

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1878

JOHN CHRISTOPHER SHAVER,
Plaintiff-Appellant,

v.

INDEPENDENCE STAVE COMPANY,
INC., d/b/a SALEM WOOD PRODUCTS COMPANY,
et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Missouri, No. 4:01CV01354
The Honorable Charles A. Shaw, Presiding

BRIEF OF THE EPILEPSY FOUNDATION ET AL AS AMICI
CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Local Rule 26.1, the undersigned attorney for the Epilepsy Foundation, on behalf of *amici curiae*, certifies that there is no parent corporation and no publicly held company owns 10% or more of the corporation's equity.

BY _____
Gina C.R. Fiss

June 12, 2003

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Defendants-Appellees.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Epilepsy Foundation® ("Epilepsy Foundation") by and through undersigned attorney and pursuant to Federal Rule of Appellate Procedure 29 and this Court's Local Rule 29-1, hereby moves this Court for leave to file the accompanying brief as *amicus curiae* in support of Appellant, John Shaver, in urging reversal of the District Court's decision in this case. In support of this motion, *amici curiae* state as follows:

1. The Epilepsy Foundation is a nonprofit corporation founded in 1968 to advance the interests of 2.3 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons

with this medical condition in all aspects of life, especially employment, the Epilepsy Foundation has, since its inception, worked to dispel the stigma associated with seizures, and has supported the development of laws, including the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

2. The Epilepsy Foundation of Kansas and Western Missouri is dedicated to advancing the interests of the more than 80,000 people with epilepsy in this region. The term epilepsy continues to evoke stereotyped images and fears in others about the person who has epilepsy. These fears, myths, and misunderstandings affect all aspects of the person's life, especially in employment. This foundation continues to see people very capable of working denied the opportunity for gainful employment. The Epilepsy Foundation of Kansas and Western Missouri continues to work to dispel in every way possible the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

3. The Epilepsy Foundation of Minnesota, the sole provider for Minnesota and North Dakota, is a charitable voluntary health organization dedicated to advancing the interests of the more than 100,000 people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears. Please give this issue your full consideration.

4. *Amici Curiae* are deeply concerned that the District Court's

interpretation of the Americans with Disabilities Act ("ADA") in effect leaves people with epilepsy who are made fun of or harassed in the workplace unprotected by the ADA. This result is contrary to the mandate of the ADA, and threatens the great progress our country has made in integrating people with seizure disorders into the mainstream of American life. Thus, the accompanying brief addresses issues of importance to all people with epilepsy, seizure disorders and other disabilities.

5. *Amici Curiae* have reason to believe that their brief will supplement rather than reiterate the arguments made by Appellant.

6. Appellee has not provided written consent to this motion. The Epilepsy Foundation et al. therefore requests leave of this Court. See Fed. R. App. P. 29(a).

WHEREFORE, the Epilepsy Foundation, Epilepsy Foundation of Kansas and Western Missouri and the Epilepsy Foundation of Minnesota requests that this Court give leave for the Epilepsy Foundation et al. to file the accompanying brief *amici curiae* in support of Appellant, John Shaver, in urging reversal of the District Court's decision in this case.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

The central issue in this case is whether the District Court erred in holding that Appellant John Shaver did not establish a question of fact for the jury to decide as to whether the conduct of Appellee was severe or pervasive enough to create a hostile work environment under the Americans with Disabilities Act ("ADA"). The Court's disposition of this issue will impact all similarly situated persons within this Court's jurisdiction. Amici Curiae, Epilepsy Foundation and its affiliates, Epilepsy Foundation of Kansas and Western Missouri and Epilepsy Foundation of Minnesota therefore respectfully submit the following:

The Epilepsy Foundation® ("Epilepsy Foundation") is a nonprofit corporation founded in 1968 to advance the interests of 2.3 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders.

The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, including the Americans with Disabilities Act, that protect individuals from discrimination based on these stereotypes and fears.

STATEMENT OF THE ISSUES

Whether plaintiff, who has epilepsy and because of surgery to control his seizures, has metal plates in his head, was subjected to a hostile work environment in violation of the Americans with Disabilities Act where his supervisors and coworkers repeatedly and over a long period called him such names as “platehead” and “stupid” because of his medical condition.

Hudson v. Loretex Corp., 9 N.D.L.R. § 288 (N.D.N.Y. 1997).

Ross v. Douglas County, 234 F.3d 391 (8th Cir. 2000).

