Interpreting the ADA and Civil Rights Law

Five Supreme Court Rulings

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Although one could say that employers found some clarification in human-resources law in 1999, certain complications still remain.

The U.S. Supreme Court decided five employment-law cases at the end of its 1998-99 term. In the first three cases, employers' hiring practices were upheld when the court chose to interpret the Americans with Disabilities Act (ADA) narrowly by holding that plaintiffs' self-administered corrective measures (i.e., any and all methods, devices, or medication that alleviate or reduce their impairment) may not be disregarded for purposes of qualifying under the ADA's definition of "disabled." Thus, for example, individuals may not remove their glasses and then claim successfully that they are vision impaired and therefore disabled under the act. As we explain in this article, however, those three cases leave open a gap that could render the opinions shallow in their application.

In a fourth, unrelated case decided in the 1999 term, the court clarified the circumstances under which an employer may be held liable for punitive damages under Title VII of the Civil Rights Act of 1964. Finally, in a fifth case, the Supreme Court held that individuals who have proven that they are "totally disabled" for the purpose of receiving social-security benefits (and thus "cannot engage in any other kind of substantial gainful work") may still claim protection under the ADA by showing that "with reasonable accommodation" they could "perform the essential functions" of their jobs.

The first three cases dealing with the ADA received considerable media attention, most likely due to the potential effect those rulings have on so many individuals. If easily correctable impairments such as myopia were deemed disabilities

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The key factor in an ADA determination is not the physical condition itself, but the specific effect that the ailment or impairment has on the individual.

under the ADA, the number of potential plaintiffs would instantly skyrocket. Those three ADA cases, however, are not the strong victory for employers trumpeted by the media and may instead merely give employers a false sense of security. Moreover, the other two cases, dealing with the availability of punitive civil-rights damages and with harmonization of SSI and ADA claims, may ultimately be more troubling for employers because they will likely lead to additional claims and an increase in the average cost to settle those claims.

This article examines each of the five cases by explaining the court's holdings and discussing their practical effects, and then proposes strategies to avoid victimization under the new rulings.

Corrected Impairments under the ADA

The ADA prohibits employers from discriminating against disabled individuals in rendering employment decisions. The statute defines a qualified individual as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[1]

A "disability" is defined in one of three ways: **(1)** "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," **(2)** "a record of such an impairment," or **(3)** "being regarded as having such an impairment."[2] In past cases, courts have set standards for what qualifies as a "substantial limitation" and a "major life activity."

The three cases decided at the end of the 1998–99 term posed the following two legal issues. First, is an individual "disabled" when he or she has a condition that, if left uncorrected, "substantially limits a major life activity," but when corrected leaves that individual without any impairment? Second, is a person who is denied a job because of his or her corrected impairment(s) considered "regarded as having such an impairment" and therefore entitled to recovery under the act?

In all three of these ADA cases, the Supreme Court answered the first question by holding that an individual's corrections, medications, and even subconscious mechanisms for coping with an impairment are to be considered when assessing whether that individual is disabled. In addressing the second issue, however, the court ruled narrowly and by doing so left unresolved an important legal theory that leaves employers and lawyers with unanswered questions.

The Case of the Lazy Eye

The first case, *Albertsons, Inc. v. Hallie Kirkingburg*, arose from the following circumstances. Albertsons, Inc., a grocery-store chain, hired Hallie Kirkingburg as a truck driver. Kirkingburg had more than ten years' driving experience and passed the Albertsons road test.[3] Prior to his being hired, Kirkingburg was examined by a doctor to determine whether he met federally imposed vision standards for commercial truck drivers. Kirkingburg suffers from amblyopia (known as "lazy eye"), an uncorrectable condition that leaves him with 20/200 vision in his left eye and, in effect, monocular vision. Although this condition renders Kirkingburg unfit to drive a commercial truck under federal Department of Transportation standards, the doctor mistakenly certified that Kirkingburg met the basic vision standard. Consequently, Albertsons hired him.[4]

[1] 42 U.S.C. §1211(8).
[2] 42 U.S.C. §12102(2).
[3] 1999 U.S. Lexis 4369, 1 (6/22/99).
[4] *Id.* at 7, 8.

