

Recent Supreme Court Cases on the ADA

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Introduction: Stan Eichner works with the Disability Law Center in Boston. Each state has what is known as a Protective and Advocacy (P&A) organization which enforces the ADA. Unfortunately the quality of different states really varies, but Massachusetts has one of the strongest in the country. Stan Eichner is Director of Litigation at the Disability Law Center in Boston. Stanley Eichner: Thank you for inviting me to be a part of your important conference. I want to do a wrap up or a review of recent Supreme Court cases. I was lucky enough to meet and work with Carol Menton, Marylyn Howe and a number of other people several years ago when I was working for the attorney general's office in Massachusetts. At that time, the quality of the relay system in Massachusetts, after being taken over by MCI, substantially deteriorated. And we worked together, along with a number of other disability advocacy organizations to make sure that MCI would not be able to continue its unacceptable level of services. It was a significant case and we got a big settlement and were able to build into the system civil penalties for non-compliance, along with objective monitoring as well as standards to ensure that relay service in Massachusetts works well. I have been a disability rights lawyer for over 24 years. During that time any number of my cases have involved communication access, but I always look back on the MCI case as special because I was fortunate enough to work with a broad array of grass roots activists to ensure full and equal communication access. The Disability Law Center is the Protection and Advocacy Agency in Massachusetts. Every state and every territory has such an agency so that if you are encountering barriers to communication access or other equal rights issues there is a P and A in your state or territory which provides legal services to folks with disabilities. It is the unfortunate truth that over the last period of time the Supreme Court has issued a fair number of significant cases, which directly or indirectly touch on equal access. I am going to try to review these cases, and give a little sense of what they were about, what the holdings are, and what the implications are for our disability rights movement. I will try as much as possible to make it understandable and explain their significance. The Supreme Court building is beautiful, with big granite columns, beautiful sculpture on the top and right across the front in large letters on the frieze, are the words, "equal justice under law." Unfortunately, if one were to judge by the quality of their civil rights cases, one would have to question whether this an accurate description of what goes on within that building. Given the way the court has issued decisions over the last year or so, that is not a true or accurate description of what they have been dispensing. If the Court were subject to the truth-in-advertising law, they might have to modify the frieze by chiseling in that frieze, "unequal access under the law for people with disabilities. It has been a very disappointing time period. There have been small episodic victories such as the Martin Case, which I will talk about, but the overall trend for civil rights in general, and specifically in respect to communication access and disability rights for our community, has been for the Supreme Court limit, restrict, or otherwise cut back on our civil rights. The first case I'll be discussing is called Sutton. Sutton was actually a combination of three different decisions, which were put together and issued on the same day by the U.S. Supreme Court. The basic issue in Sutton involves the question of who is disabled within the meaning of the Americans With Disabilities Act (ADA.) Who qualifies for having a disability and who is outside of the protection of the ADA? The Sutton case involved two sisters who had visual impairments who

wanted to be airline pilots. Actually three cases were combined. One was Sutton, and there were two others. The second one involved a person with high blood pressure, which was controllable by medication, and the third case involved a plaintiff who had monocular vision -- vision in only one eye. The essential issue in Sutton was: if you have a physical or mental impairment which affects major life activity, (which is the major definition of disability under the law) and you then use what are called mitigating factors, so that you are able to compensate as the Sutton sisters did by wearing glasses, the man with monocular vision by compensating practices and the person with high blood pressure by medication, are you still an individual with a disability under the law? Justice O'Connor, in a closely decided decision, held that if you are able to mitigate the effect of the disability through these different means, you are not a person with a disability. If you are not a person with a disability, you are basically outside the protection of the ADA. What is the implication of this? Let me share with you a case which came down after Sutton in Massachusetts. It went to our state's highest court. It is called Dahill. Mr. Dahill had a hearing impairment. He wore two hearing aids and he wanted to be a police officer. He went through the Boston police academy. He passed all the exercises, and it was literally one or two days before graduation that the Boston Police Department came up to him and said: "I'm sorry you don't qualify. You don't meet the standards and we will not let you graduate." Mr. Dahill filed a lawsuit contending that his rights were violated under the ADA, which is a federal claim, as well as that his rights were violated under state law. In Massachusetts as in many states, there is a state law which prohibits discrimination against people with disabilities, and the state laws are very similar to the federal law. In light of the Supreme Court's decision in Sutton, the federal judge had no real alternative but to dismiss the federal case, stating that Dahill was not a person with a disability because his hearing aides mitigated his problem. Therefore there is no ADA claim. He still has state law claim, and the federal court did what is called certifying the question. The federal court asked the state court how should the state law be interpreted. Should you follow the narrow interpretation that the Supreme Court has enunciated in Sutton, or is state law broader?

