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The Americans with Disabilities Act: Effective Legal Protection Against Secondhand Smoke Exposure

Clifford E. Douglas

Introduction

There is no safe level of exposure to secondhand tobacco smoke, according to the United States Environmental Protection Agency, the National Institute for Occupational Safety and Health, the American Lung Association, the American Cancer Society, the World Health Organization and other leading public health and medical organizations. Secondhand smoke is the third leading preventable cause of death in the United States. For millions of Americans, secondhand smoke has the potential to cause immediate, life-threatening asthmatic attacks.

The federal Americans with Disabilities Act (ADA), which took effect in 1992, was adopted to provide a comprehensive national mandate to eliminate discrimination against people with disabilities. The ADA may be used to protect people with asthma and others whose daily activities are substantially limited by secondhand smoke exposure in private and public workplaces with fifteen or more employees (Title I); while accessing the services of, or participating in, state and local government (Title II); and in places of public accommodation (Title III). This legal synopsis outlines when exposure to secondhand smoke qualifies as a disability under the ADA (Section I), summarizes what constitutes a "reasonable accommodation" by an employer or public place (Section II), describes the scope and constitutionality of the ADA as defined by recent Supreme Court and other cases (Section III), and identifies the remedies under the ADA for smoking-related discrimination (Section IV). Section IV also provides information on who to contact for assistance in bringing ADA legal actions.

If secondhand smoke substantially impairs a disabled person in a place of public accommodation (e.g., a restaurant, hotel, school, store, museum, community center or homeless shelter), the ADA requires the facility to make itself accessible to the disabled person by making reasonable modifications in its policies and procedures. If the place of public accommodation fails to do so, it may be found liable under the ADA for having discriminated against the disabled person. Similarly, if secondhand smoke substantially impairs a disabled person at work, the ADA requires the employer to protect the individual's health by making reasonable accommodations in the workplace.

If a policy of permitting smoking has a discriminatory effect by denying a person with a substantial smoke-related impairment access to a publicly accessible facility's goods or services, the owner or manager must allow access by, for example, instituting a smoke-free policy and procedures for effective enforcement of that policy. While the ADA provides that a facility can claim that accommodating the disabled person would impose an undue hardship on the business, businesses may be hard-pressed to demonstrate such hardship since the institution of a smoke-free policy ordinarily creates little, if any, difficulty or expense. The same is true in the employment context. If an individual is qualified to do a job but cannot do (or apply for) it because of the presence of secondhand smoke, the employer can avoid a potential finding of discrimination under the

Key Points

- Those who are "disabled" by secondhand smoke can use the ADA to assert a legal right not to be exposed to smoke in workplaces and public places, such as restaurants.
- Most qualified individuals can seek money damages and injunctive relief.
- Employers, owners and managers must accommodate a disabled person by providing effective separation of smoking and nonsmoking areas or by eliminating smoking entirely.
- People with disabilities can obtain free ADA-related legal assistance from the Equal Employment Opportunity Commission and the U.S. Department of Justice.

ADA by instituting a smoke-free workplace policy or by taking other steps to ensure the disabled person will not be exposed to smoke.

A number of cases involving secondhand smoke-related disabilities have been brought under the ADA and related laws. Some cases have been resolved by jury verdicts; others have been settled out of court. While the outcome has depended on the specific facts of each case, it is clear that a failure to accommodate a disabled person in a satisfactory manner can result in costly, not to mention avoidable, litigation for the private or public employer, place of public accommodation or provider of services. In cases decided against the plaintiff, the adverse rulings often resulted when courts found that either the individual was unable to demonstrate that the alleged disability substantially limited his or her ability to work, or the defendant had taken sufficient steps to accommodate a disabled individual.

Section I — When Does a Secondhand Smoke-Related Illness Qualify as a Disability under the ADA?

The ADA provides that an individual is "disabled" if he or she has a physical or mental impairment that:

1. substantially limits a major life activity, such as breathing, walking or working;

2. has a record of such an impairment; or

3. is regarded as having such an impairment.

