CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Addressing The Americans With Disabilities Act

This section presents a selection of issues currently being litigated and resolved by courts at various levels of the state and federal systems and is not intended to be a comprehensive collection of cases.

Carparts Distribution Ctr., Inc., et al., v. Automotive Wholesaler's Ass'n of New England, Inc., et al., 37 F.3d 12 (1st Cir. 1994). COMPLAINT ALLEGING THAT AN INSURANCE PROVIDER WHICH INSTITUTED A $25,000 LIFETIME CAP ON BENEFITS FOR AIDS-RELATED ILLNESSES VIOLATED TITLES I AND III OF THE AMERICANS WITH DISABILITIES ACT STATES A CLAIM FOR WHICH RELIEF MAY BE GRANTED.

I. INTRODUCTION

Plaintiffs brought claims against a medical insurance provider alleging that defendant-employer's limit on benefits for AIDs-related illness constituted illegal discrimination on the basis of disability under Titles I and III of the Americans with Disabilities Act ("ADA").[1] The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] The claims were dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted from which plaintiffs appealed.[3]

The United States Court of Appeals for the First Circuit, exercising plenary review and accepting as true all of the allegations made in the complaint and drawing all reasonable inferences in favor of plaintiffs, held that the trial court erred in dismissing the complaint.[4]

II. BACKGROUND

Plaintiff Ronald J. Senter was diagnosed HIV positive in May 1986 and died on January 17, 1993. Prior to his diagnosis and until his death, Senter was the sole shareholder, president, chief executive officer, and an employee of plaintiff Carparts Distribution Center, Inc. ("Carparts"), an automotive parts

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[1] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

[2] Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994) (citing 42 U.S.C. § 12101(b) (Supp. V 1993)).

[3] Carparts Distribution Ctr. v. Automotive Wholesaler's Ass'n, 826 F. Supp. 583 (D.N.H. 1993).

[4] *Carparts Distribution Ctr.*, 37 F.3d at 14-15.

wholesale distributor incorporated in New Hampshire. Carparts participated in a self-funded medical reimbursement plan ("Plan") offered by defendant Automotive Wholesaler's Association of New England, Inc. ("AWANE") of which Senter was enrolled in the Plan since 1977.[5]

Beginning in 1989, Senter, or Carparts on his behalf, submitted claims for the payment of illnesses, many of which were AIDS- or HIV-related, to AWANE for reimbursement under the Plan.[6] In October 1990, AWANE informed Plan participants that it was amending the Plan to limit benefits for AIDS-related illnesses to $25,000 effective January 1, 1991. The limit on lifetime benefits otherwise is $1,000,000.[7]

Plaintiffs' initial complaint, filed before the ADA became effective, was brought under state contract law and a state anti-discrimination statute.[8] Plaintiffs alleged that the trustees of the Plan were aware of Senter's condition when they amended the Plan, and that the change was made in response to his claims for HIV- and AIDS-related illnesses.[9] Plaintiffs alleged that AWANE's failure to pay on claims submitted in excess of the $25,000 cap constituted a breach of their contractual obligation with respect to, at a minimum, plaintiff's claims for non-AIDS related treatment.[10] Plaintiffs further alleged that the $25,000 cap was a discriminatory policy which caused Carparts, as an employer, to violate the state anti-discrimination statute, with respect to employee Senter.[11]

Defendants removed the case to the Federal District Court for the District of New Hampshire, claiming that the issues raised were pre-empted by federal law.[12] Plaintiffs amended their complaint to add claims under the ADA.[13] Defendants objected to the amendment. The district court treated the objection as a motion to dismiss for failure to state a claim and dismissed the complaint.[14]

Plaintiff's amended complaint included a count alleging violation of Title I of the ADA, which provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . privileges of employment."[15] "Covered entity," defined by statute, includes, among other things, "an employer."[16] The district

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[5] *Id.* at 14.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 14-15.

[9] *Id.* at 14.

[10] *Id.*

[11] *Id.* at 14-15.

[12] AWANE claimed preemption by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1974).

[13] *Carparts Distribution Ctr.*, 37 F.3d at 15.

[14] *Id.*

[15] *Id.* at 15-16 (citing 42 U.S.C. § 12112(a) (Supp. V 1993)).

[16] *Id.* (citing 42 U.S.C. § 12111(2) (Supp. V 1993)).

court found that defendants were not "covered entities" as no defendant was an employer of plaintiff Senter.[17]

Plaintiff's amended complaint also included a count alleging violation of Title III of the ADA, which provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation."[18] The district court interpreted the term "public accommodation" as "being limited to an actual physical structure with definite physical boundaries which a person physically enters" and found that defendants did not possess this characteristic. Therefore, defendants were not liable for this count.[19]

Plaintiffs appealed the district court's dismissal of all of their claims to the United States Court of Appeals for the First Circuit.

III. ANALYSIS

A. *The District Court's Failure To Give Notice Of Its Intent To Dismiss*

The Court of Appeals noted at the outset that the district court failed to give plaintiffs notice of its intent to dismiss the complaint.[20] Plaintiffs had no reason to anticipate dismissal on the substantive issues comprising their ADA claims because defendant's answer to the amended complaint did not address these issues.[21] The court held that this failure alone warranted reversal of the dismissal.[22]

B. *Plaintiff's Title I Claim*

Addressing the substance of the ADA claims, the court assumed, for the purposes of the appeal, that the defendant's cap on insurance benefits for AIDS-related illnesses constituted discriminatory conduct.[23] The court noted that the district court correctly found that Title I of the ADA made it unlawful for an employer to discriminate on the basis of a disability in the provision of a fringe benefit, including health insurance.[24] The court found error, however, in the district court's finding that defendants were not employers of Senter.[25] It looked to Title VII of the Civil Rights Act of 1964[26] ("Title VII")

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[17] *Carparts Distribution Ctr.*, 826 F. Supp. at 585.

[18] *Carparts Distribution Ctr.*, 37 F.3d at 18 (citing 42 U.S.C. § 12182(a) (Supp. V 1993)).

[19] *Id.*

[20] *Id.* at 15.

[21] *Id.*

[22] *Id.* (citing Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973)).

[23] *Id.* at n.2.

[24] *Id.* at 16.

[25] *Id.*

[26] The court specifically referred to 42 U.S.C. § 2000e(b) (1988).

and related case law for guidance in interpreting that provision of the ADA.[27] The common meaning of the word "employer," the court noted, is not determinative of the applicability of the ADA.[28]

The court identified three theories under which defendant insurance provider might be found, at trial, to be an employer of plaintiff Senter for the purposes of the ADA. Under the first theory, defendants could be deemed plaintiff's "employer" if they exercised control over an important aspect of his employment, namely health care coverage.[29] If defendant AWANE and the Plan existed solely to enable plaintiff Carparts to delegate its health care benefit responsibilities, then AWANE would be functioning as Senter's employer for the purposes of the ADA.[30] As support for this theory, the court relied on a Second Circuit decision interpreting the term "employer" in Title VII as "encompass[ing] any party who significantly affects access of any individual to employment opportunities,"[31] regardless of whether that party might have been considered an employer at common law. Relevant to this analysis is whether the employee has any choice among alternative health care benefits, and whether the defendant has been delegated authority to set the levels of employee benefits.[32] If defendants had such authority, they would be effectively exercising control over this important aspect of plaintiff Senter's employment by Carparts. Also relevant is whether Carparts participates in the administration of the Plan.[33] If so, the court noted, AWANE and Carparts would be intertwined as employers with respect to Senter's employment benefits.[34]

The second theory the court postulated to render defendants liable under the ADA considered the potential agency relationship between Carparts and AWANE.[35] Even if Carparts had not delegated authority to AWANE to determine the level of benefits, and if AWANE acted as an agent of the employer in the administration of benefits, it would be an "employer" for the purposes of the ADA. Administrative authority implicates ADA liability as an employer in the same manner as decisional authority.[36]

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[27] The Interpretive Guidance on Title I of the ADA, published by the Equal Employment Opportunity Commission, establishes that the term "employer" is "to be given the same meaning under the ADA that [it is] given under Title VII." 56 Fed. Reg. 35,740 (1991) (to be codified at 29 C.F.R. app. § 1630) (Interpretive Guidance on § 1630.2(a)-(f)).

[28] *Carparts Distribution Ctr.*, 37 F.3d at 16.

[29] *Id.* at 17.

[30] *Id.*

[31] *Id.* (citing Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063, *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), *reinstated and modified on other grounds*, 753 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984)).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 17-18.

For a third theory of liability, the court looked to other circuits for authority on analogous Title VII provisions that have been applied to employers who are not technically employers of the plaintiff.[37] In one such decision, a hospital refused to assign a male nurse to female patients even though the nurse was in fact employed by the patient, not the hospital. The hospital was found to be within the purview of Title VII.[38] The court clearly refused to hold that coverage is automatic whenever an employer has the requisite number of employees to implicate statutory coverage.[39]

The court found that because the district court prematurely dismissed plaintiff's complaint the record was not sufficient to conclude that AWANE was Senter's for the purposes of the ADA. The court remanded to allow plaintiffs to address the issue and for the district court to determine plaintiff's Title I status.[40]

C. *Plaintiff's Title III Claim*

Plaintiff's Title III claim, a question of first impression in the First Circuit, required the court to address whether establishments of "public accommodations" are limited to physical structures.[41] The court determined that they are not so limited.[42] Looking to the words of the statute for an enumeration of "private entities . . . considered public accommodations for the purposes" of the ADA which includes service providers and professional offices,[43] the court decided that the plain meaning of the statute precluded its limitation to only physical structures.[44]

A travel service is listed as one of the service providers in the statute.[45] The court noted that this type of provider, as is typical of many service providers, may conduct business by telephone and mail without ever requiring their customers to enter their physical premises.[46] Given this reality, the court pointed out the irrationality of concluding that the ADA would not apply to these services, but would apply to services which require their customers to enter their place of business.[47] This interpretation is bolstered by a consideration of Congress' intent in enacting the ADA: to ensure that the disabled have equal

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[37] *Id.* at 18 (citing Christopher v. Stouder Memorial Hosp., 936 F.2d 870, 875 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 658 (1991); Doe *ex rel* Doe v. St. Joseph's Hosp., 788 F.2d 411, 422 (7th Cir. 1986); Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973)).