Delph v. Dr. Pepper Bottling Co., 130 F.3d 349 (8th Cir. 1997).

42 U.S.C. §§ 12102, 12112 (2002).

SUMMARY OF THE ARGUMENT

Epilepsy is a social label as well as a medical diagnosis. Despite advances in medical knowledge, enactment of civil rights laws prohibiting disability based discrimination, and public education about the impairment, the word “epilepsy” continues to invoke negative myths and stereotypes. The stigma attached to epilepsy has social, economic and psychological consequences, including social isolation, discrimination in employment and lowered self-esteem. As a result, too many people with epilepsy have not yet been incorporated into the mainstream of society.

In enacting the Americans with Disabilities Act, Congress attempted to remedy this problem. By including in the definition of disability, those whose condition did not actually substantially limit them in any particular major life activity but who were treated as though they had such an impairment, Congress recognized that people’s misconceptions and stereotypes about people with disabilities, including epilepsy, were as debilitating as the impairment itself. It attempted to remedy this problem by barring discrimination on this basis and providing victims with a private right of action.

The District Court’s decision renders this remedy meaningless, however. In holding that consistent, long term name calling with negative connotations, such as “platehead” and “stupid” based upon a physical impairment, was mean spirited and unprofessional but not extreme or severe enough to constitute the “severe or pervasive” conduct required to establish a prima facie case of hostile work environment under the Americans with Disabilities Act, the court sanctioned and endorsed the continuation of private and public ridicule and humiliation of people with cognitive and other disabilities which the ADA seeks to end. This is contrary to the express purpose of the Americans with Disabilities Act, and threatens the

progress this country has made in eliminating the stigma associated with disabilities and epilepsy. We therefore ask that the lower court's grant of summary judgment be reversed, and the case remanded for proceedings consistent with this decision.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT BEING CALLED “PLATEHEAD” AND “STUPID” CONSISTENTLY AND FOR AN EXTENDED TIME PERIOD BY COWORKERS AND SUPERVISORS BECAUSE AN INDIVIDUAL HAS EPILEPSY IS NOT SEVERE OR PERVASIVE ENOUGH TO CREATE A HOSTILE WORK ENVIRONMENT UNDER THE AMERICANS WITH DISABILITIES ACT.

The Eighth Circuit has implicitly recognized that the Americans with Disabilities Act (ADA) creates a cause of action for a hostile work environment. See Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999). A hostile work environment claim under the ADA is governed by the same standards as a hostile work environment claim arising under Title VII of the Civil Rights Act of 1964. Id. Such a claim thus requires that the Plaintiff-Appellant Mr. Shaver show that the offending conduct is “severe or pervasive.” Duncan v. General Motors Corp., 300 F.3d 928, 934 (8th Cir. 2002). Whether the offending conduct is severe or pervasive depends upon “the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it [both objectively and subjectively] interferes with an employee’s work performance.” Id.

To understand whether conduct is truly humiliating and to fully consider the totality of the circumstances, *Amici* contend that a court cannot simply look at the

words used in isolation nor ignore the fact that the names employed were based on and make reference to a physical impairment, and were not just random barbs like “meathead” or “you have cooties” or other such names one might hear uttered in a school yard. Rather the court must consider the context in which such names were used and the effects on the particular individual involved as well as how a reasonable person would be affected. Such an analysis would thus include consideration of psychological effects such as stress, allegations that the termination was merely a pretext for discrimination and not supported by violations of workplace rules, the long history of discrimination against people with epilepsy because of the stigma associated with the condition, the consequences of such discriminatory behavior and Congress’ intent to eradicate such discrimination when it enacted the ADA. The lower court failed to engage in such an analysis.

Though the trial court was required under the applicable summary judgment standard to view the evidence in a light most favorable to the nonmovant party appellant, it instead assumed as true the employer’s allegations that the firing and probationary notices were legitimate. However, in compliance with the proper standard for summary judgment, the court should have assumed that these actions were, as appellant alleged, a pretext for discrimination and considered them as part of the questionable conduct. Had it done so and considered this behavior in

context of the long history of discrimination fueled by the stigma associated with epilepsy, we believe that the court would have found that legitimate question of fact existed and that a reasonable jury could find that the conditions present in the instant case created a hostile work environment in violation of the ADA. We ask this Court to reverse the grant of summary judgment, and remand to the lower court for a decision consistent with the appropriate standards.

