Spirit of Americans with Disabilities Act turned on its head by Kathryn Denner

When, in 1990, Congress enacted the Americans with Disabilities Act (ADA), there seemed little doubt that the law's provisions would benefit people with epilepsy. The Congressional debates and hearings that led to the passage of the ADA are replete with references to epilepsy, indicating that Congress meant for the law to protect such people from workplace discrimination. In fact, the Fall 1990 edition of the *Epilepsy Foundation of the St. Louis Region Quarterly* noted that St. Louis Epilepsy Foundation Executive Vice President Darla Templeton attended the signing of the ADA at the White House, at the invitation of President George H. Bush. Of particular interest to readers of the *Quarterly* were the ADA's prohibition of workplace discrimination based on disability and its requirement that employers make reasonable job modifications to accommodate the disabilities of their employees, as long as such accommodation would not cause an undue hardship for the employer. Hope was high that the ADA would cut through employers' fears, misunderstandings and prejudices about epilepsy, and result in greater freedom for people with epilepsy to participate in the workplace based on their ability to make a contribution.

Unfortunately, in the ten years since it became effective, the ADA has not lived up to expectations in providing protection for people with epilepsy. The primary reason for this is the considerable attention that the federal Courts of Appeal and, in some cases, the United States Supreme Court have focused on the ADA's definition of disability. The undeniable trend is for the Courts to dispose of cases by finding that the plaintiff is not disabled within the meaning of the ADA. If the plaintiff's epilepsy or other condition does not constitute a disability as defined in the ADA, the plaintiff is not entitled to the law's protections from discrimination.

The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities. The regulations interpreting the statute list some examples of major life activities, including seeing, hearing, walking, and breathing. In a series of cases decided in 1999, the United States Supreme Court held that the question of whether a person is substantially limited in performing a major life activity must be determined *after* considering the effects of mitigating measures such as medication. Accordingly, a person whose epilepsy is for the most part controlled by medication probably could not show the required substantial limitation, would not be considered disabled, and would not be protected from workplace discrimination based on his or her epilepsy.

The coverage of the ADA has been further eroded by recent cases that deal with what is or isn't considered a major life activity. For example, in January 2002 the Supreme Court examined the case of Toyota Motor Manufacturing v. Williams. The plaintiff, Ms. Williams, had carpal tunnel syndrome. She could not continue to perform her assembly line job, but could perform other jobs at the plant at which she worked. The Court never got to the question of whether Toyota had an obligation to transfer Ms. Williams to such a position, however, because it concluded that her carpal tunnel syndrome was not necessarily a disability. Although the ADA regulations specifically list performing manual tasks as a major life activity and Ms. Williams had shown that she could not perform the manual tasks associated with many types of jobs, the Court noted that she could still perform other activities such as sweeping, gardening and brushing her teeth. Ms. Williams had not done enough to show how her impairment restricted her ability to perform the activities of daily life,

according to the Supreme Court. It sent the case back to the lower court to determine whether Ms. Williams was truly disabled and thus entitled to the ADA's protections.

A 2001 case from the Eleventh Circuit Court of Appeals, Chenoweth v. Hillsborough County, is particularly important to people with epilepsy. Ms. Chenoweth worked in health care administration. She suffered a seizure and was diagnosed as having focal onset epilepsy. Her doctor prescribed anti-seizure medication and prohibited her from driving until she had been seizure free for six months. To deal with her driving restriction, Ms. Chenoweth asked her employer to allow her to perform some of her work from home and to adjust her office hours, so that she could arrange alternative transportation. Her employer refused and Ms. Chenoweth filed suit under the ADA.

Again, the Appellate Court never got to the question of whether Ms. Chenoweth could have effectively performed her job with the requested accommodations or whether such accommodations would have imposed an undue hardship on her employer. Instead, it concluded that Ms. Chenoweth did not qualify for the protections of the ADA because her epilepsy did not qualify as a disability within the meaning of the law. Driving, said the Court, is not a major life activity. Furthermore, her inability to drive did not substantially limit Ms. Chenoweth's ability to work. She could still perform all of the activities of her job (except, of course, that she could not get to the workplace to do them.) No disability, no protection under the ADA; case closed for Ms. Chenoweth.

In February 2002 the United States Supreme Court refused to review the Eleventh Circuit's conclusion that driving is not a major life activity. The Chenoweth decision thus remains intact and is binding on the courts within the jurisdiction of the Eleventh Circuit, which includes the southeastern part of the United States. The decision and the Supreme Court's refusal to reconsider it will likely also be persuasive when other Courts of Appeal examine the same issue.

Missouri is within the jurisdiction of the Eighth Circuit Court of Appeals. In 2000 the Eighth Circuit examined an ADA case in which the plaintiff, Rhonda Otting, suffered from epilepsy. The Court concluded that Ms. Otting was disabled within the meaning of the law. Unfortunately, the Court diluted the benefit of its decision to other people with epilepsy by emphasizing that medication and surgery had been ineffective in controlling Ms. Otting's epilepsy and that she continued to have several severe seizures per month. The Court clearly indicated that it might reach a different conclusion in a case where the efforts to control the seizures were more effective or the seizures were less frequent and severe.

The Court decisions discussed above and others like them are unfortunate for a number of reasons. Rather than carry out the ADA's purpose of providing employment opportunities to the greatest number of people despite individual physical or mental impairments, the Courts have invested resources in deciding whether particular impairments are substantially limiting enough to allow the plaintiff into the courtroom in the first place. Instead of examining an employer's motivation and condemning employment decisions based on fear, prejudice and misunderstanding of individual differences, the Courts allow the employer to act on those bases as long as the employee does not meet the threshold definition of a disabled person. Perhaps most disheartening, the current situation forces prospective plaintiffs to emphasize their limitations rather than their abilities. By focusing on what an employee *can't* do rather than on what he or she can do, the spirit of the ADA is turned on its head. Congress should act to override the Courts' misguided decisions and restore the promise of the

ADA.

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