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Barry C. Taylor
Legal Advocacy Dir., Equip for Equality of IL

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AN UNFORTUNATE REVERSAL OF FORTUNE: THE SUPREME COURT’S NARROWING OF THE AMERICANS WITH DISABILITIES ACT

By Barry C. Taylor*

“When passing state laws will correct some of the problematic Supreme Court decisions, it sadly marks the return to a patchwork of laws protecting some people with disabilities more than others depending on where they happen to live.”

* Barry C. Taylor is the Legal Advocacy Director of Equip for Equality, the protection and advocacy system in Illinois, which provides free legal advocacy and education services.
explore what the future holds for the ADA and the civil rights of people with disabilities.

A BRIEF HISTORY OF THE ADA

When Congress enacted the major federal civil rights laws in the 1960s protecting people from discrimination on the basis of race, national origin, age, gender and religion, no comparable federal civil rights legislation was passed for people with disabilities. This inequity began to change in the 1970s when Congress passed the Rehabilitation Act of 1973. However, Section 504 of the Rehabilitation Act only prohibited disability discrimination by entities receiving federal funding. Thus, its reach was relatively limited, since it did not cover many common areas of disability discrimination, including discrimination by private employers.

When the ADA was finally passed in 1990, it was closely modeled on Section 504. In fact, the definition of disability under the ADA is identical to the definition of “handicap” under Section 504:

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Being regarded as having such an impairment

42 U.S.C. 12102(2).

Since its passage, courts have liberally construed who is covered under the Rehabilitation Act. In fact, over the years, only a small percentage of plaintiffs were deemed ineligible under the Act. Defendants rarely challenged whether someone had a “handicap” as defined by Section 504. Rather, most cases focused on whether the person was qualified or whether the adverse action taken by the defendant was actually in response to the plaintiff’s disability.

Shortly before the passage of the ADA, the Supreme Court decided School Board of Nassau County v. Arline, 480 U.S. 273 (1987) under Section 504. Arline was an employment discrimination case brought by a teacher with tuberculosis, and the Court took an expansive view of coverage under Section 504. Accordingly, when the ADA was being drafted, Congress was urged to adopt Section 504’s definition of disability in order to incorporate into the ADA the Rehabilitation Act’s favorable jurisprudence of the lower courts and the Supreme Court.

The drafters of the ADA made clear that Congress intended states to be covered by the ADA by explicitly abrogating state sovereign immunity. Additionally, Congress was careful not to substantially expand the Rehabilitation Act’s remedies when passing the ADA in order to prevent future claims that the ADA’s remedies were not congruent and proportional, and thus subject to a constitutional challenge. Congress heard wide-ranging testimony in order to establish a rich and clear legislative history. As will be discussed below, the Supreme Court has completely disregarded Congress’ intent by invalidating the ADA’s application to state employers.
DEFENSE STRATEGIES TO UNDERMINE THE ADA

Because the Rehabilitation Act’s discrimination provisions are limited to only those entities receiving federal funding, the defense bar was not particularly motivated to develop a coordinated strategy to defeat plaintiff claims under Section 504. However, once the ADA was passed, the universe of defendants expanded substantially to include all private businesses open to the public, and all employers with 15 or more employees. As a result, defendants began to aggressively challenge whether certain plaintiffs were even covered by the ADA. Similarly, state attorneys general began to develop strategies to challenge the constitutionality of the ADA and its application to the states as a way to avoid liability.

Regrettably for plaintiffs, numerous courts, including the Supreme Court, have been very receptive to these arguments. As a result plaintiffs have been unsuccessful in a high percentage of ADA cases, often failing to get past the initial determination of whether they have an ADA disability.

Plaintiffs who sue for discrimination based on race, national origin, age and gender do not have to spend significant resources proving that they are within a protected class, and instead can focus primarily on the underlying acts of discrimination. However, because of the aggressive assault on the ADA by defendants, ADA plaintiffs have become mired in a hyper-technical analysis of eligibility and jurisdiction, often resulting in the court never even reviewing the defendant’s purported discriminatory conduct. Clearly, these developments are contrary to Congress’ intent that the ADA be viewed expansively, and ignore the long line of favorable precedents established under the Rehabilitation Act.

THE SUPREME COURT EMBRACES A NARROW CONSTRUCTION OF THE ADA

Among the ADA cases the Supreme Court has decided, four have been particularly detrimental to the rights of people with disabilities: Sutton v. United Airlines, 527 U.S. 471, 119 S.Ct. 2133 (1999), Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001), and Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002). The following is a discussion of how these decisions have negatively impacted the ADA, as well as potential claims under other civil rights statutes.

