



DBTAC: SOUTHEAST ADA CENTER

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Americans with Disabilities Act Case Law Developments 2010

Marking the 21 year anniversary of the passage of the Americans with Disabilities Act of 1990 (ADA), this document summarizes important decisions for 2010, providing precedent or influence in the Southeastern United States.

Since the passage of the ADA Amendments Act in 2008, the Federal courts have been tasked with applying the amended ADA in a variety of employment and civil rights contexts. The decisions of the courts in this critical time period will have long-term significance in

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establishing the future meanings of disability and discrimination in U.S. civil rights law.

The U.S. Circuit Courts of Appeals with jurisdiction over states in the Southeast Region include:

[Fourth Circuit](#) North Carolina (NC), South Carolina (SC)

[Fifth Circuit](#) Mississippi (MS)

[Sixth Circuit](#) Kentucky (KY) and Tennessee (TN)

[Eleventh Circuit](#) Alabama (AL), Florida (FL), Georgia (GA)

Access to the complete versions of the 'ADA Case Law Alerts and Briefs' presented in this paper are available from the Southeast DBTAC at:

www.sedbtac.org/legalissues.php?idpg=54&audience=All#CLresults

Additional 'Legal Updates & Issues' are available from the Southeast DBTAC at: www.sedbtac.org/legalissues.php?idpg=14.

Fifth (5th) Circuit Court of Appeals

Carmona v. Southwest Airlines Company

604 F.3d 848

April 22, 2010

Edward Carmona was a flight attendant who had psoriasis and psoriatic arthritis, which caused him to take 6-12 days of leave under the Family and Medical Leave Act each month. Mr. Carmona also took unexcused leave for illness and was disciplined for taking the unexcused leave. When Mr. Carmona injured his thumb and took 4 additional days of leave, he was fired under the leave policy of Southwest's collective bargaining agreement. Mr. Carmona sued Southwest under the ADA, claiming Southwest should have accommodated him for his psoriasis and

psoriatic arthritis by not counting his FMLA leave when applying its leave policy. At trial, a jury found for the plaintiff Carmona, but the district court overturned the jury decision, holding that the jury could not reasonably have found that the plaintiff's condition was a qualifying disability under the ADA. In its decision, the district court weighed the fact that Carmona's condition was intermittent and also that it could be alleviated by medication. Carmona appealed the district court decision to overturn the jury verdict. The 5th Circuit Court of Appeals considered the question of whether the district court should have excluded Carmona from ADA protection. The court ruled in favor of the appellant, Carmona, holding that a reasonable jury could have concluded that Carmona had a disability, even using pre-ADA Amendments Act standards, because Carmona's condition was not adequately relieved by medication, and

because while his arthritic attacks were not constant, they were very frequent.

Frame v. City of Arlington

2010 WL 3292980

August 23, 2010

The plaintiffs reside in the city of Arlington, Texas and are individuals with disabilities who have mobility impairments necessitating the use of motorized wheelchairs. The plaintiffs sued the city of Arlington based on the argument that inaccessible sidewalks, curbs and parking lots placed the city in violation of Title II of the ADA. The district court granted the City's motion for dismissal, holding that sidewalks, curbs and parking lots are not "services, programs, or activities" under Title II of the ADA. The plaintiffs appealed, and the 5th Circuit ruled for the appellants, holding that the district court should have understood that sidewalks, curbs and parking lots are

covered under Title II. The City petitioned for a rehearing. On rehearing, the 5th Circuit changed its decision, with one of three judges dissenting, holding that sidewalks, curbs, and parking lots are not “services, programs, or activities” in themselves, and only fall under Title II where they are specifically a gateway to actual services, programs and activities.

