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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,212

CITY OF MIAMI,

Petitioner,

vs.

JAMES P. GILBERT,

Respondent.

On Review of a Certified Questions from the
First District Court of Appeal

REPLY BRIEF OF PETITIONER

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I.

THE JUDGE OF COMPENSATION CLAIMS ERRED IN APPLYING BARRAGAN V. CITY OF MIAMI, 545 So. 2d 252 (Fla. 1989) RETROACTIVELY WHERE SAID DECISION OVERRULED NUMEROUS APPELLATE PRECEDENTS UPON WHICH THE CITY RELIED TO ITS DETRIMENT.

A. Gates Litigation

Respondent's attempt to equate the matters litigated in Gates[1] with the circumstances in the instant case is downright fallacious. The Gates class action, unlike the Barragan pension offsets at issue herein (which were taken from the time Respondent was granted a service-connected disability retirement until August 1, 1989), concerned the City's improper diversion of ad valorem taxes which had been specifically authorized and assessed for the pension system. These monies were allegedly used to pay judgments against it and to pay workers' compensation benefits. These matters are irrelevant.[2]

Further, sometime after Barragan issued, the City sought to enforce the Gates final judgment entered in 1985 as it pertained to class members who filed claims for retroactive pension offset benefits. Respondent's counsel and other attorneys appeared on behalf of class members and adamantly maintained that the Gates

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[1] See City of Miami v. Gates, 393 So. 2d 586 (Fla. 3d DCA 1981).

[2] Moreover, counsel for Respondent unpersuasively argued these matters in City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994), rehearing denied April 11, 1994 and the 10 cases consolidated with it.

litigation had nothing whatsoever to do with pension offsets.[3] The trial court denied relief, holding in part that Gates concerned the funding of the City's pension plan and that pension offsets were neither discussed nor released by Gates' class members. The Third District Court of Appeal affirmed, noting that "[b]y 1985 ... [w]e see no basis on which to say that the class knew, or should have discovered the Barragan issue was involved in the class litigation." City of Miami v. Gates, 592 So. 2d 749, 752 (Fla. 3d DCA 1992). Thus, Gates has no bearing whatsoever on either the pre or post-Barragan litigation.

B. Respondent Was Afforded a Fair Hearing

It is astonishing that Respondent now contends "surprise" because "at the pretrial, the City made no announcement of any defense that it detrimentally relied upon any case, or even upon its own ordinance, and at the trial it presented no evidence of any such detrimental reliance." Answer Brief at 8. The primary legal issue in this case (and the approximately 40 other post-Barragan claims for retroactive pension offsets that have been litigated through the appellate courts) has always been whether, as a matter of law, the justifiable reliance exception to

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[3] Interestingly, counsel's position before the circuit court and the Third District Court of Appeal is the direct opposite of the position he now asserts before this Court.

retroactivity can be applied under the circumstances.[4]

Respondent's assertion that "he has not been afforded the opportunity at a fair hearing to present any evidence that it would not be a hardship to the City to pay him" is not only spurious, it is a disingenuous attempt to assail this Court's decision in Bell which is impermissibly raised for the first time on review before this Court. Of course, in Bell and the 10 consolidated cases (as in the instant case), the interests of the public were pitted against the interests of the individuals. The Court found in favor of the public's interests because from 1973 until Barragan was decided in 1989, "[t]he City's budgeting for salary and benefits as well as its allocation of tax resources was made in reliance on the ordinance and existing caselaw. Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations." Bell, 634 So. 2d at 166. There is no reason whatsoever in the instant case for the Court to depart from its reasoning in Bell.

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[4]Assuming arguendo that this determination required "evidence", the string of appellate decisions expressly upholding the City's right to take the offset pursuant to its ordinance are all the "evidence" the City needed to justify its reliance. It would be ludicrous to require the City to produce the testimony of its lawyers that over the years, their conclusion that the City could continue to take the offset was premised on the string of appellate decisions upholding the validity of its ordinance.

