FIREHOUSE LAWYER

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ADA Cases Before U.S. Supreme Court

Two Federal Circuit Court of Appeals cases arising under the Americans with Disabilities Act, were deemed significant enough by the U.S. Supreme Court to be accepted for review.

The first case is Kirkingburg v. Albertsons, Inc., 143 F.3d 1228 (9th Cir. 1998).

In this case, the Department of Transportation vision standards for interstate truck drivers became relevant. The employer had a policy of hiring only drivers who met or exceeded the DOT standards.

The plaintiff was a longtime truck driver with an excellent driving record. He had one accident, but even that was not his fault. In 1990, at one of his regular physical examinations, a physician certified that his vision met the DOT requirements. However, this particular driver suffers from a condition referred to as "lazy eye". He has been nearly blind in his left eye for many years, and basically sees effectively by using the other eye. In 1991 the driver was off work for over a year as a result of a non-driving injury. When he sought to return to work, his employer required recertification. After the physical examination, the doctor would not certify him because of the vision problem.

When the plaintiff failed the examination, he applied for a DOT waiver, which is available to experienced commercial truck drivers with clean driving records who have demonstrated the ability to drive well despite their vision problems. The employer would not accept the waiver, as it would employ only drivers who could meet or exceed the DOT standards. Therefore, Kirkingburg was fired. Even after he got the waiver from DOT, the employer would not accept it or reconsider the termination previously made, so the plaintiff brought suit under the ADA.

After the district court dismissed the case on the employer's motion, the plaintiff appealed. The 9th Circuit remanded the case for trial because an employer cannot selectively adopt or reject federal safety regulations if the effect of that selective adoption or rejection would be to discriminate against truck drivers with disabilities.

The Ninth Circuit held that blindness in one eye is a disability, even though the employee has learned to cope with it. It is still a substantial limitation on the major life activity of seeing. A person does not have to be totally blind to be disabled, the Ninth Circuit said. The Ninth Circuit pointed out that the ADA was designed to protect a broad class of individuals from illegal discrimination, and not just those with the most severe disabilities. The Ninth Circuit did not

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conclude as a matter of fact that the plaintiff was disabled but only that the plaintiff deserved a chance to prove he was disabled or to show that his employer regarded him to be disabled.

Under the ADA, a disabled person must still show that they are qualified for the job despite the impairment. If accommodations are required to enable the employee to perform the essential functions of the job, the employer is required to make those accommodations, if they are reasonable.

The Ninth Circuit said an employee must prove that they have the required skills, experience, education, or other job related requirements of the position. Second, the employee must prove that they can perform the essential functions of the job with or without reasonable accommodation. Clearly, this plaintiff had the qualifications to be a truck driver. The issue in this case revolved around the second question. The employer argued that the ability to meet DOT regulations was an essential function of the position, but the court disagreed because of the waiver program.

Also, the employer argued that the adoption of DOT standards was necessary to prevent harm to the driver or others. Under the ADA, there is a "safety defense". In effect, an employer does not have to hire or retain employees who pose a direct threat to health or safety. However, the court held that drivers who obtain waivers could not be shown to be direct safety threats. Indeed, a driver like the plaintiff who qualified for the waiver program had shown that they were not a safety threat.

Finally, the employer argued that the waiver program was experimental, but two of the three judges of the Ninth Circuit panel said that made no difference. The third judge said it was unfair to require the employer to accept the program when the DOT itself deemed it experimental.

At this stage, it is not possible to speculate as to all of the reasons why the Supreme Court accepted the case, but after one reads the next case, we might speculate that the Court sees these cases, taken together, as an opportunity to clarify the question whether mitigating conditions, by which an individual has learned to cope with or correct an impairment, allow them to be considered "disabled".

In Sutton v United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997), the plaintiffs applied for commercial airline pilot positions with United Airlines. At their interviews, the plaintiffs were informed that their uncorrected vision disqualified them from pilot positions with United in that applicants for pilot positions must have uncorrected vision of 20/100 or better in each eye. Plaintiffs' uncorrected vision is 20/200 in the right eye and 20/400 in the left eye. Both plaintiffs had the same vision, as they are twin sisters. The plaintiffs' corrected vision is 20/20 in both eyes.

This case, therefore, squarely presents the issue as to whether a person with uncorrected vision, whose corrected vision is 20/20 or otherwise up to standards of the employer, can still be considered disabled. This question has been much debated in the literature, and not clearly decided once and for all by the judicial system.