After injuring himself on the job nearly a year and a half later, Kirkingburg went for a physical, at which time the original doctor's error was discovered. Kirkingburg was informed of an experimental DOT scheme wherein individuals who fail the basic vision standards may receive a waiver of the standards under certain limited circumstances and as long as they agree to report for annual reevaluations of their condition.[5] Kirkingburg applied for and received such a waiver from the DOT. Albertsons, however, had terminated him for failing to meet the DOT vision standards before the waiver was granted and refused to rehire him.

After Kirkingburg sued Albertsons alleging discrimination under the ADA, the Ninth Circuit found that he was disabled. Albertsons then sought review by the Supreme Court.

The Supreme Court addressed only whether the Ninth Circuit erred in labeling plaintiff Kirkingburg disabled under the ADA. (The court did not need to address the issue of whether Albertsons regarded Kirkingburg as disabled since Albertsons did not challenge that aspect of the appellate decision.[6]) The court set out three reasons why the Ninth Circuit was too hasty in qualifying Kirkingburg as disabled.

First, according to the Supreme Court majority, the Ninth Circuit erred by expanding the ADA's definition of disability. The Ninth Circuit held that the plaintiff was disabled because there was a "difference" between him and those not afflicted by the condition in question. The Supreme Court held that the plaintiff must prove that the condition posed a "significant restriction" on the individual's ability to perform major life activities and not that there was simply a "difference."[7] Thus, the court held that only impairments that "substantially limit" an individual's major life functions trigger an individual's protection under the act.

Second, the Ninth Circuit suggested that in gauging whether monocular vision rendered Kirkingburg disabled the court need not take into account the individual's ability to compensate for the impairment. The lower court recognized that the plaintiff had developed subconscious mechanisms for dealing with his vision impairment, but the Ninth Circuit did not examine those coping mechanisms in reaching its conclusion that the plaintiff was disabled under the act. The Supreme Court held that the determination of whether the individual is disabled is a function of the fact that the employee needed to undertake mitigating measures with artificial aids such as medication or corrective lenses. That holding extends to the "body's own systems,"[8] such as the subconscious coping mechanisms employed by Kirkingburg. Instead, the question is whether the employee—with or without such means—is substantially limited.

Third, and as the Supreme Court wrote: "perhaps most significantly," the Ninth Circuit erred by failing to heed the statutory obligation to determine the existence of disabilities on a case-by-case basis.[9] Specifically, the court noted that an individual can not be labeled disabled solely based on his having been diagnosed with a particular condition or ailment. What one must assess to determine whether an individual qualifies under the ADA is the specific effect that the ailment or impairment has on the individual.

The job qualification that Albertsons used for visual acuity is the standard set by federal law, which is binding on Albertsons. The only issue left for the court, then, was whether Albertsons was obligated to accept Kirkingburg's experimental waiver of the DOT visual-acuity standards. The Supreme Court held that there was no obligation to accept the waiver because the regulations establishing the waiver program did not modify those visual acuity standards. Because the waiver constituted a DOT experiment in safety, there could be no fair way to obligate employers to accept the exceptions to the original safety regulations.

The Case of the Clinical Diagnosis

The second case in which the Supreme Court dealt with self-applied remedial measures to alleviate potential disabilities under the ADA is *Murphy v. United Parcel Service, Inc.*[10] This case arose when UPS fired a mechanic, Vaughn Murphy, for having high blood pressure.

Like Albertsons, UPS is obligated by the DOT to require that mechanics meet certain physical requirements where driving commercial motor vehicles is part of their job. One such requirement is that the driver have "no current clinical diagnosis of high blood pressure likely to interfere with his or her ability to operate a commercial vehicle safely."[11]

When Murphy was hired by UPS, his blood-pressure measurement was too high to qualify for DOT health certification, but nevertheless he was granted certification in error. A subsequent test

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[5]The DOT allows licensure of applicants with deficient vision who had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the applicant was cited for a moving violation, conviction for certain driving-related offenses, or citation for certain serious traffic violations. See: *Id.* at 8.

