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EMPLOYMENT LAW DECISIONS FROM THE UNITED STATES SUPREME COURT'S 2001-2002 TERM: PART I

■ Diane M. Juffras

The United States Supreme Court decided a record number of employment law cases in its 2001-2002 term. This Public Personnel Bulletin is the first of two that will discuss those decisions. It focuses on four Americans with Disabilities Act (ADA) cases: Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, Chevron USA, Inc. v. Echazabal, Barnes v. Gorham and US Airways, Inc. v. Barnett. The ADA prohibits discrimination in employment against qualified individuals with a disability who, with or without an accommodation, are able to perform the essential functions of a job.[1] An employer who fails to make reasonable accommodations to the known physical or mental limitations of an employee or applicant with a disability is considered to have discriminated unless the employer can show that accommodation would impose an undue hardship on its operations.[2]

Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (January 8, 2002).

Holding: To be substantially limited in the major life activity of performing manual tasks (and therefore to be disabled within the meaning of the ADA), an employee must be unable to perform the variety of tasks central to daily life.

Under the ADA, an employer must make a reasonable accommodation to an applicant or employee with a disability, unless the employer "can demonstrate that the accommodation would impose an undue hardship."[3] The ADA defines disability as "(a) a physical or mental

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[1] *See* 42 U.S.C. § 12112(a), (b).

[2] 42 U.S.C. § 12112(b)(5)(A).

[3] *See* 42 U.S.C. § 12112(b)(5)(A) (2001).

impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairments; or (c) being regarded as having such an impairment."[4] In *Toyota*, the Supreme Court held that in a case in which an employee claims a disability consisting of a substantial impairment in his or her ability to engage in the major life activity of performing manual tasks, a court's focus must be on whether the employee is unable to perform the variety of tasks central to most people's daily lives, not on whether the employee is unable to perform the tasks associated with his or her specific job.[5]

Ella Williams worked on the engine fabrication assembly line at one of Toyota's U.S. automobile manufacturing plants. Her position involved the use of pneumatic tools, which, over time, caused her to develop carpal tunnel syndrome and bilateral tendonitis. Her personal physician recommended a permanent work restriction that precluded Williams from lifting more than twenty lbs., frequently lifting or carrying objects weighing even ten lbs., engaging in repetitive flexing or extension of her wrists and elbows, performing "overhead work," or using vibratory or pneumatic tools.

Toyota reassigned Williams to its Quality Control Inspection Operations unit (QCIO), where she visually inspected painted cars on the assembly line and then reinspected the cars by wiping them with a gloved hand. Williams was able to perform both activities without difficulty. After Williams had been working in QCIO for about three years, Toyota reorganized the department and assigned Williams additional duties. One of the new inspection tasks that Williams now had to perform required her to hold her hands and arms at shoulder height for several hours at a time, an activity that her physician had advised her against performing. Williams began experiencing pain in her neck and shoulders. She was diagnosed with inflammation of the muscles, tendons and nerves involved with the upper extremities.

Williams and Toyota dispute what happened next: Williams claims she asked Toyota to accommodate her diability by allowing her to limit her work to the original two tasks she had performed for QCIO, but Toyota refused. Toyota claims that Williams simply began calling in sick on an increasingly frequent basis. In any event, Toyota terminated Williams for poor attendance. Williams filed suit, alleging that Toyota had failed reasonably to accommodate her disability and had terminated her in violation of the ADA.[6]

The issue that ultimately came before the Supreme Court was the proper standard for assessing whether an individual is substantially limited in performing manual tasks.[7] At the trial court level, Williams had in fact claimed that she was substantially limited in three major life activities: lifting, working and performing manual tasks.[8] The District Court found that she was not substantially limited in any of these categories.[9] Williams appealed and the Sixth Circuit Cout of Appeals ruled in her favor. Because it found that Williams *was* substantially limited in her ability to perform manual tasks and thus *was disabled* at the time she sought an accommodation, the Sixth Circuit did not decide whether or not she was substantially limited in working or lifting and in turn, these questions played no part in the Supreme Court's analysis.[10] The Sixth Circuit held that in order for a plaintiff to demonstrate that she is disabled due to a substantial limitation in her ability to perform manual tasks, she would have to "show that her manual disability involve[s] a 'class' of manual activities affecting the ability to perform tasks at work."[11]

The Supreme Court reversed the decision of the Sixth Circuit. The Court's reasoning was based, in large part, on the plain language of the ADA's definition of the term "disability." First, the Court noted, the use of the word "substantially" in the phrase "substantially limits" suggests that the impairment or limitation must be "considerable" or "large," and thus precludes from the definition of disability those impairments that interfere in only a minor way with the performance of manual tasks.[12] The Court then turned to the use of the word "major" in the phrase "major life activities," and found that "major" means "important," and that the term "major life activities" must therefore refer to the activities that are of central importance to daily life.[13] Thus, the Court concluded, "to be substantially limited in

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[4] *See* 42 U.S.C. § 12102(2).

