Americans with Disabilities Act

Passed in 1990, the Americans with Disabilities Act (ADA) prohibits discrimination against disabled individuals in employment in public services, telecommunications, and other areas.[1] Title 1 of the Act, covering employment, prohibits employers from discriminating against an individual with a disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.[2]

The ADA defines a "disabled" person as someone who has "a physical or mental impairment which substantially limits one or more major life activities."[3] Since the ADA was passed, courts have struggled with determining which impairments fall under this classification. In 1998, the Supreme Court addressed the question of when, during the progression of AIDS, a person becomes covered by the ADA. In *Bragdon* v. *Abbott*,[4] in a 5–4 decision, the Court held that people who are infected with HIV, the virus that causes AIDS, are protected from discrimination under the ADA even if they have no AIDS-related symptoms.

Sidney Abbott visited Randon Bragdon, a dentist in the small Maine town of Bangor, in September 1994. Bragdon conducted a routine examination and discovered a cavity on Abbott's back lower tooth. Bragdon then refused to fill Abbott's cavity at his office, because Abbott had noted on a registration form that she was HIV positive. Bragdon offered to conduct the procedure at a local hospital where additional precautions could be taken, at no additional charge. However, Abbott refused and filed suit. Abbott's visit to Bragdon's office was part of an intentional campaign to target physicians, dentists, and other medical practitioners nationwide who refuse to provide routine treatment to AIDS patients. In the past, the dentist had repeatedly stated at public conferences that he felt that special measures needed to be taken in dealing with HIV patients.

The Court agreed with Abbott that HIV infection is a disability under the ADA—that is, a physical impairment that substantially limits one or more major life activities—even though Abbott's condition had not progressed to a stage where she was showing physical symptoms. In support of its decision to classify HIV as a physical impairment, the Court reasoned that the virus causes immediate abnormalities in a person's blood and a continuous reduction in a person's white blood cell count. Thus, HIV infection is regarded as a "physiological disorder with an immediate, constant, and detrimental effect on the hemic and lymphatic systems."[5] The Court identified Abbott's ability to reproduce and bear children as the "major life activity" that the HIV infection substantially limits. That categorization was supported by the possible transmission of HIV to a male partner, as well as to the child during gestation and childbirth, if Abbott were to attempt to conceive.

The ADA does state that a person can be denied treatment if he or she poses a significant risk to the health and safety of others.[6] Bragdon argued to the Court that Abbott posed such a risk, and he noted that he offered a similar, but safer, alternative to her at no extra charge. The Supreme Court stated that the standard for ascertaining whether a person poses a "significant risk" should be determined from the "standpoint of the health care professional who refuses treatment or accommodation, and the risk assessment is based on the medical or other objective, scientific evidence available to him and his profession, not simply on his good-faith belief that a significant risk existed."[7]

The Court ruled that the first circuit court of appeals did not rely on sufficient material on the record when it determined that filling a cavity did not pose a significant threat of having the virus transmitted to Bragdon. The Court also ruled that the first circuit may have mistakenly relied on the 1993 dentistry guidelines from the Centers for Disease Control, which do not assess the level of transmission of risk from filling a cavity, as well as the 1991 American Dental Association policy on HIV, which was the work of a professional organization and not a public health authority. Thus, the first circuit's decision was vacated and remanded for additional proceedings to determine whether filling a cavity poses a significant risk of transmission of HIV under the Court's enunciated standard.

The ruling in this case is significant, because it further clarifies the definitions of "impairment" and "major life activities" under the ADA and sets a standard for the determination of "significant risk." The definitions and the standard may be applied by courts in addressing other diseases and handicaps in addition to AIDS.

Constitutional protection for "at-will" employees?

The Supreme Court will soon decide whether "at-will" employees, who can quit or be fired anytime without cause, have a constitutionally protected interest in continued employment. The question hinges on whether an "at-will" employee's discharge constitutes an actual legal injury. In *Haddle* v. *Garrison*,[8] the U.S. Court of Appeals for the Eleventh Circuit held that an at-will employee who was fired could

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not proceed with a claim to the effect that the owner of the home health care company for which he worked discharged him in retaliation for his cooperation with a criminal investigation into alleged medicare fraud by the company.

