Smoke-Free Environments Law Project
The Center for Social Gerontology, Inc.
2307 Shelby Avenue
Ann Arbor, Michigan 48103
734 665-1126 • fax 734 665-2071 • sfelp@tcsg.org

THE AMERICANS WITH DISABILITIES ACT AND SMOKING IN THE WORKPLACE

INTRODUCTION:

The federal Americans with Disabilities Act ("ADA") was enacted in 1990 and took effect in 1992. Described by its chief sponsor, U.S. Senator Tom Harkin, as "the 20th-century emancipation proclamation for people with disabilities," the ADA was adopted to provide a comprehensive national mandate to eliminate discrimination against people with disabilities.

The ADA prohibits discrimination against individuals with disabilities by private and public employers with 15 or more employees (Title I), by state and local government entities (Title II), and by places of public accommodation (Title III). Title I covers all employers except the United States government, Indian tribes and private membership clubs that are exempt from taxation.

While Title I of the ADA, as enacted, covered state governments, the Supreme Court ruled in February 2001 that state government workers cannot sue their employers for money damages under the ADA. The Court held that the Eleventh Amendment to the U.S. Constitution, which gives the states broad protection against damage suits, immunizes state governments against ADA damage actions. The Court held, however, that state workers retain the power, under Title I, to bring actions for injunctive relief. The Court further held that *local* government employees can sue their employers for damages, because Eleventh Amendment immunity does not extend to local governmental units such as cities and counties. Finally, both state and local government employees continue to have non-ADA remedies under various state laws, through administrative procedures, or with the Equal Employment Opportunity Commission.

(The Supreme Court has not addressed the question of whether Title II of the ADA, which deals with the "services, programs, or activities of a public entity," can be used for claims of employment discrimination by a state or local government employee.)

This overview briefly addresses the ADA's prohibition against discrimination against disabled persons in private workplaces.

WHAT QUALIFIES AS A DISABILITY?

Title I of the ADA requires private employers, employment agencies and labor unions to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. An individual is "disabled" if he or she has a physical or mental impairment that 1) substantially limits a major life activity, such as breathing, walking or working, 2) has a record of such an impairment, or 3) is regarded as having such an impairment. One such impairment is difficulty

breathing or other ailments, such as a cardiovascular disorder, that are caused or exacerbated by exposure to secondhand tobacco smoke. For a person who suffers from such health effects, secondhand tobacco smoke may pose as great a barrier to access as a flight of stairs poses to a person in a wheelchair.

To be covered by the ADA, a person who is impaired by such exposure must be able to show that such impairment is substantial. To be "substantial," the impairment must be severe and predictably long-term. A person whose asthma, angina or chronic bronchitis, for example, is aggravated by exposure to secondhand smoke is more likely to be covered by the ADA than another person who experiences a temporary condition such as bronchitis following the flu, since the former illnesses are chronic, underlying conditions. Disability determinations of this kind are made on a case-by-case basis.

It is notable that, in the recent Supreme Court case that disallowed ADA lawsuits against state government employers, one of the plaintiffs was a state employee who, because of chronic asthma, had asked his employer to modify his duties to minimize his exposure to cigarette smoke and carbon monoxide. The Court found that state agencies cannot be sued under the ADA, but it did not question the right of a person to claim a disability under the ADA relating to cigarette smoke exposure.

Individuals who smoke, however, are not considered disabled persons under state law, according to a decision rendered by the Michigan Court of Appeals. The court relied in part on the ADA and confirmed that a person who smokes is not "disabled" in the legal sense and cannot require an employer to permit smoking in the workplace.

Recent Supreme Court decisions have stated that a disabled person who experiences no substantial limitation in any major life activity when using a mitigating measure, such as medication, does not meet the ADA's first definition of disability, as described above. While it is possible, therefore, that an asthmatic whose asthma is fully controlled with medication would not be defined as disabled under the ADA, it is important for employers, owners and managers to keep in mind that 1) this has yet to be thoroughly tested and 2) there are potentially millions of Americans whose disabilities resulting from exposure to secondhand smoke may continue to qualify as "disabled" under the ADA. The Court emphasized, moreover, that the disability determination must be based on the person's actual condition at the time of the alleged discrimination. In short, if the person was not in the practice of using a medication to mitigate the disability, speculation regarding whether the person might not have been disabled with the aid of medication is irrelevant, and the employer cannot make such an argument.

WHAT CONSTITUTES DISCRIMINATION?

It is clear that, if secondhand smoke substantially impairs a disabled person at work, the ADA requires the employer to protect the individual's health by making reasonable accommodations in the workplace. If an employer fails to do so, it may be found liable under the ADA for having discriminated against the disabled person.

