Journal of Life Care Planning, Vol. 4, Nos. 2 & 3, (127-138)

Americans with Disabilities Act: An Evolving Resource

Lewis E. Vierling, MS, NCC, NCCC, CRC, CCM

Abstract. *It is expected that life care planners are aware of and understand how possible resources may be considered in the assessment of the individual client and the preparation of a life care plan. In practice, a detailed assessment based upon guidelines provided by the Americans with Disabilities Act (ADA) case law can be a valuable source of information for the judge and/or jury in the adjudicating process. However, in the last seven years, the Supreme Court has narrowed the scope of the ADA, and the protection it was meant to afford. Because of the narrowing of the scope and definition of who may be covered, many individuals with a mild impairment may be determined disabled, while, ironically, someone with a severe impairment may not be able to overcome the court-imposed obstacles and be covered by the Act. Understanding the evolution of the ADA through the courts, and whether or not it is a resource for the individual, is of value to the life care planner.*

Introduction

In providing testimony in a litigated situation, questions could be posed to the life care planner related to whether the planner considered the ADA as a resource for the individual. Or, questions could be asked by the opposing attorney regarding whether in the preparation of the plan, the individual considered any aspect of the ADA, Title I, II, or III to offer support to the client in their rehabilitation. Without an understanding of the evolving case law, the life care planner may not be able to articulate appropriate responses to these questions. For the life care planner, it is important to know that the ADA may not be a resource to the individual following an acquired disability.

ADA Definition of Disability

Disability, as defined in the ADA, is a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or regarded as having an impairment (ADA, 1990). The Equal Employment Opportunity Commission (EEOC) has issued guidelines for complying with the ADA law. Within the EEOC's regulations is an expansion of the definition that was within the ADA legislation.

The ADA took affect July 26, 1992, two years after the signing by President George Bush. Title I of the ADA prohibits private employer, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The following is a review of each major emphasis under all five titles and is not meant to be a full description of Titles I through V.

- Title I: Employment – affecting employers having 15 or more employees.
- Title II: Public Services – affecting all activities of state and local governments, with Subtitle B applicable to transportation provided by public entities.
- Title III: Public Accommodations and Services Operated by Private Entities – affecting privately operated public accommodations, commercial facilities, and private entities offering certain examinations and courses.
- Title IV: Telecommunications – affecting telecommunications relaying services and closed captioning.
- Title V: Miscellaneous Provisions – including the relationship of ADA to other laws, the requirements for technical assistance, the role of Architectural and Transportation Barriers Compliance Board, the coverage of Congress, and some additional definitions regarding coverage.

The Courts are still struggling with the problem of proving whether an individual has a covered disability under ADA, and therefore is protected against discrimination. In the words of a judge at the First Circuit Court of Appeals in a recent decision, the word “disability” is considered to be a “term of art” (Heyburn, 2002). This clearly indicates how the Courts are struggling with defining that point at which an impairment rises to the level of a disability.

Individual’s Burden of Proof

In the first ADA case heard by the United States Supreme Court, Bragdon v. Abbott (1998), the question presented to the Supreme Court was whether asymptomatic Human Immunodeficiency Virus (HIV) is a disability under ADA. In this decision, the Supreme Court set forth a three-part analysis to determine if the individual has a disability within the meaning of ADA. Within this three-part analysis, the Court determines whether a plaintiff has shown that they are substantially limited in a major life activity. After hearing the plaintiff’s evidence in their burden-of-proof phase, the Court applies the three-part analysis as follows:

1. The Court must determine whether the plaintiff has an impairment under the ADA.
2. The Court must identify the life activity upon which the plaintiff relies in their case and determine if it indeed constitutes a major life activity.
3. The Court must decide whether the impairment in question substantially limits the major life activity identified by the plaintiff.

It is important to note that the plaintiff must assert that they are substantially limited in a specific major life activity. Then the plaintiff must articulate with precision the impairment alleged and how that major life activity is affected by that impairment. In this three-step analysis, the three elements must be established before a plaintiff is to be considered disabled. After this burden has been satisfied, the plaintiff can then proceed with presenting information regarding the discrimination phase of the case.