Hale v. King

No. 07-60997, 2010 WL 4013324

October 14, 2010

Plaintiff, John Hale, filed a complaint against Ronald King, superintendent of the Southern Mississippi Correctional Institution, other prison administrators, and several medical and psychiatric care staff in their official capacities, alleging violations of Title II of the Americans with Disabilities Act. Hale alleged the state denied his access to programs, services and benefits of the Correctional

Institution on the basis of his disabilities. Hale had been diagnosed with Hepatitis C, post-traumatic stress disorder, chronic depression, intermittent explosive disorder, and anti-social personality disorder. Due to these health issues, Hale was classified at “medical class III” under prison regulations. This classification limited his work and program assignments. Consequently, he had fewer opportunities for “meritorious earned time” that could give him privileges in the prison environment or secure his early release.

The district court held for the defendant, reasoning that the state and state officials are entitled to “sovereign immunity” from suits under Federal law, except when a violation of Title II of the ADA also violates a right protected under the 14th amendment to the Constitution. The court found that the prison had a “rational basis” for its medically restrictive policy, and therefore was not in

violation of the Constitution. Hale appealed to the 5th Circuit, raising the question of whether a Title II action could proceed without an entwined Constitutional violation. The circuit court did not fully resolve the question, but ultimately upheld the district court ruling, reasoning that it was not in a position to “second-guess” the rationality of a state’s administration of its prisons, and deferred to the state’s judgment in determining what a rational reason was for discriminating against Hale.

Sixth (6th) Circuit Court of Appeals

Equal Employment Opportunity Commission (EEOC) v. Hosanna-Tabor Evangelical Lutheran Church and School

597 F.3d 769

March 9, 2010

Cheryl Perich was terminated from her teaching position at Hosanna-Tabor Evangelical

Lutheran Church and School (Hosanna-Tabor), after taking a disability leave, and then attempting to return to work. Perich filed a charge with the EEOC for employment discrimination, and for retaliation. The EEOC filed suit against Hosanna-Tabor, and the district court granted summary judgment to Hosanna-Tabor and dismissed the suit, based on the defense that Perich's claims fall under the "ministerial exception" to the ADA. The "ministerial exception" allows religious entities to give preference to employees and applicants for ministerial positions based on their adherence to religious tenets. If a disability were to hinder a person's ability to follow a religious tenet, the ministerial exception would allow for discriminatory treatment based on the disability. Perich and the EEOC appealed the decision to the 6th Circuit. The circuit court found that as a teacher engaged primarily in teaching secular subjects, Perich was not a "ministerial

employee.” Therefore, the 5th circuit ruled in favor of Perich.

Lowe v. Hamilton County Department of Job and Family Services

610 F.3d 321

July 1, 2010

Uneek Lowe was hired by Hamilton County Department of Job and Family Services (HCDJFS) as a Medicaid eligibility technician. Lowe, who suffered from depression and Attention Deficit Hyperactivity Disorder (ADHD), was terminated in 2005 subsequent to several medical leaves, and conflicts with her employer. HCDJFS filed a motion to dismiss, arguing that as an arm of the state of Ohio, it was entitled to sovereign immunity, and was not vulnerable to claims under Title I of the ADA. The district court held that HCDJFS was not entitled to sovereign immunity. The defendant, HCDJFS appealed to the 6th Circuit

Court. The court upheld the decision of the district court, emphasizing that sovereign immunity only applies to state governments, and not to political subdivisions of the state. The circuit court applied a four factor test to determine that HCDJFS is not an “arm of the state,” emphasizing that local organizations that administer state funding, but function fairly independently, do not enjoy sovereign immunity.

Bowers v. Wynne

2010 WL 2869517

July 21, 2010

Bowers was a federal civilian employee who worked as an Air Reserve Technician for the Youngstown Air Reserve Station (Youngstown) in Vienna, Ohio. During her employment, Bowers suffered from depression, anxiety, and

related gastro-esophageal conditions. Bowers filed suit against Youngstown and Michael Wynne, Secretary of the Air Force, following her discharge. Bowers raised multiple issues in her suit, including disability discrimination in violation of the Rehabilitation Act. The United States government, due to the doctrine of sovereign immunity, generally cannot be sued for its wrongful or negligent acts or omissions. However, Congress enacted the Federal Tort Claims Act (FTCA) in 1946 to waive the sovereign immunity of the federal government, and allow it to be sued, in specific instances. In *Feres v. United States*, 340 U.S. 135 (1950), the Court held that military personnel could not pursue claims against the government under the FTCA that “arise out of or are in the course of activity incident to service.”

