



FENWICK & WEST LLP

## U.S. Supreme Court Rulings Limit ADA's Scope

By Marcia Coyle (The National Law Journal, January 29, 2002)  
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After losing a string of disability rights cases in the U.S. Supreme Court in the past three years, disability activists are wondering whether it's time to turn to Congress for help.

The high court, beginning with a critical trio of rulings in 1999, has focused primarily on the definition of disabled in the context of workplace challenges under the Americans with Disabilities Act (ADA) of 1990.

And the justices, interpreting what most parties agree is sometimes ambiguous language in the statute, are favoring management to the growing alarm of the disabilities community.

The Court's decisions are "reasonable interpretations," says management counsel Victor Schacter of Fenwick & West in Palo Alto, Calif.

"On the other hand, for those of us practicing since its enactment, we would have speculated in the earlier years that there would have been more comprehensive coverage of the disabled in the workplace than interpreted by the Supreme Court."

Advocates for the disabled, including scholar Chai Feldblum of Georgetown University Law Center, say that an expansion of those rights is exactly what Congress intended. Lawmakers sought a significant expansion of protections from what existed under the Rehabilitation Act of 1973, she says.

With hindsight, the disability community can say today that Congress did not use the right words to convey its intent on coverage and, exacerbating the problem, courts have held too rigidly to the act's actual text, says Feldblum, who was involved in the ADA's drafting. She and others are now urging Congress to respond.

If Congress doesn't respond, disability activists and plaintiffs' lawyers will turn increasingly to state legislatures and state laws, Schacter predicts.

And that would be ironic because disability discrimination is a federal problem and the ADA, like other civil rights laws, was designed to end a hodgepodge of state protections, says Peter Blanck, director of the Law Health Policy and Disability Center at the University of Iowa College of Law.

"Perhaps we have reached the high-water mark now, where members of the disability community say, 'This ain't what we intended and we'd better go back and fix it or live with it,'" says Blanck.

### **Who's Disabled**

Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or who is regarded by others as having such an impairment.

The act does not list which specific impairments qualify. Major life activities are defined as activities that an average person can perform with little or no difficulty. Equal Employment Opportunity Commission regulations have identified as major life activities walking, breathing, seeing, hearing, speaking, learning -- and working.

Proving that one is disabled under the act does not guarantee one the job being sought. The act requires that the disabled person be qualified -- able to perform the job's essential functions with or without reasonable accommodation by the employer.

"The ADA itself is inherently, and indeed, intentionally, ambiguous in a number of different respects -- the definition of who is covered and what employers' obligations are," says Christopher Collins, senior counsel with New York's Proskauer Rose.

### **Deliberate Ambiguity**

Ambiguity was tolerated in order to hasten the passage of the bill, Blanck recalls.

"The president and the attorney general -- Republicans -- wanted it; the Democratic-controlled Congress wanted it and the disability advocacy community was very strong," he says.

But ambiguity was not seen as a problem because the language used also was familiar, says Feldblum. In drafting the ADA, Congress used the same words it had used to define the handicapped in the Rehabilitation Act of 1973, he says.

That act, signed by President Nixon, authorized funding for states to provide rehabilitation services, including counseling, training and job placement to qualified persons.

For almost two decades, courts had been interpreting those words to cover people with a wide range of health conditions -- people with diabetes, epilepsy and AIDS as well as people who were blind, deaf or used wheelchairs, says Feldblum.

"We really didn't have a lot of carpal tunnel syndrome in the 1970s, but based on cases protecting people with arthritis and bad backs, we assumed that would be covered as well under the ADA," she says.

But the courts of the 1970s and 1980s, which liberally embraced the Rehabilitation Act, were changing, and so, too, was the Supreme Court. By the time ADA challenges reached it, it had a conservative majority with little interest in an expansive reading of civil rights laws.

"The bottom line is the words used in ADA definition of disability were problematic for a court that is so legalistic," Feldblum says. "It made sense for us to use those words 11 years ago. Those words were in place for 17 years under existing civil rights law ... and we assumed the flaws wouldn't come back to haunt us because there was no problem for 17 years."

#### **Major Blows**

The Court's most devastating blow to disability advocates was not its latest ruling, Jan. 8, in *Toyota Manufacturing Corp. v. Williams*, No. 00-1089, but a 1999 "trilogy" of decisions: *Sutton v. United Air Lines*, *Murphy v. United Parcel Service* and *Albertsons v. Kirkingburg*.