A. Epilepsy is a medical condition with physical, psychological and social consequences.

Epilepsy, a neurological disorder characterized by recurrent seizures, has been recognized as a physical impairment under the Americans with Disabilities Act. Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000). Though commonly thought of as synonymous with epilepsy, seizures, which usually only last between 15 seconds and two minutes, are only a symptom of the disease. The condition itself is a chronic neurological disorder that affects various parts of the body and impairs consciousness and conscious interaction with the environment. Although approximately fifty-five percent (55%) of people with epilepsy can expect to be free from seizures with proper medication and treatment, the rest will only experience partial control of seizures, and at least twenty percent (20%) cannot control their seizures with any current medication or treatment. Charles E. Begley et al., The Cost of

Epilepsy in the United States: An Estimate from Population-Based Clinical and Survey Data, 41(3) *Epilepsia* 342, 342 (2000).

Physiologically, seizures are sudden, unexpected, uncontrolled episodes of excessive electrical discharges of brain cells, accompanied by sensory, motor and/or behavioral changes. See H. Gastaut, Dictionary of Epilepsy, Part 1: Definitions (1973) (defining "epilepsy"). There are many different types of seizures and many different causes. There are two general categories of seizures: (1) "generalized seizures," which are seizures that, from onset, affect both of the brain's hemispheres, and (2) "partial seizures," which are seizures whose onset is limited to a part of one cerebral hemisphere. Partial seizures may also become "secondarily generalized". This means that the abnormal focal discharges responsible for the partial seizure subsequently spread throughout the brain, resulting in generalized tonic-clonic seizures. Some individuals also have both types of seizures.

Generalized seizures, which include tonic-clonic seizures, myoclonic seizures, absence seizures and atonic seizures, result in a total loss of consciousness from the onset of the seizure. Tonic-clonic seizures (previously known as "grand mal" seizures) are the seizures most commonly envisioned when one first hears the word "epilepsy". This is, in part, because they are the most common form of generalized seizure. In this type of seizure, the individual loses

all consciousness, falls to the ground, stiffens and subsequently experiences convulsions as a result of massive muscle contractions. Typically, the person's eyes roll up or turn to the side, and the individual may bite his tongue. Loss of continence is common as is irregular respiration and injury as a result of hitting one's head or otherwise striking an object during a seizure.

Most such seizures last only a few minutes and often occur during sleep, but are followed by a post-ictal period, i.e. a period after the seizure characterized by disorientation, headaches, muscle soreness and exhaustion, of a few hours, or as in Mr. Shaver's case, 24 to 48 hours. How to Recognize and Classify Seizures & Epilepsy; A Guide for Allied Health Professionals, 10, 13 (Epilepsy Foundation ed. 2002). App. 00967 (Dep. John Shaver (April 24, 2002) at 14.)

Another type of generalized seizure, the myoclonic seizure also involves muscular contractions, but may either affect the whole body or be confined to the a particular area, such as the face, trunk or extremities. How to Recognize and Classify Seizures & Epilepsy; A Guide for Allied Health Professionals, supra at 12.

Absence seizures are typically characterized by a brief period of altered consciousness, in during which the person stares vacantly, not hearing or seeing anything in the environment around him, but does not experience convulsions and generally does not feel aftereffects once the seizure is over. Id. at 11-12. The last type, atonic seizures, which most commonly occur among children between the

ages of two and five, causes sudden loss of muscle tone, forcing the individual's legs to buckle and causing the person to fall directly to the ground. Id. at 13.

Partial seizures, the most common type of seizures, are also the most difficult to recognize and control. Therefore, it can be a considerable time between onset of seizures and recognition that one has epilepsy. Some people who are unfamiliar with this type of seizure may mistakenly believe that the individual is daydreaming, intoxicated, or high on drugs. There are two types of partial seizures: (1) "simple partial seizures" and (2) "complex partial seizures".

During simple partial seizures, consciousness is maintained but the individual loses sensory and motor control. Generally, during such a seizure, the individual can still interact with the environment, but the seizure will limit specific functions, such as speech or movement and may cause uncontrollable shaking of extremities on one side of the body.

