

# NCD

National Council on Disability

## The Americans with Disabilities Act Policy Brief Series: Righting the ADA

No. 7

The Impact of the Supreme Court's ADA Decisions on the Rights of  
Persons With Disabilities

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## I. Introduction and Synopsis

When enacted in 1990, supporters hailed the Americans with Disabilities Act as the "emancipation proclamation for people with disabilities."<sup>1</sup> President Bush declared "with today's signing [of the ADA]. . . , every man, woman, and child with a disability can now pass through once closed doors into a bright new era of equality, independence and freedom."<sup>2</sup> Yet recently, the Supreme Court has significantly narrowed the statute's broad protections. In the past four years, the Court has placed significant restrictions on whom the ADA covers, the types of remedies available to victims of discrimination, and when attorneys may seek fees under the statute. The Court also has expanded the defenses available to employers and questioned Congress' constitutional authority to enact the ADA.

This paper explores the impact the Supreme Court's decisions have had on persons with disabilities. It reviews published and unpublished court decisions, as well as anecdotal evidence, and demonstrates that the Court's restrictive reading of the ADA has undermined Congress' goal of eradicating discrimination on the basis of disability. This paper discusses representative examples—particularly at the federal appellate level—of how the Supreme Court's decisions have impeded the rights of people with disabilities.

Part II of this paper discusses the Supreme Court's "definition cases"—*Sutton v. United Airlines*,<sup>3</sup> *Murphy v. United Parcel Service*,<sup>4</sup> *Albertson's v. Kirkingburg*,<sup>5</sup> and *Toyota v. Williams*<sup>6</sup>—in which the Supreme Court narrowly interpreted the ADA's definition of disability. This Part analyzes how these definition cases have been interpreted by the lower courts and concludes that hundreds of ADA cases are being dismissed on the question of whether the plaintiff is *covered* by the statute, rather than whether the plaintiff was *discriminated* against because of his or her disability. This Part also documents attorneys' resulting reluctance to litigate ADA employment cases.

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Part III discusses the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*,<sup>7</sup> which held that Congress lacked the constitutional authority to abrogate the states' Eleventh Amendment immunity to suits brought under the ADA's employment provisions. This Part shows how *Garrett* has limited the ability of ADA plaintiffs to sue states for discrimination, under both Titles I and II of the ADA.

Part IV discusses *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*,<sup>8</sup> which eliminated the "catalyst theory" as a grounds for recovering attorneys' fees. Under the catalyst theory, an individual who had brought about voluntary change in the defendant's conduct by filing a lawsuit was deemed to be a prevailing party and thus entitled to an award of reasonable attorneys' fees. This Part demonstrates how elimination of the catalyst theory has restricted access to the courts for people with disabilities, because attorneys are financially unable to pursue many meritorious cases of discrimination.

Part V discusses *Barnes v. Gorman*,<sup>9</sup> which held that punitive damages are not available under either Title II of the ADA or Section 504 of the Rehabilitation Act. Part VI discusses *Chevron v. Echazabal*,<sup>10</sup> which held that the EEOC regulation allowing employers to refuse to hire applicants because their performance on the job would endanger their health due to a disability is permissible under the ADA, and *U.S. Airways v. Barnett*,<sup>11</sup> which held that when seeking a reasonable accommodation under the ADA, an employee must establish that the accommodation is "reasonable on its face." These final sections demonstrate how the Court's expansion of defenses available to employers and further limitation of the remedies available to persons with disabilities have created additional impediments to redressing discrimination on the basis of disability.

## **II. The Supreme Court Has Significantly Limited the Number of Individuals Protected by the ADA**

Perhaps the most profound impact of the Supreme Court's ADA decisions has been the narrowing of whom is covered by the statute. Under the ADA, an individual has a disability if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," has a "record of such an impairment," or is "regarded as having such an impairment."<sup>12</sup> In enacting the statute, Congress made clear that the scope of the intended protected class was vast.<sup>13</sup> The ADA's legislative history explicitly states:

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. . . . For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of hearing aids. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially

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limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.<sup>14</sup>

Nevertheless, in a series of cases regarding the ADA's definition of "disability," the Supreme Court has severely restricted the scope of the statute's protections. *Sutton v. United Airlines* and *Murphy v. United Parcel Service* held that when determining whether an individual is substantially limited in a major life activity, courts may consider only the limitations of an individual that persist *after* taking into account mitigating measures (e.g., medication or auxiliary aids and services) and any negative side effects the mitigating measures may cause.<sup>15</sup> *Albertson's v. Kirkingburg* held that a "mere difference" in how a person performs a major life activity does not make the limitation substantial; how an individual has learned to compensate for the impairment, including "measures undertaken, whether consciously or not, with the body's own systems," also must be taken into account.<sup>16</sup> Finally, *Toyota v. Williams* held that "to be substantially limited . . . , an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."<sup>17</sup> In addition, the terms of the statute "need to be interpreted strictly to create a demanding standard for qualifying as disabled."<sup>18</sup>

While, arguably, the above cases presented the Supreme Court with difficult facts (e.g., persons who wore eyeglasses, had high blood pressure, and had carpal tunnel syndrome), the Court's sweeping decisions have affected whole classes of individuals who Congress unequivocally intended to protect under the ADA. Because of the Supreme Court's decisions, the great majority of individuals bringing ADA claims (particularly ADA employment claims) spend years litigating whether they *have* a disability, rather than whether they were *discriminated against* on the basis of disability. And more often than not, the lower courts have dismissed these cases before the issue of whether discrimination actually occurred was ever reached.

The Supreme Court's narrow interpretation of the definition of disability validated and accelerated a line of cases in the lower courts restricting ADA coverage. In a seminal study conducted by the American Bar Association, the ABA found that among employment cases filed between 1992 and 1998, employers won over 90 percent of the time, often because of the courts' restrictive interpretation of the definition of disability.<sup>19</sup> This study has been repeated yearly, with similar results.<sup>20</sup> Another oft-cited empirical study of appellate ADA employment decisions concluded that "defendants prevail at an astonishingly high rate on appeal."<sup>21</sup> Other commentators have reached similar conclusions.<sup>22</sup>

These lower court cases—in which the courts have found that the plaintiffs do not satisfy the ADA's definition of disability—can be grouped into five categories of cases, which involve individuals (1) whose impairments were controlled by mitigating measures, (2) whose impairments *could* be controlled by mitigating measures, (3) whom the courts found not substantially limited in working, (4) whom the courts found not substantially limited in any

activity "central to daily living," and (5) whom the courts found not "regarded as" disabled. The net result of these cases is that individuals with a wide range of disabilities—including epilepsy, insulin-dependent diabetes, major depression, HIV, severe hypertension, cancer, multiple sclerosis, asthma, severe back injuries, post-traumatic stress disorder, attention deficit disorder, monocular vision, repetitive stress injuries, obsessive compulsive disorder, and heart conditions, among others— have been found not to be protected by the ADA. Each case category is discussed below.

**A. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Ruled that Persons Who Use Mitigating Measures are Not Protected by the ADA**

The first group of individuals found not to be protected by the ADA are those who clearly have disabling impairments, but whose impairments are controlled by medication or other mitigating measures. In some instances, these individuals were not hired, or were fired, because of their impairments. In others, they were denied the accommodations (e.g., modified work schedules, modified work environments) they needed to perform their jobs. Following *Sutton* and *Murphy*, the lower courts have ruled that when these individuals are considered in their mitigated state, they are not "limited enough" to meet the first prong of the ADA's definition of disability. As a result, despite Congress' clear intent that such individuals be covered under the statute,<sup>23</sup> the courts have ruled that they are not. And because the cases are dismissed on the coverage issue, the issue of whether discrimination actually occurred is never addressed.

*EEOC v. Sara Lee*<sup>24</sup> is representative. The Fourth Circuit described the plaintiff, a machine operator with epilepsy, as follows:

In 1992, Vanessa Turpin began to experience seizures in her sleep. Although she saw a neurologist and took medication, Turpin occasionally experienced nocturnal and daytime seizures. According to Turpin's doctor, she experienced seizures about once or twice a week. The nocturnal seizures were characterized by shaking, kicking, salivating, and at least on one occasion, bedwetting. After having these seizures, Turpin would feel tired in the morning, as if she did not sleep at all. Turpin typically was unaware that she was having seizures, and sometimes would wake up with bruises on her arms and legs.

The daytime seizures were milder in nature. Over the time period at issue in this appeal, four or five seizures happened during work itself. Turpin could feel the seizure about to start, and would sit elsewhere until the episode passed. The seizures normally lasted a couple of minutes. During these seizures, Turpin began shaking, her face took on a blank expression, and she became unaware of and unresponsive to her surroundings. . . . These seizures also sometimes caused Turpin to suffer memory loss. Turpin would occasionally forget to take her medication, or forget where she was going in her car.<sup>25</sup>

Nevertheless, the Fourth Circuit found that Turpin was not a person with a disability within the meaning of the ADA, and thus was not entitled to a reasonable accommodation of only having to work the daytime shift<sup>26</sup>. When considered in her mitigated state (*i.e.*, while taking medication), the court found that Turpin was not *substantially* limited in any major life activity, including the major life activities of sleeping, thinking, and caring for one's self.<sup>27</sup>

*Orr v. Wal-Mart Stores, Inc.*<sup>28</sup> considered the case of a pharmacist, Stephen Orr, with Type I diabetes. Orr injected himself with insulin three times a day, tested his blood sugar numerous times a day, had to eat certain foods at certain times of day, and was prone to hypoglycemic episodes. After Orr was denied the accommodation of being allowed to close the pharmacy (or, alternatively, having another individual manage the pharmacy) for half an hour per day so that Orr could administer his medications and eat his lunch uninterrupted, he was fired. The Eighth Circuit, however, never addressed the issue of whether Orr was entitled to reasonable accommodations. Rather, it found that when the effects of insulin and a controlled diet were considered, Orr was not substantially limited in any major life activities and thus was not protected by the ADA.

