that the Court had not previously treated *Black's Law Dictionary* as a single authoritative source of definitions, but had given statutory terms a contextual reading.

After reviewing the prior statutory and case law, Justice Ginsburg concluded that "there is substantial support, both old and new, federal and state, for a costs award ... to the plaintiff whose suit prompts the defendant to provide the relief plaintiff seeks." *Id.* at 1855. Believing that Congress intended the phrase "prevailing party" to carry its ordinary, contemporary, common meaning, Justice Ginsburg quoted a dictionary definition of the word "prevail" as meaning "gain victory by virtue of strength or superiority: win mastery: triumph." *Id.*, quoting *Webster's Third New International Dictionary* 1797 (1976). She argued that a lawsuit's ultimate purpose is to achieve actual relief from an opponent, and, while a favorable court judgment may be instrumental in gaining such relief, the judicial decree is not the end but the means. Based upon this common understanding of "prevailing," if a party reaches the "sought-after destination," then the party prevails "regardless of the route taken." *Id.* at 1856, quoting *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (5th Cir. 1985). Thus, Justice Ginsburg argued that a fair reading of the attorney's fees provisions in the FHAA and ADA would indicate that a party prevails whenever the party achieves, by instituting litigation, the practical relief sought in the complaint. In the present case, she believed the plaintiffs' objective was not to obtain a judge's endorsement, but to stop enforcement of a rule requiring Buckhannon to evict residents like Dorsey Pierce. If the plaintiffs achieved that objective due to the

strength of their case, then they were properly judged as the party who prevailed.

Justice Ginsburg argued that the catalyst theory advanced the enforcement of civil rights by private citizens—sometimes referred to as “private Attorneys General.” It also enabled persons of lesser means to be able to enter into litigation which they otherwise could not afford to undertake. Ultimately, Justice Ginsburg concluded that “[t]he Court’s narrow construction of the words ‘prevailing party’ is unsupported by precedent and unaided by history or logic.” *Id.* at 1861.

K. PGA TOUR, INC. v. MARTIN

PGA Tour, Inc. v. Martin, 532 U.S. 661, 121 S.Ct. 1879 (2001)

Casey Martin, a professional golfer, qualified for the Nike Tour in 1998 and 1999, and for the PGA Tour in 2000. Since birth he has had a degenerative circulatory disorder, called Klippel-Trenaunay-Weber Syndrome, that obstructs the flow of blood from his right leg to his heart. The painful, progressive condition has caused his right leg to atrophy. Toward the end of his college years, he became unable to walk an 18-hole golf course. Walking caused him pain, fatigue, and anxiety; it also created a significant risk of hemorrhaging, blood clots, and fractures of his leg bone that could necessitate an amputation. When Mr. Martin turned pro he entered a three-stage qualifying tournament known as the “Q-School” run by PGA Tour, Inc. He was entitled to use a golf cart during the first two stages, and he completed them successfully. Since 1997, however, the PGA Tour had prohibited the use of carts in the third stage. Mr. Martin made a request, supported by detailed medical records, that he be allowed to use a cart during the third stage. The PGA Tour refused to review the medical records Mr. Martin had submitted or to waive its walking rule for the third stage. Mr. Martin filed a lawsuit in federal court alleging that the PGA Tour was violating ADA by refusing to let him use a golf cart.

The district court entered a preliminary injunction directing that Martin be allowed to use a cart in the final stage of the Q-School and as a competitor in the Nike Tour and PGA Tour. The PGA Tour subsequently moved for summary judgment on the ground that it was exempt from coverage under Title III of ADA as a “private club or establishment,” and also that the play areas of its tour competitions do not constitute places of “public accommodation” within the scope of Title III. The lower court rejected both of these contentions. At trial, the PGA Tour did not contest that Martin had a disability covered by ADA, or that his condition prevented him from walking the golf course. Instead, it argued that the requirement of walking is a substantive rule of competition, and that waiving it for any individual for any reason would fundamentally alter the nature of the competition. The PGA Tour presented evidence that fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum, and that permission to use a cart might give some players a competitive advantage over other players who must walk.

The evidence on behalf of Mr. Martin showed that with a cart he must still walk over a mile during an 18-hole round, and the district court concluded that with his condition the fatigue he suffered was greater than the fatigue other competitors endure from walking the course. The district court rejected

the PGA Tour's contention that there should not be any individualized inquiry into the application of the walking rule, and concluded that under ADA it had a duty to inquire into the purpose of the rule, and to determine whether a reasonable modification could be made to accommodate Martin without frustrating the purpose of the rule and fundamentally altering the nature of PGA Tour's tournaments. After hearing the evidence at trial, the court concluded that using a golf cart would not give Martin a competitive advantage, and that it would not fundamentally alter the nature of PGA Tour golf to accommodate him with a cart. Therefore, the court entered a permanent injunction requiring the PGA Tour to permit Martin to use a cart in tour and qualifying events.

On appeal to the Ninth Circuit, the PGA Tour gave up on its claim that it was exempt as a "private club," but reasserted its contentions that during a tournament the portion of the golf course "behind the ropes" is not a place of public accommodation because the public is restricted from entering it, and that granting Mr. Martin permission to use a cart would "fundamentally alter" the nature of the tour competitions. The Court of Appeals could find no basis for distinguishing between using a place of public accommodation for pleasure and using it in pursuit of a living, and ruled that golf courses remain places of public accommodation during PGA tournaments. The Ninth Circuit viewed the fundamental alteration issue as turning on an individualized, fact-based inquiry, and found that Martin's use of a cart would not fundamentally alter the competition.

On the day after the Ninth Circuit's ruling in the *Martin* case, the Seventh Circuit issued an opinion in the case of *Olinger v. United States Golf Assn.*, 205 F.3d 1001 (7th Cir. 2000), that reached a contrary conclusion on the fundamental alteration issue. Ford Olinger, a golfer with bilateral avascular necrosis, a degenerative condition that significantly hindered his ability to walk, brought the lawsuit against the United States Golf Association (USGA) because it refused to let him use a cart in the United States Open. The Seventh Circuit found that the physical ordeals endured by golf legends Ken Venturi and Ben Hogan when they walked to their Open victories in 1964 and 1950 demonstrated the importance of stamina in the tournament. Moreover, the court ruled, alternatively, that ADA does not require the USGA to bear the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart. The different outcomes in *Martin* and *Olinger* thus represented a split in the Courts of Appeals, one of the factors that influence the Supreme Court to agree to hear an appeal in a case.

In a 7-2 decision, the Supreme Court affirmed the Ninth Circuit's judgment in *Martin*. In an opinion delivered by Justice Stevens, the Court began its discussion of the case by looking at the overall objectives of ADA and observing that "Congress enacted ADA in 1990 to remedy widespread discrimination against disabled individuals." 121 S.Ct. at 1889. It further noted the "comprehensive character" of ADA's "broad mandate" against discrimination on the basis of disability. *Id.* Focusing on the public accommodations provisions—Title III—of the Act, the Court found that the legislative history indicated that the concept of public accommodations should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to people without disabilities.

The Court declared that Title III, by its plain terms, seems to cover PGA Tour events and to afford protection to Mr. Martin. Title III specifically identifies "golf course[s]," as a type of public

accommodation. 42 U.S.C. § 12181(7)(L). It requires those who lease or operate such an accommodation, such as the PGA Tour, not to discriminate against any “individual” in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” of those courses. *Id.*, § 12182(a). Accordingly, the PGA Tour’s “golf tours and their qualifying rounds fit comfortably within the coverage of Title III, and Martin within its protection.” 121 S.Ct. at 1890.

In its appeal to the Supreme Court, the PGA Tour admitted that its tournaments are conducted at places of public accommodation, and stopped contending that the competitors’ area “behind the ropes” is not a public accommodation. Instead, the Tour argued that the competing golfers are not members of the class protected by Title III. According to this argument, Title III addresses discrimination against “clients or customers” seeking to obtain “goods and services” at places of public accommodation, whereas it is Title I that protects persons who work at such places, and in its golf tournaments the PGA Tour operates not as a golf course but as a “place of exhibition or entertainment,” 42 U.S.C. § 12181(7)(C). Thus, a professional golfer such as Martin should be considered a provider rather than a consumer of the entertainment sold to the public. Martin would therefore not be able to bring a claim under Title III because he is not a client or customer of the public accommodation. Moreover, the PGA Tour contended that Mr. Martin’s claim of discrimination was job-related and could only be brought under Title I—the employment provisions of ADA—an option that the district court had foreclosed because it ruled he was an independent contractor rather than an employee.

The Court recognized that the “clients or customers” language did not appear in the general prohibition of discrimination in Title III but in a provision governing attempts to avoid nondiscrimination obligations through contractual licensing, or other arrangements. *Id.*, § 12182(b)(1)(A)(iv). The PGA Tour urged, however, that the limitation of this provision’s coverage to clients or customers should be construed to limit the scope of Title III’s protection as a whole. The Court decided it was not necessary to determine whether the Tour was correct in this interpretation, because, even if it were, Martin was a client or customer of the PGA Tour. The Court found that the PGA Tour simultaneously offered at least two “privileges” to the public—that of watching the golf tournament and that of competing in it. The fact that the PGA Tour serves spectators at tournaments as one set of clients or customers does not prevent it from having another set, players in tournaments, against whom it also may not discriminate. The Court felt that any more restrictive reading of Title III’s coverage, even if the Court accepted the “clients or customers” limitation, would be inconsistent with the literal text of the statute and its expansive purpose. The Court noted that its conclusion on this issue is consistent with case law under Title II (the public accommodations title) of the Civil Rights Act of 1964 that had found golfers and golf tournaments to be covered.

Having ruled that Mr. Martin was entitled to be protected from discrimination on the basis of disability when participating in PGA Tour golf tournaments, the Court then turned its attention to the question whether permitting Martin to use a golf cart would constitute a fundamental alteration. Under ADA, a covered public accommodation must make “reasonable modifications in policies, practices, or procedures” unless the covered entity can “demonstrate that making such modifications would *fundamentally alter the nature* of such goods, services, facilities, privileges, advantages, or accommodations” it provides. 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added). The Court found

that the application of this requirement entails three inquiries: “whether the requested modification is “reasonable,” whether it is “necessary” for the individual with a disability, and whether it would “fundamentally alter the nature of” the competition.” 121 S.Ct. at 1893 n. 38. The PGA Tour conceded that a golf cart was a reasonable modification that was necessary if Martin was to play in its tournaments, so only the third of the three inquiries—whether the use of a golf cart would fundamentally alter the nature of PGA Tour golf competitions—was left for the Court to resolve.

The Court declared that a modification of the golf tournaments might constitute a fundamental alteration in two different ways. First, it might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally. The Court suggested that changing the diameter of the hole from three to six inches might be such a modification. Second, a modification having a lesser impact on the game itself might give a player with a disability an advantage over others and in that way fundamentally alter the character of the competition. The Supreme Court ruled that waiving the walking rule for Martin would not work a fundamental alteration in either sense.

The Court found that the essence of golf is “shot-making—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.” *Id.* at 1893-94. It also recognized that golf carts are officially permitted in a variety of golf competitions, including tournament settings such as the Senior PGA Tour, the open qualifying events for PGA Tour’s tournaments, the first two stages of the Q-School, (and, until 1997, the third stage of the Q-School as well), and even certain tournament rounds in both the PGA Tour and the Nike Tour. The Court concluded, therefore, that the walking rule is not an essential attribute of the game. The PGA Tour argued, however, that the walking rule was essential to the highest levels of golf, because at that level assessing and comparing the performance of different competitors is meaningful only if the competitors are subject to identical substantive rules. It contended that the walking requirement was intended to inject the element of fatigue into the contests of shot-making skill, and that it might be “outcome-affecting” in the sense that it might result in the critical loss of a stroke.

The Court was not convinced that golf was such an exact, pure contest of shot-making skills that it required precisely identical conditions for each competitor. The Court noted that changing weather conditions could produce harder greens and more head winds for one player than another, and even that “[a] lucky bounce may save a shot or two.” *Id.* at 1895. Thus pure chance could have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from PGA Tour’s walking rule. Moreover, the Supreme Court noted that the district court had found, based on the evidence it received, that the fatigue from walking during the PGA Tour’s four-day tournaments cannot be deemed significant. The Court also noted expert testimony that golf is a low intensity activity, and that fatigue from the game is primarily a psychological phenomenon resulting principally from stress and motivation. It recognized other evidence demonstrating that, when given the option of using a cart, the majority of golfers in PGA Tour tournaments had chosen to walk.

The Court found, however, that even if it accepted the PGA Tour’s contention that its walking rule is “outcome affecting” because fatigue may affect performance, it would not excuse the PGA Tour from making the reasonable modification Mr. Martin was requesting without a showing that the use

of a cart would, for him with his particular condition, give him an advantage over other competitors. The Court found that the reasonable modification provision of Title III requires an individualized inquiry whether a specific modification for a particular person's disability would work a fundamental alteration. The PGA Tour had refused to consider Martin's personal circumstances in deciding whether to accommodate his condition. In light of the district court's finding that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking," 994 F.Supp. 1242, 1252 (D.Or. 1998), the Supreme Court held that the purpose of the walking rule would not be compromised "in the slightest" by allowing Martin to use a cart. It declared that "[a] modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament." 121 S.Ct. at 1897.

The Court recognized that the waiver of "an essential rule of competition" for anyone could fundamentally alter the nature of PGA Tour's tournaments, but the walking rule was "at best peripheral" to the nature of the events, and thus can be waived in individual cases without working a fundamental alteration. *Id.* at 1896. The Court characterized the Tour's claim that all the substantive rules for its highest-level competitions are sacrosanct and cannot be modified under any circumstances as essentially a contention that it is exempt from Title III's reasonable modification requirement. *Id.* ADA, however, does not carve out any exemption for elite athletics; on the contrary, it explicitly covers golf courses and places of "exhibition or entertainment." 42 U.S.C. § 12181(7)(C), (L). Any questioning of the appropriateness of having courts apply the reasonable modification requirement to athletic competition is, said the Court, a complaint that should be directed to Congress, not to the Court. The Court flatly rejected dissenting Justice Scalia's contention that all rules of sports games are arbitrary and that no one, including the courts, can determine them to be nonessential if the rulemaker deems them essential. It stated that whatever merit Justice Scalia's "post-modern view" of sport may have, Congress clearly did not incorporate it in Title III of ADA, and did not give sports organizations "carte-blanche authority to exempt themselves from the fundamental alteration inquiry" by deeming any rule to be essential—an approach that would make the statutory word "fundamentally" superfluous, because alteration of any rule governing an event at a public accommodation might be considered a fundamental alteration. *Id.* at 1897.

The Court admitted that ADA imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies. But it was convinced that Congress intended that an entity like the PGA should give individualized attention to the handful of requests that it might receive from athletes with disabilities for a modification or waiver of a rule to allow them access to the competition, and also should carefully weigh the purpose, as well as the letter, of the rule before deciding that no accommodation would be tolerable. The Court concluded that in light of such obligations under ADA, Martin's request for a waiver of the walking rule should have been granted. The Court affirmed the judgment of the Ninth Circuit.

Justice Scalia submitted a fierce dissenting opinion, in which he was joined by Justice Thomas. He argued that the majority's ruling distorted the text of Title III, the structure of ADA, and common sense. In his view, Title III was intended to provide protection only to customers and clients as distinguished from employers and independent contractors. And he argued that professional golfers

are not customers of public accommodations because they are not using such places in order to enjoy the goods, services, facilities, privileges, advantages, or accommodations these places provide, but rather to earn money. In short, they are selling recreation or entertainment, not buying it. Accordingly, in Justice Scalia's view, professional athletes should not be protected from discrimination under Title III.