[5] *Toyota*, 534 U.S. 184, 122 S.Ct. at 693. The EEOC defines "major life activity" as meaning "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *See* 29 C.F.R. § 1630.2(i).

[6] The summary of *Toyota's* underlying facts is drawn from the opinion. *See Toyota*, 122 S.Ct. at 686-87.

[7] *See Toyota*, 122 S.Ct. at 681.

[8] *See Toyota*, 122 S.Ct. at 687.

[9] *See Toyota*, 122 S.Ct. at 688.

[10] *See Toyota*, 122 S.Ct. at 688-89.

[11] *See Toyota*, 122 S.Ct. at 688.

[12] *See Toyota*, 122 S.Ct. at 688.

[13] *See Toyota*, 122 S.Ct. at 688.

performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term."[14] The manual tasks specific to any particular job would not necessarily be important parts of most people's lives, and the Court found that the tasks required of Williams by Toyota are *not* an important part of most people's daily lives, and Williams' inability to perform them could not be proof that she is substantially limited in performing manual tasks.[15]

The Sixth Circuit had deemed Williams' ability to tend to her personal hygiene and carry out personal and household chores irrelevant to its analysis, but the Supreme Court found that tasks such as bathing and brushing one's teeth and performing household chores are precisely the tasks that have central importance in people's lives, and that the Sixth Circuit should have considered Williams' ability to perform *these* tasks instead of her ability to keep her arms extended at shoulder level for extended periods of time.[16] The Supreme Court noted that while the record contained some evidence that Williams was compromised in her ability to sweep, play with her children and drive long distances, it clearly indicated that she was able to brush her teeth, bathe, garden, do laundry and pick up around her house.[17] It therefore found that the evidence did not indicate that the restrictions on her activities were so severe as to establish a disability as a matter of law, and held that the Sixth Circuit should not have granted partial summary judgment on this issue in Williams' favor. The Court remanded the case to the lower courts for further proceedings.[18]

The *Toyota* decision will not effect a change in the way in which most courts have been analyzing claims of disability based on a limitation in an employee's ability to perform manual tasks.[19] Why, then, did the Supreme Court take this case? The Court identified the mistake in the Sixth Circuit's analysis as rooted in a misunderstanding of the Supreme Court's decision in *Sutton v. United Airlines*,[20] and it appears from the reasoning of the *Toyota* decision that the Court took the case to correct that misunderstanding.

In *Sutton*, the Supreme Court had said to be considered disabled in the major life activity of working,[21] a claimant would be required to show an inability to work in a "broad range" or "broad class" of jobs, rather than an inability to work in a specific job.[22] In finding that Williams was disabled because of her inability to perform a broad range of tasks required by her position, the Sixth Circuit had mistakenly applied the broad-class analysis to the major life activity of performing manual tasks. The Supreme Court emphasized that nothing in the text of the ADA, in the Court's previous ADA opinions, or in regulations of the Equal Employment Opportunity Commission (EEOC) interpreting the ADA, suggests that a broad-class framework should apply outside the context of the major life activity of working.[23]

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[14] *See Toyota*, 122 S.Ct. at 688.

[15] *See Toyota*, 122 S.Ct. at 693.

[16] *See Toyota*, 122 S.Ct. at 693.

[17] *See Toyota*, 122 S.Ct. at 694.

[18] *See Toyota*, 122 S.Ct. at 694.

[19] No other court has held as the Sixth Circuit had. For more typical decisions, *see* Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 796-97 (9th Cir. 2001) (employee who could cook, care for herself and do lighthouse work not restricted in ability to perform manual tasks, notwithstanding her inability to use a keyboard or engage in handwriting); Chanda v. Engelhard/ICC, 234 F.3d 1219, 1222-23 (11th Cir. 2000) (employee who is able to dress and feed himself, drive, and help around the house not limited in ability to perform manual tasks even though tendonitis prevented him from both typing and cutting foamboard for extended periods of time); Ouzts v. USAir, Inc., 1996 WL 578514 (W.D.Pa. 1996), *aff'd*, 118 F.3d 1577 (3d Cir. 1997) (employee who is able to make meals, bathe, fix her hair, run errands and clean house not restricted in her ability to perform manual tasks, notwithstanding her inability to open heavy doors or carry items weighing only a few pounds); Puoci v. City of Chicago, 81 F.Supp.2d 893, 897 (N.D.Ill. 2000) (inability to mow lawn and limitation in planting and gardening do not support finding that plaintiff is limited in ability to perform manual tasks because activities in question are not major life activities); Zarzycki v. United Technologies Corp., 30 F.Supp.2d 283, 289 (D.Conn. 1998) (plaintiff's inability to climb ladders, ride a bike, do yardwork, vacuum or move furniture not a restriction in his ability to perform manual tasks as a matter of law).