The 6th Circuit considered the question of whether as a civilian employee engaged in

military service, the Feres doctrine should apply to Bowers. The court ruled against Bowers, holding that her position required “performance of work directly related to national defense,” and therefore Rehabilitation Act claims should be barred against any of her superior officers. The ruling weighs against the prospect that federal civilian employees with disabilities who are working for the U.S. military will be able to advance disability and other civil rights discrimination claims under federal law.

Bates v. Dura Automotive Systems

625 F. 3d 283

November 3, 2010

Seven former employees of Dura Automotive Systems’ Lawrenceburg factory (Dura) filed an ADA Title I claim in order to challenge the employer’s drug testing policy. Dura worked with an independent drug testing company to

set up a procedure to screen employees for substances that Dura believed would be dangerous in the workplace. This policy screened employees for 12 substances including those commonly found in legal prescription drugs such as Xanax, Lortab, and Oxycodone. The employees who brought this suit tested positive for at least one of the twelve prohibited substances. Dura gave the employees an opportunity to transition to drugs without the prohibited substances, but refused to consider any letters from doctors stating the employees' work performance would not be affected by the drugs. Eventually Dura terminated the employees for continuing to take the medication with the prohibited substances.

42 U.S.C. § 12112(b)(6) of the Americans with Disabilities Act (ADA). Section 12112(b)(6) provides that discrimination under Title I includes using qualification standards,

employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. The primary question in this case rested on whether the employees could file a 12112(b)(6) claim, without being individuals with disabilities protected by the ADA. The district court allowed the suit to proceed, indicating that non-disabled individuals could file a claim under 12112(b)(6), as with certain other areas of the ADA. Dura appealed, noting that the language of this subsection of Title I is specific to individuals with disabilities. The 6th Circuit ruled for Dura, holding that 12112(b)(6) claims may not be pursued by individuals without disabilities.

Eleventh (11th) Circuit Court of Appeals

Harrison v. Benchmark Electronics

Huntsville, Inc.

593 F.3d 1206

January 11, 2010

Plaintiff John Harrison sued Benchmark Electronics Huntsville, Inc., after his employment was terminated in 2006. Prior to his termination, Harrison submitted to an employer drug test, and tested positive based on his use of prescription medication to control epilepsy. Harrison filed a charge with the Equal Employment Opportunity Commission, which determined that his epilepsy did not constitute a disability under the ADA standards then effect. Harrison then filed suit, and the district court accepted the EEOC determination that Harrison did not have a disability. Harrison appealed to the 11th circuit, on the question of whether a non-disabled individual could advance an individual

claim under Title I of the ADA related to improper medical inquiry. The court ruled in favor of Harrison, holding that non-disabled individuals can advance a private cause of action under the ADA Title I, specific to improper medical inquiry.

Soliday v. 7-Eleven, Inc.

No. 2:09-cv-807-FtM-29SPC, 2010 WL 3928586
October 4, 2010

James Soliday was hired by 7-Eleven in 1982 as a Career Development Trainee. Soliday has a progressive hearing impairment and is unable to communicate over the telephone except through a Telecommunication Relay Service in which a relay operator types the spoken words and they appear on a monitor for Soliday to read. In 2008, after more than 20 years of employment, Soliday's new supervisor began denying Soliday's requests for accommodations, including use of working fax

machines and text pagers to facilitate communication with store managers under his supervision. Soliday was subsequently terminated from employment, allegedly due to failure to perform his job duties. The plaintiff sought punitive damages, and filed a motion to compel 7-11 to submit 5 years of tax returns in order to establish the company's financial worth. The magistrate judge denied this motion, and it then went to the district court for review.

The court considered the question of whether a claim for punitive damages under the Title I of the ADA may be supported by determination of an employer's net worth. The court ruled in favor of Soliday, holding that in determining punitive damages under Title I, assessment of a company's net worth is reasonable.