Justice Scalia also argued that Title III guarantees only "access" to the goods, services, facilities, privileges, advantages, or accommodations provided by public accommodations and does not regulate the content of the goods or services offered. He characterized golf competitions as such a service, whose content ADA does not address. In his view, the PGA Tour could not deny Mr. Martin access to its events because of his disability, but it was not required to provide him a game different (whether in its essentials or in its details) from that offered to everyone else.

Turning to the fundamental alteration issue, Justice Scalia argued that all games are "entirely arbitrary," and that "there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be 'nonessential' if the rulemaker (here the PGA Tour) deems it to be essential." *Id.* at 1902. He called it "incredibly silly and incredibly difficult" for the Court to determine whether walking is a fundamental or essential aspect of golf, and suggested that the Court should have declined to do so "either out of humility or out of self-respect." *Id.* at 1902-03. In addition, he took strong issue with the majority's ruling that the existence of a fundamental alteration should be determined on the basis of individualized factual findings. He contended that ADA seeks to assure only equal access to competitive sporting events, not an equal chance to win, and that the managing bodies of competitive sports should not have "to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition." *Id.* at 1904. In Justice Scalia's view, the question whether the PGA Tour should have voluntarily granted Mr. Martin a waiver of the walking rule was a close one, but such a waiver should not be imposed as a legal requirement.

Within a week after issuing its decision in *PGA Tour, Inc. v. Martin*, the Supreme Court vacated the judgment of the Court of Appeals for the Seventh Circuit in the *Olinger v. United States Golf Assn.* case, and remanded it to the Seventh Circuit for further consideration in light of the Supreme Court's ruling in *Martin*. *Olinger v. United States Golf Ass'n*, 121 S.Ct. 2212 (2001).

L. TOYOTA MOTOR MANUFACTURING, KENTUCKY, INC. v. WILLIAMS

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 122 S.Ct. 681 (2002).

In 1990, Toyota Motor Manufacturing, Kentucky, Inc., hired Ella Williams to work on an engine assembly line at its car manufacturing plant in Georgetown, Kentucky. Soon after she began to work with pneumatic tools, Ms. Williams developed carpal tunnel syndrome and tendinitis that caused pain in both of her hands, wrists, and arms. Her personal physician placed her on permanent work restrictions that precluded her from lifting more than 20 pounds, from frequent lifting of even lighter objects, from constant repetitive motions of her wrists or elbows, from performing overhead work, and from using

vibratory or pneumatic tools. As a result, Toyota assigned Ms. Williams to various modified duty jobs. Eventually she was assigned to work as part of a Quality Control Inspection Operations team, where she routinely performed two of the four tasks of the team, both of which involved visual inspection. After two years during which Ms. Williams had satisfactorily performed these tasks, Toyota decided that teams should rotate through all four of the Quality Control Inspection tasks. Accordingly, Ms. Williams was ordered to apply a substance called highlight oil to several parts of cars as they passed on the assembly line, which required her to hold her hands and arms up around shoulder level for several hours at a time. As a result, she began experiencing pain in her neck and shoulders, and was diagnosed as having several medical conditions (including myotendinitis, myositis, and thoracic outlet compression) that cause inflammation and pain in the arms and shoulders.

Ms. Williams filed an ADA claim with the EEOC, alleging that Toyota had failed to provide her with a reasonable accommodation as required under the ADA. The district court granted summary judgment to Toyota and found that Ms. Williams' impairments did not qualify as a "disability" under the ADA because they did not substantially limit any major life activity, she did not have a record of a disabling condition, and Toyota had not regarded her as having a disability. The Court of Appeals for the Sixth Circuit reversed, holding that Ms. Williams' impairments substantially limited her in the major life activity of performing manual tasks. The court said that the proper test was whether Williams had shown that her manual disability involved a class of manual activities affecting the ability to perform tasks at work. Since her ailments prevented her from doing the tasks associated with certain types of manual jobs that required the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time, the Sixth Circuit ruled that Williams had satisfied the standard for having a disability under the ADA.

In a unanimous decision delivered by Justice O'Connor, the Supreme Court ruled that the Sixth Circuit did not apply the proper standard in determining that Ms. Williams was disabled under the ADA "because it analyzed only a limited class of manual tasks and failed to ask whether [Ms. Williams'] impairments prevented or restricted her from performing tasks that are of central importance to most people's daily lives." 122 S.Ct. at 686. The Court noted that only the major life activity of performing manual tasks was before it on appeal, and expressed no opinion as to whether Ms. Williams' limitations on working, lifting, and other activities that had been raised in the lower courts were sufficient to establish a disability under the ADA.

The parties had not contested and the Court accepted that Ms. Williams' conditions constituted impairments, but the Court focused on whether the impairments substantially limited Williams in the major life activity of performing manual tasks. The Court declared that "[s]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" *Id.* at 691, citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1976) and 17 OXFORD ENGLISH DICTIONARY 64-67 (2d ed. 1989). Therefore, the Court ruled, the word "substantial" excludes impairments that interfere in only a minor way with performance of manual tasks from constituting disabilities under the ADA. The Court

also stated that "[m]ajor' in the phrase 'major life activities' means important" and so "major life activities" refers to "those activities that are of central importance to daily life." 122 S.Ct. at 691, citing WEBSTER'S, *supra*, at 1363.

In a significant and ominous statement, the Court indicated, based upon the ADA finding that 43 million people have disabilities, that the terms "substantially limited" and "major life activities" "need to be interpreted strictly to create a demanding standard for qualifying as disabled" 122 S.Ct. at 691. The Court reasoned that "[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number would surely have been much higher." *Id.* Thus, the Court indicated that it would not suffice to try to prove disability merely by submitting evidence of a medical diagnosis of an impairment, but would require a further showing that the limitation is substantial in terms of the individual's own experience. The Court added that an individualized assessment of the effect of an impairment is particularly necessary in regard to conditions, such as carpal tunnel syndrome, having symptoms that vary widely from person to person. The Court noted that under the EEOC's regulations (which the Court assumed were valid and reasonable because the parties had accepted that they were, even though the Court expressed reservations about their persuasive value), the determination of whether an impairment is substantially limiting involves consideration of its nature, severity, and duration. *Id.* at 690, *citing* 29 C.F.R. ?? 1630.2(j)(2)(ii)-(iii)(2001).

The Court ruled that the Court of Appeals had erred in suggesting that a manual disability must impede a class of manual activities and that those activities must be ones that affect the ability to perform tasks at work. As to the first, the Supreme Court declared that nothing in the ADA, the regulations, or the Court's previous rulings supports the application of a class-based framework except in regard to the major life activity of working. Conversely, the Sixth Circuit was also wrong in limiting its consideration of the major life activity of performing manual tasks to only tasks associated with Ms. Williams' job. The Court noted that the definition of disability is applicable not only to employment but to portions of the ADA that apply to other subjects such as transportation and public accommodations, and should cover individuals in such contexts whether or not they have jobs. Moreover, the Court observed that the manual tasks unique to a particular job are not necessarily important parts of most people's lives. At the same time, the Sixth Circuit disregarded evidence that Ms. Williams was able to perform tasks involved in her personal hygiene and some personal and household chores. Yet, according to the Supreme Court, "household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether [Ms. Williams] was substantially limited in performing manual tasks." *Id.* at 693. Because the Sixth Circuit had applied improper standards in evaluating Ms. Williams' alleged disability, the Court reversed the lower court's grant of summary judgment to her. The Court refused, however, to reinstate the district court's original grant of summary judgment to Toyota, because Toyota had not sought that result in its appeal to the Supreme Court. Accordingly, the Supreme Court remanded the case for further proceedings in the lower courts.

M. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. WAFFLE HOUSE, INC.

Equal Employment Opportunity Commission v. Waffle House, Inc., 122 S.Ct. 754 (2002).

In 1994, Eric Baker began working as a grill operator at a Waffle House restaurant. Like all prospective Waffle House employees, Mr. Baker was required to sign an application in which he agreed that "any dispute or claim" concerning his employment would be "settled by binding arbitration." Sixteen days after starting to work at the restaurant, Mr. Baker had a seizure at work. Shortly thereafter, Waffle House, Inc., fired him. Mr. Baker did not initiate arbitration proceedings. He did, however, file a discrimination charge with the EEOC alleging that his discharge violated Title I of the ADA. After investigating the matter and trying unsuccessfully to conciliate, the EEOC filed an enforcement suit in federal district court alleging that Waffle House's employment practices, including its discharge of Mr. Baker, violated the ADA and that the violation was intentional and done with malice or reckless indifference to Mr. Baker's rights under the ADA. The complaint sought injunctive relief to eliminate Waffle House's unlawful employment practices; specific relief designed to make Mr. Baker "whole," including back pay, reinstatement, and compensatory damages; and punitive damages for Waffle House's malicious and reckless conduct.

Waffle House filed a petition under the Federal Arbitration Act (FAA) to stay the EEOC's lawsuit and compel arbitration, or to have the suit dismissed. The district court denied Waffle House's motion, because it found that Mr. Baker's employment contract had not actually included the arbitration provision. On appeal, the Court of Appeals for the Fourth Circuit disagreed with the district court and determined that Mr. Baker and Waffle House had entered into a valid and enforceable arbitration agreement. The Fourth Circuit concluded, however, that because the EEOC has independent statutory authority to pursue such actions and because the EEOC was not a party to the employment contract, the arbitration agreement did not foreclose the enforcement action. But the Court of Appeals ruled that in these circumstances the EEOC was limited to seeking injunctive relief and was precluded from seeking victim-specific, "make-whole" relief, because the FAA policy favoring enforcement of private arbitration agreements required giving some effect to Mr. Baker's arbitration agreement. The Fourth Circuit found that this policy interest under the FAA outweighed the EEOC's right to proceed in federal court in situations in which it seeks primarily to vindicate private, rather than public, interests.

In a 6-3 decision delivered by Justice Stevens, the Supreme Court ruled that an arbitration agreement between an employer and employee does not foreclose the EEOC from pursuing victim-specific remedies on behalf of the employee. The Court began its analysis by observing that Congress has authorized the EEOC, in enforcing the ADA's prohibitions against employment discrimination on the basis of disability, to exercise the enforcement powers, remedies, and procedures set forth in Title VII of the Civil Rights Act of 1964. In 1991, Title VII was amended to give the EEOC the status of "a complaining party," to

give EEOC authority to bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, backpay, and compensatory or punitive damages, in both Title VII and ADA actions. Accordingly, the Court observed, "these statutes unambiguously authorize the EEOC to obtain the relief it seeks in its complaint sought if it can prove its case" 122 S.Ct. at 760.

In prior decisions, the Court had recognized that the EEOC's enforcement role and an individual employee's private cause of action were not on the same footing. Against the background of these civil rights statutes and judicial precedents, the Court examined the impact of the Federal Arbitration Act (FAA). Originally enacted in 1925, the FAA announced a federal policy favoring arbitration agreements; its central purpose was to give arbitration agreements the same status as other contracts, thus reversing the traditional hostility to such agreements in English and American law. The FAA provides for stays of federal court proceedings when a party has failed to comply with an arbitration agreement. The Court found, however, that the FAA does not require parties to arbitrate when they have not agreed to do so. Because the EEOC was not a party to the arbitration agreement and had not agreed to arbitrate its claims, the FAA does not require the agency to relinquish its right to pursue judicial relief, even though the employer and employee may have chosen a different process or forum for resolving their disputes.

The interaction between the civil rights statutes and the federal policy favoring arbitration under the FAA presented, in the Court's eyes, a choice between sharp alternatives. Either the plain language of Title VII and the contractual arbitration agreement should be effectuated, giving the EEOC authority to pursue the full range of remedies, or the federal policy favoring arbitration should be held to trump the Title VII and contractual provisions, and the EEOC should be barred from pursuing any claim outside of the arbitration process. The Court observed that the Fourth Circuit's attempt to devise a "compromise solution" that would "split the difference" by allowing the EEOC to pursue injunctive relief but not make-whole remedies would turn "what is effectively a forum selection clause into a waiver of a non-party's statutory remedies." 122 S.Ct. at 765. This approach, said the Court, "would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function." *Id.* The Court ruled that the EEOC's authority for pursuing relief was not under the control of Mr. Baker, nor contingent upon the remedies directly available to him: "[t]he statute clearly makes the EEOC master of its own case" *Id.* at 763. Since the EEOC's claims under the ADA were neither "merely derivative" nor "a proxy" for those of the employee, the Court reversed the judgment of the Fourth Circuit and remanded the case for further proceedings consistent with the Supreme Court's opinion.

Justice Thomas wrote a dissenting opinion in which he was joined by Chief Justice Rehnquist and Justice Scalia. Justice Thomas stressed that the EEOC brought its action "on behalf of" Mr. Baker, and that any damages recovered by the EEOC would be paid to Mr. Baker. Justice Thomas argued that the majority was wrong in allowing the EEOC to do something "on behalf of" Mr. Baker that he would not be able to do for himself. He contended that such an outcome was contrary to language in Title VII authorizing the federal courts to provide "appropriate" relief. He believed that it was not "appropriate" to allow the

EEOC to do on behalf of Mr. Baker something that he was precluded from doing for himself. In Justice Thomas's view, the majority was granting to EEOC an authority to determine that victim-specific relief is "appropriate," thus usurping a traditional role of courts, "eviscerat[ing]" the arbitration agreement entered into by Waffle House and Mr. Baker, and "liberat[ing] Baker from the consequences of his agreement." *Id.* at 772.

Justice Thomas charged further that the majority's reasoning had no logical or principled stopping point, and that it could justify the EEOC in continuing to pursue claims in court even in cases where the employee has entered into a settlement agreement with the employer. He argued further that provisions in the ADA and in the Civil Rights Act of 1991 encouraging arbitration indicated that Congress did not intend the ADA's enforcement scheme to undermine the FAA.

N. U.S. AIRWAYS, INC. V. BARNETT

U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516 (2002)

Robert Barnett injured his back working as a cargo handler at U.S. Airways in 1990. He used his seniority rights to transfer to a less physically demanding mailroom position. After holding the mailroom position for some two years, Mr. Barnett heard that it was to be opened to seniority-based employee bidding, and that company employees senior to him planned to put in bids. He asked U.S. Airways to let him keep his mailroom position by making an exception to the seniority-bidding process to accommodate limitations resulting from his disability. U.S. Airways considered the matter for five months, but ultimately opted not to grant the exception.

Upon losing his job, Mr. Barnett filed suit against U.S. Airways under Title I of the ADA. In his complaint, Mr. Barnett claimed that as he was an individual with a disability capable of performing the essential functions of the mailroom position, that assignment to the mailroom position constituted a reasonable accommodation of his disability, and that U.S. Airways was discriminating against him by refusing to assign him to that job. The federal district court granted U.S. Airways' motion for summary judgment, ruling that varying the seniority policy would result in undue hardship both to the company and to its employees without disabilities. The Court of Appeals for the Ninth Circuit reversed the decision of the district court, and found that a seniority system is "merely a factor in the undue hardship analysis," and that the courts must conduct "[a] case-by-case fact intensive analysis ... to determine whether any particular reassignment would constitute an undue hardship to the employer." 228 F.3d 1105, 1120 (9th Cir. 2000) (en banc).

U.S. Airways appealed to the Supreme Court and asked it to decide whether "the ADA requires an employer to reassign a disabled employee to a position as a reasonable accommodation even when another employee is entitled to the position under the employer's bona fide and established seniority system." 122 S.Ct. at 1520, quoting Brief for Petitioner i. Noting that the circuit courts had drawn

different conclusions regarding the legal significance of seniority systems, the Supreme Court agreed to decide the matter.