The case law is replete with similar examples. *See, e.g., Nordwall v. Sears, Roebuck & Co.*, 46 Fed App. 364, 2002 WL 31027956 (7<sup>th</sup> Cir. 2002) (unpublished) (administrative assistant with insulin-dependent diabetes not substantially limited in her ability to work or care for herself, despite the fact that she had to test her blood sugar daily; had to administer daily shots of insulin; experienced frequent low blood sugar reactions, bouts of dizziness and lightheadedness, and occasional "blackouts"; and her diabetes required her to have low stress structured workdays); *Boerst v. General Mills*, 2002 WL 59637 (6<sup>th</sup> Cir. 2002) (unpublished) (forklift operator with depression controlled by medication, who was only getting 2-4 hours sleep per night, not substantially limited); *Chenoweth v. Hillsborough Co.*, 250 F. 3d 1328 (11<sup>th</sup> Cir. 2001), *cert denied*, 534 U.S. 1131 (2002) (nurse with focal onset epilepsy, controlled by medication, not substantially limited); *Taylor v. Nimock's Oil Co.*, 214 F. 3d 957 (8<sup>th</sup> Cir. 2000) (convenience store employee with heart condition, controlled by medication, not substantially limited); *Hill v. Kansas Area Transp. Auth.*, 181 F.3d 891 (8<sup>th</sup> Cir. 1999) (bus driver with hypertension, controlled by medication, not substantially limited); *Spades v. City of Walnut Ridge*, 186 F.3d 897, 900 (8<sup>th</sup> Cir. 1999) (police officer with depression who was not allowed back to work after suicide attempt not substantially limited because post-suicide attempt counseling and medication controlled his depression); *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645 (5<sup>th</sup> Cir. 1999) (company president with myelodysplastic syndrome, a form of blood cancer, which was treated by chemotherapy, not substantially limited) (but remanded back to the lower court because disputed issue of fact on whether individual covered under "record of" or "regarded as" prong); *Muller v. Costello*, 187 F.3d 298, 314 (2<sup>nd</sup> Cir. 1999) (correctional officer, whose asthma was treated with medication, not substantially limited in breathing, even though asthma caused numerous emergency room visits and absences); *Saunders v. Baltimore Co.*, 163 F. Supp 2d 564 (D. Md. 2001) (county corrections officer with asthma, requiring daily medication, twice weekly

injections, use of inhaler, and resulting in occasional hospitalizations, not substantially limited in breathing or working where officer only encountered breathing difficulty in area of detention center to which he was assigned); *Gutwalks v. American Airlines*, 1999 WL 1611328 (N.D. Tex. 1999) (airline employee with full blown AIDS, receiving treatment for his illness, not substantially limited in any major life activity); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 453-54 (S.D. Tex. 1999) (stocker with epilepsy who, even under medication, experienced weekly seizures lasting "only" between five and fifteen seconds, and who, as a result of the side effects of his medication experienced decreased cognitive function and memory problems, not substantially limited; the court noted that, prior to *Sutton*, "a person suffering from epilepsy would receive nearly automatic ADA protection").

**B. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Ruled that Persons Whose Impairments *Could* be Mitigated by Medication are Not Protected by the ADA**

A related category of individuals excluded from ADA coverage are those who *have* substantially limiting impairments, but whose impairments arguably *could* be mitigated by medication or other appropriate measures. Despite the fact that such individuals are in fact substantially limited in major life activities, courts have ruled that because these individuals have not availed themselves of medication or other corrective devices, they are not entitled to the ADA's protections.

For example, in *Tangires v. Johns Hopkins Hospital*,<sup>29</sup> a hospital employee with severe asthma refused to take steroidal medication prescribed by her physician because she feared such medication would adversely affect her pituitary tumor. The court ruled that because her asthma most likely could have been mitigated by medication, she was not substantially limited in the major life activities of breathing or working, and therefore could not bring suit under the ADA.

*Tangires* has been called "a perverse stretch of *Sutton*."<sup>30</sup> Nevertheless, other courts have ruled similarly and have concluded that if a disorder could theoretically be controlled by medication – even if it is not – the person with the disability is not substantially limited and therefore not entitled to protections under the ADA. *See, e.g., Hein v. All Am. Plywood Co.*, 232 F.3d 482, 487 (6<sup>th</sup> Cir. 2000) (truck driver with hypertension who refused to drive a delivery run since he was unable to obtain a medication refill prior to the trip not substantially limited; driver's condition should be viewed in its mitigated state since he voluntarily failed to take his medication); *Rose v. Home Depot*, 186 F. Supp. 2d 595, 613-614 (D. Md. 2002) ("failure to take the proper measures to gain a proper diagnosis necessary to a proper treatment plan is the legal equivalent of a refusal to avail oneself of proper treatment" because plaintiff "has effectively avoided a reasonable opportunity to achieve mitigating diagnoses and treatment"; plaintiff therefore failed to present proof that he has a disability as defined by the ADA); *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp 2d 183 (N.D.N.Y. 2001) (fork lift truck driver with post-traumatic stress disorder (PTSD)

not substantially limited where PTSD could be mitigated by medication, which truck driver voluntarily chose not to take); *Spradley v. Custom Campers, Inc.* 68 F. Supp. 2d 1225 (D. Kan. 1999) (maintenance worker with epilepsy and active seizures not substantially limited where probability of seizures would have been much lower if worker had taken prescribed medication).

**C. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Made it Much More Difficult For Individuals to Establish That They Are Substantially Limited in the Major Life Activity of Working**

The third category of individuals excluded from ADA coverage are those who the lower courts have found not substantially limited in the major life activity of “working.” In *Sutton*, and again in *Toyota*, the Supreme Court questioned whether “working” could ever constitute a major life activity within the meaning of the ADA.<sup>31</sup> Assuming, without deciding, that working *is* a major life activity, the Supreme Court looked to controversial EEOC regulations and concluded that:

The ADA does not define ‘substantially limits,’ but ‘substantially’ suggests ‘considerable’ or ‘specified to a large degree.’ . . .

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. . . .

. . . To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job or a particular job of choice. If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.<sup>32</sup>

This analysis has created an almost impossible standard of proof for individuals who have suffered adverse employment actions because of their disabilities, but who cannot establish that they are substantially limited in any major life activity other than working. Plaintiffs must prove not only that they are substantially limited in performing the job at issue, but that there is sufficient demographic data or other evidence establishing that they are unable to work in a "class of jobs" or "broad range of jobs." At the same time, plaintiffs must be careful to maintain that, at least with reasonable accommodations, they are still "qualified" to perform the job in question.<sup>33</sup> This tension between having to show that one is severely disabled yet still qualified to do the job has been cogently described by some commentators as the "ADA Catch-22."<sup>34</sup>

For example, *Duncan v. WMATA*<sup>35</sup> ruled that the plaintiff, a transit employee who had been terminated because of his back condition, was not substantially limited in working. The D.C. Circuit Court of Appeals found that despite the fact that the transit employee had introduced

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medical testimony regarding his back condition and lifting restrictions, and despite evidence regarding plaintiff's age, limited skills, education, experience, and inability to find comparable employment after discharge (the only job the plaintiff ultimately found was at 1/3 his former salary), the plaintiff failed to produce evidence of the number and types of jobs in the local employment market sufficient to show that he was disqualified from a class or broad range of jobs.<sup>36</sup> As a result, the appellate decision overturned a jury verdict awarding \$125,000 on the plaintiff's wrongful termination claim and \$125,000 on plaintiff's reasonable accommodation claim, as well as the lower court's order awarding back pay and reinstatement.<sup>37</sup>

*Broussard v. University of California*<sup>38</sup> held that an animal technician with carpal tunnel syndrome was not substantially limited in working, despite the fact that a rehabilitation counselor concluded that Broussard "had moderate to poor potential to carry out her duties as Animal Technician," because she would need to clean and change animal cages for a sustained two-hour period, and her "current ability indicates a maximum of 30-45 minutes of this particular activity."<sup>39</sup> Based on this report and that of Broussard's physician, a vocational expert determined that Broussard was precluded from 40 percent of available jobs in the San Francisco Bay area. The Ninth Circuit, however, dismissed the expert's findings as "conclusory allegations," because the expert had failed to take Broussard's vocational abilities into account and had not compared the jobs Broussard could do before and after the onset of her carpal tunnel syndrome.<sup>40</sup> Relying on *Sutton*, the court concluded that "Broussard's inability to perform the specialized job of animal technician for the transgenic mice does not constitute a substantial limitation."<sup>41</sup>

Finally, *Rhoads v. FDIC*<sup>42</sup> held that an individual with asthma and related migraine headaches, who experienced recurring bouts of bronchitis, pneumonia, severe lung infections and cluster-migraine syndrome when exposed to second-hand smoke at her office, was not substantially limited in working because she established only that she was unable to function in one particular smoke-infested office.<sup>43</sup> The Fourth Circuit found that the plaintiff had "[failed to] show, as required, that she is generally foreclosed from jobs utilizing her skills because she suffers from smoke-induced asthma and migraines."<sup>44</sup> The plaintiff had argued that an employer who is not willing to provide reasonable accommodations to its employees (e.g., enforcing a no-smoking ban) should not be allowed to point to other employers who are willing to provide such accommodations as proof that an employee with a disability is not precluded from employment generally. While finding that failure to enforce a smoking ban "is hardly commendable," the Fourth Circuit dismissed plaintiff's argument and ruled that she had failed to establish that she was precluded from a broad range of jobs.<sup>45</sup>

Other courts have made similar rulings. *See, e.g., Whitson v. Union Boiler Co.*, 2002 WL 31205208 (6<sup>th</sup> Cir. 2002) (pipefitter rigger with seizure disorder—not controlled by medication—not substantially limited in major life activity of working, even though he was fired (two days after disclosing his seizure disorder) for refusing to work at elevation because there

was no place for him to tie his safety belt into a life line and the risk of having a seizure and falling was too great); *Webb v. Clyde L. Choate Mental Health and Dev. Ctr.*, 230 F.3d 991 (7<sup>th</sup> Cir. 2000) (psychologist with asthma, osteoporosis, and weakened immune system not substantially limited in the major life activity of working where psychologist had not presented evidence that his condition prevents him from performing a class of jobs); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055 (7<sup>th</sup> Cir. 2000) (benefits analyst with major depression, requiring hospitalizations, medication, and outpatient care, not substantially limited in working); *Paul v. Wisconsin Dep't of Industry*, 101 F.3d 456 (7<sup>th</sup> Cir. 1999) (unemployment benefits specialist with ADD, certified as "disabled" by Vocational Rehabilitation, not substantially limited in working).

**D. As a Result of the Supreme Court's Definition Cases, The Lower Courts are Now Requiring Individuals to Prove Not Only That They Are Substantially Limited in Major Life Activities, But in "Activities Central to Daily Life"**

A fourth—and related—category of individuals excluded from ADA coverage are those with impairments that may be substantially limiting, but who, according to the courts, are not limited in “activities central to daily life.”