[20] 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999).

[21] In both *Sutton* and *Toyota*, the Court expressly declined to hold that working is a major life activity. *See Sutton*, 527 U.S. at 492; *Toyota*, 122 S.Ct. at 692 ("Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.").

[22] *See Toyota*, 122 S.Ct. at 692-93; *Sutton*, 527 U.S. at 491.

[23] *See Toyota*, 122 S.Ct. at 693.

The Court expressly noted that applying a broad-class analysis to the activity of performing manual tasks would allow a plaintiff whose disability claim is based on a substantial impairment in his or her ability to work to evade *Sutton's* requirement that he or she show an inability to work in a broad range of *jobs* by showing an inability to perform a broad range of *tasks* in *one particular job*.[24]

The primary effect of the *Toyota* decision will be to forestall such a development in the lower courts, and in that sense, it narrows the scope of coverage of the ADA. Had the Supreme Court's decision gone the other way, the result in those ADA cases pending in the Fourth Circuit involving employees' inability to do the manual tasks required by their specific jobs would likely be quite different, as an examination of the Fourth Circuit's decision in *Hooven-Lewis v. Caldera* suggests.[25]

Hooven-Lewis worked as a biological laboratory technician, then as a laboratory manager, in a series of government research labs at Walter Reed Army Hospital. Her job duties included handling lab specimens, chemicals and electrical and mechanical equipment. Sometime during the period of her employment, Hooven-Lewis developed a hand tremor that prevented her from handling lethal pathogens and other highly infectious live materials. Her supervisor accommodated her difficulty by having other employees render lethal and infectious specimens inactive before Hooven-Lewis handled them. After a time, Hooven-Lewis transferred into another lab, where her supervisor allowed her a similar accommodation. The arrangements were informal. At no time did her supervisors ask for nor did Hooven-Lewis offer any documentation of the medical basis of her condition. When Hooven-Lewis and her supervisor began to clash, the supervisor ordered Hooven-Lewis to begin working with live agents; Hooven-Lewis refused and demanded that the lab continue to accommodate her condition as it had been doing. The hospital asked for medical documentation of her condition, which Hooven-Lewis refused to provide. After unsuccessfully trying to place Hooven-Lewis in other labs, the hospital fired her.[26]

Hooven-Lewis brought suit against the hospital, alleging, among other things, disability discrimination, claiming to be substantially limited in the major life activity of working.[27] Unlike Ella Williams, the plaintiff in *Toyota*, Hooven-Lewis did not base her claim of disability on being substantially limited in performing manual tasks. Rather, Hooven-Lewis argued that she was unable to obtain work in her field because there were no positions at the hospital that did not involve working with infectious material.[28] The Fourth Circuit found as a matter of law that Hooven-Lewis was not disabled because she had failed to show that she was substantially limited in the major life activity of working, noting that the Fourth Circuit has repeatedly held "that a plaintiff seeking to demonstrate a limitation in her ability to work must demonstrate that she is foreclosed generally from the opportunity to obtain the type of employment involved, not merely that she is 'incapable of satisfying the singular demands of a particular job.'"[29] The court concluded that Hooven-Lewis' tremor merely prevented her from handling certain materials safely, but that her work history showed that there were many types of jobs that she could perform in biology labs.[30]

Had the Supreme Court affirmed the approach taken by the Sixth Circuit and ruled in favor of Ella Williams, rather than in favor of Toyota, a plaintiff in Hooven-Lewis's situation would now be able to proceed quite differently. If someone like Hooven-Lewis were to claim that she was substantially limited in her ability to perform manual tasks, and cited her inability to handle a broad range of pathogens and infectious agents (without reference to her ability to brush her teeth and hair and do household chores, of which the Fourth Circuit decision makes no mention in *Hooven-Lewis*), she might well be successful in establishing her disability, and in forcing a laboratory to make an accommodation. As the law now stands, however, plaintiff-employees will continue to face the requirement that they show that they are foreclosed from a broad range of jobs, not just from the one they happen to hold.

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[24] *See Toyota*, 122 S.Ct. at 693.