Writing the opinion for a 5-to-4 Court, Justice Breyer, joined by Justices Rehnquist, Stevens, O'Connor and Kennedy, held that the ADA does not ordinarily require the assignment of an employee with a disability to a particular position to which another employee is entitled under an employer's established seniority, but might in special circumstances. U.S. Airways had argued that a seniority system always takes priority over accommodation, because the ADA does not require employers to engage in "preferential treatment" of employees with disabilities and that making exceptions to a seniority system would constitute preferential treatment. The Court rejected this argument and ruled that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." 122 S.Ct. at 1521. The Court indicated that reasonable accommodations constitute a form of "preference" required for workers with disabilities under the ADA, one that is necessary to offer them the same workplace opportunity as other employees. Thus, the Court rejected any "automatic exemption" of seniority rules, and declared:

The simple fact that an accommodation would provide a "preference" -- in the sense that it would permit the worker with a disability to violate a rule that others must obey -- cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."
Id.

The Court also dismissed U.S. Airways' argument that use of the words "reassignment to a vacant position" in the ADA provision recognizing reassignment as a form of reasonable accommodation (42 U.S.C. § 12111(9)(B)) precluded reassignment in this case because the position Mr. Barnett occupied was not vacant. The Court found that "vacant" had no special meaning in these circumstances, and, since the position Barnett held was "open" for bidding under the seniority system, it could be subject to the reasonable accommodation requirement.

On the other hand, the Court rejected Mr. Barnett's contention that reasonable accommodation should be interpreted as "effective accommodation," meaning an accommodation that enables a person with a disability to perform the essential functions of a position. The Court found that "reasonable" does not mean "effective," and that it is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. Thus, an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions; the Court ruled that the ADA does not "demand action beyond the realm of the reasonable." *Id.* at 1523.

The Court adopted a burden-shifting approach to the issues of reasonableness of accommodations and whether they would impose undue hardships. To overcome an employer's summary judgment motion, a plaintiff employee needs only show that an accommodations seems reasonable on its face, "ordinarily or in the run of cases." *Id.* Once the plaintiff meets this burden, the employer has to establish the existence of "undue hardship" in the particular circumstances. The Court found that the lower courts

had used such a framework to successfully resolve the distinction between the concepts of reasonable accommodation and undue hardship without rendering them functionally identical in meaning.

Applying the burden-shifting approach to accommodations that conflict with seniority systems, the Court found that ordinarily such accommodations would not be reasonable. Noting the importance of seniority systems to employee-management relations and employees' expectations of consistent, uniform treatment, the Court ruled that employers should not have to prove on a case-by-case basis that its seniority system should prevail; when assignment to a position as a proposed accommodation runs counter to a seniority system, the Court declared that "it will ordinarily be unreasonable for the assignment to prevail." *Id.* at 1524.

But while the Court held that seniority systems shall "ordinarily" take precedence over accommodations, it did not agree with U.S. Airways' position that seniority systems must always prevail over accommodations requests. The Court announced that a plaintiff may demonstrate "special circumstances" under which such an accommodation can be considered reasonable. *Id.* at 1525. As an example of such circumstances, the Court mentioned situations in which other exceptions to a seniority system are made relatively frequently so permitting another to accommodate a worker with a disability would not significantly impact the company or workers' expectations.

To permit the lower courts to apply the principles and procedural framework it had announced, the Supreme Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the Court's opinion.

The Court's 5 to 4 majority was by the narrowest of margins; Justice O'Connor filed a concurring opinion in which she disclosed that she was troubled by some of the reasoning in the majority opinion and was joining it only because her vote was needed for any majority standard to emerge. Justice O'Connor stated that "if each member voted consistently with his or her beliefs, [the Court] would not agree on a resolution of the question presented in this case." 122 S.Ct. at 1526 (O'Connor, concurring). Because she considered it important for a majority of the Court to agree on a rule when interpreting statutes, and because she expected that the standard announced by the Court would generally achieve the same outcomes as her interpretation, she joined the Court's opinion. In her own view, however, Justice O'Connor would have held that a seniority system would only render a job reassignment as an accommodation under the ADA unreasonable if the seniority system was legally enforceable. She noted that in the U.S. Airways' Personnel Policy Guide for Agents, the document that contains its seniority policy, states that it is "not intended to be a contract (express or implied) or otherwise create legally enforceable obligations." 122 S.Ct. at 1527. Since U.S. Airways' seniority policy was not legally enforceable, the mailroom position should have been considered vacant, and Mr. Barnett's continued mailroom assignment would be a reasonable accommodation.

Justice Stevens filed a concurring opinion to identify some issues that in his view would need to be resolved by the lower courts to determine whether the accommodation requested by Mr. Barnett was reasonable. He believed that Mr. Barnett would have to meet the burden of favorably answering the following questions to overcome the presumption that U.S. Airways' seniority system justified his discharge:

(1) whether the mailroom position held by [Barnett] became open for bidding merely in response to a routine airline schedule change, or as the direct consequence of the layoff of several thousand employees; (2) whether [Barnett]'s requested accommodation should be viewed as an assignment to a vacant position, or as the maintenance of the status quo; and (3) exactly what impact the grant of [Barnett]'s request would have had on other employees.

122 S.Ct. at 1526 (Stevens, concurring) (footnotes omitted).

Justice Scalia wrote a dissenting opinion in which he was joined by Justice Thomas, and Justice Souter wrote a dissent in which he was joined by Justice Ginsburg. The reasoning of the two dissenting opinions was almost directly opposite one another. Justice Scalia would have ruled that seniority system should always take precedence over assignment to a position as a reasonable accommodation. In his view, reasonable accommodation under the ADA should only apply to "disability-related obstacle[s]," that is, to "barriers that would not be barriers *but for* the employee's disability." 122 S.Ct. at 1529. In his analysis, bona fide seniority systems are neutral workplace rules to which the reasonable accommodation requirement should not apply. Justice Souter, on the other hand, would have held that ADA does not exempt seniority rules from the reasonable accommodation requirement. He agreed with the Ninth Circuit that a seniority system derived from collective bargaining is only "a factor" in determining "reasonableness." In this case, however, U.S. Airways' seniority system was not even the product of collective bargaining, it was revocable at will, Mr. Barnett had already held the position for two years, and continuation of the placement would have caused minimal disruption to U.S. Airways' operations. Accordingly, in Justice Souter's view the seniority system was of minimal relevance and Mr. Barnett had met the burden of proving the accommodation was reasonable on its face. Justice Souter would have held that the burden now shifted to U. S. Airways to demonstrate that Barnett's requested accommodation would result in an undue hardship.

O. CHEVRON U.S.A. INC. V. ECHAZABAL

Chevron U.S.A. Inc. v. Echazabal, 122 S.Ct. 2045 (2002)

Mario Echazabal had worked in the coker unit of an oil refinery in El Segundo, California, owned by Chevron U.S.A. Inc., since 1972. In the coker unit, waste oil is recycled into usable chemicals; the air in the unit is commonly contaminated with solvents and other potentially toxic chemicals. Mr. Echazabal did not work directly for Chevron, but rather for independent contractors operating at the facility. On two occasions, he applied for a job directly with Chevron, which made an offer to hire him conditioned on his passing the company's physical examination. The physical exams showed that Mr. Echazabal had

liver damage, eventually determined to be the result of Hepatitis C. Chevron's doctors said that the liver damage would be aggravated by continued exposure to toxins at the refinery. Chevron withdrew its job offers, and the second time it asked the contractor employing Mr. Echazabal either to reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. In 1996, the contractor terminated Mr. Echazabal.

Mr. Echazabal sued Chevron, claiming, among other things, that the company violated the ADA by refusing to hire him, and by refusing to permit him to continue working in the refinery, because of a disability -- his liver condition. Chevron contended its actions were permissible under a regulation of the Equal Employment Opportunity Commission (EEOC) recognizing as a permissible qualification standard a requirement that a worker's disability on the job not pose a "direct threat" to his health. 29 C.F.R. ? 1630.15(b)(2) (2001). Two medical witnesses testified on Mr. Echazabal's behalf that his liver function was not impaired and subject to further damage under the job conditions in the refinery, but the district court granted summary judgment in Chevron's favor. The district court held that Mr. Echazabal raised no genuine issue of material fact as to whether the company acted reasonably in relying on its own doctors' medical advice, whether or not that advice was accurate.

On appeal, the Court of Appeals for the Ninth Circuit ruled that the EEOC's regulation recognizing a threat-to-self defense exceeded the scope of EEOC's authority under the ADA, and reversed the decision of the district court. The Seventh Circuit reasoned that the ADA's recognition only of a defense for threats to "other individuals in the workplace" meant that a regulation permitting such a defense for threats to self would conflict with congressional policy established in the ADA.

Justice Souter delivered an opinion on behalf of a unanimous Court that upheld the EEOC threat-to-self provision. Mr. Echazabal had argued, first, that the ADA precluded the EEOC from creating a threat-to-self defense because the statute did not leave a gap for the agency to fill. In support of this argument, he pointed to a "canon of statutory construction" -- a rule established by the courts to guide the interpretation of statutes. Judges and lawyers know the particular canon Mr. Echazabal raised by its Latin name: *expressio unius exclusio alterius*. It means "expressing one item of [an] associated group or series excludes another left unmentioned." 122 S.Ct. at 2049. The Court ruled that the canon did not apply in this case for several reasons. One was that the ADA states broadly that qualification standards "may include a requirement that an individual not pose a direct threat to others," 42 U.S.C. ? 12113(b), and the Court concluded that the expansive phrasing of "may include" indicated that Congress was not trying to make any sort of exclusiveness in mentioning threat to others. Moreover, the Court found that the statutory provision at issue here did not omit a part of a series of two or more things that should normally go hand in hand so that the leaving out of one justifies an inference that the omission was intentional. The Court did not accept that direct threats to others and direct threats to self are such a natural, closely related series. To establish that they were, Mr. Echazabal pointed to a provision of the EEOC's Rehabilitation Act regulation that includes an exception for workers who would pose a direct threat to others or to self. 29 C.F.R. ? 1613.702(f) (1990). In rejecting the contention that this provision

demonstrated a series of closely related things, the Court noted that the Rehabilitation Act regulations of the Department of Justice, the Department of Labor, and the Department of Health and Human Services) did not recognize threats to self along with threats to others. The Court reasoned that the ADA's use of language identical to the earlier statute, when Congress knew that the EEOC had interpreted that language to add a threat-to-self standard is inconclusive, because it may mean either that Congress meant to imply that the EEOC had been wrong in reading the earlier language to allow it to recognize threats to self, or that Congress assumed that the agency was free to do under the ADA what it had already done under the Rehabilitation Act's identical language. Given these two possible opposing interpretations, the Court found that no negative inference regarding threats to self was warranted.

The Court also considered there to be no apparent stopping point to the argument that the ADA's mention of threats to others. It questioned whether Congress's specifying threats to others in the workplace, for example, meant that an employer could not refuse to hire a worker whose disability would threaten others outside the workplace. With a dramatic flair, the Court posed the following inflammatory question: "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" *Id.* at 2051. For all these reasons, the Court concluded that the canon of statutory construction did not apply in the circumstances of the case.

Mr. Echazabal had argued in the alternative that even if the ADA did permit the EEOC some leeway to go beyond what was in the literal text of the statute, the regulatory provision doing so was an unreasonable interpretation. Chevron countered that the threat-to-self provision was reasonable because it protects employers from time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. ? 651 *et seq.* The Court focused only on the concern with OSHA and found that it was sufficient to establish the reasonableness of the provision. Mr. Echazabal had pointed out that "there is no known instance of OSHA enforcement, or even threatened enforcement, against an employer who relied on the ADA to hire a worker willing to accept a risk to himself from his disability on the job." *Id.* at 2052. But the Court stated that an employer who hired an employee in such circumstances "would be asking for trouble" *Id.* The Court considered it appropriate for the EEOC to resolve the potential tension between the policy in the ADA ensuring an individual with a disability's right to work on equal terms in the workplace with the "competing policy" of OSHA to ensure the safety of each worker, by adopting a threat-to-self provision. *Id.*

Mr. Echazabal also contended that the provision was an unreasonable interpretation because it allows employers to impose "overprotective rules and policies," 42 U.S.C. ? 12101(a)(5), and other forms of workplace paternalism that the ADA prohibits. In the Court's view, however, the ADA was not aimed at employers' refusals to place workers with disabilities in real, specifically demonstrated risks, but addressed refusals to "give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes." *Id.* In essence, the Court viewed the ADA as addressing employers' protectiveness toward employees only when it is "sham" protectiveness based on

false stereotypes about classes of disabilities. The Court noted that the EEOC provision provides that the direct threat defense must be "based on a reasonable medical judgment" supported by "the most current medical knowledge and/or the best available objective evidence," and must involve an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," that considers how imminent the risk is and how severe the harm would be. 29 C.F.R. ? 1630.2(r) (2001). The Court found that such a particularized inquiry into the harms the employee would probably face was a reasonable way to prohibit workplace paternalism while at the same time allowing employers to protect workers from specific, documented risks.

Finally, Mr. Echazabal argued that EEOC's provision would make the direct threat provision of the statute meaningless "surplusage." The Court responded that the mere fact that the EEOC might have adopted a threat-to-others rule did not mean that the statutory delineation of such a rule did not accomplish anything. The statutory rule made sure that such a standard would exist, and avoided administrative and legal battles regarding it. In the Court's view, the statutory provision established a threat-to-others standard and left open the possibility that the EEOC might go a step further and establish a threat-to-self standard. In the eyes of the Court, such a statutory provision may not have been indispensable, but it was a useful thing for Congress to have done.

Having rejected all of the arguments asserted on Mr. Echazabal's behalf against EEOC's threat-to-self provision, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the Supreme Court's opinion.

P. BARNES V. GORMAN

Barnes v. Gorman, 122 S.Ct. 2097 (2002)

Jeffrey Gorman, who uses a wheelchair due to paraplegia, got into a fight with a bouncer at a nightclub in Kansas City, Missouri, in May 1992. Police officers who responded to the incident arrested Mr. Gorman on a charge of trespass. Before a police van arrived to transport him to the police station, Mr. Gorman asked for permission to use a restroom to empty his urine bag, but the police officers refused. When the vehicle arrived, it was not equipped for wheelchairs. Although Mr. Gorman objected, police officers took him out of his wheelchair and strapped him to a narrow bench in the rear of the van, securing him with a seatbelt and his own belt. On the way to the police station, Mr. Gorman released his seatbelt because he believed it was putting too much pressure on his urine bag. When the other belt came loose, Mr. Gorman fell to the floor of the van, injuring his shoulder and back, and causing his urine bag to rupture. The officer driving the van found it impossible to lift Mr. Gorman, and fastened him to a support for the rest of the trip to the station. Upon arrival, the police booked, processed, and then released Mr. Gorman. He was eventually convicted of misdemeanor trespass. The events surrounding Mr. Gorman's arrest caused him serious medical problems, including a bladder infection, serious lower back

pain, and uncontrollable spasms in his paralyzed areas. Together these problems caused him to be unable to work full time.

Mr. Gorman filed a lawsuit against members of the Kansas City Board of Police Commissioners, the chief of police, and the officer who drove the van claiming that they had violated his rights under Title II of the ADA and Section 504 of the Rehabilitation Act. He contended that they had discriminated against him on the basis of his disability because they did not have appropriate policies for the arrest and transportation of persons with spinal cord injuries.

After a trial, the jury found the police officials had violated the ADA and Section 504, and awarded Mr. Gorman more than \$1 million in compensatory damages and \$1.2 million in punitive damages. The District Court judge vacated the punitive damages part of the verdict, ruling that punitive damages are not available in suits under ? 202 of the ADA and Section 504 of the Rehabilitation Act. On appeal, the Court of Appeals for the Eighth Circuit reversed the district court judge's denial of punitive damages. The Eighth Circuit based its ruling on language in the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 70-71 (1992), in which the Court stated a "general rule" that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." The Eighth Circuit reasoned that punitive damages were an integral part of the judicial arsenal of remedies, and that Congress had not done anything to change this tradition in enacting or amending the ADA and Section 504. 257 F.3d 738, 745, 747 (8th Cir. 2001).