[38] *Sibley Memorial Hosp.*, 488 F.2d at 1341.

[39] *Carparts Distribution Ctr.*, 37 F.3d at 18.

[40] *Id.*

[41] *Id.* at 19.

[42] *Id.*

[43] 42 U.S.C. § 12181(7)(F) (Supp. V 1993).

[44] *Carparts Distribution Ctr.*, 37 F.3d at 19.

[45] 42 U.S.C. § 12181(7)(F) (Supp. V 1993).

[46] *Carparts Distribution Ctr.*, 37 F.3d at 19.

[47] *Id.*

access to the array of goods and services offered by private establishments.[48]

The court pointed out that caution is required in construing the language of the statute, in particular the provision that no person be denied, on the basis of disability, "the opportunity . . . to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of [a covered] entity."[49] This ambiguous language may be interpreted as congressional intent to reach not only access to public accommodations, but also the content of the services provided therein.[50] As an example of this possible broader interpretation, the ADA might be construed to require a tool retailer to not only make its outlets physically accessible, but also to redesign their products to be of use to the physically disabled.[51]

The court limited its consideration of plaintiff's Title III claim to an observation that such a claim, though a weaker vehicle than Title I, could still be made on remand.[52] Since remand was necessary in light of the procedural defect below in the trial court's failure to give notice of its intent to dismiss, and also in light of the need to allow plaintiff to address the Title I issues, the Title III claim was remanded for further consideration. The court pointed out in summation that it would frustrate congressional intent to narrowly limit the applicability of the ADA to the issue of access to physical structures, as did the district court.[53]

IV. CONCLUSION

This decision is one of first impression in the First Circuit of construing the ADA. It is significant for its holding that the term "employer" is to be construed broadly in order to reach defendants who have no common law employment relationship with the plaintiff.[54] Further, the court broke ground by rejecting the limiting construction of the statute as applying only to access to physical structures.[55] Both of these rulings serve to broaden the reach of the ADA to encompass defendants who were beyond the reach of the ADA under a common law interpretation of its terms. Since the court's opinion was limited by its consideration of a dismissal for failing to state a claim on which relief may be granted, the insufficiency of the record precluded definitive findings in

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[48] *Id.* (citing S. REP. No. 116, 101st Cong., 1st Sess. 58 (1989)).

[49] 42 U.S.C. § 12182(b)(1)(A)(i) (Supp. V 1993).

[50] *Carparts Distribution Ctr.*, 37 F.3d at 19.

[51] *Id.* at 20.

[52] *Id.*

[53] *Id.* Plaintiffs retained their state anti-discrimination law claim in the amended complaint, as well as a claim under 42 U.S.C. § 1985(3) (1988), alleging a conspiracy to interfere with civil rights. Because the district court found the ADA claims to be insufficient, it dismissed these claims as well. The Court of Appeals ordered their reconsideration, on remand, in light of its opinion. *Id.*

[54] *See* discussion *supra* part III.B.

[55] *See* discussion *supra* part III.C.

the case.[56] Nevertheless, the court has staked out a broad ground for applicability of the Americans with Disabilities Act in the First Circuit.

Joseph B. Harrington

Easley ex rel. v. Snider, 36 F.3d 297 (3d Cir. 1994). PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE PROGRAM TARGETING A SEGMENT OF DISABLED POPULATION DOES NOT VIOLATE AMERICANS WITH DISABILITIES ACT.

The Third Circuit Court of Appeals recently held that a state agency or department may create and administer programs for the disabled which are selectively targeted to certain populations within the disabled community, even if those programs exclude other disabled individuals.

I. BACKGROUND

Tracy Easley ("Easley"), twenty-nine at the time of the trial, was severely disabled by a car accident in 1982. As a result of her injuries, she was left immobile and without speech. She is able to communicate with her family by using facial expressions but is unable to care for herself and cannot be left alone. Florence Howard ("Howard"), 53 years old at the time of trial, suffers from multiple sclerosis and undifferentiated schizophrenia. She is immobile from the waist down and, like Easley, cannot live alone. Easley and Howard each sought services through Pennsylvania's Attendant Care Service's Program ("Care Program"), a program authorized by Pennsylvania's Attendant Care Act ("Care Act").[1] The Care Program, administered by the Pennsylvania Department of Public Welfare ("PDPW"), provides attendant care services[2] to individuals who are physically disabled but mentally alert.[3] The Care

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[56] *Carparts Distribution Ctr.*, 37 F.3d at 18, 20.

[1] Easley *ex rel.* Easley v. Snider, 36 F.3d 297, 299 (3d Cir. 1994) (citing PA. STAT. ANN. tit 62, §§ 3051 - 3058 (Supp. 1994)). The Care Act was enacted in 1986 and was "designed to enable physically disabled persons to live in their homes rather than in institutions, and, when possible, to become active and useful members of society." *Id.* at 298. The state legislature declared the goal of the Care Act to be to allow physically disabled but mentally alert adults (between the ages of 18 and 59) to live in their own homes and communities. *Id.*

[2] The Care Act defines attendant care services as "those basic and ancillary services which enable an individual to live in his home and community, rather than in an institution, and to carry out functions of daily living, self-care and mobility." Services may include assistance with grooming, feeding, dressing, personal hygiene, shopping, cleaning, laundry, financial management, and decision making, as well as other activities. PA. STAT. ANN. tit. 62, § 3053 (Supp. 1994).

[3] *Id.*

Act requires that program participants be mentally alert; be able to select, supervise, and fire an attendant; and be able to manage their own financial and legal affairs.[4] The Care Program requires that participants select from one of three levels of (increasing) administrative involvement by the PDPW in the management of his or her attendants, and that the participant be active in the selection and retention of his or her own attendant.[5] Neither Easley nor Howard are able to do these things, and both were denied attendant care services which they sought through the Care Program.

Easley and Howard brought suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the Care Act conflicts with the Americans with Disabilities Act of 1990 ("ADA").[6] Specifically, they alleged that they were discriminated against because the Care Act requires that candidates for the program be mentally alert.[7] The district court agreed that the Care Program's restriction of services to the mentally alert disabled violated the ADA and enjoined the State from excluding the plaintiffs from receiving program services.[8] The State appealed, and the United States Court of Appeals reversed, finding that the ADA was not meant to preclude public agencies from creating programs tailored to the needs of specific populations within the disabled community.

II. ANALYSIS

In deciding whether the PDPW's Care Program violated the ADA by restricting its services to only those who were physically disabled but mentally alert, the court began its analysis by considering the plain language of the ADA itself. The court first noted that the ADA was enacted to broaden the arena of protection against discrimination on the basis of disability[9] to services

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[4] *Id.* In addition, the physical impairment must last for a continuous period of at least 12 months and the disabled person must require assistance to complete the functions of daily living, self-care, and mobility. *Id.*

[5] The three models of service delivery provided by the Care Program are the consumer model, the agency model, and the combination model. Under the consumer model, the program participant advertises for, interviews, hires, manages, and fires the attendant. The participant pays the attendant and is reimbursed by the agency administering the Care Program for the participant. Under the agency model, the administering agency employs the attendant, but the participant retains the right to reject the attendant and retains the responsibility for directing the attendant's activities in the participant's home. Under the combination model, the participant selects the tasks to be performed by herself and those to be performed by the agency. *Easley*, 36 F.3d at 300.

[6] *Id.* at 298-99 (citing 42 U.S.C. §§ 12101-12213 (Supp. V 1993)).

[7] *Id.*

[8] *Id.* at 299.

[9] Protection from discrimination on the basis of disability was previously limited to the provisions of the Rehabilitation Act, 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993), which targeted institutions receiving federal funds. Specifically, the court cited

and programs provided by states and municipalities.[10] The court then observed that the language of the ADA provided specifically that "no *qualified individual with a disability* shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . ."[11] The definition of a "qualified individual with a disability" provided by the ADA is an "individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[12] A further regulation implementing the ADA provides that "nothing in this part prohibits a public entity from providing benefits, services, or advantages to . . . *a particular class of individuals with disabilities* . . . ."[13]

The state used these ADA provisions and the language of the preamble[14] to bolster its contention that the ADA explicitly allows states to deny services to disabled individuals who are not "qualified."[15] However, the district court agreed with the plaintiff's position that the ADA was controlling in these circumstances.[16] The district court further agreed that since it is not necessary to be mentally alert to receive attendant care services, requiring mental alertness as a requisite to receiving the attendant care services of the Care Program was an inappropriate "screening out" of a class of individuals with a disability.[17] The lower court, moreover, accepted the plaintiffs' view that the Care Program's elements of consumer control and independence were not essential elements of the program, but "merely two of the many opportunities" provided by the program.[18]

The court then turned its analysis to the Care Program itself, declaring that

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29 U.S.C. §§ 790-797b (1988 & Supp. V 1993).

[10] *Easley*, 36 F.3d at 300-01.

[11] *Id.* (citing 42 U.S.C. § 12132 (Supp. V 1993)) (emphasis added).

[12] 28 C.F.R. § 35.104 (1993).

[13] 28 C.F.R. § 35.130(c) (1993) (emphasis added).

[14] The preamble authorizes a state to design programs for those affected by particular disabilities. The preamble reads in part: "State and local governments may provide special benefits, beyond those required by non-discrimination requirements of this part that are limited to individuals with disabilities or a particular class of individuals with disabilities, without incurring additional obligations to other classes of persons with disabilities." *Easley*, 36 F.3d at 301 (citing 28 C.F.R. ch. I, pt. 35, app. A (1993)).

[15] The state also argued that the Care Act was consistent with the Rehabilitation Act, the forerunner of the ADA. *Id.*

[16] The district court referred to an ADA regulation which prohibits a public entity from "impos[ing] or apply[ing] eligibility criteria that screen out . . . an individual with a disability or any class of individuals" from benefiting from a state service or program, unless "such criteria can be shown to be necessary for the provision of the service, program or activity being offered." *Id.* (citing 28 C.F.R. § 35.130(b)(8) (1993)).