Michael Haddle was a manager with Healthmaster, Inc., a company that provided health care to many people covered by medicare. A significant portion of the company's revenues were obtained through medicare reimbursement. The Federal Government began investigating Healthmaster in 1994, and the company owner and president, Jeannette Garrison, and other company officials were indicted in March 1995 for medicare fraud. Haddle cooperated in the investigation and was scheduled to appear before a grand jury, although he never in fact testified against Garrison. Later, a trustee was appointed by a bankruptcy court to run Healthmaster without Garrison's involvement. According to Haddle, the trustee fired him on Garrison's direction. Haddle alleged that Garrison wished to fire him in retaliation for his threatening to testify against her and other company officials.

Under the U. S. Code, Section 1985(2) of Title 42 enables people to sue for injuries caused when "two or more persons . . . conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." The eleventh circuit ruled that Haddle had not suffered any "injury" as specified in Section 1985(2), and therefore, his suit was dismissed for failure to state a claim. Citing its earlier decision in *Morast* v. *Lance*,[9] the Appeals Court ruled that at-will employees have no constitutionally protected interest in continued employment.

Federal appeals courts are split on this question. The ninth circuit[10] already ruled that, under Section 1985(2), an at-will employee can sue after losing a job, while another decision in the first circuit supports the same holding, although the case was not directly on the point.[11]

The Supreme Court's decision will be reported in a later column.

Temporary workers: masquerading full-timers?

The trend of American employers to increasingly use leased or temporary workers has been explained by some as a result of the employers' desire not to have to pay for costly benefits typically afforded full-time workers. Workers have been challenging this trend by asking courts to step in and require employers to provide benefits in cases where the employee acts as a full-time worker of the company, but is not formally recognized as such.

Microsoft Corporation has been using what the company called "independent contractors" at its headquarters in Washington State since 1987. These workers were not permitted to participate in the company's 401(k) retirement savings plan or in the employee stock ownership plan. The U.S. Court of Appeals for the Ninth Circuit held that Microsoft's administrator of the 401(k) plan acted arbitrarily and capriciously in denying plan benefits to certain employees, who waived their rights to participate in the plan in the mistaken belief that they were independent contractors. Furthermore, that same group of employees was entitled to participate in the stock ownership plan, which, when it was created, was designed for all employees to participate in. These legal issues were decided under the common-law definition of "employee," as provided in Washington State law, which controlled in *Vizcaino* v. *Microsoft*.[12] (See "The Law at Work," *Monthly Labor Review*, October 1997, pp. 34–35.)

Following the ruling in *Vizcaino*, a critical question developed as to which independent contractors would be able to participate in the class action suit. Microsoft contended that the class should be limited to temporary workers hired between 1987 and 1990, when the company hired them directly. Since 1990, Microsoft has employed such workers through temporary help agencies. On remand, the District Court permitted all of these employees hired since 1987 to enter the class. Later, the district judge referred the matter of damages in the case to mediation.

In another, similar case with different results, the U.S. Court of Appeals for the Tenth Circuit has ruled that US WEST Communications does not have to include "leased" employees in its pension plans in order to comply with the Federal Employee Retirement Income Security Act (ERISA). In *Bronk* v. *Mountain States Telephone and Telegraph, Inc., d/b/a US WEST Communications*,[13] the Court held that a corporation's pension plan must specifically provide for the inclusion of such workers, even if the "leased" employees meet a State's common-law definition of "employee." Because Congress did not specifically provide for leased workers to be included in plans under ERISA, the Court should not step in and do so, reasoned Judge Stephen Anderson.

The employment contract for leased workers at US WEST stated that the leasing company was the "employer" and that the workers were "employees or agents" solely of the leasing company. US WEST did not keep the workers on their payroll or list them on its official service records.

ERISA provides that no pension plan may require an employee to complete more than 1 year of service or wait past age 21 to participate in a plan. Furthermore, ERISA prohibits employers from making distinctions based on age or length of service. However, the law does not prohibit employers from providing benefits for some groups of workers while excluding others. In contrast, the U.S. tax code does not permit such disparate treatment, specifically stating that all employees must be offered the opportunity to participate in a pension plan in order for the plan to receive favorable tax treatment.

Proper denial of religious accommodation

Employers in the ninth circuit (Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington) with legitimate seniority systems in place to assign shifts need not accommodate an employee's request for alternative scheduling for religious observance of the Sabbath, provided that the seniority system was implemented without discriminatory intent. The Ninth Circuit U.S. Court of Appeals ruled in *Balint* v. *Carson City*[14] that an applicant who was not hired because she refused to work weekend shifts that interfered with her religious observance could not sustain a claim of religious discrimination under Title VII of the 1964 Civil Rights Act.