The Supreme Court ruled unanimously that punitive damages were not available to Mr. Gorman under either Section 504 or Title II of the ADA. The Court began its analysis by noting that Section 203 of the ADA provides that the remedies for violations of ? 202 (the prohibition of discrimination by state and local government entities) are the same remedies as provided in ? 505(a)(2) of the Rehabilitation Act for violations of Section 504. 42 U.S.C. ? 12133. Section 505(a)(2) of the Rehabilitation Act, in turn, provides that the remedies for violations of Section 504 shall be the same as those in Title VI of the Civil Rights Act of 1964. 29 U.S.C. ? 794a(a)(2). As a result, the remedies for violations of ? 202 of the ADA and ? 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in federally funded programs and activities. 42 U.S.C. ? 2000d *et seq.*

The Supreme Court stated that it had not previously resolved the issue of what remedies are available in private lawsuits under Title VI. The Court declared that Title VI is Spending Clause legislation, enacted pursuant to Congress's power under the Constitution to raise and spend federal money. The Court stated that legislation that places conditions on the grant of federal funds should be considered "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." 122 S.Ct. at 2100-01, quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). The Court held that while not all contract-law rules would automatically apply to Spending

Clause legislation, it is appropriate to apply contract analysis to questions about damages remedies available in private lawsuits under such legislation.

The Court held that recipients of federal funds should only be liable for remedies to which they were provided reasonable notice they would be subjecting themselves, either by explicit reference in the legislation or as part of traditional remedies for breaches of contract. Legal rules applicable to breaches of contract generally do not authorize punitive damages. Nor, said the Court, should punitive damages be considered as implicitly authorized either from language of Title VI or from community standards of fairness. The Court termed punitive damages as constituting "unorthodox and indeterminate liability," and considered it unlikely that funding recipients would subject themselves to such liability. 122 S.Ct. at 2102.

The Court argued that the disallowance of punitive damages under Title VI is not inconsistent with the traditional rule that federal courts are empowered to use "any available remedy" to make good the wrong done in a violation of a federal law. *Id.*, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). The Court concluded that compensatory damages were adequate to right the wrong done in violations of Spending Clause legislation.

Having concluded that punitive damages may not be awarded in private causes of action brought under Title VI, the Court reasoned that such damages were therefore unavailable for violations of ? 202 of the ADA or of Section 504 of the Rehabilitation Act of 1973. The Court reversed the judgment of the Eighth Circuit.

All of the Justices were in agreement that the Eighth Circuit had erred, and that Mr. Gorman was not entitled to punitive damages. There was some disagreement, however, regarding some aspects of the opinion for the Court. Justice Souter, joined by Justice O'Connor, signed onto the Court's opinion, but wrote a separate concurring opinion to declare their view that the majority's opinion should be read as permitting the possibility that the contract law analogy might not resolve all issues regarding damages under Spending Clause legislation. As a particular example of an issue that would not necessarily be resolved by contract analysis, Justice Souter mentioned the question of how compensatory damages are measured.

In a more substantial difference of opinion with the majority, Justice Stevens, joined by Justices Ginsburg and Breyer, concurred with the judgment of the Court but not with its opinion, and wrote a separate opinion to explain the areas of disagreement. Justice Stevens believed that the majority had employed an unnecessary and overly broad line of reasoning in ruling that violations of Spending Clause legislation should be subject to contract law analysis. He would have ruled instead that punitive damages are not available from municipalities (and their officials) except where Congress clearly intended to authorize them. Justice Stevens objected to the majority's expansion of the *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), precedent, a case involving Spending Clause legislation, to Title II of

the ADA, which is not. He also took issue with the Court's reliance on what had been, he termed "at most, a useful analogy to contract law" and contended that the majority's approach "has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case." 122 S.Ct. at 2104. Since he would have held Mr. Gorman was precluded from punitive damages on a narrower ground, Justice Stevens, along with Justices Ginsburg and Breyer, agreed with the judgment of the Court, but not with its opinion.

III. SOME SIGNIFICANT IMPLICATIONS OF THE DECISIONS

A. Overview

The overall impact of the ADA decisions of the United States Supreme Court to date can be viewed from various perspectives. Examining the results according to which Title of the ADA was at issue reveals that the Court decided cases under Title III (public accommodations) in favor of litigants with disabilities, ruled about evenly for and against litigants with disabilities in cases under Title II (activities of state and local governments), and came down against litigants with disabilities in a significant majority of the cases under Title I (employment). The decisions can also be divided into categories according to types of legal issues raised. Thus, the decisions of the Court interpreting and applying the language of the ADA in terms of what things it covers (*Pennsylvania Department of Corrections v. Yeskey*, *Olmstead v. L.C.*, *PGA Tour, Inc. v. Martin*) have produced results generally favorable to litigants with disabilities. Decisions interpreting the substantive requirements of the ADA (*Olmstead v. L.C.*, *U.S. Airways, Inc. v. Barnett*) have produced mixed results. The Court's rulings on the scope of defenses available under the ADA (*Bragdon v. Abbott*, *PGA Tour, Inc. v. Martin*, *Chevron U.S.A. Inc. v. Echazabal*) have also been mixed, although, in numerical terms at least, predominantly favorable to litigants with disabilities. The decisions of the Court addressing the scope of congressional authority to enact civil rights laws (*Board of Trustees of University of Alabama v. Garrett*) and procedural issues, such as attorney's fees (*Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*) and availability of punitive damages (*Barnes v. Gorman*), that disability rights law shares with other civil rights constituencies, have mainly been restrictive of the interests of litigants with disabilities. Finally, cases addressing who can invoke the ADA's protection have been mixed, but increasingly limiting as time has gone on; some have taken an inclusive view of the definition of disability (*Bragdon v. Abbott*) and who is "qualified" (*Cleveland v. Policy Management Systems Corp.*), but some very significant decisions (*Sutton v. United Airlines*, *Murphy v. United Parcel Service*, *Albertson's, Inc. v. Kirkingburg*, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*) have taken a highly restrictive view of what it takes to demonstrate a disability under the ADA.

B. Overall Purposes of ADA

In *Olmstead v. L.C.*, 527 U.S. 581, 589 (1999), the Supreme Court stated:

ADA, enacted in 1990, is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities. Earlier legislative efforts included

the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. § 701 *et seq.* (1976 ed.), and the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486, 42 U.S.C. § 6001 *et seq.* (1976 ed.), enacted in 1975.

The Court added:

Congress ... set forth prohibitions against discrimination in employment (Title I, § 12111-12117), public services furnished by governmental entities (Title II, § 12131- 12165), and public accommodations provided by private entities (Title III, § 12181-12189). The statute as a whole is intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” § 12101(b)(1).

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999), the Court observed that “[t]he ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity.”

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1889 (2001), the Court discussed the origins and major purposes of ADA. It declared:

Congress enacted ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2); see § 12101(a)(3). (“[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”). Congress noted that the many forms such discrimination takes include “outright intentional exclusion” as well as the “failure to make modifications to existing facilities and practices.” § 12101(a)(5).

The Court went on to quote with approval Justice Kennedy’s characterization of ADA as “a milestone on the path to a more decent, tolerant, progressive society.” *Id.*, quoting *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (KENNEDY, J., concurring).

In *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516, 1521 (2002), the Court referred to “the Act’s basic equal opportunity goal.” Later in the opinion, the Court elaborated:

The statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation’s life, including the workplace. ... These objectives demand unprejudiced thought and reasonably responsive reaction on the part of employers and fellow workers alike.

They will sometimes require affirmative conduct to promote entry of disabled people into the workforce.

Id. at 1522-23.

These statements represent the Court's recognition of some of the legislative predecessors of ADA and summarize the Court's clear understanding of the overriding objectives of the Act.

C. Scope of Coverage of ADA

1. Generally

In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) the Supreme Court declared: "The fact that ADA's language applies in situations not expressly anticipated or discussed by Congress 'does not demonstrate ambiguity. It demonstrates breadth.'" This language was repeated in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1897 (2001). This principle could be helpful in any analysis of whether ADA covers any category of enterprises not expressly mentioned in the Act.

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1889 (2001), the Court declared:

After thoroughly investigating the problem, Congress concluded that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life." S.Rep. No. 101-116, p. 20 (1989); H.R.Rep. No. 101-485, pt. 2, p. 50 (1990), U.S.Code Cong. & Admin.News 1990, pt. 2, pp. 303, 332.

In response to such needs, the Court said, "Congress provided that broad mandate" by enacting ADA. It added:

In fact, one of the Act's "most impressive strengths" has been identified as its "comprehensive character," Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh) To effectuate its sweeping purpose, ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III). That "Congress enacted ADA in 1990 to remedy widespread discrimination against disabled individuals." It also noted the "comprehensive character" of ADA's "broad mandate" against discrimination on the basis of disability. *Id.*

Such statements clearly recognize the broad coverage of ADA.

2. Title II

a. Prisons and prisoners

In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) the Supreme Court ruled that Title II covers state prisons and prisoners. In *Barnes v. Gorman*, 122 S.Ct. 2097 (2002), the Court decided a case involving a man injured while being transported to a police station after being arrested. Mr. Gorman had successfully sued for damages under Title II of the ADA and under Section 504, and only the issue of punitive damages was before the Court, so the coverage of the incident by Title II was assumed but not specifically addressed.

b. State treatment facilities and institutions

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court applied the requirements of Title II to state residential treatment programs including institutions.

3. Title III

a. Generally

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1889 (2001), the Court found that the legislative history of ADA indicates that the concept of public accommodations should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to people without disabilities. It applied Title III's coverage consistently with "its expansive purpose." 121 S.Ct. at 1892.

b. Dentist's offices

In *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998), the Court applied requirements of Title III to the office of a dentist as a "professional office of a health care provider" expressly included within the term "public accommodation." 42 U.S.C. § 12181(7)(F).

c. Professional sports events and participants in such events

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1890 (2001), the Court found that golf courses, professional golftours, and their qualifying rounds "fit comfortably within the coverage of Title III." The PGA Tour had lost in the lower courts on its contentions that it was a "private club" exempt from Title III's coverage, and that the competitors' area "behind the ropes" is not a public accommodation, and abandoned those contentions before the Supreme Court. The Supreme Court ruled also that the golfers who participate in tournaments are members of the class of persons protected under Title III, and that Title III protects both spectators at tournaments and players in tournaments. *Id.* at 121 S.Ct. 1892.

D. What Constitutes a Disability

1. Generally

In *Sutton v. United Airlines*, 527 U.S. 471, 478 (1999), the Court summarized the three prongs of the definition of “disability” as follows: “to fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C)).” In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Court made explicit a view that it had pointed toward in the *Sutton v. United Airlines*, *Murphy v. United Parcel Service*, *Albertson's, Inc. v. Kirkingburg* decisions -- that the elements of the definition of "disability" in the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled" 122 S.Ct. at 691. The Court based this conclusion on the ADA finding that 43 million people have disabilities and an ill-founded assumption that Congress intended that only that number of people were to be protected by the ADA. The Court's position, that the definition of disability is to be construed narrowly, ignores and contradicts indications in the statute and its legislative history that the ADA was to provide a "comprehensive" prohibition of discrimination based on disability, and legislative, judicial, and administrative commentary regarding the breadth of the definition of disability.

2. Individualized determination of disability

In *Sutton v. United Airlines*, 527 U.S. 471, 483 (1999), the Court stated that “whether a person has a disability under ADA is an individualized inquiry.” As precedent for this principle, the Court cited its decision in *Bragdon v. Abbott*, 524 U.S. 624, 641-642 (1998), declining to consider whether HIV infection is a *per se* disability under ADA; and ADA Title I regulatory guidance providing that, “The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.” 29 C.F.R. pt. 1630, App. § 1630.2(j). Actually, the clearest statement about individualization in the *Bragdon* case was in the partially concurring and partially dissenting opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas, in which he declared:

It is important to note that whether respondent has a disability covered by ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made “with respect to an individual.” Were this not sufficiently clear, the Act goes on to provide that the “major life activities” allegedly limited by an impairment must be those “of such individual.” § 12102(2)(A). 524 U.S. at 657; *see also*, 524 U.S. at 664 (Justice O’Connor, concurring in the judgment in part and dissenting in part) (agreeing that Abbott’s “claim of disability should be evaluated on an individualized basis”).

In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999), the Court stated that there was a “statutory obligation to determine the existence of disabilities on a case-by-case basis.” It added that “[t]he Act expresses that mandate clearly by defining ‘disability’ ‘with respect to an individual,’ 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on ‘such individual,’ § 12102(2)(A).” In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 692 (2002), the Court again reiterated that the determination of the existence of disability was to be made in a "case-by-case manner" through "[a]n individualized assessment of the effect of an impairment"

3. *Per se* disabilities

Designation of a condition as a *per se* disability would be very helpful to future litigants and in affecting the practices and policies of covered entities. If a condition is so designated, every person who has the condition automatically meets the definition of a person with a disability and does not have to prove the effect on major life activities in her or his particular circumstances. In *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998), the Court ruled that it did not need to address the issue of whether HIV is a *per se* disability. Having stated that it was not going to reach the issue, however, the Court then devoted several pages of its opinion to a discussion of regulations, administrative interpretations, and prior court decisions supporting the Court's conclusion that "HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction." *Id.* at 647. This analysis approaches very close to declaring the condition to be a *per se* disability.

In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court ruled that monocularism was not a *per se* disability, but indicated that "some impairments may invariably cause a substantial limitation of a major life activity." *Id.* at 566. The Court thus accepted that some conditions may merit *per se* disability status, but that the Court "cannot say that monocularism does." *Id.* The Court observed that the condition monocularism encompasses variations on the degree of visual acuity in the weaker eye, the age of onset of vision loss, the extent of compensating adjustments in visual techniques, and the ultimate scope of the restrictions on visual abilities, and declared: "These variables are not the stuff of a *per se* rule." *Id.* In the absence of such a rule, the Court in *Albertson's* insisted on the normal process under ADA of individualized demonstration of the existence of disabilities on a case-by-case basis. But the Court did recognize that *per se* disability status could be appropriate for some conditions. In its decision in *Sutton v. United Airlines*, 527 U.S. 471 (1999), issued on the same day as *Albertson's*, the Court stressed the importance of individualized determinations of disabilities and of taking mitigating measures into account, 527 U.S. at 483-84, but did not preclude the possibility that some conditions might merit *per se* status.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 692 (2002), the Court stated that carpal tunnel syndrome is a type of impairment "whose symptoms vary widely from person to person," making an individualized assessment "particularly necessary." The Court also observed that it is insufficient for individuals attempting to prove disability status merely to submit evidence of a medical diagnosis of an impairment; instead, they must offer evidence that the extent of the limitation caused by their impairment is substantial in terms of their own experience. *Id.* at 691.