Sutton v. United Airlines

The Supreme Court’s decision in Sutton was the first clear evidence that the Court intended to narrowly construe provisions of the ADA. In Sutton, the Court faced the question of whether medication or assistive devices used by people with disabilities had to be taken into account when determining whether a person was substantially limited in a major life activity. The legislative history and subsequent federal regulations are extremely clear that Congress intended that mitigating measures should not be part of the analysis for ADA eligibility.

At the time the Supreme Court decided Sutton, eight federal Courts of Appeals had concluded that mitigating measures should not be included in the analysis of ADA eligibility, but instead should only be considered when evaluating whether a person was qualified under the ADA. Otherwise, people with disabilities could be put in the untenable position of deciding whether to use a mitigating measure or be
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covered by the ADA. However, the Tenth Circuit in *Sutton* took the opposite view creating a split of authority in the circuits, and the Supreme Court granted *certiorari*.

The Supreme Court affirmed the Tenth Circuit’s decision holding that plaintiffs must be viewed in their mitigated state when determining eligibility under the ADA. The Court reasoned that it did not need to look at the legislative history on this issue because the statutory text made it clear that mitigating measures must be taken into account. The Court relied on the fact that the language of the statute (i.e. “substantially limits”) is in the present tense indicating that it applies to people as they currently are in the real world, not as they might appear if they did not mitigate their impairments. The Court also relied heavily on the preamble of the ADA, which states that there are 43 million Americans with disabilities. The Court found that the ADA would cover 160 million Americans if it included people who mitigate their disabilities, a result not intended by Congress.

The Court’s reliance on the reference to 43 million people as a basis for Congress’ intent is sorely misplaced and is not supported by those who drafted the statute, by the ADA’s primary sponsor, or by the federal agency that recommended the enactment of the ADA. The Court’s reasoning wrongly assumes that Congress sought to place some sort of numeric eligibility “cap” on the ADA. The Court’s refusal to actually determine the clear intent of Congress by reviewing the legislative history leads to the absurd result that disability groups that historically have been discriminated against most (e.g. people with epilepsy and mental illness), and thus, most in need of the ADA’s protection, may not be covered by the law because of new drugs that help mitigate the symptoms of the disability.

*Board of Trustees for the University of Alabama v. Garrett*

In addition to construing key terms of the ADA very narrowly, the Supreme Court has also limited the scope of the ADA with respect to employment discrimination cases against the State. The Supreme Court ruled in *Garrett* that employment discrimination suits in federal court by state employees to recover money damages are barred by the Eleventh Amendment. The Court held that although Congress clearly intended states to be subject to ADA employment discrimination suits, the ADA’s legislative record failed to sufficiently show that Congress identified a history and pattern of irrational employment discrimination by the states against people with disabilities.

After *Garrett*, state employers are no longer subject to private, federal ADA employment discrimination suits seeking money damages. As a result, employees with disabilities working for the state have fewer civil rights protections than employees with disabilities working for private or local governmental employers. Although state employees with disabilities can still bring ADA claims against state officials for injunctive relief, one of the ADA’s strongest remedies and deterrents (i.e. money damages) has been jettisoned by the Supreme Court.

*Garrett* is just the latest in a series of Supreme Court decisions during the last several years restricting plaintiffs’ ability to sue states under federal law. The Court’s decisions invalidating civil rights enforcement against the states demonstrate an antipathy by the Court toward Congress’ stated intent to enact comprehensive remedial civil rights legislation that applies to the states. In its current term, the Supreme Court will review the constitutionality of the Family and Medical Leave Act, as well as Title II of the ADA, which covers state and local government services. Thus, it appears likely that the Court will continue its systematic rollback of Congress’ efforts to protect the civil rights of people with disabilities and other protected classes.
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Buckhannon Board and Care Home v. West Virginia Department of Health and Human Services

Just three months after Garrett, the Supreme Court issued another ADA decision that undermined the civil rights of people with disabilities and those covered by other civil rights laws. In Buckhannon, the Supreme Court eliminated the “catalyst theory” as a basis for obtaining attorney’s fees as a prevailing party. The catalyst theory is a longstanding doctrine that allows a plaintiff to be a prevailing party for purposes of fee-shifting statutes if the plaintiff achieves the result sought in the litigation even if the result was due to a voluntary change in the defendant’s conduct caused by the litigation. Plaintiff’s attorney’s frequently sought and successfully obtained attorneys fees under the catalyst theory.

Without the ability to obtain attorney’s fees for “voluntary” changes made in response to litigation, many plaintiffs may be unable to secure legal counsel to litigate civil rights cases. This is of particular concern to people with disabilities, who are often poor and will now be less likely to retain an attorney because of the risk that a defendant will unilaterally moot a case before judgment to avoid paying attorney’s fees.