One such impairment is difficulty breathing or other ailments, such as a cardiovascular disorder, that are caused or exacerbated by exposure to secondhand tobacco smoke. For a person who suffers from such health effects, secondhand tobacco smoke may pose as great a barrier to access as a flight of stairs poses to a person in a wheelchair. In the 2001 case *Board of Trustees of the University of Alabama v. Garrett*,[1] one plaintiff was a state employee who, because of chronic asthma, had asked his employer to modify his duties to minimize his exposure to cigarette smoke and carbon monoxide. While the Supreme Court ruled that state agencies cannot be sued for money damages under the ADA,[2] the Court notably did not question the right of a person to claim a disability under the ADA relating to secondhand tobacco smoke exposure. (The Court did permit claims for injunctive relief.) The Supreme Court's acceptance of a claim involving exposure to secondhand smoke confirmed that eligible plaintiffs who suffer from a disability that is induced or exacerbated by exposure to secondhand smoke can seek legal redress under the ADA.

On the other hand, the ADA cannot be used by a person *who smokes* to demand that he or she be permitted to smoke in a workplace or place of public accommodation based on an argument that he or she is addicted to nicotine and therefore "disabled" under the ADA. The ADA is clear on this matter, stating: "Nothing in this [law] shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by [Title I], in transportation covered by [Title II or III], or in places of public accommodation covered by [Title III]."[3]

To satisfy the requirement that a disability constitute a "substantial" limitation of a major life activity, a person who is impaired by secondhand smoke exposure must demonstrate the impairment is both severe and predictably long-term.[4] While disability determinations are made on a case-by-case basis, a person whose asthma, chronic bronchitis or angina is seriously aggravated by exposure to secondhand smoke—causing him or her, for example, to suffer restricted breathing, uncontrollable coughing or debilitating chest pain—is much more likely to be covered by the ADA than a person who experiences a temporary condition, such as bronchitis following the flu, since the former illnesses are chronic, underlying conditions and likely to be viewed as truly disabling.

Two prominent cases are illustrative. The first led to the elimination of smoking in many McDonald's and Burger King restaurants. In the 1995 case *Staron v. McDonald's Corp.*,[5] the U.S. Court of Appeals for the Second Circuit ruled unanimously that three asthmatic children and an adult with lupus could sue McDonald's

and Burger King under the ADA.[6] The plaintiffs alleged that the two corporations' policies of permitting smoking in their restaurants violated the ADA and they sought an injunction requiring the defendants to establish smoke-free policies. Within a year, McDonald's announced its decision to implement a smoke-free policy in all of its corporate-owned restaurants. The court stated, "under the appropriate circumstances, a ban on smoking could . . . be a reasonable modification" for purposes of accommodating a person's disability.

In a similar case involving two of the largest restaurant chains in the United States, a Maryland court ruled that three women with asthma could proceed with an ADA lawsuit to compel the Red Lobster and Ruby Tuesday chains to implement smoke-free policies.[7] The court wrote, "just as a staircase denies access to someone in a wheelchair, tobacco smoke prevents Plaintiffs from dining at Defendant's restaurants. Therefore, Plaintiffs have adequately alleged they are disabled within the meaning of the ADA and that their disability bars them from Defendants' restaurants."

The Availability of "Mitigating Measures"

The Supreme Court has ruled that a disabled person who experiences no substantial limitation in any major life activity *when using a mitigating measure*, such as medication or a device, does not meet the ADA's first definition of disability—that the disability substantially limits a major life activity. The plaintiffs in the 1999 *Sutton v. United Air Lines*[8] case were twin sisters, both of whom suffered from severe myopia that was correctable with appropriate lenses. Both had applied for positions as pilots with United Air Lines and were refused employment because of their poor uncorrected vision. The applicants argued the airline's refusal to hire them as pilots because of their poor uncorrected vision was based upon their disability and was impermissible discrimination under the ADA. The Court disagreed, notwithstanding that the defendant indisputably discriminated against the applicants and denied them employment based on their poor (uncorrected) vision.

While the Supreme Court's decision might not be regarded as particularly favorable for some of those individuals who might wish to claim disability under the ADA, the Court emphasized that a disability determination must be based on the person's actual condition at the time of the alleged discrimination. This means that, if the plaintiff was not in the practice of using a medication or device to mitigate the disability at the time the discrimination occurred, speculation regarding whether the person might not have been disabled with the aid of medication or a device is irrelevant, and an employer or proprietor of a public accommodation cannot make such an argument.