In the case, the twin sisters filed an action under the ADA, alleging that United discriminated against them in the hiring process by rejecting their applications because of their disability, *i.e.*, their uncorrected vision, and/or because United regarded them as being disabled. Plaintiffs did assert in the action that they were disabled under the

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ADA because their uncorrected vision substantially limits their major life activity of seeing. They alleged that their vision limitations are permanent and that without corrective measures, they would effectively be unable to see well enough to conduct normal, everyday activities such as driving, watching television or shopping. They alleged United regarded them as disabled in violation of the ADA because United's policy of requiring uncorrected vision of 20/100 or better blocks plaintiffs from an entire class of employment, *i.e.*, global airline pilots, without any objective evidence of job relatedness or safety.

The district court ruled that plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit a major life activity. The court stated that with corrective measures, plaintiffs were able to function identically to individuals without a similar impairment and therefore were not substantially limited in the major life activity of seeing. The court reasoned that to adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA, as millions of Americans suffer visual impairments no less serious than those of the plaintiffs. Under such an expansive reading, the court reasoned that the term disabled would become meaningless, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.

In the Court of Appeals, United Airlines asserted that the interpretive guidance from the Equal Employment Opportunity Commission, stating that disability determinations should be made without regard to mitigating or corrective measures, is in direct conflict with the ADA statutory requirement that a disability be a physical or mental impairment that substantially limits one or more major life activities. The employer reasoned that if an individual can utilize corrective measures to mitigate the effects of an impairment to a degree such that there is no substantial limitation on a major life activity, then the individual is not disabled within the meaning of the ADA.

The 10th Circuit said that to establish a claim under the ADA plaintiffs must demonstrate that they are disabled persons, that they are qualified individuals and able to perform the essential functions of the job with or without reasonable accommodation, and that the employer discriminated against them because of their alleged disability. The 10th Circuit said all other issues being satisfied the question was squarely presented whether the plaintiffs' vision qualified them as an individual with a disability. The statutory requirement that disability determinations be made "with respect to the individual" contemplates an individualized, case-by-case determination of whether a given impairment substantially limits a major life activity of <u>that</u> individual. The court cited other cases to support that proposition. The court placed emphasis on the statutory language itself, noting that the statute used the word "substantial" and the word "major" in defining disability.

The court of appeals accepted the interpretive guidance of the EEOC, suggesting that it is appropriate to analyze the "impairment" without regard to the applicability of mitigating measures. After careful consideration, the court held that the plaintiffs' allegations were sufficient to establish that their uncorrected vision of 20/200 in the right eye and 20/400 in the left eye makes worse or diminishes the eyes, the special sense organ of sight, compared to a normal person with 20/20 vision. Therefore, for purposes of a motion to dismiss, the

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plaintiffs established that their vision is a physical impairment within the meaning of the ADA. The court did not seem to question whether "seeing" is a major life activity since it actually is included in the EEOC's definitions of such.

The court noted that other courts had split on the question of whether to follow the EEOC's interpretive guidance regarding the irrelevance of mitigating measures. The 10th Circuit decided to join those courts which have rejected that portion of the interpretive guidance. The court held that this portion of the guidance is in direct conflict with the language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual, the court held. The court said, "in making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures." The 10th Circuit even found the interpretative guidance to be internally inconsistent, as elsewhere within the interpretive guidance it recognized that some impairments do not in fact impact an individual's life to such a degree as to constitute disabling impairments. The court noted that the ADA, like the Rehabilitation Act of 1973, does not attempt a complete laundry list of impairments that meet the definition of disability. The determination, being done on a case-by-case basis, is not dependent upon a name or diagnosis, but rather on the effect of that impairment on the life of the individual. Therefore, the court found it reasonable to include eyeglasses or contact lenses as mitigation measures that had a drastic effect on that question.

Since it was undisputed that plaintiffs' corrected vision was 20/20 or better, the court said plaintiffs could not make a showing to survive the motion to dismiss their case. The court noted that the plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts the major life activity of seeing and thus not qualified individuals, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing. The court said that in order to demonstrate that an impairment substantially limits the major life activity of working, an individual must show significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities. In the end, the court held that the plaintiffs could only establish that their physical impairment--their uncorrected vision--prevented them from working for United as a pilot--a single, particular job. They could not show disqualification from a class of jobs.