[6]See: *Id.* at footnote 9.

[7]*Id.* at 18.

[8]*Id.* at 19.

[9]*Id.* at 20.

[10]1999 U.S. Lexis 4370 (6/22/99).

[11]*Id.* at 7 (Citing 49 CFR §391.41(b)(6)).

revealed Murphy's high blood pressure.

For his condition, Murphy takes medication that inhibits him from lifting heavy objects, but he otherwise functions normally. The court therefore held that Murphy is not disabled under the ADA, since the positive effects of the mitigating measures Murphy employs—namely, the regulation of his blood pressure by medication—are to be factored into the analysis of his condition.

The court then addressed the issue of whether UPS regarded Murphy as having a disability that substantially limits one or more life functions. There are two ways in which plaintiffs may be considered "regarded as" having a disability. **(1)** An employer may mistakenly believe that the employee has a physical impairment that substantially limits one or more major life activities (i.e., the plaintiff doesn't actually suffer from any impairment, but the employer nonetheless thinks that he or she does based on stereotyping or other unfair biases). **(2)** An employer may mistakenly believe that an actual, nonlimiting impairment substantially limits one or more major life activities (i.e., the plaintiff has an impairment that does not actually limit the ability to carry out a major life activity, but nonetheless the employer believes that it does).

The major life activity of working is considered actionable under the ADA statute if specific criteria are met. The Supreme Court looked to the Equal Employment Opportunity Commission (EEOC) guidelines to determine when working may be the major life activity being impaired. The guidelines require that the plaintiff 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." The inability to perform a single, particular job (e.g., one involving heavy lifting) does not constitute a substantial limitation in the major life activity of working.[12] Thus, if jobs using the individual's skill set are available, one is not precluded from a substantial class of jobs.[13] Also, if many different types of jobs are available, one is not precluded from a broad range of jobs.[14]

Murphy alleged that UPS regarded him as being unable to work at all because of his hypertension. In response, UPS argued that it did not regard Murphy as substantially limited in the major life activity of working, but rather regarded him as unqualified to work as a UPS mechanic because of his inability to obtain a DOT health certification.[15]

The high court held that Murphy was at best able to prove that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle—which is a specifically defined type of vehicle.[16] Murphy could not prove that he is regarded as unable to perform any mechanic's job that does not require driving a commercial motor vehicle or does not require the DOT certification. Indeed, Murphy could perform many other mechanic's jobs.[17] Therefore, the court found that UPS did not regard Murphy as disabled.

In the Skies with Glasses

Because the following case involves what appears to be an omitted argument, *Sutton v. United Air Lines, Inc.*, is the most important of the three cases that address the issue of whether a plaintiff with a self-corrected condition may be considered disabled under the ADA. In the majority opinion Justice O'Connor hints that an omitted argument could have prompted a different result had it been submitted. This gap raises several important concerns for employers.

The case commenced after United Airlines refused to hire twin sisters with severe myopia for positions as global commercial airline pilots. Both sisters met United's basic age, education, experience, and FAA-certification requirements.[18] With corrective measures, both sisters function identically to individuals who are not myopic. United denied them employment because they did not meet the employer's vision requirement of 20/100 uncorrected visual acuity or better. They brought suit under the ADA alleging that they were discriminated against based on their disability.

As a threshold matter, the Supreme Court examined whether the sisters qualified as "disabled" under the ADA. With corrective lenses, both sisters were clearly not disabled, so the court needed only to determine whether to evaluate the sisters with their glasses on or off. The court held that the sisters were not disabled because their vision was not impaired when they wore their glasses.

The court presented three arguments supporting its conclusion to apply the act to the Sutton sisters in their corrected-vision state. First, the court wrote that the phrase "substantially limits" appears in the act in the present indicative verb form, which demonstrates that Congress intended to protect individuals *presently*, not potentially or hypotheti-

[12]See: *Sutton v. United Air Lines*, 119 S. Ct. 2139, 2150 (1999) (Citing 29 CFR §1630.2(j)(3)(i)).