It is possible, of course, that in secondhand smoke-related cases a plaintiff, such as a person with asthma, whose condition was fully controlled with medication, would not be regarded as disabled under the ADA. Nonetheless, prudent employers, owners and managers will still bear in mind that:

- The ADA clearly permits claims of disability due to secondhand smoke exposure;
- Determinations of disability and discrimination are made on an individual-by-individual basis;
- Potentially millions of Americans have tobacco smoke-related disabilities that may qualify them to take action pursuant to the ADA.

The 2001 federal district court case *Service v. Union Pacific. R.R. Co.*,[9] which considered the purported availability of a mitigating measure to offset the effects of secondhand smoke exposure, is instructive. The *Service* case concerned an employee's claim that exposure to tobacco smoke caused him to suffer severe asthma attacks. He alleged his employer had discriminated against him in violation of the ADA and the California Fair Employment and Housing Act. Mitigating measures could be used only after an attack had begun, and even then his asthma could not always be controlled. The defendant did not dispute that the plaintiff's asthma constituted a physical impairment within the meaning of the ADA. The only issue was whether the plaintiff's asthma substantially limited one or more of his major life activities. Citing the Supreme Court's decision in *Sutton*, the federal district court stated:

> Although the court must consider any factors that may mitigate plaintiff's impairment, the presence of mitigating measures does not mean that an individual is not protected by the ADA. Rather, an individual may still be substantially limited in a major life activity, notwithstanding the use of a corrective device like medicine, which may only lessen the symptoms of an impairment.

Consequently the court denied the defendant's motion for summary judgment on the issue of whether it had reasonably accommodated the plaintiff.

Section II — What Constitutes a "Reasonable Accommodation" by an Employer or Public Place?

As noted, the ADA affords a disabled individual the right to be accommodated in a reasonable fashion to make possible his or her employment or access to a public place. A significant body of case law covers what satisfies the requirement that disabled persons be reasonably accommodated. If a defendant is deemed to have already provided reasonable accommodation, courts generally will rule against the plaintiff, although courts do not always interpret the requirements of the ADA in exactly the same way.

The first court decision rendered under the ADA concerning unwanted exposure to secondhand smoke found the employer had reasonably accommodated the disabled employee. The 1993 case *Harmer v. Virginia Electric & Power Company*[10] was brought by an individual who suffered from asthma and alleged that his employer had discriminated against him by failing to provide a smoke-free working environment. Prior to trial, the employer prohibited smoking in all of the buildings where it had not already installed separate ventilation systems in smoking rooms. Dismissing the claim, the court held that the ADA protected the plaintiff from discrimination due to his disability, but found that the defendant had reasonably accommodated him.

A later case, however, which did not pertain to smoking, disagreed with the narrow interpretation of the ADA employed in the *Harmer* decision. In the 1999 federal district court decision *Branson v. West*,[11] the court found unpersuasive the proposition that accommodations are only necessary to enable an employee to perform the essential functions of the position. It determined employers also have responsibility to ensure a disabled person can enjoy the privileges and benefits of employment equal to those enjoyed by employees who are not disabled.

In the 1998 case *Cassidy v. Detroit Edison Co.*,[12] a Michigan lawsuit that was decided under the ADA and the Michigan Handicappers' Civil Rights Act, an individual filed a discrimination claim alleging her employer failed to provide her with an allergen-free work environment. The U.S. Court of Appeals for the Sixth Circuit agreed the plaintiff was disabled by a breathing condition that was exacerbated by exposure to cleaning chemicals, smoke and other airborne substances, but ruled the defendant had accommodated her by scheduling her for shifts that enabled her to leave when a known allergen would be present, and by testing the facilities and permitting her to use a breathing machine.