For example, *Stedman v. Bizmart*<sup>46</sup> held that the plaintiff, a liver transplant recipient with diabetes, was not protected by the ADA because the plaintiff’s diabetes did not substantially limit him in performing any major life activity outside of the workplace. The district court explained:

Prior to January 2002, case law made satisfaction of a *prima facie* case under the ADA, particularly meeting the "disability" prong, relatively simple. On January 8, 2002, however, the Supreme Court significantly altered the definition of "substantially limits a major life activity." . . . Curtailing previous case law defining "major life activities," [*Toyota v. Williams*] held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Specifically, the Court stated that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." As a result, *this decision creates additional obstacles for many plaintiffs in disability cases, particularly those alleging discrimination in the workplace. Under Toyota, it appears that courts now have greater discretion in determining what is a major life activity and what interference with that activity is substantial enough to constitute a disability.*<sup>47</sup>

Applying *Toyota*'s analysis, *Thornton v. McClatchy*<sup>48</sup> ruled that a newspaper reporter with repetitive stress injuries, who was unable to use a keyboard for more than 30 minutes at a time or

60 minutes intermittently per day, and who could not write for more than 5 minutes at a time or 60 minutes intermittently per day was not substantially limited in a major life activity. The Ninth Circuit held that even though the reporter's "life has been diminished," continuous keyboarding and writing are not activities of central importance to *most* people's daily lives<sup>49</sup>. Because the court found that the plaintiff was not covered under the ADA, she never had the opportunity to establish whether accommodations existed that would have allowed her to continue to perform her job.

Similarly, *Fultz v. City of Salem*<sup>50</sup> held that a police officer who suffered a work-related injury to his left ring finger and who was fired as a result was not protected by the ADA because "the injury does not prevent or severely restrict Plaintiff from doing activities that are of central importance in most people's daily lives."<sup>51</sup> The Ninth Circuit found that even though the plaintiff could no longer perform law enforcement jobs that required forcible arrests or involvement with potentially combative situations, and even though he had difficulty performing manual tasks such as buttoning his shirt, he did not satisfy the ADA's definition of disability, as he still "could do most of his activities."<sup>52</sup> See also *Mack v. Great Dane Trailers*, 308 F.3d 776, 781 (7<sup>th</sup> Cir. 2002) (overturning jury verdict and finding trailer builder not protected by the ADA because "[a]n inability to lift heavy objects may disqualify a person from particular jobs but does not necessarily interfere with the central functions of daily life"); *EEOC v. United Parcel Service*, 306 F.3d 794, 802-03 (9<sup>th</sup> Cir. 2002) (UPS drivers with monocular vision not substantially limited in major life activity of seeing; "for a monocular individual to show that his impairment is a disability, the impairment must prevent or severely restrict use of his eyesight compared with how unimpaired individuals normally use their eyesight in daily life") (remanded on question of "regarded as").

**E. As a Result of the Supreme Court's Definition Cases, The Lower Courts Have Made it Almost Impossible For Individuals to Establish That They Fall Within the "Regarded As" Prong of the ADA's Definition of Disability**

The last category of individuals negatively impacted by the Court's definition cases are those who argue they were discriminated against because they were "regarded as" having disabilities. When enacting the ADA, Congress made clear that the "regarded as" prong was intended to protect those individuals who were discriminated against because of misperceptions, myths, fears, and stereotypes about disability and disease: "[a] person who is . . . discriminated against . . . because of a covered entity's negative attitude toward that person's impairment is treated as having a disability."<sup>53</sup>

In *Sutton*, however, the Supreme Court focused on the fact that the third prong of the ADA's definition of disability covers those who are regarded as having "*such* an impairment." Under the Court's crabbed reading, "such an impairment" means the same kind of impairment as would

give rise to protection if it actually existed, i.e., one that substantially limited one or more major life activities. The Court explained:

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.<sup>54</sup>

In the employment context, where plaintiffs also must establish that they are "otherwise qualified to perform the job" in order to prevail on their ADA claims,<sup>55</sup> ADA plaintiffs often argue that they are able to perform the job in question, but that they were discriminated against because their employers "regarded" them as substantially limited in working. Under *Sutton*, however, it is not sufficient to show that an employer fired, or refused to hire, an individual because of concerns regarding the individual's impairment. Since being substantially limited in working is defined as being substantially limited in the ability to perform a broad range or class of jobs, *Sutton* held that an employee must establish that the employer regarded the employee as unable to perform a broad range or class of jobs, rather than a single job.<sup>56</sup>

Since employers can argue that they had no opinion as to whether the plaintiff could perform a variety of jobs, but just had concerns regarding the individual's ability to perform the job in question, establishing coverage under the "regarded as" prong has become virtually an impossible task. As a result, individuals who clearly were discriminated against because of "myths, fears, and stereotypes" about disease and disability have nonetheless been found not to be covered under the ADA.

For example, in *EEOC v. Rockwell Int'l Corp.*,<sup>57</sup> an employer refused to hire over 70 entry-level job applicants who failed nerve conduction tests. Though the applicants did not have any medical impairments, they were not hired on the grounds that failing the nerve conduction test was an indication that the applicants *might* suffer from neuropathy and therefore *might* be susceptible to injuries from frequent repetitive motions or the use of vibratory power tools. The EEOC argued that these individuals were denied jobs and thus discriminated against because they had been regarded as persons with substantially limiting impairments. The Seventh Circuit, however, ruled that the EEOC had failed to submit sufficient evidence to show that the applicants were regarded as substantially limited in working. Because the EEOC had failed to introduce demographic or other data regarding the surrounding labor market, the court ruled, the EEOC had only established that the employer perceived the applicants as unable to perform the

specific entry level jobs at Rockwell International Corp., rather than unable to perform a class of jobs or broad range of jobs.<sup>58</sup>

In *Sorenson v. University of Utah*,<sup>59</sup> a flight nurse with multiple sclerosis was forcibly reassigned because of her employer's concerns regarding the impact the nurse's MS would have on her ability to do her job. Despite assurances from the nurse's neurologist that she could perform the essential functions of a flight nurse, and despite the fact that after her diagnosis the nurse successfully worked as a regular nurse in the burn unit, the surgical intensive care unit, and the emergency room, the nurse's supervisors remained concerned that she "would suffer from an episode or problem associated with her MS while on duty," and they refused to reinstate her<sup>60</sup>. The Tenth Circuit ruled that the nurse was not protected by the ADA, because the hospital had not regarded her as substantially limited in working. Rather, the hospital merely perceived the nurse as unable to perform the job of flight nurse; the fact that the hospital continued to employ the nurse as a burn unit, surgical ICU, and emergency room nurse showed that the hospital did not regard her as unable to perform a class of jobs or broad range of jobs.<sup>61</sup>

In *Giordano v. City of New York*,<sup>62</sup> a police patrol officer who took anti-coagulant medication following aortic valve replacement surgery was terminated because of the fear that he could sustain catastrophic bleeding if he was injured on the job. The Second Circuit ruled that the New York Police Department did not regard the officer as substantially limited in working. At most, the court found, the officer had introduced evidence that the Department regarded the officer as "disabled from police or other investigative or security jobs that involve a substantial risk of physical confrontation."<sup>63</sup> This, the court held, was not sufficient to establish that the Department regarded the officer as substantially limited in working a "broad class of jobs," and thus was insufficient to establish protection under the ADA.<sup>64</sup>

The case law contains many other examples of the lower courts' reluctance to view plaintiffs as being covered by the "regarded as" prong. *See, e.g., Fultz v. City Of Salem*, 2002 WL 31051577 at \*2 (police officer who suffered a work-related injury to his left ring finger and who was fired as a result only regarded as having impaired left finger, not regarded as disabled); *Cooper v. Olin Corp.*, 246 F. 3d 1083 (8<sup>th</sup> Cir. 2001) (locomotive engineer with chronic depression, prohibited from operating locomotive engine after return from depressive episode despite clearance to return to work by treating physician, not regarded as substantially limited in working); *Steele v. Thiokol Corp.*, 241 F.3d 1248 (10<sup>th</sup> Cir. 2001) (rocket test technician with obsessive compulsive disorder (OCD) not regarded as disabled, despite employer's awareness of technician's OCD, the medicines he was taking, and supervisor's concerns regarding technician's mood swings); *Krocka v. City of Chicago*, 203 F.3d 504 (7<sup>th</sup> Cir. 2000) (police officer with depression, which was treated successfully with Prozac, not regarded as disabled, despite the fact that, because he was taking Prozac, police officer was required to participate in Police Department's "Personnel Concerns Program," which required frequent monitoring by Department officials and routine medical evaluations, including blood draws); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492 (10<sup>th</sup>

Cir. 2000) (individual with severe depression and anxiety, whose managers described as "incapacitated" and who was fired due to her inability to make decisions and her lapses in memory and judgment, not regarded as substantially limited in any major life activity); *Cash v. Smith*, 231 F.3d 1301 (11<sup>th</sup> Cir. 2000) (typesetter with seizure disorder controlled by medication, type 2 diabetes, depression, mitral valve prolapse, high blood pressure, and who had had a brain tumor removed, neither substantially limited nor regarded as substantially limited in working, despite the fact supervisor contacted company's disability management personnel regarding typesetter's excessive medically-related absences, and despite the fact that typesetter was reassigned to a lower level position); *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083 (8<sup>th</sup> Cir. 2000) (railroad manager with major depression and anxiety, whose employer refused to allow him to return to work under maximum 40 hour work week restriction, not regarded as substantially limited in working); *Stumbo v. Dyncorp Technology Services, Inc.*, 130 F. Supp. 2d 771 (W.D. Va. 2001); *aff'd*, *Stumbo v. Dyncorp Procurement Systems, Inc.*, 17 Fed. Appx. 202 (4<sup>th</sup> Cir. 2001); *cert. denied*, 122 S. Ct. 1302 (2002) (security officer with fully corrected hypertension, denied job because reviewing physician noted in application file, "overweight smoker on hypertensive meds, wouldn't recommend for strenuous work," not regarded as substantially limited in working); *EEOC v. J.B. Hunt Transp.*, 128 F. Supp. 2d 117 (N.D.N.Y. 2001) (truckload motor carrier did not discriminate against class of applicants that it did not hire because it learned (after it had made them a conditional offer of employment) that they were taking medications that appeared on a list that the company used to screen out applicants; plaintiffs had merely presented evidence that they were taking these medications, not that the employer regarded them as substantially limited in any major life activity or that they were actually substantially limited in a major life activity); *Arnold v. City of Appleton*, 97 F. Supp. 2d 937 (E.D. Wis. 2000) (applicant for firefighter position, whose conditional offer of employment was revoked because he had epilepsy, not protected by the ADA; "the perceived inability to perform one job is not sufficient to establish that the plaintiff is substantially limited in the major life activity of working"); *Piascyk v. City of New Haven*, 64 F. Supp.2d 19 (D. Conn. 1999) (patrol officer with multiple injuries from car accident, who was denied promotion to superintendent position, not regarded as substantially limited, despite employer's receipt of employee's doctor reports, employer's express reference to officer as being injured, and officer's assignment to "light duty").