Our office, working with several other organizations, filed a brief in our state court, which argued that the federal court interpretation was wrong in its narrow interpretation about mitigating factors. Instead, our state law should be interpreted broadly the way the law was intended to be understood. "Fortunately in Massachusetts, the state Supreme Courts did not follow the narrow ruling of Sutton, but instead took the more appropriate view that if someone has a disability that affects one or more life activities, that is a disability regardless of whether the person compensates for it by coping mechanisms, glasses for example. Without this broad interpretation if you have a disability you can apply for a job and be denied, or if you are working they can fire you because they don't want a person with a disability to be working for them. But if you go to court they can say you are not someone with a disability and are not protected by the law. It is a classic catch 22. People in Massachusetts are lucky that they have the broader state law. [Note: after the decision of the Massachusetts Supreme Court ruled that Massachusetts law is broader, Mr. Dahill's case went before a jury and it awarded him over \$700,000.

Whatever states you are from, you need to be aware of this possible discrepancy and use this strategy to get cases to enforce a broader state law. If you don't have a state law, or it is unclear the scope of them, you can go back and do a legislative effort to try and make sure that your state law is

interpreted more consistent with the philosophy of protecting employment rights of folks with disabilities. Let me turn our attention to the next case: Garrett. This case came down in February of 2001. Garrett was also an employment discrimination case. Ms. Garrett and Mr. Asch were two people that worked for the University of Alabama. Patricia Garrett was a cancer survivor. Asch was a man with a breathing problem. He was working in the parking area of the university, and needed reasonable accommodation in order to deal with his respiratory issues. They both believed they were discriminated against in their employment at the university so they filed a suit under the ADA, and as is typical in employment cases, they asked for damages. This is probably one of the harder areas to explain because it deals with a principle called sovereign unity, which makes no sense to lawyers let alone non-lawyers. Basically there is a fiction that the states are sovereign and can only be sued in federal court under two conditions: first if they agree to it, which is called waiving sovereign unity, or second, if Congress accomplishes in a specific way by setting aside sovereign immunity. (called abrogation). States can't be sued unless it fits under one of these 2 narrow categories. So the Garrett case involved the issue of sovereign immunity. Thus, if you work for the state, as Garrett and Asch did for the University of Alabama, and you are discriminated against because of your disability, and you want to bring an action to enforce that, would you be allowed to obtain damages against the state? It was always pretty much understood that damages were an appropriate part of the relief that you could get under the ADA if you were a public worker or a private worker. The Supreme Court issued its decision in Garrett holding that you could not obtain damages against the state in an employment discrimination case because Congress did not properly waive or put aside the immunity that Alabama had. This is a significant problem because if you are a state employer you know that the worse that can happen is what is called injunctive relief, which is an order for them to do something. You might be able to do this, but it doesn't help make that person who was discriminated against whole. This is a major problem in terms of trying to get folks with disabilities equal rights to readdress their grievances when they are discriminated against. Unfortunately, although it's been possible in some earlier instances to fix the problem by getting Congress to amend the law, the holding of the Supreme Court makes it almost impossible to fix it legislatively. What this means is that applicants and employees who wish to work for the state who feel they have been discriminated against can get some remedies by bringing suit, but are precluded from getting damages. What is the possible strategic approach for our community in terms of trying to fix this? First, as I said before, Congress, probably can't fix the problem. The only other way is for the state to agree to suit or give up sovereign unity. Why would the states do that? They don't want to be sued typically so why would they give it up? In some states, it is the beginning of a political process by grass roots activists. There have been coalitions forming in different states, Alabama, California, Connecticut, where not only folks within the disability community, but others outside of it, have organized to say to their state legislatures, we want equal rights for workers with disabilities. So sometimes the setbacks have offered up opportunities. Again it is very much in the formative stage, but that would be a legal way in which a bad decision such as Garrett could be undone. Let's talk about a case called Sandoval. Sandoval was not a disability rights case, but in many ways it might potentially have a much more negative affect than the other two cases. Sandoval was a case which challenged a voting system, with the people in the case claiming that the voting process had a discriminatory effect on minorities. There is a civil rights law called, "Title VI" which prohibits discrimination on the basis of race, national origin, ethnicity and it covers programs that receive federal financial assistance. That phrase should