Diagnosis of Catastrophic Injury Does <u>Not</u> Equal Disability

Under the ADA, a diagnosis of catastrophic injury or illness does not automatically rise to the level of a disability. In fact, the U.S. Supreme Court has not recognized any impairments to be "per se disabilities." A per se disability or condition, by its very nature, would qualify as a disability under the ADA. For example, presentation of a diagnosis of paraplegia should reasonably qualify automatically as a disability. However, it is no longer enough for an individual to submit evidence of a medical diagnosis of an impairment. The individual and/or the life care planner must submit a case-by-case assessment to prove that a particular or specific impairment is protected under the ADA (Bragdon, 1998). The individual must offer very specific evidence or documentation that the extent of the limitation caused by the impairment is substantially limiting in terms of his or her own life. Most courts have not recognized any impairments to be per se disabilities because the Supreme Court has not recognized any per se disabilities under the ADA.

Covered Entities

A covered entity, as defined by the ADA and upheld by the Supreme Court, is an employer who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" (Clackamas Gastroenterology Associates, P.C. v. Wells, 2003). An employee, on the other hand, is defined as "an individual employed by an employer" (Clackamas et al., 2003).

The Supreme Court dealt with the issue of who is a covered entity or employer in the case of Clackamas Gastroenterology Associates v. Wells, 2003. In this case, the Courts held that the four physician shareholders of an Oregon clinic are not employees of the corporation. Therefore, it was determined that Clackamas Gastroenterology Associates is not considered to be a covered entity under the ADA because it has fewer than fifteen employees. The Supreme Court noted that they were persuaded by the EEOC standards related to the question of control over the business of the corporation. Specifically, the EEOC offered the following six factors as to whether a director/shareholder is an employee:

1. Whether the organization can hire or fire the individual or set the rules or regulation of the individual's work.
2. Whether and, if so, to what extent the organization supervised the individual's work.
3. Whether the individual reports to someone higher in the organization.
4. Whether and, if so, to what extent the individual is able to influence the organization.
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

The Supreme Court's decision about who is a covered entity will primarily affect companies offering professional services, such as medical practices, law firms, and accounting businesses. It will have an important impact on thousands of employees who may be considered in the "protected class" under the ADA.

The Role of Mitigating Measures

In June 1999, the Supreme Court rendered opinions on a trilogy of cases that have had a permanent impact on determining which impairments rise to the level of a disability under the ADA. These decisions have also created new legal standard for helping the Courts define who has a disability covered under the Act. In essence, the Supreme Court held that the ADA "requires" courts to consider mitigating or corrective measures when determining whether an individual meets the statutory definition of disability (Sutton, 1999).

The central issue that had been argued for almost eight years in the lower courts was whether the determination of an individual's impairment as "substantially limiting" to one or more major life activities (MLA) should include the use of mitigating measures. The EEOC has long held and has published interpretive guidelines stating that mitigating or corrective measure should not be taken into consideration. The Supreme Court, however, has established the consideration of mitigating measures in the disability determination process as the new legal standard.

The Court identified mitigating measures as medications, corrective lenses, prosthetic devices, and the body's ability to compensate for an impairment (Sutton, Murphy, Kirkingburg, 1999). Mitigating measures may lessen or eliminate the limitations caused by an impairment. The Court requires that an assessment be completed of both the positive and negative effects of the mitigating of corrective measures. In that assessment process, it must be determined whether or note the measure fully controls the person's impairment. This requires that the individual's actual circumstances be assessed.

In Ruth O'Brien's book, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (2001), she writes, "People with disabilities seeking employment have gone from being subjects of medicine to subjects of law" (page 207). Judges are now required to look at how the individual may mitigate his or her impairment. O'Brien has compared the idea of mitigation to what the rehabilitation expert used to call "compensation." Judges are scrutinizing how well the individual has been able to compensate for an impairment. They are using the individual's personal life history to determine whether or not the ADA affords protection. It becomes a matter of what the individual is experiencing rather than the essence of the impairment.