4. Major life activities

a. General meaning

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002), the Court stated that the word "major" in the phrase "major life activities" means "important." The Court quoted the Webster's Dictionary definition of "major" as "greater in dignity, rank, importance, or interest," and declared that "[m]ajor life activities" thus refers to those activities that are of central importance to daily life." *Id.* Accordingly, the standard for determining whether an activity is a major life activity is whether

or not it is central to daily life. The Court suggested that tasks that do not individually constitute a major life activity can constitute a major life activity in combination, if together they comprise an activity that is central to daily life.

b. List not exhaustive

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), all nine of the Justices agreed that the list of major life activities in ADA regulations is not exhaustive. *See* 524 U.S. at 639 (“As the use of the term ‘such as’ confirms, the list is illustrative, not exhaustive.”); *id.* at 659 (Chief Justice Rehnquist, concurring in the judgment in part and dissenting in part) (“The Court correctly recognizes that this list of major life activities ‘is illustrative, not exhaustive’”); *id.* at 664-65 (Justice O’Connor, concurring in the judgment in part and dissenting in part) (“the representative major life activities ... listed in regulations relevant to the Americans with Disabilities Act”).

c. Not limited to public, economic, or daily activities

The majority in *Bragdon* also held that major life activities under ADA were not limited to activities that have a public, economic, or daily character. The Court declared: “Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’ The breadth of the term confounds the attempt to limit its construction in this manner.” *Id.* at 638. These clarifications will guide subsequent determinations of what constitutes a major life activity.

d. Manual tasks

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Supreme Court reviewed the Sixth Circuit’s analysis of whether Ms. Williams was substantially limited in regard to the major life activity of performing manual tasks. The Court ruled that the Court of Appeals had erroneously focused on whether she was able to perform manual tasks in her job. The Court declared that “occupation-specific tasks may have only limited relevance to the manual task inquiry.” *Id.* at 693. The Court indicated that analysis of limitation on the activity of performing manual tasks should consider instead the person’s ability to perform personal-care tasks and household chores. The Court declared that “household chores, bathing, and brushing one’s teeth are among the types of manual tasks of central importance to people’s daily lives” This analysis should assist persons whose impairments affect the performance of self-care and housekeeping tasks to establish that they have a disability under the ADA. The Court’s reasoning also provides helpful guidance that the analysis of impact on major life activities in an employment discrimination case is not limited to looking only at impact on activities relevant to the workplace.

e. Activities of reproduction and sex

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), consideration of Ms. Abbott’s condition focused on whether her HIV infection substantially limited the activity of reproduction, which the majority found was a “major life activity” under ADA, reasoning that “[r]eproduction and the sexual

dynamics surrounding it are central to the life process itself.” *Id.* at 638. The Court also found that Ms. Abbott’s condition substantially limited her ability to reproduce by causing a significant risk that male sexual partners would be infected and a significant risk that the disease will be transmitted to her child during pregnancy and childbirth. In future cases, this ruling should be very helpful to most persons with HIV trying to establish that they have a disability under ADA. The Court’s analysis of the impact on reproduction in *Bragdon* should clearly apply to all persons for whom reproduction is a realistic option.

There is some ambiguity in the Court’s statement in *Bragdon* that “[r]eproduction and the sexual dynamics surrounding it” are central. Does this mean that sex is itself a major life activity.” The Court quoted language from a 1988 opinion of the Office of Legal Counsel of the Department of Justice (OLC) referring to “[t]he life activity of engaging in sexual relations.” 524 U.S. at 642-43, quoting Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-265 (Sept. 27, 1988) (preliminary print). The OLC had stated that “[t]he life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus.” 12 Op. Off. Legal Counsel at 274. The Court stated that either this consideration or the risk of transmission to the infant was “sufficient to render asymptomatic HIV infection a handicap” 524 U.S. at 643. This indicates that impact on sexual relations is sufficient to render HIV a disability, but it is not completely clear whether this is true in and of itself or because the limitation on sexual activity will interfere with opportunities for procreation.

This distinction may be significant for persons with HIV or other conditions who are trying to establish disability under ADA and are incapable of procreation, whether because of medical problems leading to sterility or menopause or otherwise. To the extent that engaging in sexual relations is considered to be a major life activity on its own, such persons should be able to use the *Bragdon* precedent to help establish that HIV or other conditions will substantially limit this major life activity. Similarly, the implications of the *Bragdon* decision as to sexual activity are also not entirely clear for gay and lesbian individuals.

f. Working as a major life activity

Regulations implementing Section 504 and ADA have consistently included “working” in the list of examples of major life activities. In *Sutton v. United Airlines*, 527 U.S. 471, 492 (1999), the Court indicated that it was “[a]ssuming without deciding that working is a major life activity” It added the following caution:

We note, however, that there may be some conceptual difficulty in defining “major life activities” to include work, for it seems “to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] ... then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.” Tr. of Oral Arg. in *School Bd. of Nassau Co. v. Arline*, O.T. 1986, No. 85-1277, p. 15 (argument of Solicitor General). Indeed, even the EEOC has expressed reluctance to define “major life activities” to include working and has suggested that working

be viewed as a residual life activity, considered, as a last resort, *only* “[i]f an individual is not substantially limited with respect to *any other* major life activity.” 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (emphasis added).

The quoted statement of the Solicitor General was significantly ill-conceived and illogical when it was made (No one has ever contended that “exclusion constitutes an impairment,” but rather that exclusion because of an impairment demonstrates either that the impairment limited the person’s ability to work or that the employer considered the person’s impairment to be substantially limiting). It is indeed unfortunate that such deficient legal reasoning, in a brief filed in 1986, influenced the Court to doubt the validity of the widely accepted concept of a major life activity of working. Hopefully, more carefully considered analysis will ultimately lead the Court to accept the legitimacy of the concept in future cases.

In *Murphy v. United Parcel Service*, 527 U.S. 516, 523 (1999), the Court likewise assumed without deciding that regulations delineating “working” as a major life activity are valid.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Court again asserted its reluctance to recognize working as a major life activity. The Court declared:

Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.

Id. at 692.

Accordingly, the question still remains an open one.

g. Other major life activities

In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 563 (1999), the Court treated “seeing” as a major life activity, after noting that there was no dispute about this issue and that the parties had not challenged the validity of EEOC ADA regulations providing that it is a major life activity. Similarly, in *Sutton v. United Airlines*, 527 U.S. 471, 490 (1999), the Court indicated that the plaintiff sisters did “not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing.”

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001), the Court treated “walking” as a major life activity and declared that Casey Martin was “an individual with a disability as defined in the Americans with Disabilities Act” because of his condition that interfered with his ability to walk. 121 S.Ct. at 1885. The PGA Tour did not contest that Martin was an individual with a disability under ADA. *Id.* at 1886.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002), the Court recognized, consistently with ADA and Section 504 regulations, that walking, seeing, and hearing, as "basic abilities ... central to daily life," are major life activities under the ADA.

These rulings may provide some help to future litigants who allege that they have limitations on their activities of seeing, hearing, or walking.

5. Substantially limits

In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 564-65 (1999), the Court ruled that the Court of Appeals had erred in construing "a mere difference" in "an individual's manner of performing a major life activity" as sufficient to establish that the individual's condition "substantially limits" the performance of the activity. The Supreme Court ruled that there has to be a "significant restriction" on performance of a major life activity, not simply a difference in the manner in which the individual performs it.

The Court provided additional guidance concerning the meaning of the "substantially limits" concept in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681, 691 (2002). Drawing upon dictionary definitions, the Court declared that "substantially" in the phrase "substantially limits" suggests "considerable" or "to a large degree." It held that the use of the word "substantial" "precludes impairments that interfere in only a minor way with the performance of ... tasks from qualifying as disabilities." *Id.* The Court applied as a standard for having a disability that an individual must have an impairment that "prevents or severely restricts" the individual from performing major life activities. The Court reiterated the proviso established in the EEOC ADA regulation that to be substantially limiting an impairment's impact must be permanent or long-term. See 29 C.F.R. ?? 1630.2(j)(2)(ii)-(iii) (2001). In doing so, even though the Court expressed reservations about what persuasive authority should be afforded the EEOC regulations definition provisions, the Court's reference and citation to the duration limitation could be interpreted as some measure of support for the EEOC position. The Council has criticized the EEOC for creating a duration limitation not found in the statutory language or legislative history of the ADA, nor in other federal agencies ADA regulations. See, e.g., National Council on Disability, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 221-222 (2000).

The *Williams* Court rejected the approach, applied by the Sixth Circuit, that a class of activities comprising a major life activity must be affected for an impairment to be substantially limiting. The EEOC has applied, in the context of the major life activity of working, a requirement that an individual show inability to perform a "class" or a "broad range" of jobs; the Court said such a requirement should not be applied outside the context of the major life activity of working. *Id.* at 693. Conversely, the Court ruled that, even in a case arising out of allegations of employment discrimination, the determination of limitations on other major life activities should not focus only on manifestations of the activity limitation in the workplace. These two positions should assist litigants seeking to establish that they are substantially limited in major life activities other than working. On the other hand, the Court's arguable

endorsement of EEOC's position that an impairment must impose a permanent or long-term limitation provides an additional evidentiary hurdle for complainants to overcome, both in regard to the major life activity of working and other major life activities.

6. Mitigating measures

A central holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), was that corrective and mitigating measures should be considered in determining whether an individual has a disability under ADA. Indeed, the Court held that “the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of ADA.” *Id.* at 482. While the *Sutton* case involved corrective lenses (eyeglasses and contact lenses), in *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999), the Court clarified that the same principle applied to medication used to treat an otherwise disabling condition. In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999), the Court elaborated further that mitigating measures encompass, not just artificial aids, such as medications and devices, but also measures undertaken, whether consciously or not, with the body’s own systems, including subconscious mechanisms for compensating and coping with visual impairments. These rulings represented a rejection by the Court of the position on mitigating measures taken by eight of the nine circuit courts that had addressed the issue prior to *Sutton*, and by all three of the executive agencies that had issued regulations or interpretive bulletins construing ADA definition.

The Court has recognized that the mere fact that a person makes use of mitigating measures does not automatically mean that the person does not have a disability. In *Sutton v. United Airlines*, 527 U.S. 471, 488 (1999), the Court observed that people who make use of corrective devices may still have a disability because the device does not correct the condition sufficiently to prevent a substantial limitation on a major life activity. And in *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999), the Court declared: “Petitioner did not seek, and we did not grant, certiorari on whether this conclusion was correct. Because the question whether petitioner is disabled when taking medication is not before us, we have no occasion here to consider whether petitioner is ‘disabled’ due to limitations that persist despite his medication or the negative side effects of his medication.”

The Web site of the Judge David L. Bazelon Center for Mental Health Law has an insightful paper, *The Supreme Court’s 1999 ADA Decisions* by Jennifer Mathis (updated May 30, 2000) that provides a summary of the *Sutton*, *Murphy*, and *Kirkingburg* decisions and presents some advocacy strategies for avoiding the negative effects of the decisions; it is found at <http://www.webcom.com/bazelon/sct99ada.html>.

7. Regarded as having a disability

In *Sutton v. United Airlines*, 527 U.S. 471, 489 (1999), the Court recognized that under the third prong of the definition of disability “individuals who are ‘regarded as’ having a disability are disabled within the meaning of ADA.” The Court indicated that an individual whose impairment is effectively corrected by mitigating measures may nonetheless be regarded as disabled by a covered entity, and thus disabled under the “regarded as” prong of the definition. The Court noted that

situations in which a person is “regarded as” having a disability can encompass instances in which “a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities,” and in which “a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” *Id.* In both such situations, a covered entity entertains misperceptions about the individual, either that a person has a substantially limiting impairment that the person does not have or that a person has a substantially limiting impairment when, in fact, the impairment is not so limiting. The Court observed that such misperceptions often result from stereotypic assumptions not truly indicative of individual ability.

8. The not-just-one-job standard

In *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999), the Court quoted the EEOC’s standard for what “substantially limits” means when applied to the major life activity of working: significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i) (1998).

In the context of the *Sutton* case in which neither party contested the validity of the EEOC regulations, the Court assumed without deciding that the EEOC regulations interpreting the term “substantially limits” were reasonable, and applied the EEOC’s not-just-a-single-particular-job criterion. Similarly, in *Murphy v. United Parcel Service*, 527 U.S. 516, 523-24 (1999), the Court again assumed without deciding that the EEOC regulations were valid and required a showing of inability to perform either a class of jobs or a broad range of jobs in various classes.

NCD has criticized the EEOC’s formulation of the “single job” exception and court decisions that have too readily adopted it wholesale. *See, e.g., Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 213-15 (2000). NCD has noted that the class-of-jobs-or-broad-range-of-jobs and the single-particular-job-is-not-sufficient criteria are not found in the statutory language of ADA, and yet were incorporated into ADA Title I analysis by the EEOC. NCD believes that judicial precedents the EEOC cited to support these standards in its regulatory guidance are of a dubious nature,¹ and that the EEOC ignored other applicable judicial precedents,

explicitly mentioned in ADA committee reports, to the contrary.¹ Some legal commentators have also been strongly critical of this position of the EEOC.²

NCD has formally recommended to the EEOC that it should “reorient its policy positions on the interpretation of the definition of disability,” “take clear and explicit actions to mitigate the impact of its previous restrictive positions,” and “promote, to the maximum extent possible, an inclusive interpretation of the scope of ADA protection to extend to all persons whom an employer disadvantages because they have a physical or mental impairment.” *Id.* at 236, Recommendation 36.

It can be argued that the EEOC limitation to what is substantially limiting in regard to working makes at least some sense in the context of the first prong (actual disability) of the definition of disability. Whatever the merits of the not-just-one-job standard under the first prong, it is wholly inappropriate under the third prong (regarded as). Yet the EEOC regulatory guidance has not made this distinction clear. While neither the EEOC Title I regulation nor the regulatory guidance declare that being denied or terminated from a single job because of a physical or mental impairment would be insufficient to constitute being “regarded as” having a disability under the third prong of the definition, the EEOC has engendered confusion, however, by its ambiguous stance on this issue. The EEOC has asserted that its interpretation of what is substantially limiting to working is not intended to present onerous burdens of evidence and proof on potential plaintiffs. *See* 29 C.F.R. pt. 1630 App. (commentary on § 1630.2(j)); 56 Fed. Reg. 35,728 (1991) (commentary on § 1630.2(j)). It has stressed a “myths, fears, and stereotypes” route for proving that an employer regarded an individual as having a substantially limiting impairment, and has provided concrete examples of the application of the “regarded as” prong of the definition of disability. EEOC, *Compliance Manual* § 902.5 (March 1995 guidance memorandum on the definition of disability). But convoluted and confusing discussions of proof issues in relation to the “regarded as” prong, and protestations about not placing onerous burdens on plaintiffs do not alter the fact that applying a “class of jobs or a broad range of jobs” criterion under the third prong of the definition does force complainants to prove what was in the employer’s mind when it took an adverse action toward them—a very difficult evidentiary burden.

NCD has contended that “[t]he illogic of permitting employers to terminate a person from a job because of a physical or mental condition and then to argue that the condition is not serious enough to constitute a disability is starkly apparent.” *Promises to Keep: A Decade of Federal Enforcement*

¹ S. Rep. No. 116, 101st Cong., 1st Sess. 24 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 53-54 (1990) (Education & Labor Committee). These reports cite *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) and *Doe v. Centinela Hospital*, No. CV87-2514 PAR, 57 U.S.L.W. 2034, 1988 WL 81776 (C.D. Cal. June 30, 1988).

² *See, e.g.*, Richard A. Bales, *Once is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 Hofstra Lab. L.J. 203, 210-11 (1993); Robert L. Burgdorf Jr., ‘Substantially Limited’ Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 Villanova L. Rev. 409 (1997); Arlene B. Mayerson, *Restoring Regard for the ‘Regarded as’ Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587 (1997); Bonnie Poitras Tucker, *The Supreme Court’s Definition Under ADA: A Return to the Dark Ages*, 52 Ala. L. Rev. 321, 356-61 (2000).

of the Americans with Disabilities Act at 215. In contrast to the ambiguity the EEOC's position has engendered, NCD has observed that a better course is readily apparent:

It would have been relatively simple, and fully consistent with ADA's intent to provide a comprehensive remedy for discrimination, for the EEOC to have declared that whenever complainants show that employers have taken adverse actions against them based on the employee's physical or mental conditions, a presumption is created that the employer regarded the person as having an impairment that substantially limits a major life activity. *Id.*

The parties in the *Sutton* case, and consequently the Court, assumed that the not-just-one-job limiting standard applies under the third prong and that plaintiffs must demonstrate that an employer regarded them as unable to perform either a class of jobs or a broad range of jobs in various classes. The plaintiff sisters in *Sutton* contended that United Airlines mistakenly believed their physical impairments substantially limited them in the major life activity of working, and had applied a vision requirement that precluded them from obtaining the job of global airline pilot, which they argued was a class of employment. 527 U.S. at 490. The Court ruled that the position of global airline pilot is a single job, so the plaintiffs' allegations did not support the claim that United regarded them as having a substantially limiting impairment. *Id.* at 493. In this context, the Court assumed without deciding that the EEOC's standards were valid and then applied the not-just-one-job standard under the third prong of the definition. Similarly, in *Murphy*, after assuming without deciding that the EEOC regulations are valid, the Court ruled that Murphy showing that he was "regarded as" unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—a specific type of vehicle used on a highway in interstate commerce was insufficient to establish a genuine issue of material fact that he was regarded as disabled. 527 U.S. at 524. The Court simply accepted without discussion that the EEOC's "class of jobs or a broad range of jobs" standard applied under the third prong of the definition.