**F. The Supreme Court's Definition Cases Have Had a Chilling Effect on Whether and How Individuals With Disabilities and Their Attorneys Pursue ADA Claims In Court**

The cases discussed above show how, as a result of the Supreme Court's definition cases, many litigants with disabilities are being denied the opportunity to prove they were discriminated against, because their cases are dismissed on the grounds that they are not covered by the ADA. The same Supreme Court cases have had a chilling effect on individuals and attorneys considering filing ADA claims, which has resulted in fewer discrimination cases ever even being

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considered by the courts. For example, the Epilepsy Foundation has collected information showing that:

ADA claimants with epilepsy are generally not getting past the threshold question of whether their condition falls within the ADA's definition of disability. Indeed, of the cases of which we are aware, only two plaintiffs have successfully showed that they are disabled [post -*Sutton*] . . . There is no way to gauge precisely how many possible claimants have dropped their claims because of this devastating track record, but we know for certain from the calls that we have received that claimants are abandoning claims. . . . It is worth pointing out that before the *Sutton* decision, the trend in the courts was just the opposite. In those few ADA or Rehabilitation Act cases where disability was an issue, there was little dispute that epilepsy fell within that definition.<sup>65</sup>

Data from the Equal Employment Opportunity Commission (EEOC) shows that the number of ADA lawsuits filed by the EEOC decreased significantly after the trilogy of ADA decisions in 1999 (*Sutton*, *Murphy*, and *Kirkingburg*) and decreased again after the 2002 trilogy (*Williams*, *Barnett*, and *Echazabal*).<sup>66</sup> This was true despite the fact that EEOC lawsuits filed under other federal employment discrimination laws during those years increased.<sup>67</sup>

The Supreme Court's ADA decisions also have had an impact on *how* the EEOC performs its work. Commission representatives explained:

- "After the issuance of the *Sutton-Murphy-Kirkingburg* trilogy, the General Counsel began submitting all ADA cases to the Commission for litigation authorization. Previously, the General Counsel exercised his own authority to authorize litigation of ADA cases, or delegated it to the Regional Attorneys. . . .
- "We have always viewed "regarded as being disabled" as a last resort for establishing coverage under the ADA, but we tend to rely on the theory even less, in part because of the proof element that the employer must regard the individual as being substantially limited in a major life activity, and evidence of this perception is difficult to obtain.
- "We have placed greater emphasis on a larger variety of major life activities to establish coverage under the ADA.
- "We are more reluctant to rely on "working" as a major life activity, in both "actual" and "regarded as" cases, but due to increased difficulty in establishing a substantial limitation in other major life activities, we are frequently forced to assert "working" as a major life activity."<sup>68</sup>

The U.S. Department of Justice has noticed a direct and profound impact on its ADA enforcement as well. Representatives from the Department's Civil Rights Division explained:

- "We are now making different decisions than we would have prior to the *Sutton* trilogy when deciding whether to open a complaint for investigation. It is more difficult to open an investigation when the complaint is from a person who is hard of hearing and whose hearing is ameliorated by hearing aids or when the complaint is from a person who has diabetes and uses insulin. Similar situations involve those whose physical conditions are controlled through medication (e.g., high blood pressure, epilepsy) or who have lost limbs (and may or may not use prosthetic devices.)
- "We are unable to pursue some title I cases for people with depression who are treated with medication. For example, someone who uses Prozac and is not hired on that basis is not usually covered under the first prong of the definition or under the "regarded as" prong.
- "We now have to spend additional time in developing matters into a case because of the need to develop a record of disability. In some cases we spend twice as much time and often have to go on site to develop a record that, despite the use of medication, a major life activity is substantially impaired. . . .
- "Because of the *Sutton* cases, we now must engage in intrusive inquiries into the private lives of persons with disabilities who complain to us. We may have to look into debilitating side effects of medications [and make] minute inquiries into how someone carries out the activities of daily living, including intimate behaviors from toileting to sex. It seems incongruous and unjust for a person with a disability to have to reveal such detail about themselves merely to attend a concert or get a job."<sup>69</sup>

Not surprisingly, private attorneys, who used to litigate the majority of ADA employment discrimination cases, are now reluctant to take these cases. As one employment discrimination attorney bluntly explained, "I have virtually stopped putting any energy into ADA employment discrimination cases unless they appear at first blush as so egregious as to meet the . . . standards set by the courts."<sup>70</sup> Another stated, "I'm doing fewer ADA employment cases because of what the Supreme Court has done to the ADA, and I'm finding fewer attorneys to refer these cases to. Indeed, I accepted cases and got relief for workers in the early years of the ADA—including, for example, a truck driver with monocular vision—that I probably wouldn't be able to accept today for litigation."<sup>71</sup>

Not-for-profit and publicly-funded attorneys find themselves reluctant—or at times, unable—to take ADA cases as well. Attorneys from the Protection & Advocacy System<sup>72</sup> explained:

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- "The greatest impact [of the Supreme Court's recent decisions] is in the advice we give to clients, and in the cases we do not take for representation, because the client probably does not meet the definition of disability after *Williams* and *Sutton*. It is hard to explain this to clients who are struggling with getting their lives together and have faced what is clearly discrimination, but not *illegal* discrimination [as defined by the Supreme Court]."<sup>73</sup>
- "The impact of the "what is a disability" trilogy has been a reluctance to push most disability discrimination employment claims . . . including requests for reasonable accommodation, because we are afraid the person would not be deemed disabled (and we don't have a comparable state law interpreted more leniently). The National Disability Law Reporter is full of depressing cases on that score. We therefore do very little employment discrimination work."<sup>74</sup>
- "We are a regional P&A, covering a 15-county area. . . . While our P&A . . . has always been selective about when we would get involved in an employment discrimination case (they can be very resource intensive), they have always been on our list of priorities. One of the ways we have managed to deliver services with modest resources is to involve the private bar on cases that offer the promise of a potential for attorneys' fees (either through total referrals or co-counseling arrangements). . . .

The double whammy of *Sutton*, et al. with *Buckhannon*, et al. has made it much more difficult to refer these cases out. In fact, one law firm that had regularly brought ADA employment cases has almost ended that area of its practice ("if they meet the *Sutton* standard for disability, they probably don't meet the ADA test for otherwise qualified"). The reaction of other private attorneys and public sector attorneys who do this work is similar."<sup>75</sup>

Finally, some attorneys have stopped using the ADA altogether and only bring claims under state law. As one attorney explained:

Given the recent narrowing of federal law as to the scope of the definition of "disability" . . . disability civil rights attorneys in California are increasingly advising clients to forego claims under federal law, and instead pursue claims solely under more protective California law. Specifically, California law provides expansive definitions for "medical condition," "mental disability" and "physical disability." . . .<sup>76</sup>

Such an approach is effective for people with disabilities who reside in states with strong anti-discrimination laws that define disability broadly.<sup>77</sup> But a recent study has established that state anti-discrimination laws vary widely, with a significant number of states providing *less*

protection than that provided under the ADA.<sup>78</sup> And in states whose anti-discrimination statutes are modeled after the ADA, most state courts are following the Supreme Court's analysis and are dismissing allegations of disability discrimination on the coverage issue.<sup>79</sup>

### **III. The Supreme Court Has Given States Immunity From Suits In Federal Court For Money Damages Under Title I of The ADA**

The Supreme Court's recent federalism revolution also has had a direct and adverse impact on the rights of people with disabilities. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that Congress lacked authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity to suits brought under the ADA's employment provisions (Title I). The full impact of this decision is still being played out in the courts. At its simplest, *Garrett* prohibits all state employees who have been discriminated against on the basis of disability from suing their employers for money damages under the ADA. At its most complex, *Garrett* raises the issue of whether portions of the ADA are unconstitutional. The decision thus has resulted in extensive litigation regarding who can be sued under the ADA, the types of remedies that are available, and the scope of Congress' authority to enact civil rights legislation.

#### **A. As a Result of *Garrett*, States are Immune From Suits Brought Under Title I of the ADA**

The most immediate impact of *Garrett* has been on the ability of state employees to sue their employers for money damages under Title I of the ADA. While individuals employed by *private* employers may still seek money damages, individuals who are discriminated against on the basis of disability and happen to be employed by the state (whether a state university, a state hospital, or a state governmental agency) can no longer seek compensation under the ADA for the harm they have suffered<sup>80</sup>. The plaintiffs in *Garrett* are prime examples. Patricia Garrett was a nurse with a state university hospital who was discriminated against because she had breast cancer. Milton Ash was a juvenile corrections officer who was seeking accommodations for his asthma. Because Garrett and Ash were employed by public, rather than private, entities, they were barred from seeking monetary relief under the ADA.

*Garrett* destroyed dozens of ADA Title I cases pending against state employers at the time the Supreme Court decision came down. For example, Robert Robison, a former correctional officer, sued his employer, the Nevada Department of Prisons (NDOP), after it terminated him because of a back injury.<sup>81</sup> A jury found the NDOP liable and, in 1999, awarded Robison \$200,000 in compensatory damages and \$248,000 in future lost wages. The district court also awarded Robison \$140,000 in back pay<sup>82</sup>. The state appealed. In light of *Garrett*, the Ninth Circuit vacated the damage awards and ordered that the case be dismissed.<sup>83</sup> Because the statute of

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limitations under state law had already run, Robison was left with no compensation for the discrimination he had suffered.<sup>84</sup>

*Garrett's* reach, however, has not been limited to *state* employees. As a result of the decision, local government employers have begun to argue that they are an *arm* of the state, and thus immune from damage suits as well. For example, in Arizona, an individual who uses a wheelchair and works as a high school teacher's aide was fired because she refused to put a flag and flagpole on the back of her wheelchair.<sup>85</sup> The employer, a local school district, argued that the aide needed to place the flag on her wheelchair so that the students could see her. The aide argued that the flag was unnecessary and stigmatizing.<sup>86</sup> Rather than defending the case on the merits, the school district argued that for purposes of Eleventh Amendment immunity, it was an "arm of the state" and thus immune from suit.<sup>87</sup> The court ruled that the school district was *not* an arm of the state,<sup>88</sup> and the school district appealed. The matter is currently pending before the Ninth Circuit.<sup>89</sup>

### **B. As a Result of *Garrett*, There Has Been Extensive Litigation Regarding Whether States are Immune From Suit Under Title II of the ADA**

While the decision in *Garrett* was limited to the ADA's employment provisions (Title I), the Court's analysis raises the issue of whether Congress had the authority to abrogate the states' immunity under Title II of the ADA, which prohibits state and local governments from discriminating against individuals with disabilities in the provision of government programs, services, or activities. During the time that this paper was being written, the Supreme Court announced that it had decided to hear *Medical Board of California v. Hason*, which considers this very issue. The Court's decision in *Hason*, expected in June 2003, will clarify the limits of Congressional authority to prohibit disability-based discrimination.