During complex partial seizures, the person will lose sensory and motor control. His consciousness may also be impaired partially or totally. Practically, this means that the person experiencing the seizure cannot interact normally with the environment, is temporarily unaware of where he is or what he is doing, and usually will not remember what happened during the episode. Indeed, the individual may be so oblivious to pain and his surroundings during a seizure that he may place a hand directly on a hot surface, incurring serious burns or other

injuries, and be completely unaware until the ictal period (the period of the actual seizure) has passed. Impaired consciousness, sleepiness or confusion may continue for a period of time after the seizure passes, the so-called post-ictal period. This phase varies greatly from person to person but averages twenty to thirty minutes, followed by slow re-entry to awareness of the environment. In some people, the post-ictal period of sleepiness and confusion can last for hours or even up to three days.

Frequently, complex partial seizures are manifested by "automatisms," repetitive complex motor activity that is purposeless, undirected, and inappropriate. Some common examples of automatisms are lip smacking, repetitious swallowing or chewing and fidgeting with fingers or hands. Some people will, during a complex partial seizure, disrobe, run, scream, flail or exhibit excessive fear.

While epilepsy may be treated with medication or controlled through lifestyle changes, surgery, dietary modifications and assistive technology, every person, even those whose conditions are "well controlled", like Mr. Shaver, is at risk for a breakthrough seizure. A "breakthrough seizure" is a seizure that occurs randomly after a long period of no seizure activity and may be triggered by such common occurrences as a viral illness, stress, irregular sleep schedule, hormonal changes or changes in medication. See Nancy Santilli, Selection and Discontinuation of Antiepileptic Drugs, in

Managing Seizure Disorders: A Handbook for Health Care Professionals (N. Santilli ed. 1996) (identifying illness as a cause of breakthrough seizures); Steve Schachter, Treatment of Seizures, in The Comprehensive Evaluation and Treatment of Epilepsy: A Practical Guide (S. Schachter & D. Schomer eds. 1997) (identifying lack of sleep and changes in medication as causes of breakthrough seizures); Andrew G. Herzog et al., Three Patterns of Catamenial Epilepsy, 38 *Epilepsia* 1082 (1997).

Though seizures are a physiological phenomena, they have physical, social and psychological consequences. For most people with epilepsy, the condition forces the person to alter his daily schedule to take medicine, compensate for side effects of medication or the condition itself, including fatigue, memory and recall problems, and to avoid seizure triggers, such as exhaustion and stress. See Kimford J. Meador, M.D., Cognitive Outcomes and Predictive Factors in Epilepsy, 58(Supp. 5) *Neurol.* S21, S23 (2002) (medications can affect cognitive function). Adhering to a rigid sleep schedule, avoiding alcohol, setting work breaks and lunch periods to accommodate medication schedules, and avoiding work that requires irregular shifts or night time shifts are some of the most common schedule modifications.

Seizures are also physically isolating and can stress social relationships.

When a person has a seizure, certain physical activities, such as climbing or swimming, may be restricted for a specific period of time, and driving privileges may be suspended for an extended period. Losing the ability to drive has a major impact on the person's life. Not only is it more difficult to get to work, but the individual also needs to find alternative transportation to do such common activities as shop for food, go to doctor's visits, and attend social functions. Public transportation is not always an alternative, either because service is limited or because it is not accessible in the individual's area. The alternative then is to rely on friends and family for rides, which stresses those relationships, or forego the activity altogether which leads to social isolation. The physical effects of the condition, including such conditions as sexual dysfunction, may also cause depression and conflict in interpersonal relationships.¹

The stigma associated with epilepsy, including the stigma attached to having a seizure in public, also negatively impacts the individual's social well being. First, it affects the individual's self esteem. People with epilepsy typically internalize society's negative perceptions (i.e. the stigma) and as a result, experience lowered self-esteem. Michael Hills & Peter Baker, Relationships Among Epilepsy, Social Stigma, Self-Esteem and Social Support. 5 J. Epilepsy 231, 232 (1992). Second, stigma also affects interpersonal relations: the greater

¹ See Martha Morrell, M.D., The Physiological and Psychological Consequences of Epilepsy, 1(7)

the level of stigma, the greater the social isolation. Id.; Morrell, *supra* at n.1.