[17] *Id.*

[18] *Id.*

the outcome of this case must turn on "whether mental alertness is part of the essential nature of the [Care Program]."[19] To answer this question, the court first examined the PDPW Manual, which stated that the goal of the Care Program is " 'to allow the physically disabled to live in the least restrictive environment as possible [and] to remain in their homes,' " to prevent inappropriate institutionalization, and to allow the disabled to seek and/or maintain employment.[20] While the district court concluded that any physically disabled person, mentally alert or not, could achieve these goals with the assistance of the Care Program attendant care services, the appellate court held that this view of the essential nature of the program was incomplete in that it left out the nature of the "service[s] actually being offered."[21]

In its examination of the actual services offered, the court found that "personal control is essential to the program, and that mental alertness is a necessary requirement for receipt of the program's essential benefit rather than merely a service to benefit recipients."[22] Even when the level of agency involvement is at its highest (i.e., even when the agency employs the attendant on the behalf of the service recipient), "program beneficiaries do not relinquish personal control" over the selection of attendants and over the tasks the attendants perform.[23] Furthermore, the court recognized that the beneficiary's personal control over her care, and the resulting independence, is the goal of the Care Program. To achieve this goal, the court found that the physically disabled must be mentally alert.[24] The court noted that the Care Program existed to provide attendant care services to the disabled not only for the purpose of allowing beneficiaries to stay out of institutions and in their own

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[19] *Easley*, 36 F.3d at 302. In reaching this conclusion, the court reexamined two earlier cases relied on by the district court. Southeastern Community College v. Davis, 442 U.S. 397 (1979), held that the then-controlling Rehabilitation Act did not prohibit a federally funded nursing school program from denying a deaf applicant admission to its program because the applicant was not "otherwise qualified," a term defined by the court as "able to meet all of a program's requirements in spite of his handicap." *Id.* at 406. The court also relied on Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983), which held that the determination of whether a program is discriminatory is based on "whether the plaintiff meets the program's stated requirements in spite of his/her handicap" and "whether a reasonable accommodation could allow the handicapped person to receive the program's essential benefits." *Id.* at 231. Further, when determining whether an accommodation would allow the applicant to receive the benefit, a court cannot rely solely on the stated benefits because programs may attempt to define the benefit in a way that "efficiently denies otherwise handicapped individuals the meaningful access to which they are entitled . . . ." *Id.* (citing Alexander v. Choate, 469 U.S. 287, 300 (1984)).

[20] *Easley*, 36 F.3d at 302.

[21] *Id.*

[22] *Id.* at 303.

[23] *Id. See* discussion *supra* note 5.

[24] *Easley*, 36 F.3d at 303.

homes, but also to allow them to continue to live independently.[25] Therefore, the court reasoned, allowing individuals to participate in the program who were unable to exercise personal control over their own care was in conflict with the "programmatic goal" of the Care Program.[26]

The court found further support for this position in one of the stated goals of the Care Program—that of allowing the physically disabled to seek and maintain employment.[27] The requirements that the state may impose on a participant in a program designed to encourage the employment of the physically disabled may of necessity be different than the requirements of a program whose purpose is only to allow such people to remain out of institutions. The court found that since mental alertness is clearly a prerequisite to employment, it is therefore a reasonable requirement of a program that is designed to allow its beneficiaries to seek employment.[28]

Finally, the court considered the plaintiffs contention that their proposed use of surrogates to help them make the decisions regarding their care required by the Care Program was analogous to the Care Program's own "agency" and "combination" models of service delivery.[29] The court found, however, that "[a]ll three models require, at the very least, that the consumer make the best choice as to the best form of service delivery."[30] Thus, the court found that the use of surrogates by Care Program clients was "at complete odds with the program objectives" of participant control and independence, and that "mental alertness is a necessary prerequisite to participation" in the Care Program.[31]

The court then turned to the issue of whether the use of surrogates as decision-makers for non-mentally alert participants to satisfy the mental alertness requirement of the program was a "reasonable modification" within the meaning of the ADA. The "reasonable modification provision" of the ADA requires public entities to allow for such modifications "to avoid discrimination on the basis of disability" unless the modification would "fundamentally alter the nature of the services, program, or activity."[32] The test used by the court to determine the reasonableness of the modification was "whether [the modifica-

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[25] *Id.* The court stated that the program's goal was to deliver services to the physically disabled in order to preserve their independence and recognized that if the intended program participants were not physically disabled, they would be in full control of their own lives. *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 304.

[30] *Id.* The court also found support for this position in its examination of Pennsylvania's history of targeting specific classes of the disabled for assistance. The court cited the Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (1969 & Supp. 1994) as an example of the state's commitment to "alleviat[ing] the lot" of a class of the disabled. *Easley*, 36 F.3d at 303.

[31] *Id.* at 304.

[32] 28 C.F.R. § 35.130(b)(7) (1993).

tion] alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program."[33] Noting that allowing the modification would "change the entire focus of the program" from "the provision of attendant care and its societal objectives for the physically disabled to personal care services to the many thousands of physically disabled who are often served by other specially designed state programs," the court concluded that the modification would create "an undue and perhaps impossible burden on the State," perhaps even jeopardizing the existence of the program by forcing the state to "provide attendant care services to all physically disabled individuals, whether or not mentally alert."[34] Thus, the court held that the use of surrogates would be an unreasonable modification of the Care Program.[35]

The final issue considered by the court was the contention that the Care Act discriminated against the plaintiffs under the provisions of the ADA because they were afflicted not only by a disability that the Act was intended to alleviate, but by an additional disability as well.[36] To undermine this argument, the court referred to the language of the ADA and the Rehabilitation Act, an independent evaluation of the Care Program conducted by several social service providers at the behest of the PDPW,[37] and the regulations implementing the acts as addressing specific classes of disabled persons.[38] The court also cited several federal and state social service programs that serve only a narrow class of disabled people.[39] The court found that the ADA similarly contemplates reaching "groups of the disabled without incurring obligations to other

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[33] *Easley*, 36 F.3d at 304 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987); Alexander v. Choate, 469 U.S. 287, 300 (1985); Nathanson v. Medical College of Pa., 926 F.2d 1368, 1384-86 (3d Cir. 1991)).

[34] *Id.*

[35] *Id.*

[36] *Id.* The plaintiffs and the lower court relied on a regulation implementing the ADA, 28 C.F.R. § 36.302(b)(2) (1994), which reads in part:

> A health care provider may refer an individual with a disability to another provider, if that individual is seeking . . . services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

The plaintiffs acknowledged that the state may provide a service to a group of people on the basis of a disability, but claimed that the regulation did not give the state the right to exclude the plaintiffs from receiving that service on the basis of an additional disability. *Easley*, 36 F.3d at 304.

[37] *Id.* at 302, 305.

[38] *Id.* at 305.

[39] *Id.* Specifically, the court noted government programs provided for by the following statutes: the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (Supp. V 1993), which provides vending licenses to the blind; PA. STAT. ANN. tit. 43, §§ 1461-1467 (1991 & Supp. 1994), a Pennsylvania program which provides for the deaf and hearing impaired; and PA. STAT. ANN. tit. 35, §§ 6201-6208 (1993), another Pennsylvania program which provides for the care of persons suffering from chronic renal disease.

groups of handicapped."[40] As the court succinctly stated, "the Care Act does not discriminate against the mentally disabled; it focuses on a different class of handicapped."[41] Therefore, the provisions of the Care Act and the Care Program which provide attendant care only to mentally alert physically disabled individuals do not violate the ADA.[42]

III. CONCLUSION

In *Easley v. Snider*, the court held that under the provisions of the Americans with Disabilities Act, a state entity or agency can provide a program or service for the benefit of one specific class of disabled individuals, and may do so by imposing a requirement on program participation if such a requirement is part of the "essential nature" of the program. The state is not required to make every program for disabled people available to every disabled person, and may tailor such programs to the unique needs and abilities of the various subpopulations within the disabled community. The ADA was not intended to restrict the services that states may provide to the disabled, nor to force states to create only programs broad enough in scope to include every disabled individual in every program.

Gabrielle Sellei

Petersen, et al., v. Hastings Public Schools, 31 F.3d 705 (8th Cir. 1994). SCHOOL DISTRICT'S DECISION TO EDUCATE HEARING-IMPAIRED STUDENTS BY USE OF A SIGN LANGUAGE SYSTEM OTHER THAN THAT USED IN THE STUDENTS' HOMES DID NOT VIOLATE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT OR THE AMERICANS WITH DISABILITIES ACT.

I. INTRODUCTION

Petersen v. Hastings Public Schools[1] provides an example of a court using its analysis of a claim brought under the Individuals with Disabilities Education Act[2] to dispose of a charge brought under the Americans with Disabilities

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[40] *Easley*, 36 F.3d at 305. The court noted that cases of interpreting the Rehabilitation Act achieved the same result. " 'There is nothing in the Rehabilitation Act that requires any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.' " *Id.* (citing Traynor v. Turnage, 485 U.S. 535, 548 (1987)).

[41] *Id.*

[42] *Id.* at 306.

[1] Petersen v. Hastings Public Schools, 31 F.3d 705 (8th Cir. 1994).

[2] 20 U.S.C. §§ 1400-1484a (Supp. IV 1992).

Act.[3]

II. BACKGROUND

Nicholas Petersen, Alex Petersen, and Kendra Janssen, students of Hastings Public Schools, are hearing-impaired. The children communicate through sign-language and require sign-language interpreters in the classroom.[4]

In their homes, the children use the strict Signing Exact English or SEE-II signing system.[5] Hastings Public Schools (the "School District") utilizes a signing system it developed, a "modified" SEE-II system.[6]

The children's parents opposed the use of the modified system and made numerous requests to the School District to implement the strict SEE-II system. The School District refused.[7] Claiming that the School District's decision to use a modified SEE-II system deprived their children of minimally adequate individualized special education programs as required by the Individuals with Disabilities Education Act ("IDEA") and the Nebraska Special Education Act ("NSEA")[8], the parents sought an administrative hearing with the Nebraska Department of Education.[9] At this administrative proceeding, the hearing officer found that the School District had provided reasonable justification for its use of the modified SEE-II system,[10] and concluded that the School District was not obligated to implement the strict SEE-II system.[11]

The children and parents then brought action in the United States District Court for the District of Nebraska, claiming that the hearing officer erred in deciding that the School District's use of the modified signing sytem was not

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[3] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

[4] *Petersen*, 31 F.3d at 705.