Although the Court in *Sutton* and *Murphy* only assumed *arguendo* (for the purpose of argument in the particular case) that the EEOC standards are valid and expressly stated that it was not so deciding, NCD is very concerned that these decisions will be considered as having endorsed the EEOC approach on these issues, weakening the chances of any frontal assault on them. While the Court directly rejected another of the EEOC's positions—on mitigating measures—the Court seemed to follow the single-job standard, albeit without deciding its validity, without expressing any misgivings or hesitation.

NCD has recommended that the EEOC should take a leading role in attempting to limit the potential negative implications of an overbroad reading of the *Sutton* and *Murphy* decisions on standards under the third prong. NCD has declared that the EEOC should "[i]ssue sub-regulatory guidance clarifying that the third prong of the definition of individual with a disability includes any American who suffers discrimination on the basis of physical or mental impairment, even if that discrimination occurs on only one occasion in connection with one particular job with a particular employer, and explaining the portions of the *Sutton*, *Murphy*, and *Kirkingburg* decisions interpreting the third prong of the definition represented an uninformed misapplication of first prong analysis to the third

prong.” *Promises to Keep* at 236-37. Further, the EEOC should “[p]ursue in litigation and in policy activities a proactive and concerted strategy of distinguishing the *Sutton*, *Murphy*, and *Kirkingburg* rulings as much as possible from other factual situations, with the goal of confining the impact of these rulings to their peculiar facts.” *Id.* at 237. To date, the EEOC has not fully embraced and implemented these recommendations of NCD.

Whether the EEOC attempts to stem the tide or not, however, there is real danger that the lower courts may interpret the *Sutton* and *Murphy* decisions as having resolved the issue whether proving that an employer regarded a person as substantially limited in the activity of employment requires a showing that the employer regarded the person as unable to perform a class of jobs or a broad range of jobs. The Court did nothing to rectify this situation in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), where the Court recited the EEOC not-just-one-job standard (without deciding that the regulation was valid), but held that the criterion of inability to perform a class or broad range of activities should not be applied to major life activities other than working.

9. Particular conditions

a. Asymptomatic HIV infection constituted a disability

In *Bragdon v. Abbott*, 524 U.S. 624, 631, 637, 641 (1998), the Court ruled that HIV even in the asymptomatic stage is a physical impairment, and that Abbott’s HIV infection substantially limited the major life activity of reproduction, and thus constituted a disability. Because “of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease,” the Court ruled that HIV infection “is an impairment from the moment of infection” and “satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.” *Id.* at 637. The possible implications of the Court’s focus on the activity of reproduction are discussed above in the context of “activities of reproduction and sex.”

The Court indicated that it felt constrained to restrict its analysis to reproduction because Ms. Abbott had consistently claimed that HIV infection placed a substantial limitation on her ability to reproduce and to bear children, and that it is the Court’s “practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.” *Id.* at 637-38. The Court recognized, however, that it appeared “legalistic to circumscribe our discussion to the activity of reproduction” considering that “major life activities of many sorts might have been relevant to our inquiry,” and recognizing arguments “about HIV’s profound impact on almost every phase of the infected person’s life.” *Id.* at 637. The Court added, “[w]e have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.” *Id.* These statements suggest additional promising avenues for demonstrating that HIV infection is a disability under ADA in future cases.

b. Severe myopia correctable to 20/20 vision

In *Sutton v. United Airlines*, 527 U.S. 471 (1999), the Court ruled that two sisters who had severe myopia, but whose vision with glasses or contact lenses was 20/20 or better did not have a disability under ADA.

c. Medically correctable hypertension

In *Murphy v. United Parcel Service*, 527 U.S. 516, 519, 521 (1999), the Court ruled that a man whose unmedicated blood pressure was approximately 250/160, but who the Court of Appeals found could, with medication, function normally without any significant restrictions on his activities was not substantially limited in a major life activity and thus did not have a disability under ADA. The Court was not presented with any contention that Mr. Murphy was substantially limited in some way while medicated, and the Court observed that it had “no occasion here to consider whether petitioner is ‘disabled’ due to limitations that persist despite his medication or the negative side effects of his medication.” *Id.* at 521. The *Murphy* decision does not preclude future litigants from submitting such proof. (*Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), also involved a plaintiff with hypertension, but the issues considered by the Court did not include the disability of the plaintiff.)

d. Amblyopia resulting in monocular vision

In *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999), the Court ruled that the issue of whether monocular vision constitutes a disability must be determined through case-by-case consideration of the extent of visual restrictions. The Court clarified that it did not mean “to suggest that monocular individuals have an onerous burden in trying to show that they are disabled,” and, in fact, “people with monocular vision ‘ordinarily’ will meet the Act’s definition of disability.” *Id.* at 567. It was simply requiring “monocular individuals, like others claiming the Act’s protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.” *Id.*

e. Mental retardation and psychiatric disabilities

In *Olmstead v. L.C.*, 527 U.S. 581, 589 (1999), the Court stated that there was “no dispute that” the plaintiffs, two women with mental retardation, one of whom had also been diagnosed with schizophrenia, and the other with a personality disorder, had disabilities under ADA. The state officials did not contest the existence of the women’s disabilities.

f. Carpal tunnel syndrome

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Court considered, but did not resolve whether Ms. Williams' conditions of carpal tunnel syndrome and tendinitis constituted disabilities under the ADA. The Court ruled that the Court of Appeals had applied the wrong legal standards in assessing whether Ms. Williams' condition substantially limited the major life activity of performing manual tasks, and remanded the case for further proceedings under the proper legal standards. The Court indicated that because the symptoms of carpal tunnel syndrome vary widely from person to

person, an individualized assessment of the effect of the condition was necessary. Recognizing the large differences in the severity and duration of the effects of carpal tunnel syndrome in particular cases, the Court refused to make an across the board ruling that the condition is or is not a disability. Such a resolution leaves open the possibility that future litigants, and Ms. Williams herself, may prevail in proving that their carpal tunnel syndrome is a disability within the meaning of the ADA in their particular circumstances.

E. INTEGRATION MANDATE AND DEINSTITUTIONALIZATION

1. Prohibition of Segregation

In *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999), the Court ruled that “[u]njustified isolation ... is properly regarded as discrimination based on disability.” The Georgia officials had contended that discrimination necessarily requires uneven treatment of similarly situated individuals, so that plaintiffs must identify a comparison class of similarly situated individuals given preferential treatment. The Court responded that it was “satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in ADA.” *Id.* at 598. The Court ruled that ADA not only requires public entities to refrain from discrimination, but its “Findings” explicitly identified unjustified “segregation” of persons with disabilities as a form of discrimination. *Id.* at 600. The Court observed that ADA’s recognition of unjustified institutional isolation of persons with disabilities as a form of discrimination reflects two judgments: (1) that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life;” and (2) that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 600-01. The Court found that dissimilar treatment had been established: “In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.” *Id.* at 601.

The Court’s recognition of the integration mandate of ADA has had significant positive consequences. It led, for example, to the January 14, 2000, letter of Secretary of Health and Human Services (HHS), Donna Shalala, to the governor of each of the States citing the *Olmstead* decision and HHS’s belief “that no person should have to live in a nursing home or other institution if he or she can live in his or her community,” and to a letter from the Health Care Financing Administration to each State’s Medicaid Director explaining the *Olmstead* ruling in more detail and indicating that each State should have “a comprehensive, effectively working plan for placing qualified persons with disabilities in the most integrated setting appropriate.” See NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 129 (2000). More recently, the *Olmstead* decision was a major impetus for President George W. Bush to issue, on June 18, 2001, Executive Order No. 13217, which declared the commitment of the United States to community-based alternatives for individuals with disabilities and declared that “[u]njustified isolation or segregation of qualified individuals with disabilities through institutionalization is a form of

disability-based discrimination prohibited by Title II of the Americans with Disabilities Act of 1990 (ADA).” The Order requires the Attorney General, the Secretaries of Health and Human Services, Education, Labor, and Housing and Urban Development, and the Commissioner of the Social Security Administration to work cooperatively to ensure that the *Olmstead* decision is implemented in a timely manner. Specifically, the designated agencies are to “work with States to help them assess their compliance with the *Olmstead* decision and ADA in providing services to qualified individuals with disabilities in community-based settings, as long as such services are appropriate to the needs of those individuals.”

Thus, it is clear that this aspect of the *Olmstead* decision has been a powerful engine for increasing community alternatives and eliminating unjustified institutional placements.

2. Prerequisites to deinstitutionalization

The right to integrated placement established in *Olmstead* is tempered by some limitations or conditions announced in the Court’s decision. None of these is based upon explicit statutory language nor is directly enunciated in ADA regulations.

a. Not for all

The Court assumed that there are some people whose condition necessitates non-community institutionalization; individuals for whom “no placement outside the institution may ever be appropriate.” *Id.* at 605. The Court concluded that nothing in ADA or the regulations condones termination of institutional settings for persons “unable to handle or benefit from community settings.” 527 U.S. at 601-02.

b. Deference to states’ professionals

The Court indicated that a state generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets essential eligibility requirements for placement in a community-based program, and should not remove individuals from the more restrictive setting if they do not qualify for community-based placement. *Id.* at 602.

c. Person must desire to be integrated

The Court declared that federal law does not create any “requirement that community-based treatment be imposed on persons who do not desire it.” *Id.* This ruling suggests that states can keep people in unnecessarily segregated settings so long as the individuals do not (or are unable to) object to it.

d. The state must offer the community services sought

While ruling that “States must adhere to ADA’s nondiscrimination requirement with regard to the services they in fact provide,” the Court cautioned that it was not holding that ADA imposes on the

States a “standard of care” for whatever medical services they render, or that ADA requires States to “provide a certain level of benefits to individuals with disabilities.” *Id.* at 603, n. 14. Thus the Court spoke of “the State’s responsibility, once it provides community-based treatment to qualified persons with disabilities....” *Id.* at 603.

3. Cost defense

In its ruling in the *Olmstead* case, the 11th Circuit had declared that the standard for applying the fundamental alteration limitation was “whether the additional expenditures necessary to treat [the plaintiffs] in community-based care would be unreasonable given the demands of the State’s mental health budget.” 138 F.3d at 905. None of the various opinions filed by the Justices of the Supreme Court garnered a majority. A total of eight Justices (all except Justice Stevens), however, concluded that the Eleventh Circuit had applied too restrictive an interpretation of the defense. Justice Stevens would have affirmed the Eleventh Circuit’s decision as to the fundamental alteration defense. Five Justices (the four who joined in Justice Ginsburg’s opinion plus Justice Kennedy) concluded that the Eleventh Circuit had applied too restrictive an interpretation of the defense. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have held that differential treatment because of cost is not discrimination at all. As to the standard that should be applied to such cost defenses, Justice Ginsburg wrote that “the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.” 527 U.S. at 604. Justice Kennedy indicated that states should be “entitled to wide discretion in adopting [their] own systems of cost analysis, and, if [they] choose, to allocate health care resources based on fixed and overhead costs for whole institutions and programs.” *Id.* at 615.

The Justices’ views on the cost defense may have been influenced by the apparent acceptance by the United States of cost factors beyond those accepted by the Eleventh Circuit. Justice Ginsburg’s opinion, for example, quotes the brief *Amicus Curiae* of the United States regarding “increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions” and “the cost of running partially full institutions in the interim,” prior to closing down particular institutions. *Id.* at 604, and n. 15, quoting Brief for United States as *Amicus Curiae* 21. During oral arguments in *Olmstead*, the Solicitor General’s office also furthered the idea of a financial hardship defense to States’ duties under Title II of ADA to render services in the most integrated setting appropriate (The pertinent section of the transcript of the oral argument is found at 1999 WL 252681, pp. 20-21). ADA itself established a fundamental alteration standard, a higher standard than financial hardship³. For NCD’s critical analysis of these

³ One commentator has argued that the Court’s recognition of a financial burden defense in *Olmstead* represents a compounding of error made when the courts manufactured such a defense from a dubious and unsupported dictum in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Armen H. Merjian, “Bad Decisions Make Bad Decisions: *Davis*, *Arline*, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act,” 65 *Brooklyn Law Review* 105 (1999).

and some other policy stances on behalf of the United States regarding issues raised in *Olmstead*, see NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 119-120 (2000).

4. Not directly requiring closing institutions

Justice Ginsburg's opinion, and the shifting lineup of Justices joining in its different parts leaves some ambiguity about the Court's views on whether ADA may require the closing of some or all of states' institutions. In part III.B of the opinion, which did not represent a majority of the Court, Justice Ginsburg wrote that "[a]s already observed, see *supra*, at [119 S.Ct.] 2187-2188, ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." 527 U.S. at 604. While this statement is relatively clear, the discussion apparently referred to on the cited pages, which are part of the opinion for a majority, actually states, "[w]e emphasize that nothing in ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601-02. This statement is not exactly equivalent to the former. Justice Kennedy, in a portion of his opinion in which he was joined by Justice Breyer, wrote about negative consequences of some deinstitutionalization. In his view, it would be "unreasonable" and "tragic" if ADA were interpreted "to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." *Id.* at 610. These statements, while not explicitly conclusive on the issue, represent a sentiment among at least five of the Justices that ADA does not require the closing of institutions. When added to the three dissenters, who argued that segregation in treatment facilities does not constitute discrimination at all, the opinions represent a setback to efforts to interpret ADA as requiring the closing of isolated, segregated state institutions. This effect, however, may be offset by the *Olmstead* decision's clear endorsement of an integration requirement. The impact of this integration mandate in ensuring community placements for increasing numbers of individuals may eventually generate economic reasons for phasing out state institutions.

5. Waiting Lists

In Justice Ginsburg's view, a state could meet ADA reasonable modification requirement by having a "comprehensive, effectively working plan" for placing qualified persons with mental disabilities in less restrictive settings. *Id.* at 605-06. And this would be sufficient even if the plan involved a waiting list, so long as the waiting list "moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated...." *Id.* at 606. These views are presented in a portion of Justice Ginsburg's opinion that does not represent a majority of the Court, but when considered in light of the three dissenting Justices who do not believe that segregated placements constitute discrimination at all, the endorsement of waiting lists in Justice Ginsburg's opinion could be significant.

F. CONSTITUTIONAL LIMITS ON CONGRESSIONAL AUTHORITY IN RELATION TO ADA

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court ruled that suits by employees of a state to recover money damages from a state for violations of Title I of ADA are barred by the Eleventh Amendment. This followed the Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), in which the Court had ruled that the Age Discrimination in Employment Act did not validly abrogate states' Eleventh Amendment immunity from suits by private individuals. En route to its decision in *Garrett*, the Court indicated that in evaluating congressional authority to enact ADA provisions as part of its power to enforce the Fourteenth Amendment, the Court would require that legislation reaching beyond the scope of the Fourteenth Amendment's guarantees must exhibit "congruence and proportionality" between the constitutional injury being addressed and the means adopted to address it. *Garrett*, 121 S.Ct. at 963, quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). In considering the constitutional injury addressed by ADA, the Court indicated that it would apply "rational-basis review"—the lowest level of equal protection analysis—to state discrimination on the basis of disability challenged as violating equal protection. In applying such standards to Title I of ADA and as it applies to state employment, the Court found that the evidence Congress assembled of unconstitutional state discrimination in employment was inadequate, and that Congress had not imposed a remedy that is congruent and proportional to the targeted constitutional violation.