[13]*Id.*

[14]*Id.*

[15]Murphy, at 11.

[16]The court notes that 49 CFR §390.5 defines a commercial motor vehicle as a vehicle weighing over 10,000 pounds, designed to carry 16 or more passengers, or used in the transportation of hazardous materials. See: *Id.* at 15.

[17]*Id.* at 16.

[18]See: *Sutton* at 2143.

cally substantially limited by their impairment [emphasis added].[19]

Second, the court pointed out that the definition of disability also requires that "disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the major life activities of such individual."[20] The act should therefore be applied not categorically to individuals, but rather on a case-by-case basis. This individualized approach lends additional support for the court's conclusion to examine both the positive and negative effects of the individual's impairment, and any corrective measures taken with respect to such impairments.

Third, the court noted that Congress did not intend to extend ADA protection so broadly that it would take in individuals with correctable conditions.[21]

The Sutton twins next alleged that they were regarded by the defendant as having an impairment. The sisters argued that United Airlines mistakenly believed that their myopia substantially limited them in the major life activity of working.[22] They further claimed that the vision requirement set by the airline was based on "myth and stereotype" and that the requirement substantially limited their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which they argued is a "class of employment."[23]

To the contrary, the court held that when the major life function allegedly being limited is that of working the restriction must apply to the ability to perform either an entire "class of jobs," or a "broad range of jobs in various classes."[24] Here, the court noted that the Suttons were restricted from doing only a single, particular job, a restriction that does not constitute a substantial limitation in the major life activity of working.[25] This is because the sisters' myopia disqualified them only from the position as global pilot. It did not restrict them from jobs that used the same set of knowledge, skills, or abilities such as courier pilot, pilot instructor, or regional pilot.

The gap. A gap in the Suttons' argument calls into question the relevance of the *Sutton* holding. The O'Connor majority wrote: "Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of *seeing*. They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life function of *working*" [emphasis added].[26] In other words, the plaintiffs failed to argue that the employer mistakenly labeled them as being impaired when they are not. Had they done so, it is possible the employees would be protected by the act.

Because the court did not address the unmade contention, it is unclear whether it referred to the absent argument as "obvious" because it would obviously fail or because the result would have been different had it been included. This omitted argument leaves open the question of whether the Sutton sisters could have prevailed by arguing that

The Supreme Court held that two nearsighted, would-be pilots were not disabled because their vision was not impaired when they wore their glasses.

[19] *Id.* at 2146.
[20] *Id.* at 2147.
[21] The court noted that the ADA was intended only to benefit "some 43,000,000 Americans [who] have one or more physical or mental disability" (citing §12101(a)(1)), and that "individuals with disabilities are a discrete and insular minority," persons "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society" (citing §12101(a)(7)). See *Id.* at 2147–48.
[22] *Id.* at 2150.
[23] *Id.*
[24] *Id.* at 2151.
[25] *Id.*
[26] *Id.* at 2150.

United regarded them as having substantially impaired sight, even though their corrective lenses rendered the impairment non-limiting.

Effects of the Three Cases

The three cases have two clear effects and leave open one question. First, when plaintiffs seek redress under the ADA, any and all self-administered measures to alleviate their impairments are to be considered in determining whether such individuals are substantially limited in one or more major life activities. Second, employers may refuse to hire or retain employees with corrected or correctable impairments if such conditions prevent the employees from satisfying government-imposed job criteria, as was the case in *Albertsons* and *Murphy*. In such situations employers may argue that they did not regard the employee as disabled but instead were simply basing an employment decision on the employee's inability to meet job requirements set by the government. Similarly, even when an employment criterion is set by the employer itself, such as the visual-acuity requirement in *Sutton*, so long as working is the only substantially impaired "major life activity" alleged by the employee, the employer's defense that it regarded the employee as unfit only for a particular job is a powerful one.