The doors have been opened for judges to scrutinize all of the individual's life experiences, not just the limitations that the impairment itself imposes. This development has placed many individuals with a mild impairment in the ironic position of being determined disabled, while someone with a severe impairment may not have been able to overcome the court-imposed obstacles and be considered disabled. Judges can take into account how individuals have been able to compensate for their impairment and to measure them to the "average" person. If the individual with an impairment has been able to compensate or to mitigate the effects on their daily life experiences, they generally are not protected from employment discrimination by the ADA. Some judges have considered education, experience, and other ways that individuals have been able to compensate for the limitations of an impairment in this process.

An actual disability is defined in the first prong of the ADA as a physical or mental impairment that substantially limits one or more of the major life activities (ADA, 1990). The Courts have provided very specific guidance in determining how to assess whether an impairment affects a major life activity. Major life activities are such activities as caring for oneself, performing manual tasks, seeing, hearing, speaking or breathing, learning, walking, and working. Some of the Circuit Courts of Appeals and the Supreme Court have added reproduction, lifting, sitting, standing, reaching, concentration and remembering to the list of major life activities. A number of courts have ruled that impairments that restrict a person from being able to lift a certain amount of weight do not demonstrate substantial limitations in a major life activity.

The Supreme Court has provided some highly detailed guidance related to the definition of an impairment that is, in effect, substantially limiting. A major life activity is substantially limited by an impairment "if it renders an individual unable to perform a major life activity which the average person in the general population can perform, or if it significantly restricts the condition, manner, or duration under which an individual can perform such an activity compared to the general population" (Karen Sutton & Kimberly Hinton v. United Airlines, 1999).

Other issues considered in the definition of disability are the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact or the expected permanent or long-term impact of, or resulting from, the impairment (Vierling, 2002). Obviously, therefore, the determination of disability requires an individual assessment on a case-by-case basis. The life care planner must specifically address issues that are related to the definition of a disability. As an outcome from the Sutton, Murphy, and Kirkingburg Supreme Court decisions, the EEOC has issued instructions for field offices regarding the analysis of ADA complaints and how to address the use of mitigating measures in considering whether a person is disabled (EEOC, 1999). These instructions changed the procedure for field office staff investigating individual complaints. The instructions to field offices summarized and explained charges filed under ADA and also provided specific instructions about completing an individualized assessment to determine if any individual has a disability as defined by ADA.

If an individual with an impairment is considering identifying work as a major life activity affected by the impairment, he/she needs to be aware of the clear-cut guidelines provided by the Supreme Court. To be substantially limited in the major life activity of work, the individual must satisfy this definition: "must be significantly restricted 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" (Karen Sutton & Kimberly Hinton v. United Airlines, 1999). This creates a burden of proof for the individual and his or her representative. Generally speaking, a life care planner will need to prepare or assist a vocational expert to prepare an evaluation that identifies the number and types of available jobs that use similar training, knowledge, skills, or abilities and from which the individual is disqualified. Furthermore, the evaluation will need to show that these jobs are within a geographic area that is reasonably accessible to the individual.

In preparing a life care plan, the life care planner will need to identify all corrective measures used by the individual and their effects on that individual's daily life, both positive and negative.