The more recent case of *Equal Employment Opportunity Commission v. American Airlines, Inc.*,[13] provides an excellent example of how filing an ADA claim can result in an employer's accommodation that effectively protects an individual against disabling exposure to the smoke of others. Flight attendant Norma Broin had suffered from lung cancer and ongoing respiratory difficulties as a result of exposure to secondhand smoke in airline cabins and other work-related environments. In an action brought by the Equal Employment Opportunity Commission (EEOC) on Broin's behalf,[14] American Airlines agreed to protect Broin against exposure to secondhand smoke and to pay her a combined $74,000 in back pay, interest and compensatory damages. The suit was filed under Title I of the ADA, as well as the Civil Rights Act of 1991, and alleged the defendant violated the ADA by failing to reasonably accommodate Broin in a timely manner.

The settlement provided that, in addition to compensating Broin as described above, the airline would afford Broin reasonable accommodation by allowing her to select nonsmoking flights that originated and landed in airport terminals that did not permit smoking in areas where Broin might be required

or reasonably be expected to be present. The defendant further agreed that any American Airlines training centers that the airline might require Broin to attend would be nonsmoking facilities. Moreover, the airline agreed to post for a period of two years a conspicuous notice to employees setting forth the airline's legal obligations under the ADA. Finally, the settlement generally enjoined the airline from engaging in any employment practice that violated the ADA by discriminating against its employees and job applicants on the basis of disability. (Notably, the Broin case was filed in March 2000 and officially resolved with the federal district court's approval in June 2001. Thus, once the EEOC took action on Broin's behalf, the legal process moved relatively swiftly.)

Reasonable accommodation must also be provided in public places. In *Access Living of Metropolitan Chicago v. Chicago Transit Authority*,[15] decided in 2001, a not-for-profit group sued a local government agency under Title II of the ADA, as well as another federal statute, the Rehabilitation Act.[16] The court heard evidence of multiple incidents of disabled riders being stranded, ignored and injured while riding the city of Chicago's public transportation system. Access Living and some of its individual members sought injunctive relief and money damages. The defendant argued it had taken numerous steps to accommodate disabled riders. Finding the plaintiffs had provided evidence that each of the defendant's precautions and procedures had failed repeatedly and continued to fail, the court denied the defendant's motion for summary judgment and permitted the case to proceed against the local government agency.[17]

It is also worth noting that, in at least some circumstances, the complete elimination of smoking may be deemed a reasonable accommodation. For example, as discussed in Section I, the court in *Staron v. McDonald's Corp.*, which concerned smoking in McDonald's and Burger King restaurants, decided that "under the appropriate circumstances, a ban on smoking could . . . be a reasonable modification" for purposes of accommodating a person's disability. The Appendix provides additional case examples, including further references to how different courts have addressed the issue of "reasonable accommodation."

Section III — Key Court Decisions Concerning the Constitutionality and Scope of Titles I and II of the ADA

Since the ADA went into effect in 1992, several appellate court decisions have been issued that affect the use of Titles I and II in certain respects.[18] Title I of the ADA requires private employers, employment agencies and labor unions to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. Title I also protects employees and applicants for employment against disability-related discrimination by state and local government entities.[19] The U.S. Supreme Court, however, has limited the remedies available in legal actions brought against *state* government defendants. Title II provides similar protections for individuals who are eligible to receive service or participate in programs or activities provided by state and local government entities. A majority of federal appeals courts that have adjudicated legal challenges to the use of Title II against state governments have upheld its constitutionality, while a small minority of courts has disagreed. (The Supreme Court has yet to consider the question.)

While Title I initially was widely regarded as authorizing state government workers to sue their employers for both money damages and injunctive relief, the U.S. Supreme Court ruled in 2001 that state government workers cannot sue for money damages under the ADA. In *Board of Trustees of the University of Alabama v. Garrett*,[20] the Court held that the Eleventh Amendment to the U.S. Constitution, which gives the states broad protection against damage suits, immunizes state governments against ADA damage actions. The Court found, however, that state workers retain the power to bring actions for injunctive relief under Title I. In a dissenting opinion that was also signed by three other justices, Justice Stephen Breyer observed that injunctions "are sometimes draconian and typically more intrusive."