C. No Violation of Equal Protection

Neither this Court, by virtue of its Bell decision, nor the City has violated anyone's right to equal protection. Respondent, for the first time on review before this Court, argues that he is a member of a "suspect class" for equal protection purposes by virtue of his being declared "permanently and totally disabled" under Florida's Workers' Compensation Act. As a result, Respondent erroneously asserts that "[t]he Court may not choose between [the interests of today's] taxpayers and the physically handicapped." Answer Brief at 10. Respondent is wrong. Both the Court's decision and the City's action pass constitutional muster under either a stringent compelling state interest or the lesser rational basis analysis.[5]

As the Court recognized in Bell, the balancing of the competing interests compels the conclusion that the public-at-large's interest in maintaining municipal services at present levels and fiscal soundness is paramount to the interest of a finite group of individuals to recoup retroactive offsets. The Court properly tempered the fact that the offsets were taken pursuant to an ordinance, which had been consistently upheld by a string of appellate decisions, against the devastating impact on the City's services and fiscal condition should it be required to pay retroactive offsets. Although the group seeking retroactive

[5]Section 760.10(1), Fla. Stat., pertains to "unlawful employment practices." See Answer Brief at 10. It has no bearing whatsoever on this case.

pension offsets is finite, the potential liability is of catastrophic proportions -- in excess of $5 million, plus statutory interest of 6% and/or 12%, plus statutory penalties of 10% or 20%, without including attorney's fees. Otherwise stated, the interests of a finite group of individuals in obtaining such a windfall could not be deemed paramount to the public's interest of reallocation (or loss) of municipal services and fiscal havoc.[6]

D. No Violation of the Americans With Disabilities Act (A.D.A.)

Respondent's assertions with regard to the Americans With Disabilities Act, again raised improperly for the first time before this Court, are frivolous. Respondent does not fall under the umbrage of the A.D.A. as he retired on a service connected disability pension on December 18, 1976.[7] A copy of the Act is attached hereto for the Court's convenience.

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[6] In note 6, Respondent asserts that six persons other than Barragan and Giordano were paid full retroactive pension offset benefits. What Respondent failed to mention was that the payments were made to the six others as a result of an unfortunate glitch. Those six cases came before the Court on the basis of conflict and the Court declined review. The First District Court of Appeal did not issue a certified question until its decision in the seventh case, Bell, and the Court agreed to review the case and those following it.

[7] Even if Respondent was covered by the Act, it did not become effective until July 1992, and it does not apply retroactively. Verdon v. Consolidated Rail Corp., 828 F. Supp. 1129 (S.D.N.Y. 1993).

Subchapter I of the Act pertains to "Employment." See 42 U.S.C. Sections 12111 through 12117. That this subchapter applies to employees and job applicants, and not retirees, is readily ascertainable. Under Section 12112(b)("Construction"), reference is made to a "job applicant or employee" (Sec. 12112(b)(1), (5)(B), and (7); "qualified applicant or employee with a disability" (Sec. 12112(b)(2)); "qualified individual with a disability who is an applicant or employee" (Sec. 12112(b)(5)(A)). Moreover, the Act defines a qualified individual with a disability to be "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Section 12111(8)(emphasis added). There is no evidence whatsoever in this record that Respondent, who has been receiving a disability retirement pension since 1976, is a job applicant, holds an employment position, or that he can perform the essential functions of the employment position.

Respondent, a retired firefighter and paramedic, does not fall within the definition of "employee" under the City's pension code. An "employee" is "a fire fighter or police officer presently employed by the city as a fire fighter or police officer, whether in the classified or unclassified service of the city." Section 40-200, Miami City Code. Moreover, the term "service" means the "active service as an employee." Section 40-

200, Miami City Code. Respondent is neither presently employed nor in active service.

In Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), the Supreme Court held that retired employees were not employees within the meaning of the amended National Labor Relations Act. The Court observed that "[t]he ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." 404 U.S. at 168. Likewise, once Respondent was granted a service connected disability retirement on December 18, 1976, he ceased working for the City.

Moreover, Respondent's assertion that this Court violated the A.D.A. because it "balanced the interest of the City of Miami taxpayers with the interest of the permanently and totally disabled ... firefighters ... notwithstanding that the disabled employees are clearly within a federally protected status as physically handicapped" is downright preposterous. Answer Brief at 11. The Court is not Respondent's employer under any circumstance, let alone the A.D.A.; therefore, no liability can attach.

II.

THE CITY SHOULD NOT BE SUBJECTED TO THE 10% PENALTY FOR ITS FAILURE TO PAY A COMPENSATION CLAIM WHERE A RETROACTIVE "BARRAGAN" PAYMENT DOES NOT CONSTITUTE "COMPENSATION" OR "AN INSTALLMENT OF COMPENSATION" FOR PURPOSES OF SECTION 440.20, FLA. STAT.