The Role of Medications as a Mitigating Measure

In the Supreme Court case, Murphy v. United Parcel Services (UPS), the question before the Court was whether conditions that are improved with medication should be considered in the medicated or non-medicated state for the purposes of determining disability. UPS had dismissed Mr. Murphy from his job as a mechanic because he had high blood pressure. He failed a physical examination because of hypertension; therefore, he was disqualified from receiving a Department of Transportation (DOT) health certification. Mr. Murphy filed suit under Title I of the ADA in federal district court. The district court granted a motion for summary judgment to UPS. A motion for summary judgment is granted by the Court when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (Elias & Levinkino, 1999). Generally, a motion for summary judgment is granted only if the evidence tips so overwhelmingly in favor of the moving party that a reasonable person simply could not draw a contrary conclusion. The Court of Appeals for the Tenth Circuit then affirmed that judgment. Eventually, the Supreme Court was asked whether the Court of Appeals correctly considered Murphy in his medicated state when it held that his impairment did not substantially limit one or more of his major life activities and whether it correctly determined that he is not "regarded as disabled" (Murphy, 1999). The Court opined that medication is considered a mitigating measure for the purposes of determining whether someone has a disability. It also stated that the inability to perform a single, particular job does not qualify as a substantial limitation in the major life activity of working. In addition, it stated that being regarded as unable to perform a single particular job does not constitute discrimination under the ADA's "third prong." In terms of Mr. Murphy satisfying the definition that he is significantly restricted in the ability to perform either a class of jobs or broad range of jobs in various classes, the Court stated that he failed to show that he was regarded as unable to perform a class of jobs. The Court noted that Mr. Murphy's skills and array of jobs available to him utilizing those skills demonstrated that he was unable to meet the burden of proof regarding being restricted from performing either a class of jobs or a broad range of jobs in various classes as compared to the average person (Murphy, 1999).

Body's Ability to Compensate as a Mitigating Measure

The third case in the trio of decisions on June 22, 1999 involved an individual with monocular vision. The question presented to the Court was whether having monocular vision constitutes a per se disability under the ADA. The Court also considered whether a driver of a commercial motor vehicle, who failed to meet the minimum DOT vision requirements, is considered a "qualified individual" under the ADA. In this case, Albertson's, Inc. v. Kirkingburg, Mr. Kirkingburg was diagnosed with amblyopia, an uncorrectable condition that left him with 20/200 vision in his left eye. A physician erroneously certified that he had met the DOT standards. When his vision was assessed correctly at a subsequent physical, Albertson's fired him for failing to meet the basic DOT vision standards and refused to rehire him after he received a DOT waiver.

The Supreme Court found that there was merely a significant difference (rather than a significant restriction) between the manner in which Kirkingburg sees and that in which most people see. In this decision, the Supreme Court included the "body's own ability to compensate" as a mitigating measure. The Supreme Court was unanimous in its decision (Kirkingburg, 1999).

Impairment Imposing "Direct Threat" in the Workplace

Another challenge is that the individual with an impairment may pose a direct threat to either him/herself or others in the workplace. The individual with an impairment may not be qualified under ADA if it can be shown that they are a direct threat to the health and safety of others, and to themselves, that cannot be eliminated by modification of policy, practices, procedures, or by the provision of auxiliary aides or services.

The Supreme Court has opined that the ADA does not entitle individuals to jobs that might jeopardize their health. The EEOC, in its regulations implementing ADA, stated that an employer may deny employment to a person with a disability when a risk of harm to the health or safety of the individual cannot be eliminated or reduced by reasonable accommodation. The Supreme Court has also noted that employers are justified in their decisions to avoid lost work time as a result of sickness, workers' compensation claims, excessive turnover from medical retirement or death, and the threat of litigation under state law (Chevron, 2002). Specifically, the Supreme Court issued an opinion in Chevron that stated that employers do not have to hire individuals who are unable to carry out the essential functions of the job without incurring risk to their own health or life. The Supreme Court also included a provision requiring the employer to assess the individual's current or prospective ability to safely perform the essential functions of the job (Chevron, 2002). This assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and the best available objective evidence. In this individualized assessment, the imminence of risk and severity of harm to the individual must also be assessed. A life care planner and/or case manager may be called upon to provide this individualized assessment.

The Supreme Court emphasized the requirements that a "particularized inquiry into the harms the employee would probably face" (Chevron, 2002) must be assessed. The question that the Court had to consider in Chevron was whether or not the company had enough medical information at the time that it considered Echazabal a potential health risk because of his diagnosed Hepatitis C. Mr. Echazabal had offered the opinions of two liver specialists who said that Chevron's official medical findings were incorrect. The board-certified specialists determined that Echazabal was not at any more heightened risk than the average worker.