The question left unanswered is whether the defense that worked in *Murphy* is available to employers without any pre-set standards for hiring. For example, in *Sutton*, the employer had established the vision criterion and refused to hire employees who could not meet it. Can the employer successfully argue that it did not regard particular employees as disabled, and instead, just regarded them as being unable to satisfy the job requirements? Again, this defense is successful when the government sets the criteria. It is unclear how the court would react to an employee's argument that the requirement itself is evidence that the company unlawfully regards all those with less than 20/100 vision as disabled.

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Changing the Nature of Discrimination Law

In *Kolstad v. American Dental Association* the Supreme Court addressed the issue of when punitive damages are available under Title VII, the section of law that prohibits discrimination based on sex, race, color, national origin, and religion.[27] The law did not at first include a right to jury trial, and damages were limited to back pay, reinstatement, attorney's fees, and costs. The Civil Rights Act of 1991 amended Title VII by providing for jury trials and the possibility of punitive and compensatory damages. According to the 1991 amendments, punitive damages were available if the plaintiff proved that the employer "engaged in discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[28] The question that employers, plaintiffs, and courts pondered was, what is the difference between intentionally discriminatory conduct and malicious or reckless discriminatory conduct? This is the question that the court addressed in *Kolstad*.

The *Kolstad* trial court held that for the jury to be allowed to consider a request for punitive damages the plaintiff had to show that the employer engaged in "egregious" conduct. On appeal, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit (the DC Circuit) reversed the decision. The employer moved to have the case reheard *en banc*, meaning that all the judges in the circuit would hear the case. In a divided opinion, the *en banc* majority reversed the panel's decision and affirmed the trial court's opinion. Because of the split between the *en banc* majority and the first panel decision, the Supreme Court decided to hear the case and decide whether Title VII's punitive damages are limited to instances where employers engaged in egregious behavior, or instead are generally available.

Not egregious. The Supreme Court rejected the *en banc* holding, held that to satisfy the malicious or reckless standard plaintiffs need not prove that the employers' conduct was egregious, and identified three narrow instances when punitive damages would not be available. Presumably, then, punitive damages will be available in all other cases.

The three narrow situations set forth by the court provide little security for employers charged with a civil-rights violation. First, the court stated that punitive damages would not be available if the employer was unaware of the relevant law.[29] It seems likely that the instances in which such "unawareness" is credited by the jury is limited.[30] Second, the court cited instances where the theory of discrimination is novel or otherwise poorly recognized.[31] Even though such a scenario is more plausible than the court's first instance, those situations are extremely rare. Employers may be unaware of so-called poorly recognized prohibitions, but employment lawyers are not. A good lawyer will recognize the issue, inform

[27] 78 Stat. 253, as amended, 42 U.S.C. §2000e *et seq.*

[28] Rev. Stat. §1977, as amended, 42 U.S.C. §1981(b)(1).

[29] *Kolstad*, at 20.

[30] That exact argument was advanced publicly in November 1999, when an immigrant Thai restaurateur in Miami added a service charge to the checks of African-American parties, but not those of other groups. He subsequently agreed to levy the service charge evenhandedly.

[31] *Kolstad*, at 20.

the employer that it has violated the law, and the case will be settled. As for novel areas, few employers wish to endure the costs of a trial on novel issues; so again, most of those cases settle. Finally, the court stated that the employer may believe that the discrimination is justified because of a *bona fide* occupational qualification, or "BFOQ."[32] A BFOQ is an affirmative defense that is available in the limited instances where discrimination is necessary to accomplish the essence of a job.[33] For example, courts have accepted the BFOQ defense in the entertainment field, where authenticity is often a vital component of a production. Thus, a casting director can, for example, refuse to hire a woman to play Michael Jordan in the basketball star's biography. Another instance where the BFOQ was accepted was when a prison refused to hire women as guards at a prison holding only men. The court accepted that a guard's job was to control prisoners and that a woman, just by her presence, would make the prisoners lose control.[34] Again, only rarely has an employer knowingly discriminated because it believed that such a BFOQ defense was available.