[5] *Id.*

[6] *Id.* at 705-06. Under the School District's modified SEE-II signing system, strict SEE-II principles are used eighty-five percent of the time, and the modifications are used the remaining fifteen percent of the time. *Id.* at 706. The school's modifications to the SEE-II system were designed to supplement the educational needs of hearing-impaired children while in school. The modifications sought to simplify several elements of the strict system to allow young students just beginning to sign to learn the language more easily. *Id.*

[7] *Id.*

[8] NEB. REV. STAT. §§ 79-3301 to -3365 (1987 & Supp. 1992).

[9] *Id. See* NEB. REV. STAT. §§ 79-3301 to -3365 (1987 & Supp. 1992)). See *infra* text accompanying notes 17-21 for an overview of the Individuals with Disabilities Education Act and for clarification of the parents' right to an administrative hearing.

[10] The School District asserted that the modified SEE-II system included several simplifications of the strict system which helped young students, who were new to sign-language, to learn it more easily. *Petersen*, 31 F.3d at 706.

[11] *Id.* The parents had also claimed that the School District was required to provide sign-language interpreters "during non-academic portions of the school day in addition to the classroom activites for which interpreters had been previously supplied." The hearing officer agreed. *Id.*

in violation of the IDEA, or its state counterpart, the NSEA.[12] In addition, the children and parents claimed that under the Americans with Disabilities Act ("ADA"), the School District was required to honor their choice of the strict SEE-II system.[13] Rejecting both claims, the district court ruled in favor of the School District.[14]

The children and parents appealed to the United States Court of Appeals for the Eighth Circuit, arguing that the IDEA and the ADA require the School District to provide classroom instruction in the signing system of the students' choice, rather than the School District's choice.[15] The Eighth Circuit affirmed the lower court's decision.[16] Its examination of the issues is discussed below.

III. ANALYSIS: INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Under the Individuals with Disabilities Education Act,[17] a state may receive federal funds to assist in the education of disabled children, so long as that state complies with certain requirements.[18] The primary requirement is that a participating state effectuate a policy which ensures all children with disabilities the right to a "free appropriate public education."[19] A "free appropriate public education" is one that is tailored to the unique needs of the child by means of an individualized education program ("IEP").[20]

The IDEA provides parents the opportunity to challenge school district decisions regarding their child's IEP at a state administrative hearing, and it permits either party to appeal the hearing officer's decision to federal court.[21] As

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 705.

[17] The IDEA was originally known as the "Education of All Handicapped Children Act of 1975." *See, e.g.*, Nagle v. Wilson Sch. Dist., No. 93-4658, 1994 U.S. Dist. LEXIS 13927, at *17 n.9 (E.D. Pa. Sept. 26, 1994).

[18] *Petersen*, 31 F.3d at 706 (citing Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52, 53 (8th Cir. 1986), *cert. denied*, 480 U.S. 936 (1987)). *See also* 20 U.S.C. § 1412 (1988 & Supp. V 1993). Currently, all fifty states and the District of Columbia receive federal funding under the IDEA. Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 299 n.21 (1993).

[19] *Petersen*, 31 F.3d at 706 (citing 20 U.S.C. § 1412(1) (Supp. IV 1992)).

[20] *Id. See also* 20 U.S.C. §§ 1401(a)(18)(D), (a)(20) (1988 & Supp. V 1993). A disabled child's IEP must be developed by a multidisciplinary team, including the child's parents or guardian. 20 U.S.C. § 1401(a)(20) (1988 & Supp. V 1993); 34 C.F.R. § 300.340-.345 (1993). The IEP must include the present educational performance of the child, goals for improvement in that performance, as well as details regarding the specific educational services to be provided to the child. 20 U.S.C. § 1401(a)(20) (1988 & Supp. V 1993); 34 C.F.R. § 300.346 (1993).

[21] *Petersen*, 31 F.3d at 707 (citing 20 U.S.C. §§ 1415(b)(1)(E), (e)(4)(A) (Supp.

set forth by the United States Supreme Court in *Board of Education v. Rowley*,[22] a court's inquiry in evaluating challenges to an IEP is twofold.[23] "First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits?"[24] The Supreme Court has dictated that "[i]f these requirements are met, the State has complied with obligations imposed by Congress and the courts can require no more."[25]

The children and parents did not claim that the State failed to satisfy the procedural requirements set forth in the IDEA.[26] Thus, the issue in this case involved the second prong: specifically, whether the School District's decision to use a modified SEE-II signing system for each child's IEP was reasonably calculated to enable the children to receive educational benefits.[27] To determine whether the children had received educational benefits, the *Petersen* court "[f]ollow[ed] the mandate set forth in *Rowley*," and looked to the disabled students' "achievement of passing marks and progress from grade to grade."[28] In other words, if each child improved academically, the School District's use of the modified SEE-II signing system had enabled each to receive educational benefits.[29]

The court found that Nicholas Petersen, Alex Petersen, and Kendra Janssen had improved academically.[30] Thus, the Eighth Circuit decided the children had received educational benefits from the School District's use of the modified SEE-II signing system.[31] By conferring educational benefits on the hearing-impaired children, the School District satisfied the mandate of the IDEA and was not required to implement the strict SEE-II signing system.[32] The

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IV 1992)).

[22] 458 U.S. 176 (1982).

[23] *Petersen*, 31 F.3d at 707.

[24] *Id.* (quoting *Rowley*, 458 U.S. at 206-07).

[25] *Id.* (quoting *Rowley*, 458 U.S. at 207).

[26] *Id.*

[27] *Id.* With regard to the second prong, the Eighth Circuit explained that "[u]nder *Rowley*, the [S]chool [D]istrict meets the [IDEA]'s requirements of providing a 'free appropriate public education' when the personalized instruction is given 'with sufficient support services to permit the child to benefit educationally.' " *Id.* (quoting *Rowley*, 458 U.S. at 203).

[28] *Id.* (citing *Rowley*, 458 U.S. at 207). *See Rowley*, 458 U.S. at 207, n.28 ("When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit.").

[29] *Petersen*, 31 F.3d at 707.

[30] *Id.* For instance, the School District planned to promote Nicholas Petersen to the next grade level based on his achievements in the classroom and on standardized tests. *Id.*

[31] *Id.* at 708.

[32] *Id.* The *Petersen* court acknowledged that the concerns of the children and par-

court noted, "[w]ere we to conclude that parents could demand that their children be taught with a specific signing system, we would be creating the potential that a school district could be required to provide more than one method of signing for different students whose parents had differing preferences."[33]

IV. ANALYSIS: AMERICANS WITH DISABILITIES ACT

The parents and children also charged that the School District's decision to use the modified SEE-II signing system violated the Americans with Disabilities Act ("ADA").[34] Among the mandates of the ADA is the stipulation that an individual with a disability may not "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[35] The ADA's implementing regulations further state:

> The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity . . . . The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required [because the public entity can demonstrate that the proposed action would result in undue financial or administrative burdens].[36]

The parents and children argued that the School District failed to give their choice of using the strict SEE-II signing system "primary consideration" and that the modified SEE-II signing system was not an "effective means of communication."[37]

The court did not address whether or not the School District gave primary consideration to the parents' and children's choice of using the strict signing system. As for the plaintiffs' second argument, the Eighth Circuit relied on its analysis of the IDEA claim and stated only that "there was ample evidence that after the School District had implemented the modified signing system, the children's scholastic performance improved. Therefore, the system has

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ents were legitimate, but stated that it was prohibited "from displacing the sound educational policy judgments of the school district." *Id.* at 707 (citing *Rowley*, 458 U.S. at 200). Moreover, the IDEA "does not require states to provide each handicapped child with the best possible education at the public expense." *Id.* at 708 (quoting A.W. *ex rel.* N.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158, 163-64 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987)).

[33] *Id.*

[34] *Id.*

[35] 42 U.S.C. § 12132 (Supp. V 1993).

[36] 28 C.F.R. pt. 35.160, app. A at 463 (1993). As used in the regulations, "auxiliary aids and services" includes "qualified interpreters." A "qualified interpreter" is "an interpreter who is able to interpret effectively, using any necessary specialized vocabulary." 28 C.F.R. § 35.104 (1993).

[37] *Petersen*, 31 F.3d at 708.

proven to be an effective means of communication."[38] Because the modified SEE-II signing system was an "effective means of communication," the court held that the School District had not violated the ADA.[39]

V. CONCLUSION

Under the IDEA, children with disabilities are entitled to a free, appropriate public education, tailored to meet their unique needs by means of an individualized education program or IEP.[40] Parents must be involved in the development of the IEP, and the IEP should include services, such as sign language interpretation, that a child with a disability would need to facilitate his education.[41] In *Petersen*, the Eighth Circuit concluded that a showing of improved academic performance by the children proved that the School District complied with the requirements of the IDEA.[42]

Under the ADA, persons with disabilities may "not be denied the benefits of the services, programs, or activities of a public entity."[43] Moreover, under the ADA, such persons choice of auxiliary aids and services, such as sign language interpretation, must be honored by the public entity (school district), unless the school district can demonstrate that another effective means of communication exists.[44] Faced with the claim that Hastings Public Schools failed to satisy these ADA requirements, the court simply deferred to its analysis of the requirements of the IDEA.[45] The court found that a showing of improved academic performance by the disabled children proved that the School District complied with the ADA.[46]

Michelle Kavoosi

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[38] *Id.*
[39] *Id.*
[40] *See supra* notes 19-20 and accompanying text.
[41] *See supra* note 20.
[42] *See supra* notes 30-32 and accompanying text.
[43] *See supra* note 35 and accompanying text.
[44] *See supra* note 36 and accompanying text.
[45] *See supra* notes 37-39 and accompanying text.
[46] *See supra* notes 38-39 and accompanying text.

Sarsycki v. United Parcel Service, 862 F. Supp. 336 (W.D. Okla. 1994). COMPANY POLICY PROHIBITING AN INSULIN-DEPENDENT DIABETIC FROM DRIVING A MOTORIZED VEHICLE WEIGHING LESS THAN 10,000 POUNDS WHEN THE INDIVIDUAL IS OTHERWISE QUALIFIED TO DRIVE VIOLATES THE AMERICAN WITH DISABILITIES ACT.