The reasonableness of the employers' actions is measured against very specific guidelines. Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation (Chevron, 2002). The following four factors are to be considered in deciding whether an individual poses a direct threat:

1. Duration of the risk.
2. Nature and severity of the potential harm.
3. Likelihood that the potential harm will occur.
4. Imminence of the potential harm.

Courts have held that the employer must gather substantial information about the employee's work history and medical status. It also has found that employer requirements that an employee be "100% healed" before returning to work are violations of the ADA. An individualized assessment of whether the employee can safely perform the essential functions of the job with or without accommodations needs to first be completed. The emphasis should not be on whether or not the individual is 100% healed, but rather whether they pose a direct threat to themselves or others in the workplace.

On remand from the Supreme Court, the Appeals Court noted that Echazabal had raised an issue as to whether or not Chevron's decision was "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence" (Chevron, 2002). It was determined that Chevron had not considered the severity, imminence, and potential likelihood of harm to Echazabal. It is important to make certain that the treating physician rendering a medical opinion about the potential risk of the employee is aware of the actual job requirements and to insure that the medical decisions are based on reasonable medical judgment that relies on the most current knowledge and best evidence.

Disqualified Because of Social Security Disability Benefits

The Supreme Court, in *Cleveland v. Policy Management Systems Corporation* (1999), recognized that there might be many situations in which the claim for Social Security Disability Income (SSDI) benefits and an ADA claim may exist side-by-side. The Court stated that because the qualification standards for social security benefits and ADA are not the same, an application for social security benefits is not inconsistent with being a "qualified individual" with a disability under the ADA. The individual must, however, provide an explanation about how they can still perform the essential functions of the job with or without reasonable accommodation. The Court noted four other examples of SSDI claims and ADA claims that can exist side-by-side, as follows:

1. The Court stated that one of the steps of the SSDI procedure, which accounts for approximately 60% of all awards, compares the applicant's condition with a list of impairments. It was noted that without any additional evidence, individuals may be accepted with one of the conditions on the list of impairments and be identified as permanently disabled and entitled to benefits. Therefore, an individual can qualify for SSDI benefits and still be able to perform the essential functions of a job.
2. Occasionally benefits are given to individuals who are employed in trial work programs and, therefore, they may continue to receive benefits for up to twenty-four months, even while they are working.
3. The Court recognizes that an individual's disability may change over time and that a statement in an application for SSDI benefits may not accurately reflect the individual's capacities at the time of the employment decision.
4. Finally, the Court recognizes that there may be a gap in the application for benefits and the award, and that the inconsistencies in statements are normally permitted in the legal system under the theory that parties are allowed to assert legal theories in their claims.

Therefore, there is the possibility that an individual receiving social security benefits would still be protected under the ADA. The ADA, however, emphasizes the importance of providing reasonable accommodations to assist the individual to be able to perform the essential functions of the job. Social Security determination does not take into consideration the possibility of providing reasonable accommodation to the individual.

SUPREME COURT DECISIONS

The following chart identifies eight Supreme Court cases relevant to the topic discussed in this article, along with a summary of the opinions rendered by the Court.

Title of Case	Opinion of the Court
Bragdon v. Abbott (1998)	1. Abbott's HIV is a disability under ADA and reproduc tion is a major life activity, but no "per se disabilities" under ADA. 2. A risk assessment must be based on medical or other objective evidence.
Cleveland v. Policy Management	1. The application for or receipt of Systems (1999) social security benefits does not preclude an ADA claim. A claim for social security and an ADA claim can exist "side-by-side." (Court listed 5 specific examples.)
Sutton v. United Airlines (1999)	1. Determination of disability under the ADA must take into account corrective or mitigation measures. 2. The inability to perform a single job does not consti tute a substantial limitation in the major life activity of work.
Murphy v. United Parcel Services	1. Medication is a corrective or (1999) mitigation measure. 2. Inability to perform a single, particular job does not constitute a substantial limitation in the major life activ ity of work. 3. "Regarded as" unable to perform a single particular job does not constitute discrimination under the ADA "third prong."
Albertson's Inc. v. Kirkingburg (1999)	1. Monocular vision is not a "per se disability." 2. The body's own ability to compensate is considered a mitigating measure.
Toyota Motors v. Williams (2002)	1. In determining a substantial limitation in the major life activity of performing manual tasks, must assess whether or not the impairment prevents or severely restricts tasks that are of central importance to most peoples' daily lives. 2. Impairments must have a permanent or at least a long-term effect.
Chevron v. Echazabal (2002)	1. Employers do not have to hire individuals who are unable to carry out the essential function of the job without incurring risk to their own health. 2. The ADA does not entitle individuals to jobs that might jeopardize their health.
Clackamas Gastroenterology v. Wells (2003)	1. A covered entity is an employer who is "engaged in an industry affecting commerce who has 15 or more employees for each working day in each 20 or more calendar weeks in the current or preceding calendar year." 2. An employee is defined as "an individual employed by an employer."