In the vast majority of cases, employees allege that they suffered an adverse employment action because of their protected class. In turn, employers claim that they were motivated by non-discriminatory reasons (e.g., the individual's poor performance, business downturns). In those cases the jury decides whom to believe. Prior to the *Kolstad* case, juries could find for the plaintiff, but absent some egregious behavior, punitive damages were unavailable. Moreover, since back pay is reduced by the income an employee earns in the period between the termination of employment and the trial, back-pay awards are often small. With the *Kolstad* decision, however, punitive damages may be nearly automatic.

A new ball game. The magnitude of potential damages available greatly affects settlement negotiations.[35] Prior to *Kolstad*, the value of a Title VII case rarely included the possibility of anything more than back pay.[36] Thus, management attorneys knew that they could settle a case for back pay less what the plaintiff earned in the interim. *Kolstad* may have changed the calculus. Now, plaintiffs' lawyers will be able to include the prospect of punitive damages in settlement negotiations. Management will rarely convince the plaintiff's lawyer that the employer did not know that the alleged conduct was illegal, that the issue was poorly recognized or novel, or that it had a good-faith BFOQ defense.

An out. The court did give employers what appears to be an out when it wrote that "...in the punitive-damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith' efforts to comply with Title VII."[37] Since most employers do try to comply with Title VII—and all employers should do so—this language appears to provide a defense to possible punitive damages under *Kolstad*.

Unfortunately, because the court's language is so vague, one cannot be sure whether employers will be protected in such an instance. The reason for this uncertainty is that the court failed to answer at least three questions: **(1)** what is a good-faith effort?; **(2)** whose burden is it to prove?; and **(3)** who decides whether the company acted in good faith, a jury or a judge?

No legal authority defines what constitutes a good-faith effort to comply with Title VII. Good faith, however, seems to be a less-stringent standard than reasonable care, for instance. A court held in 1998 that employers could avoid liability for hostile-environment sexual harassment of supervisors against employees if the "employer exercised reasonable care to prevent such harassment" and the employee failed to take advantage of those procedures. Reasonable care is an objective standard and focuses on the employer's actions, but it is also clear that good faith is to be judged by actions, for the court created the good-faith provision to encourage employers to "adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions."[38] While employers must engage in assertive actions to comply

[32] *Id.*

[33] See: 42 U.S.C. § 2000e-2(e)(1) (establishing "where religion, sex, or national origin is a *bona fide* occupational qualification," a potential defense to Title VII claims exists for employers). For a discussion of the BFOQ exception, see: Jon P. McConnell, "Bare Trap: The Legal Pitfall of Requiring Scanty Costumes," *Cornell Hotel and Restaurant Administration Quarterly*, Vol. 26, No. 3 (November 1985), pp. 78-82.

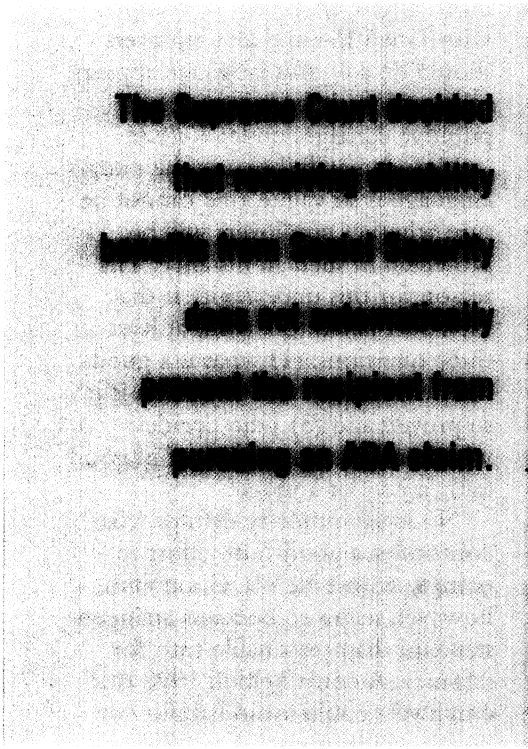
[34] See: Dothard, Director; *Dept. of Public Safety of Alabama, et al. v. Rawlingson, et al.* 433 U.S. 321; 97 S. Ct. 2720 (1977).