Prior to Buckhannon, nine of the Circuit Courts of Appeal had long embraced the catalyst theory. As in Sutton, the Supreme Court’s decision in Buckhannon was contrary to an overwhelming majority of decisions by Circuit Courts of Appeal. The Supreme Court’s elimination of the catalyst theory has resulted in a dramatic change in the landscape of civil rights litigation, and some lower courts are exploring extending Buckhannon beyond the ADA to other civil rights laws including the Individuals with Disabilities Education Act.11

Toyota Manufacturing v. Williams

In 2002, the Supreme Court decided Toyota Manufacturing v. Williams, another ADA employment discrimination case, and continued to limit the scope of the Act making it even more difficult for plaintiffs to succeed. In Williams, the plaintiff had carpal tunnel syndrome and sought reasonable accommodations under the ADA. The accommodations were denied, and ultimately, she was fired. The Supreme Court found that the plaintiff did not have an ADA disability, and therefore, was not entitled to the protections of the Act.

The Court stated that plaintiffs who claim to be covered by the ADA because they are substantially limited in the major life activity of performing manual tasks must be able to show that these limitations are for activities that are central to “most people’s lives.”12 The Court essentially created a new standard not supported by the text of the ADA, which only requires plaintiffs to show a “substantial limitation in a major life activity of such individual.”13 (emphasis added). The Court’s requirement that plaintiffs must now prove that the major life activity is central to “most people’s lives” imposes a new objective standard that may require plaintiffs to introduce expert social science or vocational testimony. Requiring plaintiffs to expend additional litigation costs and resources will surely adversely affect the ability of people with disabilities to adequately enforce their rights under the ADA.

The Court also stated that the elements of the definition of disability “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”14 The strict construction standard articulated by the Court in

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Williams is an alarming departure from long-standing precedent that civil rights laws are to be construed liberally to achieve their remedial purposes. The potential ripple effect of the Court’s strict construction standard is certainly a cause for serious concern.

**WHAT CAN BE DONE IN RESPONSE TO THE SUPREME COURT’S DECISIONS?**

The Supreme Court’s ADA decisions have not eliminated the ability of people with disabilities to combat disability discrimination, and for some plaintiffs the ADA continues to be an important and effective tool. However, the cases highlighted above have certainly made the playing field much more favorable to defendants.

Many disability advocates have concluded that amending the ADA or enacting new legislation may be the only way to halt the Supreme Court’s systematic dismantling of the Act. Historically, disability advocates were extremely wary to “open up” the ADA legislatively fearing that Congress would use the opportunity to make the law even more restrictive. However, in light of the Supreme Court’s restricted interpretations of the ADA, as well as the Court’s consistent criticism of Congress that the ADA’s language is vague, it appears that a legislative fix may be the best option.

The National Council on Disability is currently in the process of publishing a series of policy briefs responding to the Supreme Court’s ADA decisions, and will soon be making specific legislative proposals to address the problems arising from the Supreme Court’s decisions. One example of a legislative solution can be seen in a bill recently introduced in the Senate seeking to undo the Supreme Court’s elimination of the catalyst theory in *Buckhannon.*

Another response to the Supreme Court’s decisions is for individual states to agree to pass corrective legislation. For instance, in response to the Supreme Court’s decision in *Garrett,* Minnesota passed legislation waiving sovereign immunity under the ADA and other civil rights laws. Sovereign immunity waiver legislation similar to the Minnesota law is pending in numerous other states. These laws would allow people with disabilities to proceed with ADA claims against the states despite the Supreme Court’s decision in *Garrett.* While passing state laws will correct some of the problematic Supreme Court decisions, it sadly marks the return to a patchwork of laws protecting some people with disabilities more than others depending on where they happen to live. This geographic inequity was one of the main reasons the ADA was passed — i.e., to provide a national standard and serves as a reminder of how the Supreme Court has thwarted the intent of Congress.

Other plaintiff attorneys are choosing to rely on state and local disability laws instead of the ADA when seeking redress for disability discrimination because many of the laws have a broader definition of disability. In these forums, people with disabilities have a greater opportunity for the alleged discrimination to be reviewed by the trier of fact, instead of the sole focus being whether a plaintiff is eligible under the law, which has been the situation facing many ADA plaintiffs.

The legacy of the current Supreme Court will surely include its ADA decisions that significantly limited the ability of Congress to provide a national standard for comprehensive and remedial civil rights protection. Unfortunately, this shameful legacy will be carried on the backs of people with disabilities and people in other protected classes.

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