[25] 249 F.3d 259 (4th Cir. 2001). Hooven-Lewis was an employee of Walter Reed Army Hospital Institute of Research, a federal facility, and her claim of disability discrimination was therefore brought under the Rehabilitation Act of 1973. Employment discrimination claims under the Rehabilitation Act are decided by the same substantive standards applied under the ADA. *See* 29 U.S.C. §§ 793(d), 794(d); *Hooven-Lewis*, 249 F.3d at 268-69; *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995).

[26] For a more detailed exposition of the facts of the case, *see Hooven-Lewis*, 249 F.3d at 262-65.

[27] S*ee Hooven-Lewis*, 249 F.3d at 266.

[28] S*ee Hooven-Lewis*, 249 F.3d at 266.

[29] S*ee Hooven-Lewis*, 249 F.3d at 269, *citing* Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986).

[30] S*ee Hooven-Lewis*, 249 F.3d at 269.

Toyota does not mandate any change in the way in which employers handle requests for accommodation of carpal tunnel syndrome. The Supreme Court emphasized in *Toyota*, as it has elsewhere, that determinations of whether or not individuals have an ADA-qualified disability must be made on a case-by-case basis. Quoting its 1999 opinion in *Albertson's Inc. v. Kirkingburg*, the Court said that "the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] *in terms of their own experience* . . . is substantial'" [emphasis added].[31] With respect to carpal tunnel syndrome, the Court noted that the symptoms vary widely from person to person, and said that as a result, "an individual's carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA."[32] The touchstone remains whether the carpal tunnel syndrome renders the employee substantially limited in a major life activity.

Chevron U.S.A. Inc. v. Echazabal, 536 U.S. __, 122 S.Ct. 2045 (June 10, 2002).

Holding: The ADA permits the EEOC regulation allowing the employer defense that a worker's disability on the job would pose a direct threat to his or her health.

The ADA permits employers to refuse to employ a disabled person if the disability poses a direct threat to the health or safety of *other persons* in the workplace and the threat cannot be eliminated by reasonable accommodation.[33] But what if the disability would cause a given job to pose a risk to the health or safety of the employee himself or herself? The Ninth Circuit had held that the employer could not reject an employee on that basis, while the Eleventh Circuit had found such a rejection justified.[34] In *Echazabal*, the U.S. Supreme Court held that the ADA permits employers to refuse to hire individuals with disabilities where their performance of the job would endanger *their own* health.

Mario Echazabal suffered from Hepatitis C. For over twenty years, he had worked at one of Chevron's California oil refineries, not as the employee of Chevron, but for one or another of the independent contractors who performed maintenance for Chevron. Twice during this period, Echazabal applied for a position with Chevron itself (which would have provided him with health benefits, as the independent contractor positions did not), and twice Chevron extended him a conditional offer, subject to his taking a medical examination. Both times the medical examination revealed that Echazabal had a liver abnormality of the type caused by Hepatitis C, and Chevron withdrew the offer on the grounds that exposure to the toxins produced at the refinery would likely worsen his condition -- a conclusion that his own physicians disputed. After Echazabal underwent Chevron's medical examination the second time, Chevron asked his employer either to reassign him to a job in which he would not be exposed to toxins or to remove him from the refinery. The contractor terminated Echazabal's employment. Echazabal filed a complaint, alleging that Chevron had violated the ADA by refusing to hire him and by refusing to allow him to continue working in the refinery as an employee of the contractor. The Ninth Circuit agreed.[35]

The text of the ADA addresses threats posed to others, but not threats to an employee's own health. In the definition of "discrimination," the ADA includes the practice of "using qualification standards . . . that screen out or tend to screen out an individual with a disability," but provides an exemption for qualification standards "shown to be job-related for the position in question and . . . consistent with business necessity." As an example of a permissible qualification standard, the statute gives requirements that individuals "not pose a direct threat to the health or safety of other individuals in the workplace."[36] However, in its regulations interpreting the ADA, the EEOC has recognized a threat to *oneself* as within the scope of the exception for qualification standards:

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[31] *See Toyota*, 122 S.Ct. at 691-92; Albertson's Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999).

[32] *See Toyota*, 122 S.Ct. at 692.

[33] *See* 42 U.S.C. § 12113 (a), (b) (2002).

[34] *See* Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1072 (9th Cir. 2000); Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996). In Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999), the Seventh Circuit failed to reach this issue, affirming instead the District Court's finding that the plaintiff was not qualified to perform the essential functions of his job at the time of his termination.

[35] *See Echazabal*, 122 S.Ct. at 2047-48. For background to the case, *see also* "Court Rules Against Debilitated Employee in Disabilities Case," *Associated Press Report*, June 10, 2002, 10:43 a.m. ET.