If an individual is qualified to do the job but cannot do (or apply for) it because of the presence of secondhand smoke, the employer can avoid a potential finding of discrimination under the ADA by instituting a smoke-free workplace policy or by taking other steps that ensure that the

disabled person will not be exposed to smoke. While the ADA provides that an employer can claim that accommodating the disabled person would impose an undue hardship on the business, it is unlikely that an employer would succeed in a case involving secondhand smoke since the elimination of smoking in the workplace creates little if any difficulty or expense for the employer. Likewise, if a policy of permitting smoking has a discriminatory effect by denying a person with a substantial smoke-related impairment access to a facility's goods or services, the owner or manager must allow access by, for example, instituting a smoke-free policy and procedures for effective enforcement of that policy.

WHAT REMEDIES DOES THE ADA PROVIDE?

The employment provisions of the ADA are enforced under the same procedures that apply to race, color, sex, national origin and religious discrimination. The ADA enables employees to take legal action if they believe they have suffered discrimination relating to exposure to secondhand tobacco smoke. Individuals who believe they may have been subjected to workplace discrimination relating to a disability may file a complaint with the Equal Employment Opportunity Commission or designated state human rights agencies. To file with the EEOC, an individual can begin by calling (800) 669-4000 (voice) or (800) 669-6820 (TDD) to reach the field office in their area.

In addition, the regulations adopted to implement the ADA provide that any person subjected to discrimination may institute a civil action to prevent such discrimination, including an application for a temporary or permanent injunction or other potential remedies. The plaintiff may also request the intervention of the Justice Department, which will then determine whether the case is of general public importance. If the Justice Department does so, the court may permit the Justice Department to intervene in the action, and in some circumstances the court may then appoint an attorney for the plaintiff and authorize commencement of the action without the payment of fees or costs.

The Department of Justice provides information about the ADA through its toll-free ADA Information Line. This service permits individuals, businesses, state and local governments, and others to call and ask questions about general or specific ADA requirements and to order free ADA materials. ADA specialists are available Monday through Friday, from 10:00 AM until 6:00 PM (eastern time), except on Thursday when the hours are 1:00 PM until 6:00 PM. Spanish language service is also available. The toll-free numbers are 800/514-0301 (voice) and 800/514-0383 (TDD).

HAVE CASES BEEN BROUGHT USING THE ADA?

Yes, cases have been brought under the ADA and related laws. While the outcome depends on the specific facts of each case, on balance the record suggests that a failure to accommodate a disabled person in a satisfactory manner can result in expensive, not to mention avoidable, litigation for the employer. Some plaintiffs have succeeded while others have not. Generally, where plaintiffs have lost, it was because courts found that either the individuals were unable to demonstrate that their sensitivity to secondhand smoke substantially limited their ability to work or employers had taken sufficient steps to accommodate the individual's disability. Several case examples follow:

Sample Cases:

The U.S. Court of Appeals for the Second Circuit ruled unanimously on April 4, 1995, in **Staron v. McDonald's Corp. and Burger King Corp.,** Docket Nos. 94-7395, 94-7399 (2d Cir.), that three asthmatic children could sue McDonald's and Burger King under the ADA. The court declared, "[w]e see no reason why, under the appropriate circumstances, a ban on smoking could not be a reasonable modification" to an establishment in order to accommodate a person's disability. The case was filed in March 1993; within a year, McDonald's announced its decision to implement a smoke-free policy in all of its corporate-owned restaurants.

In another case involving two of the largest restaurant chains in the United States, **Red Lobster** and **Ruby Tuesday**, a U.S. District Court in Maryland ruled on March 1, 1999, that an ADA lawsuit could proceed, in which three women with asthma sued to compel the two chains to implement smoke-free policies. The court wrote, "Just as a staircase denies access to someone in a wheelchair, tobacco smoke prevents Plaintiffs from dining at Defendants' restaurants. Therefore, Plaintiffs have adequately alleged they are disabled within the meaning of the ADA and that their disability bars them from Defendants' restaurants."

Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982). The U.S. Court of Appeals for the 9th Circuit held that a sensitive federal government employee who suffered from exposure to tobacco smoke in the workplace was entitled to sick pay disability benefits until the employer could place her in a comparable position in which she was not exposed to smoke. Since no such job was available, the employee received a disability retirement pension of $50,000 plus a lump sum payment.