I. BACKGROUND

In March, 1982, United Parcel Service ("UPS") hired Michael Sarsycki.[1] Employed as a full-time package car driver, Sarsycki drove vehicles weighing less that 10,000 pounds. Nine years later, doctors diagnosed Sarsycki as a insulin-dependent diabetic.[2] This discovery prompted UPS to invoke a company policy prohibiting insulin-dependent diabetics from driving motorized vehicles on public highways. In doing so, UPS reassigned Sarsycki to a part-time car washer position in July, 1991.[3]

In March, 1992, Sarsycki filed a claim with the Oklahoma Human Rights Commission alleging that UPS violated Oklahoma's anti-discrimination statute.[4] Sarsycki also filed two grievances through his union.[5] On June 21, 1993, Sarsycki accepted a second part-time non-driving job enabling him to work over forty hours per week. A collective bargaining stipulation required Sarsycki to execute a written agreement in the presence of his union representatives and lawyer. This agreement stated that the two jobs were "reasonable accommodation" for Sarsycki's predicament. Although the agreement acted as a settlement of the union grievances, a related document demonstrated that Sarsycki did not view the two part-time jobs as a reasonable accommodation. Rather, he stated that he would accept the offer if no other options were available. Hence, Sarsycki accepted the second part-time job while maintaining that he was a qualified package car driver.[6]

Sarsycki filed suit in the United States District Court Western District of Oklahoma against UPS alleging discrimination on the basis of a physical disability in violation of the American with Disabilities Act ("ADA")[7] and the Oklahoma Anti-Discrimination Act.[8] At the time of the trial, Sarsycki held

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[1] Sarsycki v. United Parcel Service, 862 F. Supp. 336,338 (W.D. Okla. 1994).

[2] *Id.*

[3] *Id.*

[4] OKLA. STAT. ANN. tit. 25, §§ 1101-1901 (West 1987 & Supp. 1995). Specifically, the court cited OKLA. STAT. ANN. tit. 25, § 1901 (West Supp. 1995).

[5] *Sarsycki*, 862 F. Supp. at 338. The grievances Sarsycki filed included: "(1) UPS' refusal to allow him to work as a package car driver and (2) UPS' refusal to combine part-time jobs to allow Sarsycki to work approximately the same number of hours as before his diagnosis." *Id.*

[6] *Id.*

[7] 42 U.S.C. § 12101-12213 (Supp. V 1993).

[8] *See supra* note 4.

both part-time jobs at UPS.[9]

In its motion for summary judgment and motion to dismiss, UPS presented four alternative theories. First, it claimed that federal law pre-empted the state law claims. Second, UPS argued that Sarsycki failed to state a claim under Oklahoma's public policy tort law. Third, UPS insisted that Sarsycki failed to establish that it committed intentional disability discrimination under the ADA. Fourth, UPS argued that Sarsycki waived his right to claim discrimination under the ADA when he signed the agreement accepting the two part-time jobs as a reasonable accommodation.[10]

II. ANALYSIS

A. *Preemption and the Public Policy Tort*

In its brief analysis of UPS' first proposition, the court reasoned that labor claims must be resolved by governing state law or dismissed as pre-empted by federal law. The district court judge dismissed Sarsycki's state law claims as pre-empted by two federal laws, the National Labor Relations Act ("NLRA")[11] and the Labor Management Relations Act ("LMRA").[12] The court also quickly disposed of Sarsycki's second claim that UPS committed a public policy tort.[13] Thus, the court found that Sarsycki's claim of wrongful

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[9] *Sarsycki*, 862 F. Supp. at 338.

[10] *Id.*

[11] 29 U.S.C. §§ 151-169 (1988 & Supp. V 1993).

[12] 29 U.S.C. §§ 141-197 (1988 & Supp. V 1993). According to the United State Supreme Court, "a suit in state court alleging a violation of a provision of a labor contract must be brought under section 301 [of the LMRA] and be resolved by reference to federal law." *Sarsycki*, 862 F. Supp. at 339 (quoting Allis-Chalmers Corp. v. Lueck, 471 U. S. 202, 209-10 (1985)). The court found that the NLRA protected employees from unfair labor practices such as interference, restraint, or coercion in their right to engage in collective bargaining. The court then held that UPS interfered with Sarsycki's concerted activities in pursuit of his collective bargaining rights. Applying the conclusion reached in *Lueck*, the court stated that "when resolution of a state claim is substantially dependent upon analysis of the terms of an agreement made between parties in a labor contract, that claim must be either treated as a section 301 claim, . . . [citations omitted] or dismissed as pre-empted by federal labor contract law." *Id.* (quoting *Lueck*, 471 U.S. at 220).

[13] In 1989, the Oklahoma Supreme Court provided a narrow public policy exception for the at-will termination rule for claims of wrongful discharge. Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). The court also noted that the United States Court of Appeals for the Tenth Circuit rejected a plaintiff's request to expand the public policy tort to include wrongful failure to hire claims. Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 248-49 (10th Cir. 1993). *Sanchez* relied on the Oklahoma Supreme Court's refusal to expand the public policy tort past its narrow exception. The court agreed with *Sanchez* stating that "'the Oklahoma Supreme Court has been very precise in carving out narrow exceptions to the employment-at-will doctrine, and we are unwilling to unnecessarily expand those exceptions.'" *Sarsycki*, 862 F. Supp. at 339 (quoting *Sanchez*, 992 F.2d at 248).

discriminatory conduct by UPS failed under Oklahoma's public policy tort law.

B. *Sarsycki's Claims and the ADA*

The district court next examined whether Sarsycki presented a valid claim for intentional discrimination against an individual with a disability under the ADA.[14] The ADA describes a disability as "(A) a physical or mental impairment that substantially limits one or more to the major life activities of such an individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[15] Exploring the statutory construction of certain key terms, the court found that Sarsycki did have a disability covered by the ADA. The court began this segment of its analysis by referring to the Equal Employment Opportunity Commission's ("EEOC") clarification of the terms in its regulations. First, the court noted that the term " 'substantially limits' means, '[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.' "[16] The court then indicated three factors that determined whether an individual's disability restricted her major life activities: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected long term impact of or resulting from the impairment."[17] In addition, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines . . . ."[18] The parties agreed that without medication Sarsycki would be unable to perform major life activities.[19] These considerations convinced the court that Sarsycki did in fact suffer a disability as defined under the first prong of the ADA standard.

In the next portion of its ADA analysis, the court reviewed Sarsycki's claim

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[14] *Id.* The ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge or employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C § 12112(a) (Supp. V 1993).

[15] 42 U.S.C. § 12102(2) (Supp. V 1993).

[16] *Sarsycki*, 862 F. Supp. at 339 (quoting the EEOC regulations promulgated in 29 C.F.R. § 1630.2(j)(ii) (1993)).

[17] *Id.* at 340 (quoting 29 C.F.R. § 1630.2(j)(ii)(2) (1993)).

[18] *Id.* (quoting 29 C.F.R. § 1630.2(h) (1993)).

[19] The court found that the evidence submitted by Sarsycki and UPS was expected to show that Sarsycki would be unable to engage in major life activities without medication. In fact, Sarsycki's doctors were expected to testify that without insulin, he would "get sick, have multiple symptoms, and eventually lapse into a coma and die." *Id.* Further, it was undisputed that Sarsycki would have this condition for the rest of his life. *Id.*

that he could safely perform the essential functions of a full-time package car driver, thus making him a "qualified individual with a disability" under the ADA. Sarsycki conceded that because he was a diabetic he no longer met the UPS qualification standards for drivers. However, he argued that but for the UPS policy he could safely perform all essential functions of his job.[20] Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires."[21] As a reasonable accommodation, Sarsycki contended that the Oklahoma waiver policy for commercial motor vehicles weighing less that 10,000 pounds should replace the UPS policy. Sarsycki argued that the Oklahoma policy permitted him to drive despite his disability provided that food was within reach and that he carry neither passengers nor hazardous materials.[22] The court then examined whether under the ADA Sarsycki was a "qualified individual with a disability . . . [who] . . . with or without reasonable accommodation, [could] perform the essential functions of the employment position that . . . [he] holds or desires."[23] The court first analyzed UPS' contention that Department of Transportation ("DOT") regulations mandated its policy.[24] UPS defended its policy as exceeding DOT standards in order to promote the safety goals underlying DOT's policies.[25] In response, the court reasoned DOT's regulations indicated that insulin-dependent diabetics were not prohibited from operating vehicles under 10,000 pounds and that, read as a whole, did not apply to vehicles under 10,000 pounds.[26] The court found this interpretation consistent with the Federal Highway Administration's ("FHWA") statement that "a person is physically qualified to drive a CMV [commercial motor vehicle] if the person 'has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin control.' "[27] Combined, these sources demonstrated that federal law did not require UPS to apply its policy to vehicles weighing less than 10,000 pounds.

The court next indicated that UPS' policy could be justified based on safety concerns.[28] Under the ADA, safety concerns serve as a basis for a restrictive employment practice when the employer can show that "an individual with a disability poses a direct threat to the health or safety of other individuals in the workplace."[29] The ADA defines a direct safety threat as a "significant risk to the safety of others that cannot be eliminated by reasonable accommoda-

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[20] *Id.*

[21] 42 U.S.C. § 12111(8) (Supp. V 1993).

[22] *Sarsycki*, 862 F. Supp. at 340.

[23] *Id.* (quoting 42 U.S.C. § 12111 (8)(Supp. V 1993)).

[24] *Id.* (referring to 49 C.F.R. §§ 390.5, 391.41(b)(3) (1993)).

[25] *Id.*

[26] *Id.*

[27] *Id. See* 58 Fed. Reg. 40,690 (1993) (quoting 49 C.F.R. § 391.41(b)(3) (1993)).

[28] *Sarsycki*, 862 F. Supp. at 341.

[29] 42 U.S.C. § 12113(b) (Supp. V 1993).

tion."[30] Determining whether such an employee poses a direct threat entails undertaking "an individualized assessment of (1) the nature, duration and severity of risk; (2) the probability that potential injury will occur; and (3) whether reasonable modifications of policy will mitigate the risk."[31] The court stated that individualized analyses are "absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices."[32] The court concluded that UPS had not conducted an individualized assessment as to whether Sarsycki posed a direct threat to the health and safety of his fellow employees. Instead, the court found that UPS relied on *Chandler v. City of Dallas* which held that insulin-dependent diabetics are not qualified to operate motor vehicles.[33] Accordingly, the court reasoned that UPS believed Sarsycki to be unable to operate a motor vehicle. However, the court decided that the FHWA's waiver program for insulin-dependent commercial vehicle drivers overruled *Chandler* and precluded UPS' argument.[34] Therefore, the court stated that Sarsycki sustained his burden to demonstrate that he was otherwise qualified to drive vehicles under 10,000 pounds with the reasonable accommodation that he have food within reach and not carry hazardous materials or passengers.[35]

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[30] 42 U.S.C. § 12111(3) (Supp. V 1993).