People with epilepsy may avoid social situations, including going to public places or engaging in intimate sexual relations, for fear of having a seizure. Hills & Baker, *supra.*; Mimi Callanan, R.N., Sexual Assessment & Intervention for People with Epilepsy, 3(1) *Clinical Nursing Practice in Epilepsy* 7 (1996). Also some people still mistakenly believe that people with epilepsy suffer from personality disorders because of the unusual behavior some individuals demonstrate during a seizure. Shawn L. Masia and Orrin Devinsky, Review. Epilepsy and Behavior: A Brief History. *Epilepsy & Behavior* 1, 27-36, 31 (2000). As a result, for many people with epilepsy, the stigma associated with the condition and the social isolation that accompanies it are a major concern of living with epilepsy. See Robert S. Fisher et al., A Large, Community-based Survey of Quality of Life and Concerns of People with Epilepsy: Part 1. Address at the American Epilepsy Society Annual Meeting, San Diego, Cal. (Dec. 9, 1998).

B. Stigma has led to the exclusion of people with epilepsy from mainstream economic and social life.

For hundreds of years, epilepsy was viewed as a frightening and horrible disease that afflicted both body and soul. People thought that those with seizures were possessed by demons or were mentally ill. See, e.g., L. Eisenberg,

Advanced Studies in Medicine 294, 300 (2001).

Sociocultural Perspectives, in Epilepsy: A Comprehensive Textbook 41 (1997).

As a result of these beliefs, people with epilepsy were subjected to horrific treatment, ranging from physical violence to extreme physical isolation, including incarceration in institutions. See id. Indeed, it was the mistaken belief that epilepsy was contagious that led to the development of the first asylums in the United States. Masia and Devinsky, *supra* at 28. And people who suffered from epilepsy continued to be institutionalized until the latter half of the 20th century. See Eisenberg, supra. The law ostracized people with epilepsy and perpetuated this stigma in other ways as well. Until the late 1970's and in the early 1980's, women with epilepsy were subject to forcible sterilization under state eugenic laws, which had been enacted in a misguided effort to limit the reproduction of what were deemed as "socially inferior" people. Masia and Devinsky, *supra* at 29. Until the mid-sixties, many states also forbade men and women with epilepsy from marrying for similar reasons. Id.

Today, despite advances in medical knowledge and laws such as the ADA, this stigma persists. A recent national study of teenagers found that nearly half of America's teens (49%) think epilepsy is contagious or don't have enough knowledge to know that it is not a communicable disease. Fifty-five percent (55%) of teens would either not date a person with epilepsy or are not sure that they would. And more than one-third (41%) of teenagers surveyed are not sure whether

they would tell their friends they had epilepsy or definitely would not tell them. Joan Austin, et al., “Epilepsy Familiarity, Knowledge, and Perceptions of Stigma: Report from a Survey of Adolescents in the General Population,” Epilepsy & Behavior 3, 368 (2003).

Fear of what would happen following such a disclosure is common among people with epilepsy, and for good reason. Despite the advances in medical knowledge and community education about epilepsy, people with epilepsy continue to be the targets of ridicule and cruel jokes, both privately and in public. In 2002, Rosie O’Donnell caused her audience to laugh by describing a baby doll made to fall while learning to walk as a “baby having a seizure,” and then set her dog to bite it on her national television show, “The Rosie O’Donnell Show.” “The Rosie O’Donnell Show”, NBC, Dec. 17, 2001. The Epilepsy Foundation heard from numerous constituents who heard the derogatory remarks and were personally offended. Just this past winter, a Warner Brother’s popular children’s movie, “Kangaroo Jack,” made derogatory jokes about people with epilepsy- - one of which mocked someone having a seizure by gesticulating wildly and making offensive noises- - eliciting audience laughter about an “epileptic”, to the horror and humiliation of children with epilepsy and their relatives sitting in the audience. See The Hawaii Channel—KITV4 News, “Epilepsy Group Upset with ‘Kangaroo Jack’,” January 31, 2002

(<http://www.thehawaiiichannel.com/news/1945770/detail.html>) (describing offending conduct and reporting the Epilepsy Foundation's public statement on the movie); Healy, Michelle, "'Kangaroo Jack' Angers Epilepsy Group," USA Today (Jan. 30, 2003), D2. See also "Epileptics Have Right to Be Upset Over Tasteless Movie," Editorial, Easton, PA, Express-Times, Jan. 28, 2003. See also Manns, Lena, "Upset with Kangaroo Film," Letter to the Editor, Big Sandy News, Feb. 14, 2003 (expressing personal opinion that film was distasteful because of jokes about people with epilepsy); Bizik, Kris, "'Tain't funny, 'Jack'!", Letter to the Editor, Philadelphia News, Feb. 3, 2003; Birkhauser, Terri, "Cleverness Lacking", Letter to the Editor, Hagerstown (Maryland) Mail, Feb. 12, 2003; Swearingen, Susan, "Epilepsy Reference in Hollywood Comedy Not Slightest Bit Funny," Letter to the Editor, Tennessee Herald, Feb. 6, 2003; Weinheimer, Bob, "Movie Makes Mock of Epileptics," Letter to the Editor, East Valley (Arizona) Tribune, Feb. 4, 2003.