Lisette Balint applied for a position with the Carson City, Nevada, sheriff's department in 1993. She indicated on a job application that she was available for work at any time during the week. After passing physical, psychological, and drug tests, Balint was told she would begin work on Friday, Mar. 31, 1995. Balint then informed the department that she could not work from sundown on Fridays to sundown on Saturdays because, as a member of the Worldwide Church of God, she was enjoined from working during her observance of the Sabbath. Carson City refused to accommodate her schedule to permit her religious observance.

Title VII prohibits employers from discriminating against employees on the basis of their religion and requires employers to accommodate an employee's religious beliefs unless such an accommodation would impose an "undue hardship" on the employer's business. However, under an earlier Supreme Court interpretation of Title VII,[15] employers are permitted to impose different terms and conditions on employment as part of a nondiscriminatory seniority or merit system.

Carson City has a long-standing practice of scheduling shifts according to a bidding system by order of seniority. Only one sheriff in the department gets both Friday and Saturday off, and trading shifts is not permitted between deputies. Shifts during sundown Friday to sundown Saturday are some of the least desirable shifts available, due in part to the heavy workload at that time. Because the seniority system had a viable, nondiscriminatory motive, the department was not required to accommodate Balint's scheduling needs.

The ninth circuit distinguished this case, wherein shifts could not be traded, from *Opuku-Boateng* v. *California*,[16] in which an employer refused to accommodate a Seventh-Day Adventist who did not want to work on the Sabbath. In *Opuku-Boateng*, trading shifts was permitted, so the employer's failure to accommodate the worker was a violation of Title VII.

Get a haircut

Four employees of Blockbuster Video lost claims that their terminations for refusing to cut their long hair constituted gender bias and retaliation under Title VII of the 1964 Civil Rights Act. In *Harper* v. *Blockbuster Entertainment Corp.*,[17] the U.S. Court of Appeals for the Eleventh Circuit[18] ruled that a policy requiring male employees, but not female employees, to cut their hair did not violate Title VII. Prior Federal rulings have upheld work rules that dictate different lengths of hair for males and females. The eleventh circuit distinguished work rules that relate to the manner in which an employer chooses to run a business (for example, grooming policies) from those leading to situations in which the right to gender equity at work is violated (such as when employee health and pension plan benefits differ by gender).[19] Blockbuster initiated the grooming policy in May 1994; later that year, the plaintiffs were fired after they objected to the policy and refused to comply with it. □

Footnotes

[1] 104 Stat. 327, 42. U.S.C. § 12101 et seq.

[2] Title I, Section 102, of the Americans with Disabilities Act. The full text of the Act is on the Internet at **http://www.usdoj.gov/crt/ada/pubs/ada.txt** (visited Oct. 26, 1998).

[3] 42 U.S.C. § 12102(2).

[4] No. 97–156. Argued Mar. 30, 1998; decided June 25, 1998. The full decision is on the Internet at **http://www.findlaw.com** (visited Oct. 26, 1998).

[5] No. 97–156, Section II(A)(1).

[6] 42 U.S.C. § 12182(b)(3).

[7] No. 97–156, Section III.

[8] Unpublished opinion. See 132 F.3d 46 (11th Cir. 1997) for the decision.

[9] 807 F. 2d 926 (11th Cir. 1987).

[10] *Portland* v. *Santa Clara County, Calif.*, 995 F. 2d 898 (9th Cir. 1983).

[11] *Irizarky* v. *Quirus*, 722 F. 2d 869 (1st Cir. 1983) (holding that a number of farm workers were injured when they were denied reemployment following a Federal legal action against their employer).

[12] 120 F.3d 1006 (1997).

[13] 140 F.3d 1335 (1998).

[14] 1998 WL 261417 (9th Cir.).

[15] *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

[16] 95 F.3d 1461 (9th Cir. 1996).

[17] 139 F. 3d 1385 (11th Cir. 1998).

[18] Includes Alabama, Georgia, and Florida.

[19] See, for example, *U.A.W.* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) (ruling that a company policy barring female employees able to have children from working in battery-manufacturing jobs was discriminatory); *Newport News Shipbuilding and Dry Dock Co.* v. *E.E.O.C.*, 462 U.S. 669 (1983) (stating that an employer policy of providing inferior health benefits to the spouses of male employees, as opposed to the spouses of female employees, was discriminatory); and *City of L.A., Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978) (striking down as discriminatory an employer policy that required female employees to make larger contributions to an employee pension plan than male employees).