[36] *See Echazabal*, 122 S.Ct. at 2048-49; 42 U.S.C. § 12113 (a), (b) (2002).

> The term 'qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace (emphasis added).[37]

The issue presented to the Supreme Court in *Echazabal* was whether the EEOC had exceeded its rulemaking authority when it adopted that regulation.[38] Echazabal argued that because Congress had failed to include a threat to oneself when it mentioned a threat to others, it could not have intended the qualification-standard exception to the ADA to include situations where the only person likely to be harmed by the applicant's performance of the job was the applicant himself.[39]

The Supreme Court rejected Echazabal's argument, noting that the language of the statute makes clear that the threat-to-others exception is set forth as an *example* of those types of qualification standards that may be found lawful in the appropriate circumstances. [40] The Court found that the EEOC's regulation is valid because it makes sense of the ADA's provision allowing qualification standards that are job-related and consistent with business necessity.[41] By way of example, the Court focused on OSHA's requirement that employers furnish their employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees."[42] No court has yet considered whether an employer would be liable under OSHA where the employee knowingly consented to work in a job likely to have health consequences particular to him or her, but in such a situation, the Court said, "there is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker."[43] The EEOC's regulation is valid, the Court continued, because it "exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives . . . imprecisely marked."[44]

The *Echazabal* decision does not effect any changes in the law governing pre-employment medical inquiries and examinations. Employers still may not ask job applicants questions about their health or medical history and still may not require applicants to undergo medical examinations until a conditional offer of employment has been extended.[45] Any decision to withdraw a conditional job offer based on the results of a medical inquiry or examination must be job-related and consistent with business necessity.[46] And employers must be careful not to substitute their own ideas of what might be harmful for solid medical judgment. *Echazabal* warns employers against turning away otherwise qualified applicants based on the threat-to-self exception where the perception of a threat to the applicant's own health grows out of stereotypes, noting that the EEOC regulation recognizing the threat-to-self exception requires that such a decision be made – like all ADA decisions -- an *individualized* basis in light of current medical opinion.[47]

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[37] See 29 C.F.R. § 1630.15(b)(2).

[38] *See Echazabal*, 122 S.Ct. at 2047, 2048, 2049.

[39] This is the principle of statutory interpretation known as *expressio unius est exclusio alterius*, defined by Black's Law Dictionary to mean "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 602 (7TH ed. 1999). Another way of explaining the theory is that "under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

[40] *See Echazabal*, 122 S.Ct. at 2049-51.

[41] *See Echazabal*, 122 S.Ct. at 2051-52.

[42] 29 U.S.C. § 654(a)(1); *See Echazabal*, 122 S.Ct. at 2052.

[43] *See Echazabal*, 122 S.Ct. at 2052.

[44] *See Echazabal*, 122 S.Ct. at 2052.

[45] 42 U.S.C. § 12112(c) (2002).

[46] *See* 42 U.S.C. § 12113 (2002).

[47] *See Echazabal*, 122 S.Ct. at 2052-53. *See also* 29 C.F.R. 1630.2(r) (2002), which defines the term "direct threat" in the phrase "the individual shall not pose a direct threat to the health or safety of other individuals in the workplace" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."

Barnes v. Gorman, 536 U.S. ___, 122 S.Ct. 2097, (June 17, 2002).

Holding: Punitive damages are not available in private suits against state and local governments under Title II of the ADA.

Most cases involving claims of disability discrimination in employment arise under Title I of the ADA. *Barnes v. Gorman*, by contrast, arises under Title II of the ADA, which prohibits discrimination against qualified individuals with a disability more generally in the provision of the services, programs or activities of public entities. *Barnes* is not, therefore, an employment case per se, but the decision has employment law consequences for public employers with fewer than fifteen employees, and affects *all* public entities charged with discrimination in the provision of government services.[48]

Jeffrey Gorman, an individual who uses a wheelchair, was arrested for trespass after a fight in a nightclub. The police van sent to transport him to the city jail was not equipped to handle a wheelchair, and an officer removed Gorman from his wheelchair and strapped him to a bench inside the van. The belts became loose during transit and Gorman fell to the floor, rupturing his urine bag and injuring his shoulder and back. Gorman suffered continuing serious medical problems as a result of his injuries that left him unable to work.

Gorman brought suit against defendant Kansas City Board of Police Commissioners alleging that by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries, the City had discriminated against him on the basis of his disability in violation of both Title II of the ADA and § 504 of the Rehabilitation Act (which prohibits discrimination against the disabled by recipients of federal funding). At trial, the jury found in favor of Gorman and awarded him both compensatory damages and $1.2 million in punitive damages. The issue before the Supreme Court in *Barnes* was whether punitive damages may be awarded in a private lawsuit brought under Title II of the ADA and § 504 of the Rehabilitation Act.[49] The Court held that they may not.