People with epilepsy are also often arrested for disability-related behavior. For example, in Virginia, a man with epilepsy was charged and convicted of assault after he grabbed a woman's arm during a seizure on a subway train; this conviction was ultimately reversed. See, e.g. "Essex Police Get Epilepsy Training After Man's Death in Bloomfield," New Jersey Star-Ledger, Aug. 22, 2002; "Virginia Judge Reverses Himself, Clearing Epileptic of Assault," The Washington

Post, May 7, 1998 (referring to conviction of September 17, 1997). Some employers are afraid to employ persons with epilepsy because of mistaken beliefs that a person will be unable to perform the job safely because of his epilepsy, or have a seizure on the job thereby increasing their risk of injury. See, e.g., Chicago and North Western R.R. v. DILHR, 297 N.W.2d 819 (Wis. 1980) (the court held that a man with epilepsy could not be denied a job as a welder at a railroad company solely because of his epilepsy where the employer had not shown that the employee's employment would be hazardous to plaintiff's health or safety of others solely because of his having epilepsy).

The impact of this stigma on employment of people with epilepsy is significant. It is estimated that at least twenty-five percent (25%) of working-age people with epilepsy are unemployed; among those whose seizures are poorly controlled, the unemployment rate is even higher. See Epilepsy: A Report to the Nation 11 (Epilepsy Foundation of America ed. 1999). By way of comparison, during the same time period, the unemployment rate for the general population was only five percent (5%). See id. The primary causes of this high unemployment rate among persons with epilepsy are the frequency of seizures and the attitudes of employers. Despite the existence of federal and state civil rights laws, employers continue to discriminate against people because of their epilepsy. Indeed, sixty-four percent (64%) of individuals with epilepsy indicated in a survey that they

were unemployed as a direct result of their seizures. See id.; see also, R.A. Hicks & M.J. Hicks, Attitudes of Major Employers Toward the Employment of People with Epilepsy: A 30-Year Study, 32(1) *Epilepsia* 86-88 (1991); W. Allen Hauser & D.C. Hesdorffer, Employment, in Epilepsy: Frequency, Causes and Consequences 273, 279 (Epilepsy Foundation of America ed. 1990). For those who are able to obtain jobs, the probability of continued employment is also significantly lower (twenty-six percent (26%) among men and twenty-one percent (21%) among women) for people with controlled seizures than among those who do not have seizures at all. See Epilepsy: A Report to the Nation, *supra*.

Also, the rate of underemployment (employment in positions below one's level of skill) is significantly higher among persons with epilepsy than among the general population.² See Begley et al., *supra* at 342, 347. People with epilepsy are less likely than the average person to hold a professional job. Indeed, people with epilepsy are typically employed in low-skilled, low-paying menial jobs. See Epilepsy: A Report to the Nation, *supra*. One community study found that while thirty-two percent (32%) of the general population was engaged in managerial and professional jobs, only twenty-two percent (22%) of people with epilepsy were so employed. In that same community, fifteen percent (15%) of people with epilepsy

² A 1999 study of the cost of epilepsy found that the average man would experience a thirty-four percent (34%) decline in productivity over his lifetime as a result of his epilepsy. See C.E. Begley et al., The

were employed in lower level jobs in the service and manual labor sectors compared to only nine percent (9%) of the general population. Hauser & Hesdorffer, Employment, supra. This trend is in part explained by the lower educational levels among people with epilepsy.³ Morrell, supra. In short, the stigma that accompanies epilepsy sharply limits an individual's employment opportunities and ability to retain a job. And today, despite the existence of the Americans with Disabilities Act, the Rehabilitation Act of 1973 and many state civil rights laws barring disability-based discrimination, some employers continue to enforce blanket policies that forbid people with epilepsy and other specified medical conditions from engaging in particular occupations, regardless of their particular medical history, or ability to perform the job with or without a reasonable accommodation. See, e.g. Arnold v. City of Appleton, Wis., 2000 WL 620198 (E.D.Wis. 2000)(applicant's job offer was rescinded after employer learned he had epilepsy because departmental policy required he be seizure free for five years off of medication and he had only been seizure free four years on medication.).