Note: The **Parodi** case was brought under the Rehabilitation Act of 1973 ("RA"), before the ADA was enacted. The RA contains similar disability provisions but applies the somewhat outmoded term "handicapped" persons. In addition, the RA applies only to recipients of federal financial assistance, while the ADA also prohibits discrimination by state and local governments and most of the private sector. The legislative history behind the adoption of the ADA shows that "disabled," as used in the ADA, and "handicapped," as used in the RA, are essentially interchangeable. The decision by Congress to equate the two terms is important because the decisions of courts and administrative tribunals protecting sensitive nonsmokers by application of the RA can serve as precedents for similar protection under the ADA. The ADA also provides specifically that "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under … the Rehabilitation Act of 1973."

Another case brought under the Rehabilitation Act is **Vickers v. Veterans Administration**, 549 F.Supp. 85 (W.D. Washington 1982), in which a federal district court found that an employee's hypersensitivity to tobacco smoke limited his capacity to work and qualified him as a "handicapped person." In that case, the court ruled that the employer had made reasonable accommodation.

The U.S. Supreme Court ruled in **Board of Trustees of the University of Alabama v. Garrett**, 531 U.S. ___ (2001), that state government workers cannot sue their employers for damages under Title I of the ADA. The Court held that the Eleventh Amendment to the U.S. Constitution, which gives the states broad protection against damage suits, immunizes state governments against ADA actions. One of the plaintiffs in the case was a state employee who, because of

chronic asthma, had asked his employer to modify his duties to minimize his exposure to cigarette smoke and carbon monoxide. The Court, while finding that state agencies cannot be sued for damages under Title I, did not question the right of a person to claim a disability under the ADA relating to cigarette smoke exposure. The Court also held that state workers retain the power, under Title I, to bring actions for injunctive relief, and that the federal government can bring damage actions against states for violating standards prescribed by Title I. The Court further held that *local* government employees can sue their employers for damages, because Eleventh Amendment immunity does not extend to local governmental units such as cities and counties. The Court did not address the question of whether Title II of the ADA, which deals with the "services, programs, or activities of a public entity," can be used for claims of employment discrimination by a state or local government employee. *See Project Life, Inc. v. Glendening*, 2001 WL 487642 (D. Md., May 2, 2001).

In **Popovich v. Cuyahoga County**, 2000 Fed. App. 0330P (6th Cir., Sept. 18, 2000), the U.S. Court of Appeals for the 6th Circuit ruled that Congress exceeded its authority in Title II of the ADA when it abrogated states' sovereign immunity under the Eleventh Amendment. The individual plaintiff brought three federal claims against the Domestic Relations Division (DRD) of the Cuyahoga County Court of Common Pleas, a state government entity in Ohio, alleging: (1) failure to accommodate his hearing disability, in violation of Title II of the ADA; (2) retaliation, in violation of the ADA; and (3) a non-ADA civil rights claim under a separate statute. The plaintiff claimed that the DRD failed to provide him with an adequate hearing aid in the course of a prolonged child custody dispute. The appellate court's decision means that, in the states covered by the 6th Circuit (Michigan, Ohio, Kentucky and Tennessee), Title II can no longer be used to sue state or local governments for engaging in discrimination in their services, programs, or activities. Federal appeals courts in the 7th and 8th Circuits have issued similar rulings; however, federal appellate courts in the 2nd, 5th, 9th, 10th, and 11th Circuits have decided that Title II can be used against state government entities.

In **Cassidy v. Detroit Edison Co.**, 138 F.3d 629 (6th Cir. 1998), a Michigan case that was decided under the ADA and what is now called the Michigan Disabilities Civil Rights Act, an individual filed a discrimination claim alleging that her employer failed to provide her with an "allergen-free work environment." While finding that the plaintiff was indeed disabled by a breathing condition that was exacerbated by exposure to cleaning chemicals, smoke and other airborne substances, the U.S. Court of Appeals for the 6th Circuit ruled on March 12, 1998, that the defendant had accommodated her by scheduling her for shifts that enabled her to leave when a known allergen would be present, and by testing the facilities and permitting her to use a breathing machine.

CONCLUSION

A common theme that recurs in the ADA cases that have been litigated is that most have involved disagreements over reasonable accommodation of the employee. Since there are basically four options for addressing workplace smoking problems - segregating employees in common areas; limiting smoking to lounges or cafeterias; developing completely different areas for smokers and nonsmokers to congregate and work; or instituting a totally smokefree environment - it is apparent that the latter option, creating a smokefree workplace, is the employer's most efficient and least costly alternative. Instituting a smokefree policy is also

advisable because, for disabled and able-bodied employees alike, there is no safe level of exposure to secondhand smoke.

Prepared by SFELP, July 11, 2001