To date, no consensus has emerged in the Circuit courts that have grappled with the Title II abrogation issue. In cases dealing with such wide-ranging issues as licensure to practice medicine, access to adequate mental health care in the correctional system, surcharges for parking placards, and access to effective hearing assistance in a custody hearing, Congress' authority to abrogate the state's immunity under Title II (and thus the availability of damages against the state) has proven unclear.

The Ninth Circuit is the only appellate court to have found that Congress validly abrogated the states' immunity when it enacted Title II. In a pair of decisions—one involving an individual with mental illness who was denied his license to practice medicine, the other a class action against the state of Hawaii for failing to include individuals with disabilities in its expanded Medicaid program—the Ninth Circuit ruled that Congress had sufficient constitutional authority to apply Title II to the states.<sup>90</sup> Plaintiffs in both cases, however, have not yet been compensated. As noted above, the medical licensure case, *Hason*, will be considered by the Supreme Court in

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the spring of 2003. The state of Hawaii had asked the Court to consider the Medicaid case as well; the Court just recently declined to do so.<sup>91</sup>

At least three Circuits—the Fourth, Fifth, and Tenth—have ruled that Congress lacked the authority to abrogate the states' immunity under Title II. For example, in *Reickenbacker v. Foster*,<sup>92</sup> a class action alleging that the Louisiana Department of Public Safety and Corrections was providing deficient mental health services to prisoners with mental illness, the Fifth Circuit found that Congress failed to make “the requisite findings of state discrimination” against persons with disabilities and that Title II fails the “proportional and congruent” test imposed by the Supreme Court<sup>93</sup>. Because the plaintiffs had sued only the state department of corrections, and not the individual state officials, the court dismissed the plaintiffs' claims under Title II in their entirety.<sup>94</sup> As a result, plaintiffs are still not getting the mental health services they desperately need.

The First, Second, and Sixth Circuits have held that Title II *sometimes* validly abrogates a state's Eleventh Amendment immunity, but only under certain circumstances. For example, in *Popovich v. Cuyahoga County Court of Common Pleas*,<sup>95</sup> the court considered a claim brought by an individual with a hearing impairment who had been denied the appropriate auxiliary aids and services that would have allowed him to meaningfully participate in his child custody case. At trial, the jury found in favor of the plaintiff and awarded him \$600,000 in damages. The Sixth Circuit, however, in an *en banc* decision, ruled that the plaintiff's action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred in so far as it relies on congressional enforcement of the Due Process clause<sup>96</sup>. Because the original charge to the jury appeared to be based on equal protection principles, the Sixth Circuit remanded the case back to the lower court for a new trial. Subsequent decisions in the Sixth Circuit have explicitly interpreted *Popovich* as only allowing ADA Title II cases against the state where due process concerns are implicated.<sup>97</sup>

In *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*,<sup>98</sup> the Second Circuit considered a claim brought by a student with learning disabilities and attention deficit disorder who had been dismissed from a state university medical school. The Second Circuit ruled that Title II suits for money damages against the state may be valid, but only in those instances where the plaintiffs bringing such suits can establish that the Title II violation was motivated by “discriminatory animus or ill will based on the plaintiff's disability” – i.e., “conduct that is based on irrational prejudice or wholly lacking a legitimate government interest.”<sup>99</sup> Because the Second Circuit found that the plaintiff's claim did not allege discriminatory animus or ill will based on his disability, it affirmed the lower court's dismissal of the suit.<sup>100</sup>

Finally, in *Kiman v. New Hampshire Dep't of Corrections*,<sup>101</sup> the First Circuit considered a claim for compensatory damages brought by a former prisoner who has amyotrophic lateral sclerosis (ALS), a condition commonly referred to as Lou Gehrig's disease. The prisoner's lawsuit alleged

that although the state knew of his disease, he was deprived of a cane to walk with, a toilet suitable for his use, and a chair to sit on in the shower; that his hands were inappropriately cuffed to cause him pain; that he was made to stand in lines and climb stairs; and that his guards did not give him medications prescribed by his doctors.<sup>102</sup> The First Circuit held that "Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state."<sup>103</sup> (In this instance, the court found that the prisoner's allegations of mistreatment constituted violations of the Eighth Amendment, and thus, his suit against the state Department of Corrections could proceed.) The court declined to reach the question of whether Congress acted within its power in subjecting states to private suit under Title II as a whole.<sup>104</sup>

These varied interpretations of *Garrett* have resulted in a significant number of cases spending years in the courts as the parties battle over who may be sued, when, and under what circumstances. On a practical level, while the lawyers brief complex and sometimes arcane issues regarding federal jurisprudence, discrimination remains unaddressed and people with disabilities are suffering. For example, in *Kiman*, after the three judge panel of the First Circuit held that the case could proceed, the entire First Circuit decided to rehear the case *en banc*. After the Supreme Court granted *certiorari* in *Hason*, the First Circuit stayed the proceedings entirely, pending the Supreme Court's decision. Because of his ALS, Mr. Kiman is dying. Even if the Supreme Court's decision in *Hason* ultimately allows Title II suits against states to proceed, Mr. Kiman may no longer be alive to pursue his case.

*Popovich* has also been delayed. The case was originally filed in 1995, and a jury awarded a \$600,000 verdict in favor of the plaintiff in 1998. After the decision was reviewed by both a three judge panel and an *en banc* panel of the Sixth Circuit, and after the Supreme Court denied *certiorari* in 2002, the case is now set for trial, to retry the same facts, some time in 2003.<sup>105</sup>

A similar fate has befallen many community integration cases, in which individuals with disabilities languish in institutions while the parties debate whether the state is subject to suit, rather than whether the institutionalized individuals can be more appropriately served in community settings. For example, *Martin v. Taft* is a class action lawsuit filed on behalf of all people with mental retardation or developmental disabilities in need of residential services in the state of Ohio. The case was originally filed in 1989 and amended to include ADA integration mandate claims after the ADA was enacted. The state moved to dismiss on sovereign immunity grounds in 1993, and the district court ruled in favor of the plaintiffs that year.<sup>106</sup> After attempts at settlement failed, and in light of the Supreme Court's more recent 11<sup>th</sup> Amendment jurisprudence, defendants again moved to dismiss on sovereign immunity grounds in 2000. The district court again ruled in favor of the plaintiffs in September, 2002.<sup>107</sup> The case is now scheduled for pre-trial in April, 2003.

#### **IV. The Supreme Court's Interpretation of the ADA's Attorneys' Fees Provision Has Restricted Persons with Disabilities' Access to the Courts**

Another Supreme Court decision that has had a dramatic, albeit indirect, effect on the rights of persons with disabilities is *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*.<sup>108</sup> In *Buckhannon*, the Supreme Court held that, in order to qualify as a "prevailing party," and thus be entitled to an award of attorneys' fees under the ADA and most other fee-shifting statutes, there must be a judicially sanctioned change in the legal relationship between the parties—*i.e.*, a party must secure either a judgment on the merits or a court-ordered consent decree<sup>109</sup>. This is a significant departure from what had been the state of the law in most judicial circuits, where, under what was called the "catalyst theory," an individual who had brought about voluntary change in the defendant's conduct by filing a lawsuit was deemed to be a prevailing party. (For example, if, after an individual had filed a lawsuit against a store owner, the owner made accessibility modifications to his store, the attorney who filed the lawsuit on behalf of the individual would have been entitled to reasonable attorneys' fees.)

As is true of civil litigation generally, very few ADA cases ever go to trial. And, after *Buckhannon*, defendants have a significant incentive to procrastinate complying, and settle cases informally rather than by consent decree, because they can avoid paying attorneys' fees. As a result, there is little incentive for private attorneys to take ADA cases, who rightly fear they will not be compensated for their work.

This is particularly true in the ADA Title III context, which applies to places of public accommodation, and which, unlike Titles I and II, does not provide for compensatory damages. As a result, the only incentive for the private bar to take these cases in the first place had been the promise of attorneys' fees. Since most architectural access claims brought under Title III are easily remedied (and therefore settled informally), after *Buckhannon*, attorneys' fees are generally no longer available. In addition, there is now much less incentive for owners of public accommodations to comply with ADA Title III until they are actually sued. If and when they are sued, the owners can then make the necessary changes to their property, and incur no additional costs other than the costs of compliance.

*Buckhannon* also has had an impact on the work performed by not-for-profit attorneys, who generally do not charge their clients for representation and thus depend in large part on attorneys' fees to support their work. Because fewer attorneys' fees means fewer resources with which to combat discrimination, these attorneys are taking fewer cases. As a result, persons with disabilities are finding it more difficult to secure legal representation, even in instances where discrimination on the basis of disability has clearly occurred. As some attorneys explained:

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- We have also felt the blow of *Buckhannon*. Our office likely spent hundreds of thousands of dollars litigating a case related to horrible conditions at a state residential center for persons with mental retardation. . . . Prior to trial, the state decided it was in its interest to close the facility. The federal district court noted that if there were a hearing on whether the lawsuit was the catalyst for the state action of closing the facility, the court would be inclined to find that there was substantial evidence to indicate that the state's action was the result of our litigation. However, the court was foreclosed from awarding attorneys' fees since we were not "prevailing parties" under the law. Our program is now not able to do a significant amount of work that we would have been able to undertake had we recovered the costs of our work in [that case]. The rights of clients in that facility . . . have been vindicated. . . but at the expense of not being able to have resources to enforce the rights of other clients.