Congress has provided that plaintiffs alleging violations of Title II of the ADA should have the same "remedies, procedures and rights" as those alleging violations of § 504.[50] The Rehabilitation Act, in turn, provides that plaintiffs alleging violations of § 504 should have the same "remedies, procedures and rights" as those set forth in Title VI of the Civil Rights Act of 1964 (which prohibits racial discrimination in federally funded programs).[51] Congress' ability to place conditions such as a prohibition against discrimination on the grant of federal funds both in Title VI and in the Rehabilitation Act derives from its powers under the Spending Clause of the United States Constitution.[52] The Supreme Court has over the years analogized federal statutes containing such spending conditions with contracts because the recipients of the funds are agreeing to comply with certain federally-imposed conditions in exchange for the funds. The Court has held that just as private parties in breach of contract may be held liable for contract damages, so too federal-funds recipients in breach of their agreement with the federal government may be held liable for damages.[53] As the Court put it:

> when a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.[54]

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[48] Title I of the ADA and the EEOC regulations implementing Title I (29 C.F.R. Part 1630) apply to public employers with fifteen or more employees. *See* 42 U.S.C. § 12111(5)(A) (2002); 28 C.F.R. § 35.140(b)(1). The United State Department of Justice is charged with enforcing Title II of the ADA, and under its regulations, *public employers with fewer than fifteen employees* are subject to the employment-related requirements of § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against the disabled by recipients of federal funding, and the regulations promulgated thereunder. *See* 42 U.S.C. § 12132 (2002); 28 C.F.R. § 35.140(a). For the Rehabilitation Act of 1973, *see* 29 U.S.C. § 794 *et seq*. The original Rehabilitation Act regulations formed the basis of many of the regulations issued by the EEOC under Title I of the ADA.

[49] While Title I of the ADA explicitly authorizes the award of punitive damages to plaintiffs alleging disability discrimination in employment, Title II does not. Public employers are not covered by the punitive damages provision of Title I. *See* 42 U.S.C. § 1981a(a)(2).

[50] *See* 42 U.S.C. § 12133.

[51] *See* 29 U.S.C. § 794a (a)(2).

[52] *See* U.S. Const., Article I, § 8, cl. 1.

[53] *See Barnes* 122 S.Ct. at 2100-02.

[54] *See Barnes* 122 S.Ct. at 2102.

The Court has regularly applied the contract-law analogy in cases defining the scope of the *conduct* for which federal funds recipients may be held liable for money damages.[55] In *Barnes*, the Court extended that analogy to determine the scope of *damages*,[56] holding that because compensatory damages and injunctive relief are remedies of the sort typically found in breach of contract actions, recipients of federal funding can be said to be on notice that they are subject to those remedies, but that because punitive damages are not generally available as contract remedies, recipients cannot be said implicitly to consent to liability for punitive damages.[57] The Court observed that it would reach the same result even if it were to recognize some sort of *implied* punitive damages provision in Title VI. Implied contract terms are said to be those that comport with community standards of fairness, or, alternatively, those that the parties would have agreed to, had they considered the matter. Under either analysis, the Court said, it is unlikely that federal-funds recipients would have agreed to exposure to the unlimited liability represented by an implied punitive damages provision.[58]

Barnes instructs state and local law enforcement that they must take appropriate measures to insure that disabled suspects are transported safely and that their transportation needs are evaluated on an individualized basis. The decision makes clear more broadly that where government discriminates against disabled persons in the provision of any service, program or activity, victims will be made whole for the losses they suffer, but will not receive additional compensation in the form of punitive damages. *Barnes* does not address whether the compensatory damages available under Title VI, the Rehabilitation Act and Title II of the ADA include damages for pain and suffering. The Fourth Circuit has held, however, that under § 504 of the Rehabilitation Act (and thus under Title II of the ADA), compensatory damages may include awards for pain and suffering where the plaintiff has shown that the discrimination was intentional.[59]

Although employment is not the context in which *Barnes* arose, the decision is nonetheless important for municipal employers with fewer than fifteen employees. When a disabled employee asks for a reasonable accommodation, small municipal employers may be financially less able to provide the requested accommodation and may, in good faith, invoke the undue hardship exception. Notwithstanding that good faith, when an ADA claim goes to trial, undue hardship is a jury question, and juries' actions are notoriously hard to predict. Removing punitive damages from the set of available remedies in cases of disability employment discrimination involving very small public employers eliminates the possibility of a judgment that could break a municipal budget for years to come. It also brings the potential liability of smaller public employers in line with that of their larger cousins: while private entities covered by the employment provisions of Title I of the ADA are liable for punitive damages, public employers are not.[60]

US Airways, Inc., v. Barnett, 535 U.S. __, 122 S.Ct. 1516, (April 29, 2002).