Thus, by retaining the power to sue for injunctive relief, plaintiffs continue to possess a powerful legal tool to seek redress from state government entities

under Title I. The majority of the Court further held that *local* government employees can sue their employers for money damages, as well as for injunctive relief, because Eleventh Amendment immunity does not extend to local government units, such as cities and counties. In addition, both state and local government employees continue to have non-ADA remedies under various state laws, through administrative procedures or with the Equal Employment Opportunity Commission.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." To date, the Supreme Court has not addressed the question of whether Title II of the ADA can be used for claims that a state or local government entity discriminated against an employee or member of the public. However, in the event the Supreme Court takes up the issue, it is likely (though not certain) that, consistent with the holding in *Garrett*, the Court will permit claims for money damages and injunctive relief against local government entities and claims for injunctive relief against state government entities.

Section IV — What Remedies Does the ADA Provide?

Discrimination Involving Places of Public Accommodation

The ADA enables individuals to take legal action if they believe they have suffered discrimination relating to exposure to secondhand tobacco smoke in facilities open to the public. The regulations adopted to implement the ADA provide that any person subjected to discrimination may institute a civil action to prevent such discrimination, including an application for a temporary or permanent injunction or other potential remedies. An individual may file a Title III discrimination complaint alone or may, when applicable, join with other individuals who have been subjected to the same discrimination (e.g., prevented from entering a restaurant that permits smoking) in filing a single complaint bearing all of their names.

Individuals who believe they may have suffered discrimination by public accommodations or commercial facilities, or by a state or local government unit, may file a complaint with the Civil Rights Division of the Department of Justice at the following address: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 66738, Washington, DC 20035-6738.

A plaintiff who has brought a private civil suit may also request the intervention of the Justice Department, which will then determine whether the case is of general public importance. If the Justice Department does so, the court may permit the Justice Department to intervene in the action, and in some circumstances the court may then appoint an attorney for the plaintiff and authorize commencement of the action without the payment of fees or costs.

The ADA's regulations encourage the use of alternative means of dispute resolution, where possible, including settlement negotiations, conciliation and arbitration to resolve such disputes. In enacting the ADA, Congress specifically encouraged the use of alternative means of dispute resolution. The primary goal of the Justice Department's enforcement process is to increase voluntary compliance through technical assistance and negotiation. Indeed, most complaints are settled following negotiation. Representation by an attorney is permitted, but not required, in mediation. The Justice Department refers appropriate ADA disputes to mediators at no cost to the parties and provides the names of trained mediators who are participating in the department's mediation program and who are located in the geographical area of the complainant. If an individual wishes to pursue the dispute through the Justice Department's mediation process, he or she should address the complaint to the ADA Mediation Program at the address noted above.

The Department of Justice provides information about the ADA through its toll-free ADA Information Line. This service permits individuals, businesses, state and local governments, and others to call and ask questions about general or specific ADA requirements and to order free ADA materials. ADA specialists are available Monday through Friday, from 10:00 AM until 6:00 PM (eastern standard time), except on Thursday when the hours are 1:00 PM until 6:00 PM. Spanish

language service is also available. The toll-free numbers are (800) 514-0301 (voice) and (800) 514-0383 (TDD).

Discrimination Involving the Workplace

The employment provisions of the ADA are enforced under the same procedures that apply to race, color, sex, national origin and religious discrimination. The ADA enables employees to take legal action if they believe they have suffered discrimination relating to exposure to secondhand tobacco smoke. Individuals who believe they may have been subjected to workplace discrimination relating to a disability may file a complaint with the Equal Employment Opportunity Commission or designated state human rights agencies. To file a complaint with the EEOC, individuals can begin by calling (800) 669-4000 (voice) or (800) 800-3302 (TDD) to reach the field office in their areas.

In addition, the regulations adopted to implement the ADA provide that any person subjected to discrimination may institute a civil action to prevent such discrimination, including an application for a temporary or permanent injunction or other potential remedies.

As in the public accommodation context described above, the plaintiff may also request the intervention of the Justice Department, which will then determine whether the case is of general public importance. Again, if the Justice Department does so, the court may permit the Department to intervene in the action, and in some circumstances the court may then appoint an attorney for the plaintiff and authorize commencement of the action without the payment of fees or costs.