Not only has *Buckhannon* hurt our efforts at the [Maryland Disability Law Center], it has had a dampening effect on our work in recruiting pro bono attorneys. For years we have had a project called "Access Maryland," which is a partnership between the Maryland Trial Lawyers, [our office], and an independent living center to coordinate enforcement actions for Title III ADA cases. In the past, we have been able to recruit private pro bono attorneys with the promise of recouping their time through attorney fees statutes. Unfortunately, the current reality is that if the attorney makes a persuasive case, the defendant can then change [its] policy or practice and moot out the case, thereby defeating the plaintiff's claim for attorneys fees."<sup>110</sup>

- Our work at the Disability Law Center has been dramatically affected by the recent Supreme Court decisions, particularly the limitations on the recovery of attorney fees as prevailing parties in cases that settle established by *Buckhannon*. Our office provides substantial attorney representation to families in special education proceedings at no cost. Prior to the *Buckhannon* decision, we made every effort to recover attorney fees in the resolution of all of our cases. . . . For the last six months we have been unable to negotiate any fees in any of the special education cases that have been resolved through settlement. Since 90 percent of the cases are in fact settled, this means that we no longer recover fees for this work. As a result, the program's budget has been impacted. Loss of this funding will affect the quality of the work we do (it will affect our resources for retaining experts, obtaining evaluations, etc.) and the number of families we can provide representation to.<sup>111</sup>
- [As a result of *Buckhannon*,] we are obtaining fewer fees, which impacts on our ability to hire additional staff, and pay current staff sufficiently, both of which decrease our ability to serve more people with disabilities.<sup>112</sup>

Indeed, a brief review of the cases shows that attorneys who would have been awarded attorneys' fees in the past are no longer being compensated for their efforts in challenging discrimination against people with disabilities.

In *Iverson v. Sports Depot*,<sup>113</sup> the plaintiff filed an ADA Title III access suit. In response, the defendant voluntarily engaged in a number of actions that reduced barriers to access in his restaurant, including removing planters obstructing wheelchair-accessible parking spaces, installing new wheelchair access signs in the parking lots and bathrooms, and altering the bathroom stall doors. The parties went to trial regarding whether defendant was required to lower the urinal in the men's bathroom, and the plaintiff prevailed. The court ruled that the plaintiff was the "prevailing party," and thus entitled to an award of attorneys' fees, but only as to the issue regarding the urinal. Notwithstanding defendant's removal of numerous architectural barriers, prompted by plaintiff's lawsuit, "the only material change in the legal relationship between the parties occurred when the defendant was ordered to lower a urinal in the men's bathroom."<sup>114</sup> As a result, plaintiff's attorney was awarded less than 10 percent of his total fees and costs related to filing and trying the lawsuit.<sup>115</sup>

In *Dorfsman v. Law School Admissions Council, Inc.*,<sup>116</sup> plaintiffs filed a lawsuit against the Council for its failure to provide accommodations to students with disabilities taking the Law School Admissions Test (LSAT). As a result of the lawsuit, the Council provided all the accommodations sought by one of the named plaintiffs, and the parties entered into a stipulation dismissing her case. The district court found that the plaintiff was not entitled to attorneys' fees, however, because she "failed to achieve a judicially sanctioned change in the parties' legal relationship."<sup>117</sup>

Other courts reached similar results. *See, e.g., Griffin v. Steeltek, Inc.*, 261 F.3d 1026 (10<sup>th</sup> Cir. 2001) (ADA plaintiff not entitled to attorneys' fees even though employer discontinued challenged practice of asking questions regarding medical history on job applications after suit was filed); *J.C. v. Regional School Dist. 10, Bd. of Educ.*, 278 F.3d 119 (2d Cir. 2002) (student who obtained all requested relief—including finding of eligibility for special education services and termination of expulsion hearing—not entitled to attorneys' fees under either the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act because relief not "judicially sanctioned").

The results in these cases and others are directly contrary to Congress' purpose in providing for attorneys' fees in civil rights cases<sup>118</sup>. As Justice Ginsburg noted in her dissent in *Buckhannon*, "the Court's constricted definition of "prevailing party," and consequent rejection of the "catalyst theory," impede access to the court by the less well-heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorney generals."<sup>119</sup>

## V. The Supreme Court Has Limited the Remedies Available Under the ADA (and Section 504)

In *Barnes v. Gorman*, the Supreme Court held that punitive damages are not available under Title II of the ADA or Section 504 of the Rehabilitation Act. The Court reasoned that the remedies available under Title II and Section 504 are the same as those available under Title VI of the Civil Rights Act of 1964.<sup>120</sup> Because Title VI, a spending clause statute, is in the nature of a contract, the Court held that punitive damages, which generally are not available under contract law, are not available under Title VI, and therefore are not available under ADA Title II and Section 504.<sup>121</sup>

The inability to recover punitive damages leaves plaintiffs with fewer tools to remedy egregious conduct. The facts in *Barnes* are illustrative. The plaintiff, a paraplegic, was arrested for trespass after fighting with a nightclub bouncer. While waiting for a police van to transport him, he was denied permission to use a restroom to empty his urine bag. When the van arrived, it was not equipped to transport a wheelchair and, over the plaintiff's objections, police officers removed him from his wheelchair and used a seatbelt and the plaintiff's own belt to strap him to a narrow bench in the rear of the van. During the ride to the police station, the belts came undone and the plaintiff fell to the floor, rupturing his urine bag and injuring his shoulder and back. Afterwards, the plaintiff suffered serious medical problems—including a bladder infection, serious lower back pain, and uncontrollable spasms in his paralyzed areas—that left him unable to work<sup>122</sup>. A jury awarded the plaintiff \$1.2 million in punitive damages.<sup>123</sup> As a result of the Supreme Court's decision, however, the jury's punitive damage award was vacated.

Following *Barnes*, a district court in Illinois recently held that a fire paramedic, who was denied disability benefits because he was no longer "disabled" but denied re-employment because of an abnormal gait due to a back injury, could not seek punitive damages against his city employer.<sup>124</sup> A district court in New York similarly held that university students with disabilities could not seek punitive damages against the state university for its ongoing failure to provide the students access to campus programs, services, activities, and facilities.<sup>125</sup>

The inability to recover punitive damages thus acts as another disincentive for individuals considering pursuing their claims in court. In addition, punitive damages have often acted as a deterrent to discriminatory action and provided a means for ADA plaintiffs to hold their governments accountable. Without such a remedy, individuals are dramatically impaired in their ability to enforce civil rights protections.

As one attorney explained:

We have a class action pending against the Housing Authority of Baltimore City [HABC]. . . Liability is not the real issue, as the case is clear. HABC has acted for years

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to deny non-elderly people with disabilities housing opportunities to which they were legally entitled. HABC has also failed miserably to comply with accessibility requirements of Section 504 [and] the ADA . . . [However], since the *Gorman* decision has stripped us of our claim for punitive damages, the remedial claims become quite difficult. . . . As our clients generally receive SSI and aren't able to work, their lack of shelter can not be said to interfere with their ability to receive normal wages. Many of our clients have not paid rent, as they live from person to person, in the street or in shelters. . . . Their harm has been extreme, yet their claims for compensatory damages are complex and uncertain. . . . When we still had a claim for punitive damages, we were convinced that the illegal action of the Authority could be punished and that the victims could expect some genuine relief. As significantly, the Authority would know in the future that they may not violate the law with impunity. Now, without the relief of punitive damages, government action can go for long periods of time and there is no true accountability for its wrongdoings.<sup>126</sup>

## **VI. The Supreme Court Has Expanded the Defenses Available Under the ADA**

Finally, in *Chevron v. Echazabal* and *U.S. Airways v. Barnett*, the Supreme Court expanded some of the defenses available under the ADA, thus making it more difficult for employees to prove their cases in court.

### **A. The Supreme Court Has Expanded the Scope of the "Direct Threat" Defense**

In *Chevron v. Echazabal*, the Supreme Court held that the EEOC regulation allowing employers to refuse to hire applicants because their performance on the job would endanger their health due to a disability is permissible under the ADA.<sup>127</sup> The EEOC regulation expanded the statutory language of the ADA, which specifically limits the "direct threat defense" to instances where the individual poses a direct threat to the health or safety of *others*.<sup>128</sup> As the legislative history explains, because "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals," Congress intended that "paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant."<sup>129</sup>

To date, only a handful of lower courts have applied *Chevron*. Advocates, however, fear that the decision will be used in the lower courts as a justification for paternalistic and discriminatory employment decisions. This fear has been realized in at least two recent cases.

In *Orr v. Wal-Mart Stores*, discussed above, the Eighth Circuit ruled that the plaintiff, a pharmacist with diabetes, was not a person with a disability as defined by the ADA. In dicta, however, the court suggested that even if the pharmacist had established a prima facie case of actual disability under the ADA, Wal-Mart could have successfully raised the "threat to self"

defense.<sup>130</sup> The pharmacist had argued that because of his diabetes, he needed to eat on a regular schedule, and that failure to do so could result in his experiencing symptoms of hypoglycemia. As a reasonable accommodation, he asked that he be allowed to routinely close the pharmacy for thirty minutes at the noon hour in order to eat an uninterrupted lunch. Citing *Chevron*, the Eighth Circuit ignored plaintiff's request for a reasonable accommodation and instead suggested that Wal-Mart was justified in not continuing the plaintiff's employment, because, based on the plaintiff's contentions, working in a single pharmacist pharmacy that did not provide for uninterrupted meal breaks posed a direct threat to the plaintiff's health.<sup>131</sup>

Similarly, in *Nanette v. Dep't of the Treasury*,<sup>132</sup> the Merit Systems Protection Board found that the employee plaintiff had failed to demonstrate that she could safely perform the essential functions of her position. The employee, an IRS program analyst, had a diagnosis of "multiple chemical sensitivity syndrome" and "respiratory reactive airway disease" and sought accommodations from her employer that would have allowed her to perform her job without getting ill. The Board found the plaintiff's requested accommodations to be unreasonable.<sup>133</sup> Moreover, the Board found that the plaintiff had failed to demonstrate that the requested accommodations would provide sufficient protection to allow her to safely perform the duties of her position. The Board noted that plaintiff's doctors agreed that there was no *guarantee* that the plaintiff could successfully avoid a debilitating chemical exposure at her workplace (even though the plaintiff, after her removal from federal employment, had successfully worked in an office environment for several private companies). Citing *Chevron*, the Board explained, "thus, although the [plaintiff's] willingness to work is admirable, we find that the consequences resulting from an accidental exposure could prove irreversibly catastrophic to her health."<sup>134</sup>

## **B. The Supreme Court Has Placed Limitations on the Requirement to Provide Reasonable Accommodations**

The ADA requires employers to provide "reasonable accommodations" to employees with disabilities that would enable such employees to do their jobs, unless such accommodations would impose an "undue hardship" on the employer.<sup>135</sup> In *U.S. Airways v. Barnett*, the Supreme Court held that a requested accommodation that violates a seniority system is presumptively unreasonable, but that employees may present evidence to demonstrate that special circumstances exist that make the accommodation reasonable in particular cases.<sup>136</sup> In so holding, the Court rejected Barnett's argument that all a plaintiff has to establish to show that an accommodation is "reasonable" is that it is "effective." Rather, the Court held that the employee has the burden of proof of demonstrating that "an accommodation seems "reasonable" on its face, i.e., ordinarily, or in the run of cases."<sup>137</sup>

It is unclear how this new criteria imposed by *U.S. Airways*—i.e., that an accommodation must not only not impose an undue hardship, but must also be "reasonable on its face"—will play out

in the lower courts. At least one appellate court, however, has construed *U.S. Airways* broadly, to the detriment of the ADA plaintiff.