Summary

It is expected that a life care planner considers numerous resources in the assessment and preparation process of a life care plan. For the life care planner, it is important to understand that the ADA may or may not be a resource to the individual following an acquired disability. In providing testimony in litigated situations, the life care planner may be questioned regarding whether or not the planner had considered the ADA as a possible resource. Understanding the evolving ADA case law may assist the planner to articulate appropriate responses to these types of questions. The Supreme Court has provided specific guidelines for presenting information in an assessment that could include a life care plan assessment. This specific information will assist all parties to understand the circumstances and the needs of the individual.

In the last seven years, the Supreme Court has narrowed the scope and therefore the protection the Act was meant to afford when signed into law in 1990. With this awareness and understanding, the life care planner can better articulate the needs of the individual and the process of life care planning.

References

Americans with Disabilities Act (1990), 41 U.S.C. 12001 et seq., *Implementing Regulations*, 29 CFR Parts 1630, 1602 (Title I, EEOC).

Elias, S. & Levinkino, S. (1999) *Legal researcher – How to find and understand the law*, 7th Edition, Berteloman Industry Services, Inc., Retrieved August 7, 2005 from www.nolo.com

Equal Employment Opportunity Commission. (July 26, 1999). *EEOC instructions for field offices: Analyzing ADA charges after Supreme Court decisions addressing "disability" and "qualified."* Retrieved August 7, 2005 from www.eeoc.gov

Heyburn, Chief District Judge, Cotter v. Ajilon Services, Inc. In the Court of Appeals for the Sixth Circuit, No. 00-2041, April 25, 2002.

O'Brien, R. (2002). *Crippled justice: The history of modern disability policy in the workplace*. Chicago, IL: The University of Chicago Press.

Vierling, L. (2002). *Court decisions involving the Americans with Disabilities Act: A resource guide for rehabilitation professionals*. Athens, GA: Elliott and Fitzpatrick, Inc.

Supreme Court Decisions

1. Albertson's Inc. v. Kirkingburg, No 98-0591, June 22, 1999
2. Bragdon v. Abbott, No. 97-156, June 15, 1998
3. Chevron v. Echazabal, No 00-1406, June 10, 2002
4. Clackamas v. Wells, No 01-1435, April 22, 2003
5. Cleveland, v. Policy Management Systems, Corp., No 97-1008, May 24, 1999
6. Karen Sutton & Kimberly Hinton v. United Airlines, Inc., No 97-1943, June 22, 1999
7. Toyota Motors v. Williams, No 00-1089, January 8, 2002
8. Vaughn L. Murphy v. United Parcel Services, Inc., No 97-1992, June 22, 1999

About the Author

Lewis E. Vierling, MS, NCC, NCCC, CRC, CCM, is a Vocational Rehabilitation Consultant with Management Consulting & Rehabilitation Services, Inc. (Mc/RS) in Ankeny, Iowa. In June 1999, the United States Supreme Court cited the results of his vocational evaluation in a landmark Americans with Disabilities (ADA) decision, Murphy v. United Parcel Services, Inc. He has provided numerous vocational evaluations in ADA litigation.