Conclusion

It is apparent from a survey of the cases decided to date that an individual who clearly satisfies the requirements of the ADA and offers a solid foundation of evidence to support his or her allegations can succeed in a claim brought under the ADA. That said, it is important that one who is contemplating filing such a claim obtain informed counsel—from a private attorney, the EEOC or the Department of Justice—regarding the viability of such a claim based on the facts of the case. As suggested above and in the summaries of cases found in the Appendix, courts do not always interpret the ADA in identical ways, and sometimes the exact same set of facts will bring a plaintiff's verdict in one court, but result in a defeat for the plaintiff in another court.

A recurring theme in ADA cases is that many have involved disagreements over what constitutes a reasonable accommodation of an employee or member of the public. There are essentially two options for addressing the problem of secondhand smoke in public accommodations: (1) providing separate smoking and nonsmoking areas, or (2) instituting a totally smoke-free environment. The workplace provides similar but also additional options: (1) segregating employees in common areas, (2) limiting smoking to lounges or cafeterias, (3) developing completely separate areas for smokers and nonsmokers to congregate and work or (4) instituting a totally smoke-free environment. In both contexts, the option of creating a smoke-free environment is the most efficient and least costly alternative. Instituting a smoke-free policy is also advisable because, for disabled and able-bodied persons alike, there is no safe level of exposure to secondhand smoke.

Another issue worthy of particular attention concerns the responsibility of state and local governments to protect all people against exposure to secondhand smoke inside government buildings. It is reasonably clear, based on recent Supreme Court interpretation of the ADA, that employees and members of the public who suffer from secondhand smoke-related disabilities generally are entitled to protection against such exposure in state and local government facilities. In light of the overwhelming medical evidence that secondhand smoke is harmful to all and extremely harmful to some, government authorities should institute smoke-free policies for all buildings within their jurisdictions.

This recommendation applies equally to private workplaces and places of public accommodation. Failure to implement smoke-free policies or, at a bare minimum, separately partitioned and ventilated smoking and nonsmoking areas, exposes employers, owners, and managers to potential liability under the ADA, as well as other state and federal laws and

common law actions.

An individual who is contemplating filing a disability claim may also consider doing so under state disability law in addition to the ADA. Some plaintiffs choose to include both federal and state legal claims. An example of one such state law is the Michigan Handicappers' Civil Rights Act, which provides that, "The opportunity to obtain employment, housing and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right."[21]

Finally, those who are considering filing suit should keep in mind that, in some instances, *organizations* that represent the interests of a group of disabled individuals can take action under the ADA. Organizations often have greater resources than individuals with which to pursue such actions, and they can represent the interests of multiple individuals in a single lawsuit. The *Access Living* case, described in section II, provides an example. The case was filed by the organization together with some of its individual members after numerous incidents in which disabled riders were stranded, ignored or injured while seeking to use Chicago's public transportation system. Citing various Supreme Court and other precedents, the federal district court found that Access Living had "representational" standing to sue under the ADA; that is, it was legally entitled to file suit as an organization representing the interests of a group of individuals. The court ruled that:

> Access Living has . . . established representational standing by virtue of asserting the rights of its members and constituents. An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Based on this and similar decisions, it is possible to envision situations in which certain tobacco-control or public health organizations either threaten or proceed to take legal action on behalf of their members or constituents who are effectively excluded from a public place due to their secondhand smoke-related disabilities.

APPENDIX

Notable Additional Case Law Interpreting the Constitutionality of the ADA as it Applies to State and Local Governments

Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808 (6th Cir. 2002) (*en banc*) *cert. denied*, 537 U.S. 812.