be familiar to you, because Section 504 of the Rehab Act, a 1973 law which protects people with disabilities, from discrimination against organizations that receive "federal financial assistance." is a set of civil rights laws that line up with Title VI which prohibits discrimination on race, and Title IX which prohibits discrimination on gender. Each of these laws was based on the other so they are likely to be interpreted similarly. What did the Supreme Court do in this case? As I said, the case involved what is called "discriminatory effect." Those of you who do advocacy probably understand that discrimination laws typically cover two different categories of action. One is intentional discrimination. If I put up a sign that says that I won't hire deaf people, that is intentional discrimination. The law also covers what is called discriminatory effect, which means that if a defendant has a policy or practice, which although neutral on its face, has the effect of discriminating against people with disabilities, that too would be covered by these laws. A classic example is when stores used to often have a policy which said that in order to cash a check we need a driver's license. No one would argue that such a policy was done with bad intent. But the effect of such a policy is that the store would not have to cash a check for someone who was blind. Because the majority of cases of disability discrimination is not intentional discrimination, but instead thoughtless barriers of communication, architecture and rigid policies and practices, the law requires that a company, or the government not do what has a discriminatory effect. If you have a policy or practice and it has a discriminatory effect, under Title III private businesses are required and, under Title II, government agencies are required, to change the policy and practice.

So, in *Sandoval*, the U.S. Supreme Court held that people could not bring a private lawsuit to challenge a policy, which had discriminatory effect. They said you could only challenge intentional discrimination. Well all of this is hugely troubling to our civil rights movement. I can tell you that my Law Center has hundreds of cases on any given time, and the overwhelming number of those cases are ones where the claims are discriminatory effect. It is fairly rare that we have a case that shows that the company or the government intended to purposely discriminate against people with disabilities. Yet, if the holding in *Sandoval* gets applied to disability discrimination, the ADA won't cover discriminatory effect. I will try to offer one approach, or strategy, of how we as a community can organize to combat these bad decisions. First, Congress can pass an amendment to the law. Before the whole tragedy of September 11, there were organizations around the country that were working to see who in Congress would be sympathetic to this concern. It has been hard to put this forward at this period in time, but it is something which Congress can fix and we're hoping again to have a broader coalition effort to basically reverse in Congress the bad Supreme Court decision of *Sandoval*. So unlike *Garrett*, which is difficult to legislatively fix, the *Sandoval* issue could be fixed by federal legislation. We have two more decisions left. They were issued on May 29th of this 2001. It was sort of a classic good news, bad news story. One of those cases got lots of attention. That's the *Casey Martin* case. You might know the basic facts of *Casey Martin*. He has a circulatory disability, which made walking both painful and dangerous. So he asked that, he asked the PGA tournament to modify what is called its walking role so he would be able to use a golf cart when he was on the professional tour. The PGA argued a couple of things. First they said we are not public accommodation. As most of you probably know, it is Title III of the ADA which covers public accommodation and prohibits public accommodations from discriminating against folks with disabilities. If an organization is not a public accommodation then they are a private club and outside the requirements of the ADA. The

PGA argued that it would not be a reasonable accommodation to let Casey Martin ride a cart. His request to ride the cart would fit within the defense or exception of what is called, "fundamental alteration." That is, basically it would be unfair to other golfers, people like Nicholas and Palmer. The Supreme Court, in a positive decision, written by Justice Stevens held that, yes, the PGA was a public Accommodation and thus subject to the ADA. They also held that allowing Martin to use a cart would not fundamentally change the nature of golf. I think quite frankly that although the decision was a victory, it was not a huge victory, generally. Why? Because its facts are very specific to Mr. Martin, and very specific to golf. The good news is that the case sets forth a more expansive interpretation of what is a public accommodation. But in terms of day-to-day lives of folks with disabilities I don't think it will have a big positive effect. The last case I want to talk about the Buckhannon case, which got much less press attention. In fact except for a small number of civil rights attorneys around the country, very few people noticed this case coming down. This is a case which addresses attorney fees being awarded. Under the ADA if someone brings a lawsuit alleging that their rights were discriminated against, and wins that case, they are entitled to have the attorneys fees paid by the losing defendant. As you probably know most cases get settled. You bring a lawsuit. The defendant sees that you are right, and they do the right thing and enter a settlement agreement and the case goes away and the Plaintiff got attorney fees from the other side. Well, what did the Court do? The Court said that we are not going to allow attorneys fees anymore if the case gets settled. So why is this important? I will submit to you that the reason it is important that civil rights be able to get attorneys fees from the other side is that that is what really enables the ability of the attorneys to bring civil rights cases. Of course there are some people who can afford to hire their own lawyer and if they get paid back from the other side, that's gravy. But I think it is generally the case that many people who are discriminated against, can't find the money to hire their own attorney. So in those areas: employment discrimination, special education there has really developed a private bar that can bring these cases and make a living out of civil rights cases. Buckhannon has changed this. I hear from lawyers every day who tell me they are unable to take civil rights cases anymore because of this decision. The good news is that this is another one, which Congress could fix it with new legislation.

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