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Susan J. Becker
Cleveland State University, s.becker@csuohio.edu

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American Bar Association
750 North Lake Shore Drive
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RECENT DECISIONS FROM THE U.S. SUPREME COURT

Higher Burden for ADA Plaintiffs

BY SUSAN J. BECKER
LITIGATION NEWS ASSOCIATE EDITOR

Plaintiffs in Americans with Disabilities Act (ADA) cases have a significantly higher burden to show a disability due to a trilogy of recent decisions.

"The ADA is just not a very helpful statute for plaintiffs at this point," says Jon W. Green, Springfield, NJ, a plaintiff's lawyer and Co-Chair of the Section of Litigation's Employment and Labor Relations Law Committee.

"The Supreme Court has come down with a very limited definition of 'disability,' and the disability requirement is the gatekeeper to the entire statute," Green adds.

The Court held that corrective eye lenses, medications, and even the body's own ability to compensate for an impairment must be considered in determining whether an individual is "disabled" under ADA standards. *Sutton v. United Airlines, Inc. Murphy v. United Parcel Services, Inc. Albertsons Inc. v. Kirkingburg.*

"Looking at the Act as a whole, it is apparent that if a person is taking corrective measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity, and thus 'disabled' under the Act," the Court said in *Sutton*, the lead opinion.

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"These decisions are pretty devastating for the ADA," says Ruth Colker, an ABA member who is an expert on the ADA and who holds the Heck-Faust Memorial Chair and Professorship in Constitutional Law at The Ohio State School of Law.

"My data on the judicial outcomes of reported ADA decisions showed that, even before these [three] cases were decided, plaintiffs had only a 6 percent chance of winning at the trial level," Colker says. "After the appeals process, about half of those were overturned or the jury award was reduced substantially. And this was when the overwhelming majority of the courts were using the broader definition of disability."

The Supreme Court's decisions are especially disturbing, Colker says, because many employers, including the defendants in *Sutton* and *Albertsons*, make their allegedly discriminatory decisions based on the uncorrected condition of the plaintiffs. "What the Court said is that even when the employer (bases its actions on) your uncorrected state, the courts have to consider you in your corrected state to determine if you are 'disabled' and can pursue an ADA remedy," Colker says. "There certainly is an irony in the Court's logic."

Not everyone is critical of the Court's three decisions. The rationale underlying these decisions is sound, says Barbara Ryniker Evans, a New Orleans defense lawyer and immediate past Co-Chair of the Section's Employment and Labor Relations Law Committee.

"I am not surprised by these decisions because I think that the courts overall have been taking a narrow view of the ADA," Evans says. "This is appropriate because the statute as written could potentially subsume almost the entire population of the United States. There are sound policy reasons to move in the direction the courts have been heading."

The Court rejected previous interpretations of the ADA by eight of the nine Circuits and three federal agencies that had promulgated regulations and guidelines for implementing various ADA provisions.

Before the Supreme Court's three decisions, most cases had measured the plaintiff's impairment without regard to any available corrective or mitigating measures. If the uncorrected state substantially limited a major life activity—like walking or seeing—then the plaintiff satisfied the threshold "disability" requirement of the ADA. Even after meeting that requirement, the plaintiff had the burden of showing that she was "otherwise qualified" to do the job, either with or without a "reasonable accommodation" by the employer.

"These decisions are pretty devastating for the ADA."

In *Sutton*, defendant United rejected the plaintiffs' applications for positions as pilots because they have uncorrected vision significantly below the required standards. Plaintiffs' corrected vision, however, is 20/20—far above requirements.

The trial court and the Tenth Circuit held that the corrective measures available to the plaintiffs (i.e., eyeglasses) removed them from the category of "disabled" persons covered by the ADA.

The Supreme Court affirmed, reasoning that the verb tense of the statutory requirement that the claimed disability "substantially limits one or more major life activities" mandates that a person presently demonstrate a substantial limitation.

"The Court's 'narrow view of the ADA is appropriate because the statute as written could potentially subsume almost the entire population of the United States."

"A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity," and so is not disabled under the ADA, the majority opinion by Justice Sandra Day O'Connor said.

The dissent said the only issue was whether plaintiffs met the threshold definition of disabled under the ADA, and so could survive a motion to dismiss. United might well have a defense to the ADA claim, if it could prove a sound business justification for excluding pilot applicants with poor vision.

"But if United regards petitioners as unqualified because they cannot see well without their glasses, it seems eminently fair for a court to also use uncorrected vision as the basis for evaluating petitioners' life activity of seeing," in determining whether they meet the ADA definition of disability, said the dissent by Justice Stevens (joined by Justice Breyer).

In *Murphy*, UPS terminated the plaintiff's employment because of high blood pressure, which, when unmedicated, exceeded the limit for obtaining a commercial truck driver's license. The Supreme Court affirmed the lower courts' holding that the plaintiff's condition did not, due to available medication, limit any major life activities, so it does not meet the ADA definition of disability.

The *Kirkingburg* plaintiff was a truck driver fired for failing to meet DOT vision standards, because his vision was essentially limited to one eye. The record showed that Kirkingburg's brain compensated for his monocular vision by making subconscious adjustments necessary for depth perception and sensing peripheral objects.

In holding that plaintiff had failed to offer sufficient evidence of a disability to survive summary judgment, the Court said: "We see no principled basis for distinguishing between measures undertaken with artificial aids, like medication and devices, and measures undertaken, whether consciously or not, with the body's own systems."

Citations:

Sutton v. United Airlines, Inc., 1999 U.S. Lexis 4371 (June 22, 1999).

Murphy v. United Parcel Services, Inc., 1999 U.S. Lexis 4370 (June 22, 1999).

Albertsons, Inc. v. Kirkingburg, 1999 U.S. Lexis 4369 (June 22, 1999).