The full U.S. Court of Appeals for the Sixth Circuit overturned an earlier decision of a three-judge panel of the same court, ruling that Congress had validly abolished states' Eleventh Amendment immunity from lawsuits by citizens when it enacted Title II of the ADA. The court thus held that the ADA allows individuals to sue states and localities for discriminatory conduct covered by the ADA. The individual plaintiff in this case had brought three federal claims against the Domestic Relations Division (DRD) of the Cuyahoga County Court of Common Pleas, a state government entity in Ohio, alleging: (1) failure to accommodate his hearing disability, in violation of Title II of the ADA; (2) retaliation, also in violation of the ADA; and (3) a non-ADA civil rights claim under a separate statute. The plaintiff claimed that the DRD failed to provide him with an adequate hearing aid in the course of a prolonged child custody dispute. Relying on the *Garrett* decision, the court of appeals found that citizens can bring lawsuits against states under the ADA based, *inter alia*, on the Due Process Clause of the Fourteenth Amendment. Thus, under this ruling, plaintiffs may sue states or local units of government under Title II of the ADA. In addition to the Sixth Circuit in the *Popovich* case, the Second, Fifth, Ninth, Tenth, and Eleventh Circuits have also found that Title II can be used against states and localities. In contrast, the federal appeals courts for the Seventh and Eighth Circuits have ruled that states are protected from such lawsuits by the Eleventh Amendment's sovereign-immunity clause.

Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98 (2d Cir. 2001).

In the *Garcia* case, the U.S. Court of Appeals for the Second Circuit decided that a plaintiff can succeed in a disability discrimination claim against a state, with the proviso that to do so he or she must prove that the state had knowingly waived its sovereign immunity from suit. The court noted that Title II (42 U.S.C. § 12134), as implemented through the U.S. Department of Justice regulations, requires that a state make reasonable modifications in its programs, services or activities for qualified individuals with a disability, unless the state can establish that the modification would fundamentally alter the nature of the program, service or activity.

Notable Additional Case Law Concerning the Issue of What Constitutes a "Reasonable Accommodation"

Vickers v. Veterans Administration, 549 F. Supp. 85 (W.D. Washington 1982).

An early case dealing with the question of "reasonable accommodation," *Vickers* was brought under the Rehabilitation Act of 1973 (RA), before the ADA was enacted. The decisions of courts and administrative tribunals protecting sensitive nonsmokers by application of the RA can serve as precedents for similar protection under the ADA. The ADA provides specifically that "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under the Rehabilitation Act of 1973." A federal district court found that an employee's sensitivity to tobacco smoke limited his capacity to work and qualified him as a "handicapped person." (The legislative history behind the adoption of the ADA shows that "disabled," as used in the ADA, and "handicapped," as used in the RA, are essentially interchangeable.) However, the court also found that, assuming the employer had a duty to make a reasonable accommodation to plaintiff's sensitivity to tobacco smoke, the employer had done so by, among other actions, physically separating the desks of smoking and nonsmoking employees, installing

ceiling vents, and permitting the plaintiff to move his desk farther away from the smoking area and closer to a window. Given this reasoning, it is important to note that this case was decided in 1982. What was regarded as a reasonable accommodation then would likely be insufficient now in light of far greater understanding today of the deleterious health effects of secondhand smoke and the inadequacy of the mere separation of smokers and nonsmokers within the same airspace.

Gupton v. Virginia, 14 F.3d 203 (4th Cir. 1994); *Miller v. AT & T Network Sys.*, 915 F.2d 1404 (9th Cir. 1990); *Forisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).

In *Gupton*, the U.S. Court of Appeals for the Fourth Circuit disagreed with the holding in *Vickers* and ruled against a plaintiff who sued her employer, the Virginia Department of Transportation (VDOT). The plaintiff had claimed that the VDOT's failure to provide her with a smoke-free work environment violated the Rehabilitation Act, as well as civil rights laws. The court concluded that the plaintiff did not establish that her allergy to tobacco smoke substantially limited her ability to work, and that she did not assert that it limited any other of her major life activities. The Fourth Circuit acknowledged that the facts of the *Gupton* case were similar to those in *Vickers*, and it also recognized that *Vickers* had not been reversed, but the court asserted that the reasoning in the *Vickers* decision conflicted with a later opinion by the U.S. Court of Appeals for the Ninth Circuit Court in the *Miller* case. The court in *Miller* ruled that, for a plaintiff to establish that he had an impairment that substantially limited his ability to work, he would have to show that it "substantially limits [his] employability generally," not just his ability to obtain a job in a non-smoke-free workplace. The *Gupton* court ruled that *Vickers* also conflicted with the decision in the *Forisi* case, which held that for an impairment to substantially limit a plaintiff's ability to work, it must "'foreclose generally [his opportunity to obtain] the type of employment involved' . . . i.e., foreclose him generally from obtaining jobs doing the type of work plaintiff has chosen as his field." Thus, the Fourth Circuit in the *Gupton* and *Forisi* cases, and the Ninth Circuit in the *Miller* case, appear to have taken an extremely restrictive approach to disability claims in the workplace. Certainly their holdings would appear to violate a primary objective of the ADA, which is to eliminate discrimination in every workplace covered by the statute. Nonetheless, while these cases were not brought under the ADA, any court inclined to restrict the rights of disabled plaintiffs who bring ADA claims theoretically could adopt their reasoning. *See*, *e.g.*, *Rhoads v. FDIC*, 257 F.3d 373 (4th Cir. 2001); *Nugent v. Rogosin*, 105 F. Supp. 2d 106 (E.D.N.Y. 2000); *Bellom v. Neiman Marcus Group, Inc.*, 975 F. Supp. 527 (S.D.N.Y. 1997).