Finally, the court noted that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone did not prevent United from presenting evidence to the contrary, were it necessary to refute a *prima facie* case of discrimination. As long as United does not practice illegal discrimination, the court said, "we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum."

It would appear likely that the Supreme Court accepted this case for review so that it can resolve the split between the circuit courts of appeal with respect to whether the EEOC interpretive guidance (requiring no consideration be given to

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mitigating measures) be followed or whether it is inconsistent with the statute.

Coincidentally, as the foregoing was being written on April 28, 1999, the Supreme Court held oral argument on the two above cases. Questions asked by several justices suggested they are concerned too about the implications of the EEOC interpretive guidance.

Local Governments not Exempt from Contractor Licensing

Under the Electrical Contractor's Licensing Act (and similar contractor registration statutes) the Department of Labor and Industries requires licensed electrical contractors to perform certain electrical work. A recent case suggests that municipal corporations should not assume they are exempt from the registration (licensing) requirements. In City of Seattle v. State, 136 Wn. 2d. 693 (1998), the Supreme Court held that RCW 19.28.120 required the Seattle Conservation Corps to have an electrical contractor's license, before it could do certain work for the City of Seattle.

The Conservation Corps prepares unemployed homeless adults for transition to full-time employment with sustainable housing. The project involved replacing inefficient light fixtures with high efficiency ones. A certified journeyman electrician was performing the work, but the Department of Labor and Industries issued a citation for not having the work performed by a licensed electrical contractor. The court ruled that either the City of Seattle or the SCC was an entity required to be licensed under the act. Generally, such licensing acts require bonding and insurance, the purpose being to protect persons dealing with such contractors from shoddy work or uninsured risks. We assume that this case would have implications for other fields other than electrical contractors, as most general and specialty contractors have statutory requirements for registration (licensing), bonding and insurance. Therefore the message is that local governments, including fire districts, water districts, and other special purpose districts should make sure that the contractors they deal with are properly registered, licensed and bonded.

WSAC and WACO Held Public Agencies Under Public Disclosure Act

In a case that would have implications for all associations of state or local government officials, insofar as they receive "dues" generated by public funds, the court of appeals recently ruled that the Public Disclosure Act applies to them.

The Public Disclosure Act, Chapter 42.17 of the Revised Code of Washington, prohibits the use of public funds in support of political campaigns, whether they be for state or local office, or in support of ballot measures. Apparently, the Washington State Association of Counties and the Washington State Association of County Officials were allegedly using dues money for the purpose of supporting political campaigns. Obviously, the funds of these associations are generated by dues paid by the municipal corporations, which in turn of course means the dues come from public funds. The argument revolved around whether the state associations are public agencies or quasi-public agencies for purposes of the Public Disclosure Act.

WSAC and WACO Held Public Agencies Under Public Disclosure Act (continued)

In discussing the Public Disclosure Act and its intent and purpose, the court said that this act is a strongly-worded mandate and is to be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, among other purposes. The court added that the Act's prohibitions on the use of public funds for political purposes are clearly expressed.

The trial court analyzed whether these associations were the "functional equivalent" of public agencies. Apparently, this analysis derives from federal cases interpreting the Freedom of Information Act. It has been held that cases interpreting the FOIA are persuasive when our state courts interpret the state's Public Disclosure Act.

The Court said that the function of these associations is "statewide coordination of county administrative programs", which has been declared by the legislature to be a public purpose. Although these associations perform mainly advisory functions, the court said, and do not govern citizen action, they largely determine the manner in which county programs are administered. Obviously, most of these associations' funds come from current county expense funds via membership dues, the court said. The court concluded that the funding system employed by WSAC and WACO contravenes the statutes allowing them to receive public funds in the first instance. Those statutes permit county funds to be disbursed only after statutorily required services are rendered. To allow counties to allocate a block of public funds to be spent entirely at the discretion of the associations, as if the funds were private, violates the clear intent of the statutes, the court said.

Generally there is no outside government control of these associations, except that WACO's financial records are subject to audit by the State Auditor. The associations themselves are completely controlled by elected and appointed county officials and there is no private sector involvement or membership. While the court recognized that these associations retain some characteristics of private entities, their essential functions and attributes are those of a public agency, they serve a public purpose, are publicly funded, are run by government officials, and were created by government officials.

For these reasons and the broad construction given to the Public Disclosure Act, the Court of Appeals held that these associations were subject to the Act, and affirmed the Thurston County Superior Court judge who had declared that the associations were subject to the Act, enjoined the Thurston County Commissioners from further improper use of public funds and required reimbursement from the associations to the counties.