Cost of Epilepsy in the United States: An Estimate from Population-Based Clinical and Survey Data, 41(3) *Epilepsia* 342, 347 (2000).

³ Epilepsy can cause high absenteeism among high school students and may, depending on the medication and severity of the condition, affect cognitive function and memory recall. This in turn affects the learning process .

The U. S. Supreme Court has also recognized that epilepsy is a stigmatizing condition. See School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987). Indeed, the prevalence and persistence of irrational fears in modern society is so severe that the United States Center for Disease Control's Conference on Public Health and Epilepsy concluded that the stigma associated with epilepsy and the factors which contribute to it should be addressed as a top priority. See Eisenberg, supra at 12. And, in enacting the ADA, Congress recognized that the irrational fears and misperceptions about disabilities, including epilepsy, can be as debilitating as the impairments themselves. See Sec. C, infra.

C. In enacting the Americans with Disabilities Act, Congress intended to eradicate this stigma.

The legislative history of the ADA makes clear that Congress intended that the Act would eliminate discrimination against persons with disabilities based on negative myths and stereotypes. The findings section of the statute states:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on the characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

U.S.C. § 12101(a)(7)(2002).

Congress further stated that its purpose in enacting the ADA was: “ to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101 (b)(1). This mandate was intended to cover people with epilepsy, as evidenced by the repeated references to epilepsy as a covered disability. See, e.g., S. Rep. No. 101-116, at 22, 31, 39, 62 (1989); H.R. Rep. No. 101-485(II), at 51-52, 62, 72, 79-80, 104 (1990), reprinted in 1990 U.S.C.C.A.N 267, 303; H.R. Rep. No. 101-485(III), at 28-29, 33, 42, 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 445.

In so acting, Congress recognized that the irrational fears and misperceptions about disability could be as debilitating as the impairments themselves. As Senator Harkin explained to fellow members of the Senate:

[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce. . . . For people with disabilities, . . . , the ADA offers promise that they will no longer be shunned and isolated because of the ignorance of others.

136 Cong. Rec. S. 7422, S7442 (June 6, 1990).

Congress included the “regarded as” prong of the definition of disability, which covers persons who may not actually have a physical or mental impairment that substantially limits one or more major life activities, but are treated by others as having such a condition, in an effort to implement this promise. 42 U.S.C. § 12101 (c) (2003). See also Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538,

541 (7th Cir. 1995) (explaining the underlying rationale of this provision as to ensure that people who are treated as being unable to participate in a particular activity such as employment because of an impairment even though they physically could participate are protected against such discrimination as are employees who may be discriminated against because of skin color or some other characteristic that is not relevant to their ability to perform a job).

This interpretation is consistent with the Supreme Court’s interpretation of the identical provision in the ADA’s predecessor, Section 504 of the Rehabilitation Act of 1973 [hereinafter Section 504]. School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). In Arline, the Supreme Court quoted the *amicus curiae* brief of the Epilepsy Foundation for the proposition that “[a] review of the history of epilepsy provides a salient example that fear rather than the handicap itself is the major impetus for discrimination against persons with handicaps.” Id. at 285 n. 13. Notably, in enacting the “regarded as” prong in the ADA, Congress borrowed the language from the implementing regulations of Section 504. See 45 C.F.R. 84.3(j)(2)(iv); see also Bragdon v. Abbott, 524 U.S. 624, 638 (1998) (noting that Congress adopted previous regulatory interpretations of Section 504 when it enacted the ADA). In so doing, Congress incorporated the Court’s interpretation of the definition of disability under Section 504 into the ADA. H.R. Rep. No. 985 (II), 101st Cong., 2d Sess. at 53 (1990) ; House Comm. On the Judiciary, H.R. Rep.

No. 485 (III), 101st Cong., 2d Sess. at 305 (1990). The purpose of the Act then is, in part, to eradicate stigma of epilepsy and the resulting discrimination. By granting individuals a private right of action, Congress also gave victims of such discrimination a shield with which to defend against such discrimination.