In Bell, the Court did not engage in any analysis as to the penalty provision other than to determine that "[t]he penalty provision of Section 440.20, Florida Statutes (1985), is inapplicable to offsets taken prior to that date [July 14, 1989 - the effective date of Barragan], but applicable to those taken after." 634 So. 2d at 166. Accordingly, as in Bell, Respondent is not entitled to the payment of penalties except for those offsets taken from July 14, 1989 to August 1, 1989.

III.

THE CITY SHOULD NOT BE SUBJECTED TO PAY PREJUDGMENT INTEREST FOR ITS FAILURE TO PAY A COMPENSATION CLAIM WHERE A RETROACTIVE "BARRAGAN" PAYMENT DOES NOT CONSTITUTE "COMPENSATION" FOR PURPOSES OF SECTION 440.20, FLA. STAT.

The Court's decision in Bell eliminates the need to decide the interest question at this late juncture. To the extent the Court is inclined to rule on same, Petitioner respectfully requests the Court to allow the City to file a supplemental brief or suggests that the Court refer to the arguments advanced in the briefs in the cases consolidated with Bell.

CONCLUSION

Petitioner, CITY OF MIAMI, respectfully requests this Court reverse the decision of the First District Court of Appeal in accordance with the Court's recent issued in Bell. Penalties and prejudgment interest are also inappropriate.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was furnished by mail to RICHARD A. SICKING, 2700 S.W. Third Avenue, Suite 1-E, Miami, Florida 33129, this 21st day of June, 1994.

Respectfully submitted,

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KSP/lb/P1595

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APPENDIX TO REPLY BRIEF OF PETITIONER

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§ 12101. Findings and purposes

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) 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 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;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328.)

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Short Title. Section 1(a) of Pub.L. 101-336 provided that: "This Act [enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, and 12181 of this title] may be cited as the 'Americans with Disabilities Act of 1990'."

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

(Pub.L. 101-336, Title I, § 101, July 26, 1990, 104 Stat. 330.)

Effective Date

Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. For the effective date of this subchapter, referred to in par. (5)(A), see section 108 of Pub.L. 101-336, set out as a note under this section.

The Controlled Substances Act, referred to in par. (6), is title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

This "chapter", referred to in par. (10)(B)(i), was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Effective Date. Section 108 of Pub.L. 101-336 provided that: "This title [subchapter] shall become effective 24 months after the date of enactment [July 26, 1990]."

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the

nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331.)

Effective Date

Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

(Pub.L. 101-336, Title I, § 103, July 26, 1990, 104 Stat. 333.)

Effective Date

Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

(Pub.L. 101–336, Title I, § 104, July 26, 1990, 104 Stat. 334.)

Effective Date

Pub.L. 101–336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. The Drug-Free Workplace Act of 1988, referred to in subsec. (c)(3), is subtitle D (§§ 5151–5160) of Pub.L. 100–690, Title V, Nov. 18, 1988, 102 Stat. 4304, which is classified to chapter 10 (§ 701 et seq.) of Title 41, Public Contracts.

This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101–336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101–336, see 1990 U.S. Code Cong. and Adm. News, p. 267.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e–10 of this title.

(Pub.L. 101–336, Title I, § 105, July 26, 1990, 104 Stat. 336.)

Effective Date

Pub.L. 101–336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of Title 5.

(Pub.L. 101-336, Title I, § 106, July 26, 1990, 104 Stat. 336.)

Effective Date

Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] not later than 18 months after July 26, 1990.

(Pub.L. 101-336, Title I, § 107, July 26, 1990, 104 Stat. 336.)

Effective Date

Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337, provided that this section is effective 24 months after July 26, 1990.

Historical and Statutory Notes

References in Text. This "chapter", referred to in subsec. (a), was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

The Rehabilitation Act of 1973, referred to in subsec. (b), is Pub.L. 93-112, Sept. 26, 1973, 87 Stat. 355, as amended, which is classified principally to chapter 16 (§ 701 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 29 and Tables.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

hapter I (§ 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

(Pub.L. 101-336, Title V, § 511, July 26, 1990, 104 Stat. 376.)

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

(Pub.L. 101-336, Title V, § 512, July 26, 1990, 104 Stat. 377.)

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.

(Pub.L. 101-336, Title V, § 514, July 26, 1990, 104 Stat. 378.)

Historical and Statutory Notes

References in Text. This "chapter", referred to in text, was in the original this "Act", meaning Pub.L. 101-336, which enacted this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and amended section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47.

Legislative History. For legislative history and purpose of Pub.L. 101-336, see 1990 U.S.Code Cong. and Adm.News, p. 267.