In *Mays v. Principi*,<sup>138</sup> the Seventh Circuit considered the plight of a Veterans Administration (VA) nurse who had injured her back on the job, resulting in a 10 pound lifting restriction. The nurse had sought reassignment to another nursing position that did not require patient care, but instead was reassigned to a clerical job, at a much lower salary and with fewer benefits. Relying on *U.S. Airways*, the Seventh Circuit held that the VA hospital did not have to reassign the plaintiff to the administrative nursing position, even if she was qualified to perform the job. As the court explained:

But assuming that she was qualified for such a job, if nevertheless there were better-qualified applicants—and the evidence is uncontradicted that there were—the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her. This conclusion is bolstered by a recent decision of the Supreme Court [*US Airways v. Barnett*] which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break," *U.S. Airways* becomes our case.<sup>139</sup>

The Seventh Circuit concluded that an employer must only provide an accommodation "that is reasonable in terms of costs and benefits."<sup>140</sup> By doing so, the court applied the *U.S. Airways* analysis outside of the seniority rights context and limited the ADA's requirement that reassignment be offered as a reasonable accommodation to the mere right to apply for an available position.<sup>141</sup>

## VII. Conclusion

The Supreme Court's ADA decisions have dramatically undermined the ability of individuals with disabilities to enforce their right to be free from discrimination. It is appropriate to consider, at this juncture, whether it is time to introduce new legislation to restore Congress' original intent.

The National Council on Disability wishes to acknowledge the contributions of Sharon Perley Masling, Director of Legal Services, National Association of Protection and Advocacy Systems, to this topic paper.

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1. 136 Cong. Rec. S9689 (July 13, 1990)(statement of Sen. Harkin).
2. *Signing of the Americans with Disabilities Act by President George Bush*, Federal News Serv., July 26, 1990.
3. 527 U.S. 471 (1999).
4. 527 U.S. 516 (1999).
5. 527 U.S. 555 (1999).
6. 534 U.S. 184 (2002).
7. 531 U.S. 356 (2002).
8. 532 U.S. 598 (2001).
9. \_\_\_ U.S.\_\_\_, 122 S. Ct. 2097 (2002).
10. \_\_\_ U.S. \_\_\_, 122 S. Ct. 2045 (2002).
11. \_\_\_ U.S. \_\_\_,122 S. Ct. 1516 (2002).
12. 42 U.S.C. § 12102(2).
13. Report of House Committee on Education and Labor, H. R. Rep. 101-485, Pt. 2, at 50-53 (1990)(discussing breadth of the definition of disability); Report of Senate Committee on Labor and Human Resources, S. Rep. 101-116, at 21-24 (1989) (same).
14. H.R. Rep. No. 101-485, Pt. 2, at 52, Report of House Committee on the Judiciary, H.R Rep. 101-485, Pt. 3, at 28 (1990).
15. *Sutton*, 527 U.S. at 482-83, Murphy, 527 U.S. at 521.
16. *Albertson's*, 527 U.S. at 564-67.
17. *Toyota*, 122 S. Ct. at 691.

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18. *Id.*
19. ABA Comm'n on Mental and Physical Disability, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental and Physical Disability L. Rep. 403 (1998).
20. Amy Allbright, 2001 Employment Decisions Under the ADA—Survey Update, 26 Mental and Physical Disability L. Rep. 393 (2002) (defendants prevailed in over 95 percent of the ADA employment cases resolved in 2001).
21. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 160 (1999).
22. *See, e.g.*, Chai Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 Berkeley J. Employ. & Lab. Law 92 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 Ala. L. Rev. 321 (2000).
23. *See, e.g.*, H.R. Rep. 101-485, Pt. 2, at 52 (persons with HIV, epilepsy, diabetes, and hearing impairments are covered under the first prong of the definition of disability).
24. 237 F.3d 349 (4<sup>th</sup> Cir. 2001).
25. *Id.* at 351.
26. Because of the company's internal seniority policy, which was not part of a collective bargaining agreement, Sara Lee had displaced Turpin from her daytime shift. In requesting her accommodation, Turpin submitted a letter from her physician stating that transferring shifts would cause a disturbance in her sleep patterns and thus worsen her seizures. *Id.*
27. With respect to the major life activity of sleeping, the court noted that while Turpin did not sleep well every night, she frequently slept through the night without any seizures, and on the nights that she did have seizures, she often did not remember having them. Moreover, according to the court, the EEOC failed to establish that Turpin's lack of sleep was worse than the quality of sleep in the general population. *Id.* at 352. With respect to the major life activity of thinking, the court noted that Turpin's occasional episodes of memory loss (forgetting things 2-3 times per week, having to write things down in order to remember them, forgetting the location of her doctor's office, forgetting to take her medication) did not rise to the level of a substantial limitation. *Id.* at 353. And with respect to the major life activity of caring for herself, the court noted that even though Turpin experienced seizures, suffered bruises, and even wet her bed, she was still able to work and care for her son, and thus was not substantially limited. *Id.*
28. 297 F.3d 720 (8<sup>th</sup> Cir. 2002).

29. 79 F. Supp. 2d 587 (D. Md. 2000), *aff'd by unpublished opinion*, 230 F.3d 1354 (4<sup>th</sup> Cir. 2000).
30. Van Deta & Gallipeau, *Judges and Juries, Why are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury?*, 19 Rev. Litig. 505, 520 n. 36 (Summer 2000).
31. *Sutton*, 527 U.S. at 492 (assuming without deciding that working is a major life activity; noting that “there may be some conceptual difficulty in defining “major life activities” to include work”); *Toyota*, 122 S. Ct. at 692 (same).
32. *Sutton*, 527 U.S. at 491-92 (citing EEOC regulations; citations omitted).
33. *See* 42 U.S.C. § 12112.
34. *See, e.g.*, Jonathan Brown, *Defining Disability in 2001: A Lower Court Odyssey*, 23 Whittier L. Rev. 355 (2001); Arlene B. Mayerson and Kristan S. Mayer, *Defining Disability After Sutton: Where Do We Go From Here?*, 27 Human Rights 13 (2000).
35. 240 F.3d 1110 (D.C. Cir. 2001) (en banc) .
36. *Id.* at 1115-1117.
37. *Id.* at 1117.
38. 192 F.3d 1252 (9<sup>th</sup> Cir. 1999).
39. *Id.* at 1255.
40. *Id.* at 1257-59.
41. *Id.* at 1259.
42. 257 F.3d 373 (4<sup>th</sup> Cir. 2001).
43. *Id.* at 388.
44. *Id.*
45. *Id.*
46. 219 F. Supp. 2d 1212 (N.D. Ala. 2002).
47. *Id.* at 1220-21 (citations omitted) (emphasis added).

48. 292 F. 3d 1045 (9<sup>th</sup> Cir. 2002).

49. *Id.* at 1046.

50. 2002 WL 31051577 at \*1 (9<sup>th</sup> Cir. 2002).

51. *Id.*

52. *Id.*

53. H.R. Rep. No. 485 (II), 101<sup>st</sup> Cong., 2d Sess. (1990) at 53; S. Rep. No. 116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (1989) at 24. The Committee reports also cited with approbation the Supreme Court's decision in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), in which the Court interpreted Section 504 of the Rehabilitation Act and explained "[b]y includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired. . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." H.R. Rep. No. 485 (II) at 53; S. Rep. No. 116 at 23.

54. *Sutton*, 527 U.S. at 489.

55. 42 U.S.C. § 12112 ("[n]o covered entity shall discriminate against a *qualified* individual with a disability . . .") (emphasis added).

56. *Sutton*, 527 U.S. at 492-94. *See also* *Murphy*, 527 U.S. at 523 (to be covered under the regarded as prong, an individual must be regarded as limited in more than just one job).

57. 243 F.3d 1012 (7<sup>th</sup> Cir. 2001).

58. *Id.* at 1018. *See also* *EEOC v. Woodbridge*, 263 F.3d 812 (8<sup>th</sup> Cir. 2001).

59. 194 F. 3d 1084 (10<sup>th</sup> Cir. 1999).

60. *Id.* at 1085-86.

61. *Id.* at 1089.

62. 274 F.3d 740 (2<sup>nd</sup> Cir. 2001).

63. *Id.* at 749.

64. *Id.* at 749-50.