D. The District Court’s decision undermines the underlying purpose of the ADA.

We would be horrified and stunned if someone said, “I don’t like you just because you wear hearing aids and I’m going to make your life miserable because you wear hearing aids.” But rarely is disability discrimination so direct.⁴ Instead, aggressors resort to indirect action and words, such as name calling, giving unfounded or exaggerated poor performance evaluations of an employee with a disability, and denying accommodations that are both reasonable and necessary. And numerous courts have found that the ADA’s prohibition against discrimination has been violated in such situations. See e.g., Vollmert v. Wisconsin Dept. of Transp., 16 NDLR § 203 (7th Cir. 1999)(court held that employer violated ADA when it refused to provide an employee with epilepsy requested computer training as a reasonable accommodation); E.E.O.C. et al. v. CEC Entertainment, Inc., d/b/a Chuck E. Cheese’s, 2000 U.S. Dist. LEXIS 13934,

⁴ The only case that is analogous is E.E.O.C. et al. v. CEC Entertainment, Inc., d/b/a Chuck E. Cheese’s, 2000 U.S. Dist. LEXIS 13934, 10 Am. Disabilities Cas. (BNA) 1593, in which a judge upheld a jury verdict in favor of a mentally retarded man who was fired by a district manager who said “We don’t hire those kind of people,” even though the manager had claimed he fired the individual for poor job performance.

10 Am. Disabilities Cas. (BNA) 1593 (Court upheld a jury verdict finding that a man with mental retardation was wrongfully terminated after his district manager said “We don’t hire those kind of people” and subsequently fired him, allegedly for poor performance); See also e.g. Hudson v. Loretex Corp., 9 N.D.L.R. § 288 (N.D.N.Y. 1997) (holding that an employee with epilepsy established the prima facie elements of a hostile work environment claim under the ADA where the employer referred to his epilepsy as a “supposed illness”, coworkers , overhearing this comment, then accused the employee of getting preferential treatment because of his “phony illness”, the employee had to take medication to treat the resulting stress, and was discharged because of poor work performance and comments referring to his general health were made when he was terminated).

In the instant case, it is exactly this type of indirect behavior of which the Appellee-Employer is accused. For a person with epilepsy, having coworkers and supervisors consistently and over a long period call one such names as “plate-headed” and “stupid” because of a physical impairment, is not simply “mean spirited and unprofessional” as the lower court concluded. See Shaver v. Independent Stave Company, Inc. d/b/a Salem Wood Products Co., and Salem Wood Products Co., 2003 WL 1203575, *6 (E.D. Mo.). Rather, it is akin to being told on a daily basis, “I don’t like you because your skin is a different color” or “You’re not as good as I am because your skin is a different color.” It is this type

of treatment that the federal civil rights laws seek to eradicate and which other courts have found unlawful. See, e.g., Ross v. Douglas County, Nebraska, 234 F.3d 391 (8th Cir. 2000)(upholding a jury verdict finding that a hostile work environment existed where an employer regularly referred to an African-American employee as “nigger” and “black boy” and occasionally referred to his wife, who was Caucasian, as “whitey”); Delph v. Dr. Pepper Bottling Co., 130 F.3d 349 (8th Cir. 1997) *rehearing denied*, 1998 U.S. App. Lexis 1844 (found a reasonable person could conclude that a hostile work environment existed where employer used racial epithets, repeatedly pointed out to plaintiff that he was the only “black” employee and lucky to have the job, and gave him warnings allegedly related to his work performance but which were found to be pretextual); See also Smith v. St. Louis Univ., 109 F.3d 1261, 1264 (8th Cir. 1997) (court held a hostile work environment existed where employer repeatedly said that women should not be doctors and gave a negative reference for a job, but no request for sexual favors was made). Congress intended to provide the same type of protections to people harassed or made fun of on the basis of a physical or mental impairment when it passed the Americans with Disabilities Act. We, therefore, ask this Court to reverse the grant of summary judgment, and remand to the lower court for a decision consistent with these proceedings.

CONCLUSION

The judgment of the District Court holding that Mr. Shaver was not subjected to a hostile work environment as a matter of law should be reversed, and remanded for determination of whether being repeatedly called “platehead” and “stupid” creates a hostile work environment under the ADA. Alternatively, we ask this Court to set out the legal standard under which a person with epilepsy can establish that they have been subjected to a hostile work environment in violation of the Americans with Disabilities Act.

Respectfully submitted,

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I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This brief contains 5,814 words, and is printed in Times Roman 14 -point type font. See Fed. R. App. P. 32(a)(7)(B)(i). This brief was prepared using Microsoft Word for Microsoft Office 2000 word processing system. (See Fed. R. App. P. 32(a)(5)

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June 12, 2003

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