Disability rights activists and scholars were quick to point out the limited scope of the *Garrett* ruling. On the day that the Court announced its decision, ADA Watch noted in a Press Release that the ruling does not: (a) prevent individual suits against a state employer for injunctive relief; (b) bar suits initiated by the Federal Government for monetary damages; (c) bar suits for money damages against private employers or local governments; and (d) apply to Title II of ADA. ADA Watch, *Press Release: Civil Rights Advocates Respond to Supreme Court Decision*, February 21, 2001. Some of these limitations are based upon footnote 9 in the Opinion in which the Court clarified that its ruling did not mean that persons with disabilities have no federal recourse against discrimination. The Court noted that states are still subject to Title I standards, and those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief. In addition, state laws protecting the rights of persons with disabilities in employment may provide additional avenues of redress. Subsequently, in *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835, 1843 n. 10 (2001), the Court would reiterate long-standing principles that "[o]nly States and state officers acting in their official capacity are immune from suits for damages in federal court," and that "[p]laintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State." In another footnote (number 1) at the beginning of its opinion in *Garrett*, the Court stressed that it was not addressing whether Title II, "which has somewhat different remedial provisions from Title I," is appropriate legislation under § 5. 121 S.Ct. at 960 n. 1. Of course, some of the analysis the Court applies to Title I in *Garrett* may nonetheless greatly affect the analysis of Eleventh Amendment immunity under Title II in future court challenges.

The direct impact of the Court's ruling in *Garrett* is fairly easy to describe, but its longer-term implications are much harder to determine. Some fear that the analytical standards applied to Title I in *Garrett* will be applied to also bar private suits for monetary damages against states under Title II. Some see the *Garrett* decision as but one step on a broader effort by the Court to restrict

congressional authority and to expand the rights of states that may have serious repercussions for the Commerce Clause authority also expressly invoked by the Congress in enacting ADA, and perhaps even to the Spending Clause authority that provides the constitutional underpinning of Section 504 of the Rehabilitation Act of 1973. Others view such threats as highly speculative and unlikely. The *Garrett* decision has been the subject of much discourse and debate. Within legal periodicals, a Westlaw search of law reviews and journals revealed some 40 articles discussing the *Garrett* decision and its implications. See, e.g., Jaclyn F. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of the University of Alabama v. Garrett and its Impact on People with Disabilities*, 9 *Am. U. J. Gender Soc. Pol'y & L.* 663 (2001); Mark A. Johnson, *Note, Board of Trustees of the University of Alabama v. Garrett: A Flawed Standard Yields A Predictable Result*, 60 *MD. L. REV.* 393 (2001). The Web site of the National Senior Citizens Law Center has a concise but informative analytical paper, *Life After Garrett: Enforcing ADA and Section 504 Against States, and State Officials* by Herbert Semmel (updated March 12, 2001) that discusses alternatives in the event of a “worst case scenario” in which the limitations on Title I in *Garrett* are eventually imposed on Title II as well; it is found at <http://www.nslc.org/lifeaftergarrett.html>.

While recognizing limitations in the direct scope of the *Garrett* decision, NCD has described the decision as “another obstacle in the path of people with disabilities,” and has expressed its deep concern that the *Garrett* decision could initiate a “slippery slope” that would lead to further restriction of rights established under ADA. NCD, *News Release: National Council on Disability Deeply Troubled by U.S. Supreme Court Decision Limiting Scope of Americans with Disabilities Act* (Feb. 21, 2001) (on the NCD Web site at <http://www.ncd.gov/newsroom/news/r01-321.html>).

G. SAFETY STANDARDS AND DIRECT THREAT DEFENSE

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court interpreted and applied the defense of “direct threat to the health or safety of others” established under Title III of ADA. 42 U.S.C.

§ 12182(b)(3). The Court indicated that the direct threat concept had its origins and is to be interpreted consistently with *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). It stated that the existence of such a direct threat is to be determined from the standpoint of the person who refuses to provide accommodation or equal treatment and must be based on medical or other objective evidence available at the time the decision was made. No special deference is to be afforded, however, to health care professionals; a health care professional who disagrees with the prevailing medical consensus on the existence of a direct threat must refute it by citing credible scientific evidence for deviating from the accepted norm.

On remand, the CDC universal precautions were found adequate to prevent a direct threat to dental workers; “possible” cases of patient-to-dental-worker HIV transmission were found to be too speculative or too tangential to establish a direct threat. The First Circuit added an admonition that in future cases it might reach different results: “The state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision.” *Abbott v. Bragdon*, 163 F.3d 87, 90 (1st Cir. 1998).

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999), raised a question under the direct threat provision of Title I. 42 U.S.C. § 12113(b). The Court noted that the United States had urged that in applying a qualification standard grounded in safety concerns, it should read subsections (a) (42 U.S.C. § 12113(a)—“job-related and consistent with business necessity, and ... performance cannot be accomplished by reasonable accommodation”) and (b) (“direct threat”) together so that when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy ADA’s “direct threat” criterion. 527 U.S. at 569. Under such an approach, all safety criteria imposed by employers would be evaluated under the direct threat standard. The Court expressed some doubt whether the Government’s interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, was a sound one, but found it did not need to confront the validity of the reading in the *Kirkingburg* case. *Id.* at 569 n. 15. Instead, the Court simply ruled that Albertson’s was entitled to rely on the DOT visual acuity standard as a job qualification criterion.

In *Chevron U.S.A. Inc. v. Echazabal*, 122 S.Ct. 2045 (2002), the Supreme Court upheld as permissible under the ADA the Equal Employment Opportunity Commission regulation that allows employers to refuse to hire applicants because their performance on the job would endanger their health due to a disability, despite the fact that in the language of the ADA Congress had recognized a “direct threat” defense only for dangers posed to other workers. The Council has opposed the EEOC danger-to-self provision, because it invites paternalistic conjecturing by employers and their physicians about perceived dangers to individuals with disabilities, often based on ignorance and misconceptions about particular conditions, and fosters perceptions that individuals with disabilities are commonly irrationally self-destructive. See National Council on Disability, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 221-222 (2000); National Council on Disability, BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT IN *CHEVRON U.S.A. INC. v. ECHAZABAL* (2002). The Court’s acceptance of the EEOC provision raises the possibility of more prevalent use of such overprotective health standards in the future.

The Court did note in *Echazabal* that the EEOC provision requires that the direct threat defense must be “based on a reasonable medical judgment” supported by “the most current medical knowledge and/or the best available objective evidence,” and must involve an “individualized assessment of the individual’s present ability to safely perform the essential functions of the job,” that considers how imminent the risk is and how severe the harm would be. 29 C.F.R. ? 1630.2(r) (2001). These requirements should ameliorate the damaging effects of the risk-to-self defense to some degree, and provide litigants with disabilities and their attorneys grounds for contesting the assertion of such a defense. These supposed safeguards may, however, be rendered ineffective to the extent that such judgments and assessments are made by physicians who are employed by employers and may be more sensitive to protecting the employer than to the equal opportunity rights of potential employees with disabilities under the ADA. Many job applicants with disabilities will not have the knowledge or resources to challenge the reasonableness and basis in current medical knowledge of judgments made by company doctors that their employment would endanger their health or safety.

The Court in *Echazabal* did not resolve an issue expressly left open in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569-570, n. 15 (1999): whether all safety-related qualification standards must satisfy the ADA's direct-threat standard. 122 S.Ct. at 2050 n. 3. But the Court did declare that safety-related qualification standards that would reject potential workers because of "indirect" threats of "insignificant" harm are implicitly precluded by the Act's specification of a direct-threat defense. Because of the procedural manner in which the case came to the Supreme Court, the *Echazabal* Court also did not have occasion to determine whether Chevron could have made a reasonable accommodation that would have permitted Mr. Echazabal to keep his job in spite of the threat-to-self standard, *id.* at 2048 n. 2. This leaves open the possibility that future litigants may be able to sidestep exclusion from a job if they can identify a reasonable accommodation that will permit job performance without endangering the worker's health or safety. The Court also accepted that safety-related qualification standards are subject to the same requirement as other types of qualification standards that screen out individuals with disabilities -- that they must be "job-related" and "consistent with business necessity." *Id.* at 2053; 42 U.S.C. ? 12112(b)(6); 122 S.Ct. at 2053 & n. 6. These requirements may provide other avenues for challenging unnecessary risk-to-self standards. The Court also indicated that it had no occasion to decide the degree of match there must be between a condition deemed disqualifying and the particular job applicant's manifestation of the condition -- "how acutely an employee must exhibit a disqualifying condition before an employer may exclude him from the class of the generally qualified." 122 S.Ct. at 2053 n.6. The Court concluded that the trial courts should have the opportunity to address this issue before the Supreme Court considers it.

In discussing the question whether Congress intended the direct threat defense to apply only to threats to others, the Court examined the statutory language creating the defense ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. ? 12113(b).), and reasoned that Congress could not have intended this language to limit the kinds of direct threats to the class listed. If it had, said the Court, then employers could not avoid hiring employees whose conditions would endanger customers or other persons not in the workplace. To illustrate this reasoning, the Court resorted to an inflammatory example: "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" 122 S.Ct. at 2051. This harsh example was both unnecessary and misplaced. First, a person with typhus would obviously present a danger to other workers. Second, given that the ADA defines "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," without a limitation to others "in the workplace," a logical reading of the provision concerning direct threat as a qualification standard would be that the defense applies to requirements that conditions not pose a direct threat to others if permitted in the workplace, *i.e.*, that "in the workplace" modifies "poses" rather than "others." Thus, typhus in the workplace would pose a direct threat to others, even if "others" is interpreted to refer to customers, not other workers.

In utilizing the "Typhoid Mary" example, and elsewhere when it refers to "skyscraper workers with vertigo," *id.* at 2053 n. 6, the Court seems to ignore the fact that to be a "qualified individual with a

disability" protected from discrimination under Title I of the ADA, a person must be able to perform the essential functions of the employment position. 42 U.S.C. § 12111(8). A skyscraper worker who cannot work on high floors and a meat processor who cannot prepare uncontaminated, hygienic food would not be qualified under the ADA and could not avail themselves of the Act's protections from discrimination. The Court expressly did not consider the issue of whether Mr. Echazabal was "qualified," but made a confusing statement that "[t]hat issue will only resurface if the Circuit concludes that the decision of respondent's employer to exclude him was not based on the sort of individualized medical enquiry required by the regulation" 122 S.Ct. at 2047 n.1. Under the ADA, the issue of whether a complainant is "qualified" should be a preliminary condition to the application of the substantive protections from job discrimination. While Mr. Echazabal was almost certainly qualified because he had been satisfactorily performing the job tasks for some time, other persons such as "Typhoid Mary" and "skyscraper workers with vertigo" will not be qualified and thus will be ineligible to invoke the protection of the Act's prohibitions of employment discrimination. The Court's statements and inflammatory examples seriously muddy the analytical waters.

The Court recognized that the EEOC has taken a narrow view of the paternalism and "overprotective rules and policies" that Congress prohibited as forms of discrimination in the ADA. 42 U.S.C. § 12101(a)(5). The Court characterized EEOC as having concluded that "Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes." In the Court's view, the EEOC direct threat provision only addresses such pretextual, class-based exclusionary standards, which the Court termed "sham protection." 122 S.Ct. at 2052-53. Neither the EEOC nor the Court has acknowledged the difficult burden of proof this interpretation places on a job applicant who has been rejected for a particular job because of alleged risk to the applicant who must try to prove that the employer was basing its actions on pretextual, class-based stereotypes. The EEOC approach suggests that an applicant who has been rejected because of an employer's risk-to-self concerns cannot simply prove that the applicant can in fact do the job safely, but might need to prove that the employer's action was based upon pretext and class-based stereotypes. Such evidence of what was going on in the employer's mind is notoriously hard to obtain. There also appears to be some tension between the class-based stereotype notion and the "individualized" determination of direct threat that the EEOC purports to require.

The Court stated that "there may be an open question whether an employer would actually be liable under OSHA [the Occupational Safety and Health Act of 1970] for hiring an individual who knowingly consented to the particular dangers the job would pose to him," but added that "the employer would be asking for trouble." *Id.* at 2052. Mr. Echazabal had pointed out and the Court accepted that "there is no known instance of OSHA enforcement, or even threatened enforcement, against an employer who relied on the ADA to hire a worker willing to accept a risk to himself from his disability on the job." *Id.* Given that factual background, the Court's reference to "asking for trouble" is somewhat mysterious. Is the Court signaling that it is prepared to recognize employers' liability in such a situation? Would the Court impose such liability under OSHA for actions required of an employer under another federal law, the

ADA? The Court's incomplete discussion of these matters concerning the intersection between two major federal laws raises more questions than it answers.

H. ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENTS

In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court ruled that a general arbitration clause does not require a worker to use the arbitration procedure for ADA claims. The Court indicated that if there were to be a waiver of the worker's right to a judicial forum for ADA claims, the waiver would have to be a clear and unmistakable waiver, but, even if there were such a waiver, the Court expressly did not reach the question whether it would be enforceable.

In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S.Ct. 754 (2002) the Court ruled that an agreement between an employer and an employee to arbitrate any employment-related dispute or claim did not bar the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific remedies, such as backpay, reinstatement, and damages, against the employer for allegedly violating the ADA. The Court examined the impact of the Federal Arbitration Act (FAA), and held that, because the EEOC was not a party to the arbitration agreement and had not agreed to arbitrate its claims, the FAA did not require the agency to relinquish its right to pursue judicial relief, even though the employer and employee may have chosen to do so. This ruling should preserve the enforcement options open to the ADA federal enforcement agencies even if complainants may have narrowed their options by agreeing to arbitrate disputes.

I. IMPACT OF APPLICATION FOR AND RECEIPT OF DISABILITY BENEFITS ON ADA CLAIMS

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), the Court found that the Court of Appeals had erred by applying a special legal presumption that would permit applicants for or recipients of SSDI benefits to pursue ADA claims only in "some limited and highly unusual set of circumstances." *Id.*, quoting 120 F.3d at 517. The Court ruled that an ADA plaintiff should not be required to rebut a presumption of estoppel but instead only to "proffer a sufficient explanation" of the apparent contradiction that arises out of an earlier SSDI total disability assertion. 526 U.S. at 806. Accordingly, a plaintiff must offer an explanation that would permit a reasonable conclusion that, assuming the earlier assertion was true or asserted by the plaintiff in good faith, the plaintiff would nonetheless be able to perform the essential functions of the job. This ruling interrupted a large body of lower court decisions that had prevented individuals who had filed for or were awarded Social Security disability benefits from pursuing ADA employment discrimination claims.

J. REASONABLE ACCOMMODATION

1. In general

In *U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516 (2002), the Court provided some analysis of the requirement of Title I of the ADA that employers make reasonable accommodations to the known

physical or mental limitations of applicants or employees with disabilities. The Court stated that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal," and indicated that reasonable accommodations constitute a form of "preference" required for workers with disabilities under the ADA, one that is necessary to offer them the same workplace opportunity as other employees. *Id.* at 1521. The Court added, "By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." *Id.*

The Court's characterization of reasonable accommodations as "special" and "preferential" is unfortunate. It fuels the misconception that the ADA gives people with disabilities some type of advantage over people without disabilities. Properly understood, reasonable accommodations are adjustments or modifications intended to level the playing field for a person who would otherwise be denied an equal opportunity. In proposing the idea of an ADA in 1986, the Council identified reasonable accommodation as "[a] key element of eliminating discrimination" on the basis of disability, and described it as "the process of matching the particular abilities and limitations of each disabled individual with the essential requirements of a particular activity and trying to modify the activity as necessary to permit the individual with a disability to participate." National Council on Disability, *TOWARD INDEPENDENCE*, app. at A-15 (1986). The Council also observed that "[d]iscrimination against people with disabilities has literally been built into the physical environment, and eliminating such discrimination requires planning and action to remove barriers that exclude disabled people." *Id.* at A-37.