[31] 28 C.F.R. § 36.208(c) (1994).

[32] *Sarsycki*, 862 F. Supp. at 341 (quoting Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993) (holding blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officers violates the ADA)); *see also* Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Ariz. 1992) (holding that coaches in wheelchairs may not be prohibited from a baseball field, regardless of the coach's disability or field or game condition, without violating the ADA, and that under the ADA, the league must make an individualized assessment of the nature, duration, and severity of the risk posed by each coach in a wheelchair).

[33] *Sarsycki*, 862 F. Supp. at 341 (citing Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994)). *Chandler* was decided under the Rehabilitation Act. The court stated:

> the provisions relating to insulin dependent diabetes and impaired vision[] have been in effect since 1970. Since that time, the Federal Highway Administration has had numerous opportunities to revisit these regulations, and to update them if need be. Yet the physical requirements regarding insulin dependent diabetes and impaired vision have remained unchanged. The statement of the Administrator of the Federal Highway Administration in the preamble to the proposed regulations remains valid to this day: 'accident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention.'

Chandler, 2 F.3d at 1394 (quoting 34 Fed. Reg.9,080, 9,081 (1969)).

[34] The court noted that the ADA helped bring about this policy change by requiring the FHWA to conduct a review of its regulations to determine whether the standards conformed with current knowledge about a disabled person's capabilities. *Sarsycki*, 862 F. Supp. at 341.

[35] The court took note of the fact that UPS admitted that Sarsycki's diabetes was

The court also found that "otherwise qualified handicapped individuals claiming discrimination need not establish an intent to discriminate."[36] Thus, UPS' stipulation that it had refused to allow Sarsycki to return to his package car driver position, because of the company policy forbidding all insulin-dependent diabetics from having such a position, was a sufficient enough showing to satisfy the burden of proof required by the ADA.[37]

Finally, the court found that the language of the settlement and concurrent letter indicated that UPS and Sarsycki had not reached a settlement agreement. Therefore, Sarsycki did not waive his right to sue.[38] The court entered judgment for Sarsycki on the ADA claim and for UPS on the state law discrimination claim. With that, the court scheduled a hearing to determine damages to be awarded under the ADA.[39]

III. CONCLUSION

The Americans with Disabilities Act prohibits discrimination against disabled individuals. Although public safety considerations may, in limited circumstances, override the ADA's goals, those exceptions must be expressly stated by the legislature or governmental agencies. A company may not maintain a policy prohibiting an insulin-dependent diabetic from driving motor vehicles weighing less than 10,000 pounds. Such a rule discriminates against the individual, especially if he is otherwise qualified to drive.

Clay C. Arnold

Tyndall v. National Education Centers, Inc., 31 F.3d 209 (4th Cir. 1994). A DISABLED EMPLOYEE WHO CANNOT MEET THE ATTENDANCE REQUIREMENTS OF A JOB IS NOT A "QUALIFIED" INDIVIDUAL UNDER THE AMERICAN WITH DISABILITIES ACT, ALTHOUGH THE EMPLOYEE HAS THE NECESSARY SKILLS TO PERFORM THE JOB.

I. INTRODUCTION

In many cases, qualification for a job is not measured simply in terms of

currently under control, that he had not experienced a hypoglycemic episode since being diagnose with diabetes in 1991, and that there was medical testimony indicating his ability to safely maintain his driving position. *Id.*

[36] *Id.* at 342 (citing Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1384 (3d Cir. 1991)).

[37] *Id.*

[38] *Id.*

[39] *Id.*

whether the person has the necessary skills to perform the work. For many disabled individuals, the issue is whether the employee or job applicant needs reasonable accommodations, and whether the employer is willing to provide these accommodations.

In *Tyndall v. National Education Centers, Inc.*,[1] the Fourth Circuit addressed the issue of reasonable accommodations. In this case, a former instructor, who suffered from an autoimmune system disorder, brought suit against her former employer, a business college, alleging that her termination violated the Americans With Disabilities Act ("ADA")[2] and the Virginians With Disabilities Act ("VDA").[3] The court concluded that the instructor was not "qualified" for the position under the ADA on account of her poor attendance record, that the college did not unlawfully discriminate against the instructor based on her association with her disabled son, and even if the instructor was qualified, the college did not discriminate against her because of her own disability.[4]

II. BACKGROUND

The plaintiff, Mary Tyndall, was discharged from her position as an instructor by the defendant, Kee Business College ("Kee" or the "employer"), a school owned by the National Educational Centers ("NEC") and located in Richmond, Virginia.[5] Tyndall suffered from lupus erythematosus, a disorder that "cause[d] her joint pain and inflammation, fatigue, and urinary and intestinal disorders."[6]

In 1989, Tyndall enrolled as a "medical assisting" student at Kee. After graduating in May 1990, she began to work for Kee's Allied Health Department (the "Department") as a part-time instructor. She was hired by Dale Seay ("Seay"), the head of the Department. Seay, as well as other Kee staff members, was aware that Tyndall suffered from the lupus condition when she was hired.[7] Kee made every effort to accommodate Tyndall's disability.[8]

In 1992, Tyndall began missing work with increasing frequency.[9] At some

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[1] Tyndall v. National Education Centers, Inc., 31 F.3d 209 (4th Cir. 1994).

[2] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

[3] VA. CODE ANN. § 51.5-1 (Michie 1991).

[4] *Tyndall*, 31 F.3d at 209.

[5] *Id.* at 211.

[6] *Id.*

[7] *Id.*

[8] Tyndall was permitted "to take sick leave, to come into work late or leave early, and to take breaks from on-going classes whenever she felt ill." *Id.* In addition, if Tyndall felt ill during the work day, the staff "would accompany her to the restroom to help her, and would offer her a ride home." *Id.* Tyndall admitted that Kee never refused any request for accommodation which she made. *Id.*

[9] Tyndall missed nineteen days from January to July 15, 1992. She spent one day helping a friend with legal work, ten days because of her disability, and eight days to attend to her son, who suffered from a gastro-esophageal reflux disease. Kee approved

point during this period, Seay brought these frequent absences to her attention. In mid-July, 1992, Tyndall requested another leave of absence to take effect from July 23 to August 17 because her son was to undergo surgery in Alabama.[10] This request was granted. However, before she was scheduled to return to work, Tyndall informed the school on August 10 that she needed additional time off to care for her son. At a subsequent meeting on August 12 to discuss this request, Tyndall explained that she had to accompany her son back to Alabama for post-operative care for an indefinite period of time but that she could work for one week beginning August 17.[11] Seay denied Tyndall's request on the grounds that "the additional leave of absence would cause [her] to miss the beginning of an instructional cycle for the third time in a row."[12] Moreover, Seay indicated that students and teachers, who had worked overtime to cover her classes, had complained about her absences, and that another leave would disrupt the school operations. At the suggestion of Seay, Tyndall resigned by signing a mutual separation agreement "because of everything going on in her life."[13] In spite of this, Seay encouraged Tyndall to reapply for employment when she was ready to return.

Subsequently, Tyndall filed a claim with the Equal Employment Opportunity Commission ("EEOC") under the ADA.[14] The EEOC determined that "the evidence did not establish a violation of the ADA."[15] In May, 1993, Tyndall filed a complaint against the NEC in the United States District Court for the Eastern District of Virginia alleging a violation of the ADA and the VDA. The complaint alleged: (1) that NEC discriminated against Tyndall because of her association with her disabled son; (2) that NEC failed to make reasonable accommodations for Tyndall's disability prior to her termination; (3) that NEC discriminated against her because they terminated her because of her disability; and (4) that NEC's action violated the VDA.[16] The district court granted summary judgment to NEC on all the counts,[17] to which Tyndall appealed.

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each of these absences. *Id.*

[10] *Id.*

[11] *Id.* at 212.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] With regard to the ADA claims (counts one and three), the district court found that NEC's reason for terminating Tyndall—that her frequent absences disrupted the school's operations—were nondiscriminatory. The district court found that Tyndall could offer no proof that this reason was a pretext for discrimination. The district court dismissed count two, the reasonable accommodations claim, on the ground that Tyndall admitted that NEC had never refused any of her requests for accommodation. Finally, the district court dismissed count four on the ground that the VDA does not apply to the NEC. *Id.*

III. ANALYSIS

In analyzing the ADA claim[18], the court noted that in order to establish a violation of the ADA,[19] the plaintiff must show: (1) that she has a disability; (2) that she is qualified for the job; and (3) that the adverse employment action at issue constitutes an unlawful discrimination based on the plaintiff's disability.[20]

A. *Determining Disability*

Although "disability" is a key term of art under the ADA,[21] the court concluded without discussion that Tyndall's lupus condition was a disability under the ADA.[22]

B. *Qualification*

A disabled individual is "qualified" under the ADA if, with or without reasonable accommodation, the individual "can perform the essential functions of the employment position" that such individual holds or desires.[23] Based on this definition, the court asked whether Tyndall "could perform the essential functions of the job"[24] and, if not, whether "any reasonable accommodation by the

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[18] The court held that count four, the VDA claim, failed for the same reasons as set forth in its analysis of the ADA claim.

[19] Under the ADA, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of the individual . . . ." 42 U.S.C. § 12112(a) (Supp. V 1993).

[20] *Tyndall*, 31 F.3d at 212.

[21] "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. § 12102(2) (Supp. V 1993). Such impairment may include any physiological disorder or condition, affecting the neurologic system, musculoskeletal system, or sense organs. 28 C.F.R. § 36.104 (1991); *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 278-80 (1986); *In re* Baby K., 832 F. Supp. 1022, 1028 (E.D.Va. 1993); *cf.* 45 C.F.R. § 84.3(j)(2)(i) (1985) (using similar language and defining physical impairment under the Rehabilitation Act, 29 U.S.C. § 294 (1985)).