[35] See: David Sherwyn, Bruce Tracey, and Zev Eigen: "In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process," 2 U.PA. J. LAB & EMPL. L. 73, 81-83 (1999), which explains how employers sometimes settle even meritless claims based in part on the fear of large damage awards.

[36] Plaintiff's lawyers would, of course, seek to inflate the value of their cases by including costs of defense and attorney fees in negotiations. These figures are relevant once the parties have engaged in litigation and attorneys from both sides have put in significant time.

[37] *Kolstad*, at 35 (citing the Appellate Court's decision 139 F.3d 958, 974 (1998) Tatel, J., dissenting). Apparent good-faith observance of Title VII was not successful for the Miami restaurant Joe's Stone Crabs. See: David Sherwyn, Melenie Lankau, and Zev Eigen, "The Good, the Bad, and the Ugly: The Peculiar Discrimination Case of Joe's Stone Crabs," *Cornell Hotel and Restaurant Administration Quarterly*, Vol. 40, No. 5 (October 1999), pp. 10–17.

[38] *Kolstad*, at 32.



with this standard, there are no directives as to what constitutes compliance. Without a more definite directive, employers will have to wait for years of litigation to know whether good faith is achieved with an EEO policy alone or whether the company needs to include other remedies, such as training, one-on-one conversations, and affirmative-action programs.

Even if we knew what good faith means, we do not know which side has to prove good faith or its absence. Furthermore, it is unclear whether good faith is a jury question, or one to be decided by a judge. This distinction will greatly affect the results of punitive-damage cases. If, for instance, the employer must prove to a jury that it acted in good faith, we predict that punitive damage awards will be commonplace. Alternatively, it will be easier for employers to prevail if the plaintiff has the burden of proving to a judge that the employer, as a matter of law, failed to exercise good faith. Again, because the court's language is vague, it will take years of litigation for those cases to be resolved. We believe that most courts will place the burden of proof of the good-faith standard on employers. We base this prediction on the fact that the *Kolstad* opinion refers to the Supreme Court's sexual-harassment cases, which hold that to avoid liability for the action of a supervisor, an employer must prove that it exercised reasonable care and that the employee unreasonably failed to take advantage of the procedures put in place by the employer.[39]

One other problem with the good-faith standard is that most employers centralize employment decisions to minimize liability. The theory is that a human-resources specialist, unlike a line supervisor, is sensitive to legal compliance, has institutional knowledge as to what types of conduct result in different employment actions, and will not base decisions on personal factors. Employers believe that juries are more likely to credit nondiscriminatory reasons put forth by an HR professional than they would those by the employee's direct supervisor. While this strategy still makes sense for liability purposes, it may backfire on employers attempting to use the good-faith argument. It seems that juries will have a difficult time finding that an employer acted in good faith after finding that its HR professional, the person in charge of Title VII compliance, discriminated.

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The *Cleveland* Case: Disabled but Qualified to Work

In *Cleveland v. Policy Management Systems Corporation*, the plaintiff sued her employer for discrimination based on her disability after she suffered a stroke and lost her job.[40] Prior to filing the lawsuit, the plaintiff applied for Social Security Disability Insurance (SSDI) benefits. In making out the SSDI application, the plaintiff, as she was required to do, swore that she was totally disabled. To be protected by the ADA, however, an employee must be qualified to perform the essential functions of the job with or without a reasonable accommodation. Both the district court and the court of appeals for the Fifth Circuit dismissed the case, holding that an employee cannot simultaneously be totally disabled and qualified to perform the essential functions of the job. The Supreme Court reversed those holdings.

