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U.S. Supreme Court Decisions Shift Focus in ADA Bias Cases

By Dan Wise

A TRIO OF DECISIONS handed down by the U.S. Supreme Court last month will force a shift in the legal battle lines between employers and employees who believe they were discriminated against due to their disabilities.

Attorneys and advocates for the disabled denounced the court's decisions handed down on June 22, 1999 because they substantially restrict who can sue for employment discrimination under the Americans with Disabilities Act (ADA). The court, in three separate cases, said that if a person, with medication or a device such as eyeglasses, can mitigate their disability and function normally, they are not entitled to protection under the ADA.

Attorneys for employers and employees agree that the ruling will force future litigants to consider the extent of mitigation required, or whether discrimination occurred because someone is perceived as disabled. In any case, though, the bar for plaintiffs to sue has been raised.

Nancy Richards-Stower, a Merrimack attorney who represents plaintiffs in employment cases, called the decisions "as bad as it gets" for employees seeking disability discrimination protection. She said the exclusion of those people from ADA protection have had to overcome their disabilities or chronic conditions is bad policy. "These decisions will discourage people from realizing their full potential," said Richards-Stower, pointing out that for some people, mitigating their disability requires tradeoffs such as taking medicines with side effects that might shorten their lifespan. "Now that they have mitigated their disability so they can do the job, they've defined themselves out of the category of 'disabled,' vaporing the ADA protections. These Catch-22 rulings undo much of the good of the ADA. We will respond—employees will concentrate their claims under the ADA protection of persons with 'perceived disabilities' and those who "have records of disability," she said, adding that she expects there will be attempts to enact corrective legislation. (Sheila Zakre, an attorney with the Disabilities Rights Center in Concord, writes in an article appearing on page 3 that the decisions "chart a new course for the ADA" that disregards the legislative history of the 1990 law.)

Attorneys representing employers praised the decision for clarifying and narrowing the definition of who should be covered under the ADA. "The beneficial

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aspect of these rulings, whether you like them or not, is that it clarifies what the ADA says," said Jill Blackmer, of the Concord law firm of Orr & Reno. "The fog has cleared a bit. The rulings clarify an issue that people didn't agree on—who should be covered by the act."

However, both plaintiffs' and defense attorneys agree that the decisions will now force greater examination of other areas. "The ruling does not answer the question of how mitigated the disability has to be," said Blackmer.

And employers do not have a license to discriminate against someone with a disability, said Mark T. Broth, of Devine, Millimet & Branch in Manchester. "The technical definition of a disabled person [under the current rulings] may mean they are no longer entitled to accommodations under the ADA, but the act still provides protection from discrimination for perceived disabilities. Evidence of discrimination—such as a disparaging remark or an employers' inability to justify why an employment decision was made—will be required to justify a claim of discrimination for those "regarded as disabled," Broth said. In that sense, he added, the court's recent rulings make disability cases more similar to age discrimination claims.

Broth said the burden remains on employers to focus on legitimate job-related criteria in their decision making and to be receptive to employees seeking accommodations. Competition is more intense for employees, and there are also complex and overlapping provisions of the Family and Medical Leave Act and workers compensation laws for employers to contend with.

"Each of these laws in abstract makes a lot of sense and is good social policy," Broth said. "What Congress leaves to the business community is how these laws are supposed to work in concert."

The U.S. Supreme Court has issued several other significant rulings in employment law that will be discussed in future issues of Bar News.