Notable Additional Case Law Entitling an Employee to Compensation for a Secondhand-Smoke-Related Disability

Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982).

The *Parodi* case was brought under the Rehabilitation Act before the ADA was enacted. The problem initially arose when the federal government employee was transferred to an office in which other employees smoked. She suffered severe pulmonary reactions to the smoke and was unable to carry out her duties. She applied for disability employment benefits, claiming that her severe reactions to cigarette smoke rendered her disabled. The U.S. Court of Appeals for the Ninth Circuit held that she was entitled to sick pay disability benefits until the employer could place her in a comparable position in which she was not exposed to smoke. Since the employer had no comparable positions available in which the employee would not be exposed to smoke, she received a disability retirement pension of $50,000 plus a lump sum payment.

About the Author

Clifford E. Douglas is a Consulting Attorney at the Smoke-Free Environments Law Project.

Endnotes

[1] 531 U.S. 356 (2001).
[2] 42 U.S.C. § 12201(b). *See* Section III for more on this issue.
[3] *See also Brashear v. Simms*, 138 F. Supp. 2d 693 (D. Md. 2001), which ruled that smoking, whether denominated as "nicotine addiction" or not, is not a "disability" within the meaning of the ADA.
[4] *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).
[5] 51 F.3d 353 (2d Cir. 1995).
[6] The *Staron* case also highlights another important feature of the ADA — that the law protects persons of all ages. Children who are asthmatic or suffer from such common illnesses as chronic middle-ear infection may qualify as disabled under the ADA if their illnesses are sufficiently severe and predictably long-term and prevent them from entering a public accommodation that permits smoking.
[7] *Edwards v. GMRI, Inc.*, Montgomery County (Md.) Circuit Court, No. 179593 (Mar. 1, 1999).
[8] 527 U.S. 471 (1999).
[9] 153 F. Supp. 2d 1187 (E.D. Cal. 2001).
[10] 831 F. Supp. 1300 (E.D. Va. 1993).
[11] 1999 U.S. Dist. LEXIS 7343 (N.D. Ill. 1999).
[12] 138 F.3d 629 (6th Cir. 1998).
[13] Civil Action No. 00-296-A (E.D. Va.), *consent decree*, June 13, 2001.
[14] *See* Section IV regarding how to receive assistance from the EEOC.
[15] U.S. Dist. LEXIS 6041 (N.D. Ill. 2001).
[16] *See* the description of the *Vickers* case in the Appendix for a discussion of the Rehabilitation Act and its complementary relationship to the ADA.
[17] At least one other federal court has followed the *Access Living* decision. *Association for Disabled Americans, Inc. v. Claypool Holdings LLC*, 2001 U.S. Dist. LEXIS 23729 (S.D. Ind. 2001).
[18] Title III has not been affected by constitutional legal challenges.
[19] Title I does not apply to the following employers: the United States Government, Indian tribes, and private membership clubs that are exempt from taxation.
[20] 531 U.S. 356, 121 S.Ct. 955 (2001).
[21] MICH. COMP. LAWS ANN. § 37.1102. For example, the case of *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998), discussed in Section II, was decided under the ADA and the Michigan Handicappers' Civil Rights Act.

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a national network of legal programs supporting tobacco control policy change by giving advocates better access to legal expertise. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement.

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