[22] *Tyndall*, 31 F.3d at 212.

[23] 42 U.S.C. § 12111(8) (Supp. V 1993); *cf.* 29 C.F.R. § 1614.203(a)(6) (1993) (employing virtually the same language found in the Rehabilitation Act defining a "qualified individual with handicap"). The court also found that the ADA expressly states that provisions of the ADA will be interpreted in a way which does not conflict with or appear inconsistent with standards for the same requirements. 42 U.S.C. § 12117(b) (Supp. V 1993). Thus, the court relied on caselaw interpreting the Rehabilitation Act's "qualified" requirement in determining whether Tyndall was qualified. *Tyndall*, 31 F.3d at 213. The Supreme Court has also indicated that a "qualified" person must be "able to meet all of a program's requirements in spite of his handicap." *Id.* at 213 (citing Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)).

[24] The essential functions are those that bear more than a marginal relationship to

employer would enable [her] to perform those functions."[25] The court indicated that Tyndall had the burden of showing that she could perform the essential functions of her job with reasonable accommodation.[26] The court held that, in addition to having the skills necessary to perform the job, an employee must be willing and able to demonstrate these skills by coming to work on a regular and reliable basis. "An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."[27]

The court found that Tyndall was not qualified for the teaching position even though her performance was evaluated "excellent" and "good" by her superiors and she was capable of performing all of her teaching duties.[28] Specifically, the court found that regular and reliable attendance was an essential function of Tyndall's job and that her record reflected that she could not comply with this requirement.[29] As an instructor, Tyndall was required to spend time on campus with her students, particularly at the beginning of each instructional cycle.[30] However, she had missed two consecutive instructional cycles and would have missed a third one if Seay had approved her last request. Furthermore, the court found it significant that although the staff allowed "more than reasonable accommodations" for her lupus disability, her attendance problems still occurred.[31] For these reasons, the court held that Tyndall was not a "qualified individual with a disability" as required by the language of the ADA.

C. *Unlawful Discrimination*

The plaintiff asserted that Kee discriminated against her in two ways: (1) that Kee fired her because of "her association with her disabled son"[32] and (2)

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the job at issue. *Id.*

[25] *Id.* (citing Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir. 1993)).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] The court relied on cases construing the "qualified individual with handicap" language of the Rehabilitation Act to avoid conflict or inconsistency with the requirements of the acts. *See, e.g.*, Carr v. Reno, 23 F.3d 525 (D.C. Cir. 1994); Walders v. Garrett, 765 F. Supp. 303 (E.D. Va. 1991), *aff'd* 965 F.2d 1163 (4th Cir. 1992); Santiago v. Temple University, 739 F. Supp. 974 (E.D. Pa. 1990), *aff'd* 928 F.2d 396 (3d Cir. 1991); Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987).

[30] *Tyndall*, 31 F.3d at 213.

[31] *Id.* at 214.

[32] *Id.* The ADA states that an employer is prohibited from discriminating against an employee or a job applicant "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (Supp. V 1993). The Interpretive Guidelines to the ADA state that an employer may not take adverse employment action against an employee simply

because the ADA prohibited Kee from taking adverse employment action based on " 'the need of [the employer] to make reasonable accommodation[s] to the physical or mental impairments of the employee or applicant.' "[33] The court rejected the first discrimination claim, accentuating that the plaintiff's poor attendance record constituted sufficient grounds for dismissal. The court held that Kee did not fire Tyndall in response to future absences which would have resulted from an approval of Tyndall's request to provide post-operative care for her disabled son. Rather, the court was satisfied that Kee had a legitimate business reason to dismiss Tyndall: her extensive absences from the job, especially at the start of instructional cycles.[34] The court also found that the "ADA does not require an employer to restructure an employee's work schedule to enable an employee to care for a relative with a disability."[35]

With regards to the second discrimination claim, that Tyndall's disability motivated Kee to fire her, the court inferred a "strong presumption of nondiscrimination"[36] from the fact that the person who hired and fired Tyndall, Seay, knew of her disability at the time the hiring decision was made.[37] The court found "that an employer who intends to discriminate against disabled individuals or holds unfounded assumptions that such persons are not good employees would not be apt to employ disabled persons in the first place."[38] By presuming nondiscrimination in the same firer/hirer, the court felt that the primary purpose of the ADA was advanced: "to encourage employers to take on qualified individuals, regardless of their disability."[39] More importantly, Tyndall could not show that Kee's proffered reasons for terminating her were motivated by bias and a mere pretext for discrimination or that Kee sought to avoid making reasonable accommodations for Tyndall's disability.[40] Instead, the court found that the evidence warning Tyndall about excessive absences from work illustrated Kee's concern for Tyndall's health. The court characterized this evidence only as "discussion" necessary "to explore workplace problems" and that the ADA does not prohibit such discussions.[41]

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because the person might "miss work" in the future in order to care for a disabled third-party. 29 C.F.R. pt. 1630, app. (1993).

[33] *Tyndall*, 31 F.3d at 214 (quoting 42 U.S.C. § 12112(b)(5)(B) (Supp. V 1993)).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 214-15 (citing Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (age-based discrimination); *see also* Mitchell v. Data General Corp., 12 F.3d 1310, 1318 (4th Cir. 1993); Leblanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174-75 (8th Cir. 1992)).

[38] *Id.* at 215.

[39] *Id.*

[40] *Id. See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding that an employee has the burden to show that an adverse action was a pretext for discrimination, or that the employer had an available alternative to the adverse action).

[41] *Tyndall*, 31 F.3d at 215.

IV. Conclusion

The critical facts of this case are not disputed. First, the plaintiff's attendance record was poor. Second, the plaintiff enjoyed extensive accommodations from Kee's staff. Third, the person who hired and fired the plaintiff was the same individual and was aware of the plaintiff's disability at the time the hiring decision was made. It is for these reasons that the plaintiff's ADA claim was denied.

However, the court did not discuss whether the employer was aware of the potential effect of the disease and whether such an awareness would affect the court's analysis. In addition, it is unclear whether the employer was also aware of Tyndall's son's disability when she was hired.

Harvey Basil

Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994). THE COURT HELD THAT CONGRESS INTENDED FOR COURTS TO LOOK TO THE REHABILITATION ACT'S REGULATIONS WHEN DETERMINING WHETHER AN INDIVIDUAL IS DISABLED UNDER THE AMERICANS WITH DISABILITIES ACT.

I. Introduction

In October 1991, Floyd Bolton ("Bolton") suffered a work-related injury and took a medical leave of absence from his job as an order selector at Scrivner, Inc. ("Scrivner"), a grocery warehouse. When he was ready to return to work, Bolton followed company policy and underwent a physical examination. A company doctor concluded that Bolton was unable to resume his duties as an order selector.[1] Upon Scrivner's refusal to rehire him, Mr. Bolton filed a lawsuit in which he alleged that Scrivner discriminated against him on the basis of his disability and age, in violation of the Americans with Disabilities Act (the "ADA")[2] and the Age Discrimination in Employment Act (the "ADEA").[3]

The district court granted summary judgment to Scrivner holding that Bolton was not an "individual with a disability" as defined by the ADA. On appeal, the court affirmed, finding that while the evidence Bolton presented showed that he could not work as an order selector, it did not show that he was "substantially limited in the major life activity of working"[4] and, therefore, disabled within the meaning of the ADA. Additionally, the court held

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[1] Bolton v. Scrivner, Inc., 36 F.3d 939, 941 (10th Cir. 1994).
[2] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).
[3] 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).
[4] *Bolton*, 36 F.3d at 941.

that Bolton failed to meet his burden to prove that Scrivner had violated the ADEA.[5]

II. ANALYSIS

The issue in this case was whether Bolton was an "individual with a disability."[6] Bolton's first claim was that the district court used an improper definition of "disability" when it granted summary judgment to Scrivner. Consequently, the 10th Circuit Court of Appeals began its analysis with the ADA's definition of a disability as a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[7]

Although the ADA does not define "major life activities," the court noted that the ADA regulations adopted the definitions in the Rehabilitation Act regulations.[8] Applying the Rehabilitation Act's regulations, the court found "major life activities" to mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[9]

Bolton argued that he was substantially limited in the "major life activity" of working.[10] Under the ADA regulations, an impairment substantially limits

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[5] The court presumed that Bolton made out a prima facie case of age discrimination. Scrivner, however, met its burden of "articulating a 'facially nondiscriminatory' reason . . . 'that [was] not on its face, prohibited by' the ADEA." *Id.* at 944. Bolton then failed to produce evidence to support the inference that Scrivner's reason was a pretext for discrimination. "A plaintiff demonstrates pretext by showing either 'that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence.' " *Id.* (citing Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir. 1994) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). The court concluded that Bolton failed to show a nexus between the supervisor's comments and Scrivner's decision not to rehire Bolton. *Id.* The court also concluded that evidence of Scrivner's decision saving the company money was insufficient to demonstrate the requisite pretext because there was no indication that Scrivner had considered savings alone when it either implemented its injured workers policy or declined to rehire Bolton. *Id.* (citing Bolton v. Scrivner, Inc., 836 F. Supp. 783, 793 n.11 (D. Okla. 1993)).

[6] *Id.* at 942. The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* (quoting 42 U.S.C. § 12112(a) (Supp. V 1993)).

[7] *Id.* (quoting 42 U.S.C. § 12102(2) (Supp. V 1993)). This section of the ADA also states that the term "disability" means "a record of such impairment" or "being regarded as having such an impairment." *Id.*

[8] *Id.*

[9] *Id.* (quoting 29 C.F.R. § 1630.2(i) (1994)). In addition, the court was also guided by the definition found in the regulations the Equal Opportunity Employment Commission had issued to implement Title I of the ADA. *Id.*

[10] *Id.*

the major life activity of working when it significantly restricts an individual's "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."[11] The court also found that the ADA regulations specify that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."[12]

The court affirmed the district court's holding that Bolton's inability to return to Scrivner as an order selector without some accommodation was not a substantial limitation in the major life activity of working. Bolton argued that the principle announced in *Welsh* should not apply because he brought his claim under the ADA, not the Rehabilitation Act. The court responded that the ADA and the Rehabilitation Act define a disability in substantially similar terms.[13]

The court next turned to Bolton's alternative argument that he was significantly restricted in the major life activity of working as defined in *Welsh v. City of Tulsa*[14] and the ADA regulations.[15] The ADA regulations set forth six factors to aid the court in determining whether an impairment substantially limits a major life activity. The first three factors, which the court "*should*" consider when determining whether an impairment substantially limits a major life activity are as follows: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; [and] (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[16]

The second set of three factors which the court "*may*" consider when determining whether an impairment substantially limits the major life activity of working are as follows:

> (A) [t]he geographical area to which the individual has reasonable access; (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (C) [t]he job from which the individual has been disqual-

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[11] *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1994)).