65. Correspondence from Gina C.R. Fiss, Staff Attorney and Legal Advocacy Coordinator, Epilepsy Foundation, to Sharon Masling, November 12, 2002 (on file with the author).
66. Correspondence from The Equal Employment Opportunity Commission to Sharon Masling, December 6, 2002 (on file with the author).
67. *Id.* See also, <http://www.eeoc.gov/stats/ada-charges.html>; <http://www.eeoc.gov/press/2-6-03.html>.
68. *Id.*
69. E-mail correspondence from the U.S. Department of Justice to Sharon Masling, December 5, 2002 (on file with the author).
70. E-mail correspondence from Daniel A. Katz, Attorney at Law, Andalman & Flynn, to Jane Hudson, November 12, 2002 (on file with the author).
71. E-mail correspondence from Harriet Johnson, Attorney at Law, to Sharon Masling, December 31, 2002 (on file with the author).
72. Located in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories, Protection and Advocacy (P&A) Agencies are mandated under various federal statutes to provide legal representation and related advocacy services to all persons with disabilities in a variety of settings. The Protection & Advocacy (P&A) System comprises the nation's largest provider of legally based advocacy services for persons with disabilities.
73. E-mail correspondence from Michael Kirkman, Legal Director, Ohio Legal Rights Services, to Sharon Masling, November 4, 2002 (on file with the author).
74. E-mail correspondence from Kathy Wilde, Legal Director, Oregon Advocacy, to Sharon Masling, October 31, 2002 (on file with the author).
75. E-mail correspondence from Jim Sheldon, Supervising Attorney, Neighborhood Legal Services, to Sharon Masling, October 9, 2002 (on file with the author).
76. E-mail correspondence from Linda Kilb, Director, California Legal Services Trust Fund Support Center Program, Disability Rights Education and Defense Fund, December 19, 2002 (on file with the author) (citing Cal. Gov. Code Sections 12926 (h), (i), (k) and (l)).
77. *See, e.g., Dahill v. Police Dep't of Boston*, 748 N.E.2d 956 (Mass. 2001) (Massachusetts law does not require consideration of mitigation or corrective devices in determining whether an employee had a "handicap"); *Epstein v. Calvin-Miller Int'l*, 100 F. Supp. 2d 222 (S.D. N.Y. 2000) (type 2 diabetes and heart disease not disabilities under the ADA, but are "medical

disabilities" under New York law).

78. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (Summer 2002).

79. *See, e.g., Seaman Unified Sch. Dist. v. Kansas Comm'n on Human Rights*, 990 P.2d 155 (Kan. App. 1999) (plaintiff with insulin-treated diabetes not covered under Kansas anti-discrimination law that mirrors the ADA); *Davis v. Computer Maintenance Service, Inc.*, 1999 WL 767597 (Tenn. Ct. App. 1999) (plaintiff with insulin-treated diabetes not covered under Tennessee anti-discrimination law that mirrors the ADA).

80. Of course, at least until recently, state employees could still seek damages under Section 504 of the Rehabilitation Act if the employer was a recipient of federal financial assistance. The issue of whether states have validly waived their immunity under Section 504, however, has also been the subject of significant litigation. *See, e.g., Koslow v. Pennsylvania*, 302 F.3d 161 (3<sup>rd</sup> Cir. 2002); *Garcia v. S.U.N.Y. Health Science Center of Brooklyn*, 280 F.3d 9 (2<sup>nd</sup> Cir. 2001); *Nihiser v. Ohio Env'tl Protection Agency*, 269 F.3d 626 (6<sup>th</sup> Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079 (8<sup>th</sup> Cir. 2000), *cert. denied sub nom., Ark. Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340 (7<sup>th</sup> Cir. 2000).

81. *Robison v. State of Nevada*, 2001 WL 474493 (9<sup>th</sup> Cir. 2001).

82. *Id.*

83. *Id.*

84. *See also, e.g., Acevedo Lopez v. Police Dep't of Puerto Rico*, 247 F.3d 26 (1<sup>st</sup> Cir. 2001) (dismissing suit against Puerto Rico police department for failure to accommodate employee with back injuries); *Nihiser v. Ohio Env'tl. Prot. Agency*, 269 F.3d 626 (6<sup>th</sup> Cir. 2001) (dismissing ADA employment suit against state environmental protection agency, but allowing suit to proceed under the Rehabilitation Act); *Demshki v. Monteith*, 255 F.3d 986 (9<sup>th</sup> Cir. 2001) (dismissing retaliation suit—brought by individual who had advocated for campaign worker with speech impediment and who was fired as a result—against California Senate Rules Committee); *Randall v. Oklahoma*, 2001 WL 830331 (10<sup>th</sup> Cir. 2001) (dismissing ADA employment suit against state agency).

85. *Savage v. Glendale Union High School Dist. No. 205*, slip op., No. 00-1546-PHX-RCB (D. Ct. Az. March 20, 2002) at 2.

86. *Id.*

87. *Id.* at 2-3.

88. *Id.* at 20-21.

89. *See also Menachaca v. Ottenwalder*, 2001 WL 700958 (9<sup>th</sup> Cir. 2001) (dismissing ADA employment suit because California school district is an "arm of the state" for Eleventh Amendment purposes); *Mingo v. Oakland Unified School Dist.*, 2002 WL 243755 (N.D. Cal. 2002) (same); *cf. Biggs v. Bd. of Ed. of Cecil Co., Md.*, 2002 WL 370195 (D. Md. 2002) (county board of education is an arm of the state for Eleventh Amendment purposes) (ADA Title II case).

90. *Hason v. Medical Bd. Of California*, 279 F.3d 1167 (9<sup>th</sup> Cir. 2002), *cert. granted*, 123 S. Ct. 561 (2002); *Lovell v. Chandler*, 303 F.3d 1039 (9<sup>th</sup> Cir. 2002), *cert. denied*, \_\_\_ S. Ct. \_\_\_, 2003 WL 95557 (2003).

91. The Supreme Court denied *certioari* on January 13, 2003.

92. 274 F.3d 974 (5<sup>th</sup> Cir. 2001).

93. *Id.* at 982-83.

94. *Id.* at 976, n. 9, 984. *See also Wessell v. Glendening*, 306 F.3d 203 (4<sup>th</sup> Cir. 2002) (claim brought by state prisoner whose disability prevented him from participating in programs that would have allegedly enabled him to earn good time credits; no valid abrogation under Title II of the ADA); *Thompson v. Colorado*, 278 F.3d 1020 (10<sup>th</sup> Cir. 2001), *cert. denied*, 122 S. Ct. 1960 (2002) (class action challenging fee charged by the state for handicapped parking placards; no valid abrogation under Title II of the ADA).

95. 276 F.3d 808 (6<sup>th</sup> Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 72 (2002).

96. 276 F.3d 808, 811.

97. *Robinson v. University of Akron School of Law*, 307 F.3d 409 (6<sup>th</sup> Cir. 2002) (dismissing ADA Title II suit for failure to provide reasonable accommodations to student with learning disability); *Carten v. Kent State University*, 282 F.3d 391 (6<sup>th</sup> Cir. 2002) (same).

98. 280 F.3d 98 (2<sup>nd</sup> Cir. 2002).

99. *Id.* at 111-12.

100. *Id.* at 112-13.

101. 301 F.3d 13 (1<sup>st</sup> Cir. Aug. 20, 2002), *rehearing en banc granted, opinion withdrawn*, 310 F.3d 785 (1<sup>st</sup> Cir. Nov. 13, 2002), *proceedings stayed pending California Bd. of Medical Examiners v. Hason*, 2002 WL 31654568 (1<sup>st</sup> Cir. Nov. 20, 2002).

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102. 301 F.3d at 15.
103. *Id.* at 24.
104. *Id.*
105. The retrial may be postponed again in light of the Supreme Court's recent grant of *certioari* in *Hason*.
106. *Martin v. Voinovich*, 840 F. Supp. 1175 (S.D. Ohio 1993).
107. *Martin v. Taft*, 222 F. Supp. 2d 940 (S.D. Ohio 2002).
108. 532 U.S. 598 (2001).
109. 532 U.S. 605-05.
110. Correspondence from Lauren Young, Legal Director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002 (on file with the author).
111. E-mail correspondence from Tim Sindelar, Senior Attorney, Disability Law Center, to Sharon Masling, October 29, 2002 (on file with the author).
112. E-mail correspondence from Jeff Spitzer-Resnick, Managing Attorney, Wisconsin Coalition for Advocacy, to Sharon Masling, October 4, 2002.
113. 2002 WL 745824 (D. Mass. 2002).
114. *Id.* at \*2.
115. *Id.*
116. 2001 WL 1754726 (E.D. Pa. 2001).
117. *Id.* at \*5.
118. *See* H.R. Rep. No. 94-1558 at 1 ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. . . . [This fee-shifting statute] is designed to give such persons effective access to the judicial process . . . ."); S. Rep. No. 94-1011, at 2 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."), *quoted in Buckhannon*, 532 U.S. at 636, n.9 (Ginsburg, J., dissenting) *See also Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968) (*per curiam*) ("When the Civil

Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . [Congress] enacted the provision of counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief. . . ").

119. *Buckhannon*, 532 U.S. at 622-23 (Ginsburg, J., dissenting).

120. 122 S. Ct. at 2100.

121. 122 S. Ct. at 2101-03.

122. 122 S. Ct. at 2099.

123. 122 S. Ct. at 2100.

124. *King v. City of Chicago*, 2002 WL 31101273 (N.D. Ill. 2002).

125. *Denmeade v. King*, 2002 WL 31018148 (W.D.N.Y. 2002).

126. Correspondence from Lauren Young, Legal Director, Maryland Disability Law Center, to Sharon Masling, November 11, 2002 (on file with the author)

127. *Chevron*, 122 S. Ct. at 2047.

128. 42 U.S.C. § 12113(b) ("direct threat" defense is limited to cases in which the excluded individual "pose[s] a direct threat to the health or safety of other individuals in the workplace").

129. H.R. Rep. No. 485, Pt. 2, 101<sup>st</sup> Cong., 2d Sess. 72, 74 (1990); *accord* H.R. Rep. No. 485, Pt. 3, 101<sup>st</sup> Cong., 2d Sess. 34, 42 (1990); S. Rep. No. 116, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 38 (1989).

130. *Orr*, 297 F.3d at 725, n. 5.

131. *Id.* This case is another example of the catch-22 problem created by the courts. *See* note 35, *supra*. Rather than finding that the plaintiff was entitled to reasonable accommodations, the Court found that he was either "not disabled enough" to be covered under the ADA, or "too disabled" to perform the essential functions of the job.

132. 92 M.S.P.R. 127 (Aug. 2002).

133. *Id.* at 140.

134. *Id.* at 140-41. *See also* *Watson v. Hughston Sports Medicine Hospital*, 2002 WL 31497595 (M.D.Ga. 2002) (nurse with latex allergies not covered under the ADA; noting in dicta that under *Chevron*, "a requirement that [the hospital's] employees not suffer from latex sensitivities

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is a valid job requirement").

135. 42 U.S.C. § 12112(b)(5)(discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of the business of such covered entity").

136. *U.S. Airways*, 122 S. Ct. at 1519.

137. *Id.* at 1523.

138. 301 F.3d 866 (7<sup>th</sup> Cir. 2002).

139. *Id.* at 872 (citations omitted).

140. *Id.*

141. *See also Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775 (7<sup>th</sup> Cir. 2002) (applying *U.S. Airways* outside of the ADA Title I context and concluding that "[t]he burden is on the plaintiffs to show that the accommodation it seeks is reasonable on its face" in an ADA Title II/Fair Housing Act case).