Holding: An employer is not required to reassign a disabled employee to a vacant position in violation of an established seniority system.

In US Airways, Inc., v. Barnett, a sharply divided Supreme Court held that absent a showing of special circumstances, the ADA does not require an employer to reassign a disabled employee to a vacant position when that reassignment would violate the rules of the employer's established seniority system. The ruling applies equally to seniority systems in non-unionized and unionized workplaces. Although seniority systems are rare in North Carolina public employment, *Barnett* also provides guidance more generally on the relationship between disability-neutral workplace policies and employees' needs for reasonable accommodation, and on the standard for deciding whether an accommodation is reasonable.

When plaintiff Robert Barnett, a cargo-handler for US Airways, injured his back on the job, he invoked his rights under US Airways' seniority system and transferred to a mailroom job that put less strain on his back. About two years later, in accordance with the seniority system's procedures, the mailroom position became open to seniority-based employee bidding, and two employees senior to Barnett indicated that they intended to bid on his job. Claiming that he was a qualified individual with a disability, Barnett asked US Airways to grant him a reasonable accommodation by exempting his job

55 *See Barnes* 122 S.Ct. at 2101.

56 *See Barnes* 122 S.Ct. at 2101.

57 *See Barnes* 122 S.Ct. at 2101, 2103.

58 *See Barnes* 122 S.Ct. at 2102-03.

59 *See* Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 831-32 (4th Cir. 1994) (using analogy of Title IX).

60 42 U.S.C. § 1981a(b)(1).

from the seniority system's bidding process and allowing him to stay in the mailroom. US Airways refused, and Barnett lost his job to another employee with greater seniority.

The issue before the Court was whether a disabled employee's need for a reasonable accommodation trumped the requirements of an employer's seniority system. The majority opinion takes a middle position between those advanced by US Airways, on the one hand, and Barnett, on the other. US Airways had argued that an accommodation that violates the rules of a seniority system would be, without exception, not reasonable as a matter of law; Barnett had argued that it was the burden of the employer to demonstrate, on a case-by-case basis, that an accommodation that violates seniority rules creates an undue hardship.[61]

US Airways' argument focused on the interplay between the requirements of reasonable accommodation and the operation of disability-neutral workplace rules. US Airways asserted that because the ADA requires only "equal" treatment for persons with disabilities, it does not require employers to grant requests that would violate disability-neutral rules (like those governing the operation of seniority systems) and thus give disabled employees preferential treatment. In response, the Supreme Court noted that the logical extension of this argument would be that employers with neutral office assignment rules would not have to accommodate employees whose disabilities required them to work on the ground floor (because such an accommodation would give such employees preferential treatment with respect to that assignment), and employers with neutral furniture allocation rules would not have to accommodate employees whose disabilities required them to use different kinds of desks or chairs.[62] The ADA makes no mention of any kind of automatic exception from the requirement of reasonable accommodation when the requested accommodation would violate disability-neutral rules.[63] Rather, both part-time or modified work schedules, and the acquisition or modification of equipment, about which many employers have disability-neutral policies, are included among the examples of reasonable accommodation given in the text of the ADA itself. From this the Court concluded that Congress had envisioned that reasonable accommodation might sometimes require exceptions to disability-neutral policies.[64]

The Court found similarly unconvincing the plaintiff's contention that consideration of whether an accommodation is "reasonable" requires only consideration of whether the accommodation is "effective" and can meet the disabled employee's needs. Barnett had argued that the fact that a proposed accommodation violates the rules of a seniority system is irrelevant to a consideration of the disabled employee's needs, and should not be considered in the reasonable accommodation analysis at all, although he conceded that it could be considered as part of an employer's showing that the accommodation would impose an undue hardship on its operations.[65] Citing ordinary English usage, the objectives of the ADA, the language of the statute and of relevant EEOC regulations, and the consistent interpretation of the phrase "reasonable accommodation" by the lower courts, the Supreme Court rejected Barnett's equation of "reasonable" with effective.[66]

Given that *Barnett* arose in the context of US Airways' motion for summary judgment, the Court took the standard for summary judgment in an ADA case as the starting point for its analysis. The trial courts' practical reconciliation of the concepts of "reasonable accommodation" and "undue hardship," the Supreme Court said, is reflected in the rule that a plaintiff-employee need only show that an accommodation seems reasonable on its face – that is, reasonable ordinarily or in the majority of cases – in order to defeat the defendant-employer's motion for summary judgment. Once the employee has made this showing, it is the employer's burden to show that the particular accommodation would impose an undue hardship on its operations.[67] Thus, from a practical vantage point, the question before the Court was whether an accommodation that violates the rules of a seniority system would be reasonable *in the majority of cases*.[68]

The majority concluded that such an accommodation would not be reasonable in most cases. The Court placed great importance first, on the advantages that seniority systems offer employees "by creating, and fulfilling, employee expectations of

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61 *Barnett*, 122 S.Ct. at 1520.