The trio essentially held that individuals claiming the ADA's protection must be evaluated in their corrected states.

If a person has, like Karen Sutton and her twin sister, Kimberly Hinton, severe myopia, the determination of whether she is substantially limited in a major life activity is based on how she functions when she's wearing glasses. The EEOC took the opposite view.

"That was a huge change, and eliminated millions of people from coverage," says plaintiffs' counsel Lisa Banks of Washington, D.C.'s Bernabei & Katz.

Since those rulings, courts have found people with bipolar disorder, epilepsy, diabetes, prosthetic legs and other conditions outside the act's protections, even if the person argues he or she was discriminated against because of that mitigated condition.

The Court also held that a person cannot win ADA protection by showing that he or she is substantially limited in performing a particular job, but must show that he or she is limited in a broad class of jobs.

"And that's a very difficult showing to make," Banks says.

Citing a statistic that would come back to haunt disability rights advocates, the justices then, and again in Toyota, based their narrowing view of disability coverage in part on Congress' statement in the ADA that 43 million Americans have one or more physical or mental disabilities.

That figure, the Court said, demonstrates "that Congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities."

In fact, the number was an estimate used by disability groups during congressional testimony to show there was a serious problem, says employment law scholar Charles Craver of George Washington University Law School. "I don't think there are any accurate figures," he says.

Toyota built on the "trilogy" of precedents by developing the meaning of "substantially limited." Someone suffering from severe carpal tunnel syndrome and claiming to be substantially limited in the major life activity of performing manual tasks must have an impairment that prevents or severely restricts activities that are of central importance to most people's daily lives -- not just work-related tasks.

The impairment's impact must also be permanent or long-term.

Some plaintiffs' lawyers disagree on Toyota's likely effects.

Banks says it is "nothing new" in principle but that lower courts could use it to "raise the bar higher" for claimants with problems doing manual tasks.

But Noah D. Lebowitz of San Francisco's McGuinn, Hillsman & Palefsky says that one would have to prove one can't brush one's teeth, comb one's hair or wash one's face to qualify as disabled under the Toyota standard.

"I challenge anybody to find anyone who meets that standard and can still perform manual tasks required in any job," he says.

And as it did in the trilogy, the Court in Toyota voiced skepticism that working itself should be considered a major life activity.

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

## **Work and Life**

The Court's decisions draw "a line quite clearly that routine or minor injuries -- not of permanent or long-term nature -- are not in the protection of ADA," says Fenwick's Schacter. What is less clear, he adds, is whether the court will find that working -- while economically central to a person's ability to live -- is a major life activity under the ADA.

Most major life activities, such as walking, seeing and performing manual tasks, are primary functions, says Proskauer's Collins.

"And you may do all of those in connection with work," he says.  
"Working generally involves a group of functions."

The concept's difficulty, he explains, is understanding "how is it that someone can be substantially limited in the major life activity of working but not other major life activities?"

But "working" is something of a nonissue now in actual litigation, says plaintiffs' counsel Paul Mollica of Chicago's Meites, Mulder, Burger & Mollica.

"I think most plaintiffs' attorneys who read the cases closely make sure they have something other than working," he says.

The Court's direction is unlikely to change in the near future, all parties agree. Its recent decisions have had strong majority votes. If change is to come, it is likely to come from Congress, it's generally agreed.

"These decisions, although significant, don't cut back on protections that the statute provided and are not contrary to legislative intent," Collins says. "For that reason, I'm not surprised there aren't any meaningful efforts to tinker with the law in response to the Supreme Court."

No meaningful efforts "yet," Feldblum and others who are laying the groundwork for a response would add. Feldblum sees opportunity in the Democratic-controlled Senate's consideration of legislation barring employers from discriminating against people with genetic markers for certain diseases, such as breast cancer.

Two senators have said the bill is not needed, she says, because the ADA already prohibits this kind of discrimination. Under the Supreme Court's analysis, says Feldblum, such people would not be considered disabled under the ADA.

"Slowly Congress is going to understand the ADA not only doesn't cover a person refused a job because she has a genetic marker for breast cancer, but quite likely does not cover the person with breast cancer who has been demoted," she says. "I think basic elements of fairness will provoke a response."