The Supreme Court held that being totally disabled and being qualified to work are not mutually

[39]See: *Burlington Industries v. Ellerth*: 524 U.S. 742; 118 S. Crt. Ct. 2257 (1998); *Farnghen v. Boca Raton*; and 524 U.S. 775, 118 S. Ct. 2275 (1998).

[40]119 S. Ct. 1597 (1999).

exclusive. Instead, the court held that "pursuit and receipt of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA."[41] The court did not ignore the inconsistency between the two statutes, however. It stated: "[A]n ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim."[42] To survive the defendant employer's motion for summary judgment, she must explain why the SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with a "reasonable accommodation."[43]

On its face, the opinion makes little sense. How can an employee be qualified to perform a job and be totally disabled at the same time? The social-security statute does not explain the court's holding. To be awarded SSDI benefits, a plaintiff must show that the impairment at issue is "of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[44] The court justified its decision by focusing on the concept of reasonable accommodation.

Under the ADA, employers have an obligation to provide disabled employees with a reasonable accommodation, including "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[45] Conversely, the SSDI eligibility does not take accommodations into account. Moreover, the Social Security Administration (SSA) operates with limited resources, according to the court, and thus restricts its inquiries to the following five-step formula:

> *Step one:* Are you presently working? (If so, you are ineligible.)[46]
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> *Step two:* Do you have a "severe impairment," that is, one that "significantly limits" your ability to do basic work activities? (If not, you are ineligible.)[47]
>
> *Step three:* Does your impairment "mee[t] or equa[l]" an impairment on a specific [and fairly lengthy] SSA list? (If so, you are eligible without more proof.)[48]
>
> *Step four:* If your impairment does not meet or equal a listed impairment, can you perform your "past relevant work?" (If so, you are ineligible.)[49]
>
> *Step five:* If your impairment does not meet or equal a listed impairment and you cannot perform your "past relevant work," then can you perform other jobs that exist in significant numbers in the national economy? (If not, you are eligible.)[50]

Sixty percent of the awards are based on the employee's meeting one of the enumerated disabilities set forth in step three above. The government uses such a simplistic test so that it can administer a large benefits system efficiently. The test is over-inclusive so that those who truly need the benefits will not be denied. Thus, according to the court, an individual could be eligible to receive SSDI benefits and be qualified, due to special circumstances, to perform the job's essential functions.

This holding brings up a question. Should the practical realities of an overworked, underbudgeted agency allow employees to claim that they are both totally disabled and qualified to work? The court responded as follows. Inconsistencies in theories are common in our legal system. For example, the following argument is perfectly acceptable in court: "I was not at the scene of the murder. However, if I was, I did not hold the gun. If I did, my gun was not loaded. If it was loaded, I did not pull the trigger." Here we have a similar scenario. The plaintiff may allege that she is able to perform the essential functions of the job, and if she cannot she is totally disabled. In the time that it takes for the issue of qualifications to be resolved the plaintiff needs to live. She applies for SSDI benefits in the interim because neither her former employer nor any other employer will hire her.

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Some of these cases have been widely reported, but whether the media reaction was reality or hype is unclear. Based on the "gap" in the ADA cases, we suggest that employers not base employment decisions on corrected impairments unless forced by government regulations to do so.

With regard to *Kolstad*, employers should ensure that they have EEOC policies and that they document all efforts to comply with Title VII. Such documentation may prevent a punitive-damages award. Along those same lines, employers can expect that demands by plaintiffs' lawyers always will include punitive damages.

Finally, employers can no longer avoid ADA liability in cases where an employee has filed for SSDI benefits. Such a filing will force the plaintiff to jump through another hoop in an ADA case, but it will not be an automatic bar to a lawsuit. **CQ**

[41] *Id.* at 1600.
[42] *Id.* at 1603.
[43] *Id.*
[44] See: §423(d)(2)(A).
[45] 42 U.S.C. §12111(9)(B).
[46] See: 20 CFR §404.1520(b) (1998).
[47] See: §404.1520(c).
[48] See: §§404.1520(d), 404.1525, 404.1526.
[49] See: §404.1520(e).
[50] See: §§404.1520(f), 404.1560(c).