62 *Barnett*, 122 S.Ct. at 1520 - 21.

63 *Barnett*, 122 S.Ct. at 1521.

64 *Barnett*, 122 S.Ct. at 1521 *See also* 42 U.S.C. § 12111(9)(b).

65 *Barnett*, 122 S.Ct. at 1522.

66 *Barnett*, 122 S.Ct. at 1523.

67 *Barnett*, 122 S.Ct. at 1523.

68 *Barnett*, 122 S.Ct. at 1523.

fair, uniform treatment,"[69] and second, on the way in which seniority systems would be undermined by requiring an employer affirmatively to show that a proposed accommodation would create an undue hardship.[70] The Court also noted analogous case law holding that Title VII's prohibition against discrimination on account of religion does not require an employer to adapt its scheduling practices to an employee's special worship schedule when to do so would conflict with the seniority rights of other employees,[71] and holding that under § 504 of the Rehabilitation Act, which prohibits discrimination in employment by recipients of federal funds, collectively bargained seniority trumps the need for reasonable accommodation.[72]

But the Court stopped short of promulgating an inflexible, absolute rule. Rather, its holding leaves open the opportunity for a plaintiff to show that despite the existence of a seniority system, special circumstances apply that make the proposed accommodation "reasonable" in the particular circumstances.[73] The Court did not define the kinds of special circumstances that might allow an accommodation to trump the rules of a seniority system, giving only two examples: where an employer has the right to make unilateral changes to the seniority system and does so frequently enough that employees have a diminished expectation that the system will be followed, or where a seniority system is so full of exceptions that one more exception cannot be said to matter.[74]

North Carolina public employers should note that the Supreme Court's decision in *Barnett* casts a new light on the Fourth Circuit's January 2001 decision in *EEOC v. Sara Lee Corp.*[75] Adopting reasoning similar to that of the Supreme Court in *Barnett*, the Fourth Circuit had held in *Sara Lee* that the ADA's reasonable accommodation requirement did not supercede either an employer's bona fide seniority system or its legitimate and non-discriminatory workplace policies.[76] *Sara Lee* could be read to allow an employer to refuse a requested accommodation where the accommodation violates other disability-neutral policies such as office- or furniture-assignment policies, but *Barnett* now makes clear that this is not permissible. If an employer asserts that assigning a disabled employee to the ground floor, or purchasing a disabled employee special office furniture, is not a "reasonable accommodation" or is an undue hardship, it will have to do so on the basis of something other than a claim that such an accommodation violates a so-called "non-discriminatory office policy." A non-discriminatory office policy will have to be one that provides "important employee benefits"[77] or fixes "job qualifications, prerequisites and entitlements to positions"[78] before its violation will be said to be "not reasonable" as a matter of law.

For attorneys representing employers in discrimination lawsuits brought under the ADA, *Barnett* changes the standard for summary judgment where the operation of a seniority system is a factor in the employer's refusal to accommodate a disabled employee. After *Barnett*, an employer need only show that an assignment or reassignment would violate the rules of its seniority system to prevail on a motion for summary judgment in the employer's favor. To defeat an employer's motion for summary judgment, an employee must now present *evidence* of special circumstances that would show that in the particular case the proposed accommodation is reasonable, notwithstanding the existence of the seniority system.[79]

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[69] *Barnett*, 122 S.Ct. at 1524.

[70] *Barnett*, 122 S.Ct. at 1524 - 25.

[71] *Barnett*, 122 S.Ct. at 1524, citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79-80 (1977).

[72] *See Barnett*, 122 S.Ct. at 1524 and cases cited therein.

[73] *See Barnett*, 122 S.Ct. at 1525.

[74] *See Barnett*, 122 S.Ct. at 1525.

[75] 237 F.3d 349 (4th Cir. 2001).

[76] *See Sara Lee*, 237 F.3d at 354-55.

[77] *See Barnett*, 122 S.Ct. at 1524.

[78] *See Sara Lee*, 237 F.3d at 354, *citing* Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998).

[79] *See Barnett*, 122 S.Ct. at 1525.