The ADA's reasonable accommodation requirement built upon a clear analytical foundation described in detail in *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES*, the U.S. Commission on Civil Rights' 1983 report on disability discrimination. Central to the reasonable accommodation concept is recognition that the impact of physical and mental impairments largely "is as much inherent in the social context as in the impairment," and that while it is frequently assumed that there is only one way of doing things -- tailored to the needs and abilities of those without disabilities -- in fact, "programs, activities, and facilities may actually be organized in a variety of ways" that "can be changed in response to the abilities and characteristics of the person involved." *Id.* at 89, 90. To the degree that a particular job situation is slanted against a person with certain impairments, identical treatment of that person in relation to other employees or applicants would not provide real equality of opportunity. As the Commission on Civil Rights observed: "When decisionmakers forget that social context almost always are structured for [people without disabilities], they are apt to view anything beyond ... identical treatment as special, unequal treatment necessitated by the [disability]." *Id.* at 99. This is precisely the verbal trap suggested by the Court's "special" and "preferential" phrasing in the *Barnett* opinion.

For additional confirmation that reasonable accommodation is not "special treatment," and a description of the types of "accommodations" employers routinely make for employees without disabilities, see Robert L. Burgdorf Jr., *"Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILLANOVA L. REV. 409, 529-533 (1997).

The *Barnett* Court's "preference" and "special" phraseology, while regrettable, is somewhat misleading. The Court explained that it was using the term "preference" narrowly in referring to some reasonable accommodations, "in the sense that it would permit the worker with a disability to violate a rule that others must obey." 122 S.Ct. at 1521. The Court recognized that such reasonable accommodations "sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy." 122 S.Ct. at 1521. As such, despite its unartful terminology, the Court's opinion ultimately validates the rationale underlying the ADA's imposition of a reasonable accommodation requirement.

The Court ruled that the reasonable accommodation obligation can require an employer to make exceptions to disability-neutral practices and rules, and elaborated as follows:

Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from- work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability.

Id.

Significantly, this ruling makes it clear that the duty of making reasonable accommodations is not restricted simply to modifying rules and practices that directly disadvantage workers with disabilities, and can necessitate exceptions to practices and policies that are disability-neutral and applied uniformly to all workers.

2. Evidentiary framework

The majority opinion in *Barnett* set out an evidentiary framework for reasonable accommodations cases in which the employer files a motion for summary judgment (which basically claims that even if the plaintiff is correct in all the factual allegations, as a matter of law the employer will still win the lawsuit). Adopting the approach of some lower court decisions, the Court ruled that to overcome an employer's summary judgment motion, a plaintiff employee needs only show that an accommodation seems reasonable on its face, "ordinarily or in the run of cases." *Id.* at 1523. Once the plaintiff meets this burden, the employer has to establish the existence of ? undue hardship? in the particular circumstances.

3. Reasonableness of accommodations

Prior to the *Barnett* decision, the EEOC and most commentators had believed that, to comply with the evidentiary burdens outlined in the prior subsection, a plaintiff merely had to show that a particular accommodation worked, in the sense that it would enable the worker with a disability to perform the essential functions of the job. The limits on its "reasonableness" were established by the ADA definition of "undue hardship," which provided that an employer did not have to make an accommodation that required "significant difficulty or expense" determined in light of resources available to the employer, the nature and cost of the accommodation, and other factors. 42 U.S.C. ? 12111(10). An "unreasonable accommodation," then, was one that resulted in undue hardship. The majority opinion in *Barnett*, however, recognized an assessment of reasonableness of accommodations apart from undue hardship.

The Court reasoned that the ADA does not "demand action beyond the realm of the reasonable." 122 S.Ct. at 1523. It rejected Mr. Barnett's argument that the word "reasonable" in "reasonable accommodation" only means "effective," and held that it is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. The Court declared that "an accommodation could be unreasonable in its impact even though it might be effective in facilitating performance of essential job functions." *Id.* at 1522. In permitting employers and courts to conduct an assessment of the "reasonableness" of accommodations, apart from their financial and administrative hardship on the employer's operation, the *Barnett* opinion opened up a troublesome can of worms. It invites employers to interject their own eccentric and prejudiced views about what is reasonable, and allows courts to second-guess otherwise workable and not unduly burdensome accommodations.

In its regulations and regulatory guidance, the EEOC has suggested a process for determining an appropriate accommodation, that involves initial discussions between the employer and the employee or applicant, analysis of the particular job involved to determine its purpose and essential functions, consultation with the individual with disability to identify job-related limitations and how those limitations could be overcome with a reasonable accommodation, identifying potential accommodations and assessing the effectiveness each would have, and selecting and implementing the accommodation that is most appropriate for both the employee and the employer considering the preference of the individual to be accommodated. 29 C.F.R. 414 (app. to pt. 1630) (commentary on ? 1630.9) (1993). This process did not contemplate that an employer could say that, although such-and-such accommodation would be effective and is not unduly costly or difficult, I still reject it because I do not think it is reasonable. Hopefully future decisions may restrict this independent evaluation of reasonableness of accommodations to the reassignment/seniority factual context at issue in the *Barnett* case.

The majority opinion in *Barnett* did recognize that the fact that an accommodation would exempt a worker with a disability from a rule or requirement other workers are subject to does not automatically show that the accommodation is not reasonable. 122 S.Ct. at 1521.

4. Conflict with seniority rights

The particular accommodation at issue in *U.S. Airways, Inc. v. Barnett* was allowing Mr. Barnett to remain in a position to which he had transferred despite the fact that the position was subject to seniority-based bidding by other employees. Accordingly, the case involved a conflict between the interests of Mr. Barnett in being assigned to the position as a reasonable accommodation and the interests of other workers with superior rights to bid for the job under U.S. Airways' seniority system. The Court ruled that the ADA does not ordinarily require the assignment of an employee with a disability to a particular position to which another employee is entitled under an employer's established seniority system, but that it might in special circumstances. The Court indicated that transfer to a position to which another employee would be entitled under a seniority system would not be reasonable "ordinarily or in the run of cases." 122 S.Ct. at 1523-24. But the Court stated that the employee could demonstrate "special circumstances" that would render a requested accommodation reasonable in the particular circumstances. As an example of such circumstances, the Court mentioned situations in which other exceptions to a seniority system are made relatively frequently so permitting another to accommodate a worker with a disability would not significantly impact the company or workers' expectations. *Id.* at 1525.

The upshot of the ruling is that plaintiffs seeking accommodations that conflict with seniority rights of other employees will face an uphill battle to demonstrate that the accommodation is reasonable, but can prevail if they can demonstrate special circumstances that make an exception to the seniority system reasonable.

On the way to its ruling, the majority clarified that for purposes of accommodations in the form of "reassignment to a *vacant* position," 42 U.S.C. § 12111(9)(B), a vacant position can be one that is "open" for bidding under a seniority system. 122 S.Ct. at 1521.

Justice O'Connor wrote in her concurring opinion that she would have held that a seniority system would only render a job reassignment as an accommodation under the ADA unreasonable if the seniority system was legally enforceable (which U.S. Airways was not). Justice Stevens also filed a concurring opinion, in which he identified some issues that in his view would need to be resolved by the lower courts to determine whether the accommodation requested by Mr. Barnett was reasonable. The slim 5-to-4 margin of the decision coupled with the sentiments expressed in the concurrences are sufficient to afford Mr. Barnett and future litigants some leeway to still argue, given the particular circumstances at issue, that transfer to a position as a reasonable accommodation should prevail over seniority rights of other employees.

K. REASONABLE MODIFICATION

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Court interpreted and applied the "reasonable modification" requirement under Title III of ADA. 42 U.S.C. § 12182(b)(2)(A)(ii). The Court found that the application of this requirement entails three inquiries: "whether the requested modification is "reasonable," whether it is "necessary" for the disabled individual, and whether it would "fundamentally alter the nature of" the competition." 121 S.Ct. at 1893 n. 38. The Court observed

that a preliminary step in applying the “reasonable modifications” requirement is to determine whether or not a particular modification sought by an individual with a disability is “necessary” to permit the individual to obtain the goods, services, facilities, privileges, advantages, or accommodations the public accommodation provides. If a person with a disability can get the benefits provided in the absence of the modification, even if it was more difficult or uncomfortable, the Court stated that in such cases “an accommodation might be reasonable but not necessary.” 121 S.Ct. at 1893. The Court also required an individualized inquiry to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. *Id.* at 1896. The principles announced by the Court are likely to be significant in guiding the application of the reasonable modification requirement in future cases.

L. APPLICATION OF TITLE III TO INDEPENDENT CONTRACTORS

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Court heard an argument that Martin’s claim of discrimination was “job-related” and could only be brought under Title I, except that Title I did not apply because he was an independent contractor (the District Court found he was) rather than an employee. 121 S.Ct. at 1891. The Court ruled that Martin was a client or customer of the PGA Tour and was thus within the protection afforded by Title III. In his dissenting opinion, Justice Scalia argued that neither Title I nor Title III protected independent contractors. *Id.* at 1898. The majority did not have to resolve the status of independent contractors as a class in the *Martin* case, so the issue may arise in future cases.

NCD believes that in pursuing the expressed congressional goal of ADA “to provide a clear and comprehensive prohibition of discrimination on the basis of disability,” 42 U.S.C. 12101(b)(1), Congress fashioned Title III in extremely broad terms intended to guarantee that no individual is discriminated against on the basis of disability in the full and equal enjoyment of public accommodations. Accordingly, people who perform, render services, or otherwise participate in events or activities at places of public accommodation, whether characterized as competitors, performers, participants, or independent contractors, should be protected by Title III.

M. VALIDITY OF AND DEFERENCE AFFORDED ADA REGULATIONS

The Supreme Court has vacillated wildly in the degree of respect it has accorded ADA regulations. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court declared that the regulations issued by the Department of Justice should be accorded the high level of judicial deference referred to as *Chevron* deference. Pursuant to the Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), where, in enacting a statute Congress expressly directs an executive agency to issue regulations to implement the statutory provisions, the regulations issued by the agency are to be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” In *Bragdon*, the Court declared as follows in regard to the DOJ’s ADA Title III regulations: “As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the

Department's views are entitled to deference. See *Chevron*, 467 U.S., at 844.” 524 U.S. at 646. The regulatory provisions at issue in *Bragdon* were primarily those addressing the definition of disability.

In *Sutton v. United Airlines*, 527 U.S. 471 (1999), on the other hand, the Court accorded considerably less value to the provisions in EEOC's ADA regulations addressing the definition of disability. The Court discussed the various delegations of authority to issue regulations under Titles I to IV of ADA, and then declared that “[n]o agency, however, has been given authority to issue regulations implementing the generally applicable provisions of ADA, ... which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term ‘disability.’ [42 U.S.C.] § 12102(2).” 527 U.S. at 479. However, because both parties in *Sutton* accepted the EEOC regulations defining “disability” as valid, and the Court determined that the validity of the regulations was not necessary to decide the case, it declined to determine “what deference they are due, if any.” *Id.* at 480. Ultimately, the Court rejected a position taken in both EEOC and DOJ regulatory guidance—that persons are to be evaluated in their uncorrected state without taking mitigating measures into account—was an impermissible interpretation of ADA. *Id.* at 482.

In his dissenting opinion in *Sutton*, Justice Breyer contended that the majority questioning of EEOC's authority was unnecessarily and inappropriately technical: “There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of [Title I's] words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.” *Id.* at 514-15.

Ironically, after questioning the EEOC's authority to issue regulations implementing the definition of disability and rejecting the EEOC's position on the mitigating measures issue, the Court accepted (though without ruling on their validity) EEOC's regulatory provisions and regulatory guidance providing (as part of the disability determination) that inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working (29 C.F.R. § 1630.2(j)(3)(i) (1998)). 527 U.S. at 491-92. In *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), the Court followed the pattern of *Sutton*, of rejecting the EEOC's position on the issue of inability to perform a broad range or class of jobs, while rejecting EEOC's stance on the mitigating measures issue.

In *Sutton*, *Murphy*, and *Kirkingburg*, the Court took pains to declare that it was assuming, without deciding, that the regulations were valid, and that, if valid, it was not deciding what level of deference, if any, they should be accorded. This in sharp contrast to the Court's opinion in *Bragdon* where the Court held the regulations entitled to one of the highest levels of judicial deference.

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Court gave a degree of respect to the integration provision of DOJ's Title II regulations. The Court declared: “We need not inquire whether the degree of deference described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is in order; “[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute

‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’” 527 U.S. at 598, quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (additional citations omitted). Thus, the Court looked for guidance to the DOJ integration and reasonable accommodation regulatory provisions, even though it would “not here determine their validity” because the state parties were not challenging the regulatory formulations as outside the congressional authorization. 527 U.S. at 592.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 122 S.Ct. 681 (2002), the Court stated that regulations interpreting the Rehabilitation Act of 1973 were entitled to considerable persuasive authority in interpreting the ADA. The Court noted that the ADA's definition of disability was drawn nearly verbatim from the definition of "handicapped individual" in the Rehabilitation Act, 29 U.S.C. § 706(8)(B), and observed that "Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." 122 S.Ct. at 689. Ironically, having recognized the significance of Rehabilitation Act regulations in interpreting the ADA, the Court indicated that the persuasive authority of the EEOC's ADA regulations regarding the definition of disability was "less clear." *Id.* The Court followed its approach in *Sutton*, *Murphy*, and *Kirkingburg*, reiterating that the ADA did not assign any agency authority to issue regulations interpreting the term "disability," but, since the parties had accepted the EEOC ADA regulations as reasonable, the Court would assume without deciding that they were valid and without deciding "what level of deference, if any," they are due. *Id.*

Thus, in various instances, sometimes in the same case, the Court has given widely varying degrees of deference to regulations issued by the agencies statutorily designated to issue regulations implementing parts of ADA.

N. REMEDIES

1. Generally

In *Barnes v. Gorman*, 122 S.Ct. 2097, 2100 (2002), the Court noted that the "remedies, procedures, and rights" for violations of § 202 of the ADA (Title II) and Section 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964. The Court also indicated that the availability of remedies under Title VI, and consequently of Title II of the ADA, should be determined with reference to a "contract law analogy" that asks whether the recipient of federal funds implicitly consented to the remedy by accepting the funds. While the *Barnes* case addressed punitive damages, it remains to be seen what impact, if any, the contract analogy may have regarding other types of remedies.

In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S.Ct. 754 (2002) the Court ruled that the EEOC's ability to pursue victim-specific remedies, such as backpay, reinstatement, and damages, against an employer for allegedly violating the ADA was not restricted by an agreement between an employer and an employee to arbitrate any employment-related dispute or claim.

2. Private right of action

In *Barnes v. Gorman*, 122 S.Ct. 2097, 2100 (2002), the Court recognized that its prior cases had established "beyond dispute" that there is an implied right of private individuals to sue under Title VI of the Civil Rights Act of 1964. Since § 202 of Title II of the ADA shares the "remedies, procedures, and rights" of Title VI, a private right of action clearly is available for violations of § 202.

3. Attorney's Fees

In *Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 121 S.Ct. 1835 (2001), the Court rejected the "catalyst theory," previously adopted by most of the U.S. Courts of Appeals, under which a plaintiff was considered a "prevailing party" eligible to be awarded attorney's fees if it achieved its desired result because the lawsuit brought about a voluntary change in the defendant's conduct. In *Buckhannon*, the Supreme Court required a judgment, consent decree, or settlement in a party's favor before the party would be eligible for attorney's fees. This decision represented a significant turnaround from the previous prevailing view and practice.

4. Punitive Damages

In *Barnes v. Gorman*, 122 S.Ct. 2097 (2002), the Court ruled that punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, under 202 of the ADA, nor under Section 504 of the Rehabilitation Act. The ruling removes a potent potential sanction against egregious violators of these laws.