This case may have serious implications for other similar associations of government officials in the State of Washington, and undoubtedly would be a case worthy of petitioning for review by the State Supreme Court. This decision was filed on April 16, 1999 by Division II.

Private Telephone Conversations

Another recent Division II case is worthy of mention. There is a good deal of public misperception about privacy rights. Many people are aware, for example, that recording a telephone conversation with another person, without permission, is unlawful. RCW 9.73.030 provides that it is

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unlawful to record or intercept private telephone conversations without consent of all parties. RCW 9.73.050 provides that information recorded or intercepted in violation of the Privacy Act cannot be admitted into evidence in Washington State courts.

The question then becomes whether the taint of illegality follows these improperly recorded or intercepted conversations in every respect, or for any person who might come into possession of such recordings. This case sheds light on that issue.

The court pointed out that the 1977 amendment to the statute deleted the word "divulge", thereby eliminating as an illegal action the disclosure or dissemination of illegally recorded telephone conversations. Therefore this court concluded that liability rests with the party recording or intercepting the conversation, but divulging such conversations creates no liability under the statute.

The case arose out of a dissolution and custody dispute. During the pendency of the dissolution proceeding, apparently the wife recorded several telephone conversations between the children and the husband. She gave copies of those tapes to the guardian ad litem and in turn they were given to the children's psychological evaluator. The guardian ad litem recommended that the husband's time with the children be supervised. The psychological evaluator expressed an opinion that the husband's behavior was detrimental to the children. Some portions of the recorded telephone conversations were filed with the court, but were not introduced into evidence at any hearing.

Ultimately, the husband filed a separate lawsuit against, among others, the guardian ad litem, the psychological evaluator and the attorney who prepared the evaluator's legal declaration. He contended that these individuals had violated his right to privacy by divulging the secrets in filing them with the court.

Applying the plain and ordinary meaning of the statute, and placing emphasis on the 1977 amendment, Division II of the Court of Appeals held that the statute only prohibits "recording" and "intercepting" and does not prohibit "divulging". The evidentiary statute, RCW 9.73.050, was directed at the trial court's admission of evidence and was not directed to the parties to an action. The statute prohibits admission in evidence, but not offering the evidence to the court. Therefore the court found there could be no civil liability for divulging the recorded conversations by simply filing them with the court. Also, there are public policy reasons for the ruling, such as the statutory immunity for guardians ad litem and an attorney's civil immunity from liability during judicial proceedings. The court did not so hold, but it did question whether individuals such as the guardian ad litem, the psychological evaluator, or the attorney could even be subject to civil liability for offering declarations or testifying about private conversations.

The court went on to find that the action was frivolously maintained against the three individuals and therefore awarded them their attorneys' fees against the husband. The court held that the trial court abused its discretion by denying attorneys' fees to the psychological evaluator and that she should be compensated for expenses incurred in defending against the meritless case at the time of trial.

No Sector Boss

There will be no Sector Boss this month as no questions were received.

Seminars and

Publications

The 1999 Seminar Series has been finalized according to the schedule below:

June 24, 1999 --
Legislative Update

August 26, 1999 --
Insurance and Risk Management/Liability

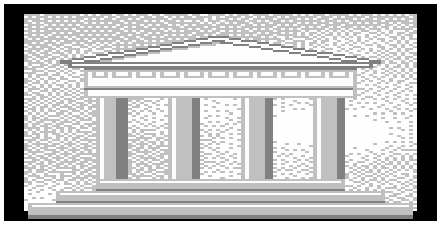
October 28, 1999 --
Labor/Management Issues

December 16, 1999 --
Annexation and Incorporation Issues

Seminars are open to all authorized fire district personnel of the State of Washington. The admission price for non-contract parties is $75.

Mr. Quinn also has available various papers or monographs that might be of interest to special purpose districts, such as "Procedures and Rules for Board Meetings" (January 1996-$10) and "Working Together: The Board and the CEO" (January 1996-$10). Also, in 1995 he published: "Handbook for Local Government Elected Officials," with five chapters, including the Open Public Meetings Act, the Open Public Records Act, Ethics/Conflict of Interest, Public Works/Public Bidding Laws and the Fair Labor Standards Act (29 pages, with 45 page Appendix=$25).

In order to obtain further information, you may contact us at either the e-mail address or the telephone number listed below



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