[12] *Id.* The court found additional support for its analysis by referring to its decision in Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992), where the court found that the major life activity of working does not necessarily mean working at the job of one's choice. In interpreting the Rehabilitation Act, the court held that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap." *Bolton*, 36 F.3d at 942 (citing *Welsh*, 977 F.2d at 1419).

[13] *Id.* at 942-43 (citing Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994)). The court stated that Congress intended that relevant case law developed under the Rehabilitation Act would be applicable to the ADA's use of the term "disability." *Id.* at 943.

[14] 977 F.2d 1415 (10th Cir. 1992).

[15] *Bolton*, 36 F.3d at 943.

[16] *Id.* (quoting 29 C.F.R. § 1630.2(j)(2) (1944)) (emphasis added).

> ified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).[17]

During the trial, Bolton introduced evidence to show that he was unable to perform work and, therefore, qualified as disabled under the ADA.[18]

Applying the six factors above, the court of appeals found that the evidence Bolton produced did not prove that his impairment was a significant restriction on his ability to perform either a particular class of jobs or a broad range of jobs in various classes.[19]

III. CONCLUSION

To prove that he has a disability, a plaintiff must show that his impairment is severe enough to significantly affect his ability to perform a class of jobs or a broad range of jobs in the geographical area. Although the court held that Bolton's evidence did not meet this standard, it neither explained what evidence would have been sufficient nor announced guidelines to aid in future application of the factors to evidence.

Delida Costin

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[17] *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(ii) (1994)) (emphasis added).

[18] *Id.* at 943-44. Bolton introduced the following evidence at his trial: (1) Dr. Fine's July 1992 report that Bolton's impairment prevented him from performing his former job; (2) a report from another doctor who had concluded in May 1992 that Bolton could not return to any job where he had to stand for prolonged periods; (3) a notice from the Oklahoma Employment Opportunity Commission that awarded Bolton unemployment benefits because he could still perform similar work with some physical limitations; and (4) an opinion from the Oklahoma Worker's Compensation Court finding that Bolton sustained a nine percent permanent partial disability to his right foot and a twenty-nine percent permanent partial disability to his left foot and was temporarily disabled from October 23, 1991, to March 20, 1992.

[19] *Id.* at 944 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1994)). In order to succeed on the alternative argument, the court found that Bolton's evidence would have to address his vocational training, the geographical area he had access to, or the number and type of jobs demanding similar training from which he would also be disqualified. Instead the court found his evidence addressed the nature and severity, duration, and impact of his impairment. Hence, the evidence did not show that Bolton was prevented from performing a class of jobs. *Id.*

Siefken v. Village of Arlington Heights, No. 94 C 24, 1994 WL 505414 (N.D. Ill. Sept. 14, 1994). THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT DO NOT PROHIBIT A MUNICIPALITY FROM DISCHARGING A DIABETIC POLICE OFFICER WHOSE FAILURE TO MONITOR HIS CONDITION RESULTED IN A SEVERE HYPOGLYCEMIC REACTION WHILE ON DUTY THAT ENDANGERED THE LIFE AND PROPERTY OF OTHERS.

I. BACKGROUND

The Village of Arlington Heights ("the Village") hired James Siefken on June 30, 1992. As his superiors were aware, Siefken was a diabetic. After completing police academy training, Siefken began working as a probationary police officer on or about September 25, 1992.[1]

Almost eight months after his hiring, while driving a squad car, Siefken suffered a hypoglycemic reaction which caused him to drive recklessly and at dangerous speeds. Siefken had no recollection of events from the onset of the hypoglycemic reaction until he was stopped, forty-five miles from Arlington Heights, by police officers from two nearby towns. Siefken collapsed into a diabetic coma and was hospitalized. The next day Village officials ordered Siefken to prepare a memorandum of the incident. A few days later, the officials fired Siefken from his post.

Siefken sued the Village[2] claiming that his termination violated both the Americans with Disabilities Act ("ADA")[3] and the Rehabilitation Act.[4] The court granted defendant's motion to dismiss.[5]

II. ANALYSIS

Siefken argued he was terminated because of his diabetic condition. The Village contended it terminated Siefken because of his conduct, i.e., his inability to control his diabetes.[6] This argument, according to the court, oversimpli-

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[1] Siefken v. Village of Arlington Heights, No. 94 C 24, 1994 WL 505414, at *1 (N.D. Ill. Sept. 14, 1994).

[2] Siefken filed his complaint in the United States District Court for the Northern District of Illinois.

[3] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

[4] 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993). Specifically, the court cited 29 U.S.C. §§ 791-797b (1988 & Supp. V 1993).

[5] *Siefken*, 1994 WL 505414 at *1. The court held that the Village's decision violated neither the ADA nor the Rehabilitation Act, and that the Village need not risk the recurrence of a hypoglycemic episode by relying on Siefken's assurance that he will control his diabetes in the future. *Id.*

[6] The Village also maintained that Siefken had no property right in his position because of his status as a probationary employee. The court rejected this claim, tersely stating that the Village "cannot terminate an employee in violation" of the ADA or Rehabilitation Act. *Id.*

fied the issue since Siefken "was not engaged in a purposeful frolic of his own."[7] Siefken responded that his condition led to his conduct and, as a result of the incident, he had learned how to control his diabetes. The Village countered by questioning how Siefken, who was diagnosed with diabetes in 1987, managed to control his insulin dependency over the years if he never knew what to do.[8]

The court noted that if the Village had terminated Siefken upon learning of his diabetic condition, the case "would fit neatly within the [statutes]."[9] The Village, however, hired Siefken with the knowledge of his diabetes, thus prompting the court to scrutinize the policies and concerns of the statutes. According to the court, the issue was whether the Village's termination of Siefken because of the hypoglycemic episode violated the ADA or the Rehabilitation Act. Further, the court questioned whether the Village's unwillingness to risk a second hypoglycemic episode by relying on Siefken's assurances that he would control his diabetes in the future violated either statute.[10]

The court began its analysis by examining the statutes' allocations of burdens of proof. Both statutes required the plaintiff to show that, given reasonable accommodation, he could "perform the essential functions of the job."[11] The parties agreed that operating a vehicle is an essential function of employment as a patrol officer. Siefken argued that proper monitoring of his blood sugar level would enable him to perform that function. Thus, the court required the Village to prove "that any accommodation [was] unreasonable and that [Siefken posed] a direct threat to the health and safety of others that [could not] be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."[12] Additionally, the ADA required the employer to assess both the potential risks of Siefken's continued employment and possible accommodations to eliminate those risks.[13]

The court concluded that Siefken's failure to monitor his blood sugar level, in light of the fact that he had been diagnosed a diabetic and had been insulin dependent for six years, caused "a direct threat to the health and safety of others." The risk Siefken posed was real and severe, and not just potential.[14] The Village gave Siefken the opportunity to explain the matter and suggest potential accommodations to eliminate the risk of recurring hypoglycemic episodes.[15] Siefken, however, offered only reassurances that he would better con-

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at *2 (citing Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993); Interpretive Guidance to 28 C.F.R., pt. 35, subpt. A, § 35.104 (1991)).

[12] *Id.*

[13] *Id.* (citing 42 U.S.C. § 12182(b)(3) (1990); *Bombrys*, 849 F. Supp. at 1216-17; 28 C.F.R. § 36.208(c) (1994)).

[14] *Id.*

[15] The court observed that "no one" suggested a modification of policies, practices or

trol his condition in the future. The court concluded that the Village's decision, based on its full assessment of the events and possible accommodations, to forego the risk of recurrence violated neither the ADA nor the Rehabilitation Act.

In surveying case law to arrive at its decision, the court noted that blanket policies against hiring insulin-dependent diabetics have been upheld in cases involving interstate truck drivers[16] and FBI agents.[17] In other cases, courts have affirmed employment decisions based upon a diabetic employee's poor control history when the position involved driving or other hazardous activity.[18] Siefken's reliance on *Bombrys v. City of Toledo,*[19] where the court struck down a blanket policy excluding diabetics from positions as police officers, was misplaced, since the court there reserved to the city the final determination of whether the named plaintiff, who suffered a hypoglycemic reaction while on duty, was fit for the position.[20]

III. CONCLUSION

This case presented the court with the task of balancing ADA and Rehabilitation Act anti-discrimination policies with "legitimate employment needs and expectations" and the safety concerns of the public.[21] Siefken's termination was not the result of a suspect blanket exclusion, but was, in the view of the court, permissible in light of the dangers posed by his failure to monitor and control his insulin-dependent condition. The Village does not have to take a second chance.[22]

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procedures, or the provision of auxiliary aids or services to eliminate the risk. *Id.* The court did not specify whether the plaintiff or defendant had the burden of making these suggestions, or whether both bore equal responsibility.

[16] *Id.* (citing Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) (addressing a Department of Transportation policy prohibiting insulin-dependent diabetics from operating trucks on interstate highways).

[17] *Id.* (citing Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd without opinion*, 865 F.2d 592 (3d Cir. 1989)).

[18] *Id.* (citing Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989); Miller v. Sioux Gateway Fire Dept., 497 N.W.2d 838 (Iowa 1993)).

[19] 849 F. Supp. 1210 (N.D. Ohio 1993).

[20] *Siefken*, 1994 WL 505414 at *3. From a policy standpoint, the court recognized that blanket exclusions present a potential for abuse based on stereptypes. *Id.* For example, employees with asthma, or epilepsy, or who are obese, run an increased risk of sudden disability. *Id.* The court also noted that even diabetics exercising good control are not immune from hypoglycemic episodes. The risks vary among diabetics, and poor control only adds to those risks. *Id.*

[21] *Id.*

[22] *Id.*