SUPREME COURT OF FLORIDA

MORTON BARRY,

Petitioner,

v.

BURDINES, et al.

Respondents.

Case No.: 86,365

District Court of Appeal,
1st District No. 94-2067

ON APPEAL
FROM THE
FIRST DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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(A) Workers' compensation benefits are "terms" of employment and are "fringe benefits" within the ADA; accordingly, workers' Compensation benefits are not "in addition to" the ADA.

Despite the EEOC's plain language that the ADA supersedes *conflicting* workers' compensation statutes, Respondents persist in arguing the ADA does not impact Florida's wage loss scheme. Respondents assert that workers' compensation is in addition to, and therefore outside, of the ADA because it protect workers unable to work, while the ADA only applies to active, on-the-job terms of employment. In other words, Respondents maintain that the ADA *only* applies to discrimination in hiring, retention and promotions. If it were that simple, then the ADA would not apply to health insurance, sick leave, pensions and life insurance--all fringe benefits which help protect employees when they are not working due to illness, disability or death. Yet the ADA covers these "terms" of employment and "fringe benefits."

The ADA prohibits discrimination in employment practices which include "[l]eaves of absence, sick leave, or any other leave; [f]ringe benefits available by virtue of employment, whether or not administered by the covered entity...[and] [a]ny other term, condition, or privilege of employment." *Americans with Disabilities Act of 1990: EEOC Technical Assistance Manual and Resource Directory* § 7.3 (EEOC 1992) Further, the prohibition that employers "may not limit, segregate or classify an individual" in a discriminatory manner applies to "health insurance and other benefit plans, such as life insurance and pension plains." *Id.* at 7.6. Title I also accords disabled

employees "equal access to whatever health insurance coverage the employer provides to other employees." *The Interpretative Guidance on Title I of the Americans with Disabilities Act,* appendix to 29 C.F.R. § 1630.5. *The Interpretative Guidance* also recognizes that "sick leave" and "benefit plans" are within the scope of Title I. *Id; see also* discussion at § 1630.16(f).

Pension plans are also considered "terms" of employment. *See Arizona Governing Comm. v. Norris,* 463 U.S. 1073, 1079 (1983). ("There is no question that the opportunity to participate in a deferred compensation plan constitutes a 'conditio[n] or privileg[e] of employment,' and that retirement benefits constitute a form of 'compensation.'") Clearly then, sick leave, life insurance, pension plans, health insurance and other benefit plans are within the provisions of Title I--just as workers' compensation is. Since an employee who is still actively at work is not eligible for the benefits from life insurance or pension plans, which by definition accrue upon death or retirement, obviously Respondents' position that Title I *only* applies to active employment is not valid or the ADA would not apply to life insurance and pension plans also. That sick leave, health and other insurance are specifically covered indicates an intent to protect employees who are off work due to illness or disability. Thus, the fact that workers' compensation benefits are designed to protect an injured worker while he or she is not actively working does not take workers' compensation outside of the ADA anymore than pension plans, life insurance, health insurance and sick leave are outside the ADA.

Further, Respondents overlook the broad scope of Title I and that "fringe benefits" are covered. Congress intended to protect the disabled from the full range of actual and potential employment related discrimination, which logically must include workers' compensation as it is an integral part of an employee's employment picture. *Cf. Byrd v. Richardson-Greenshields Securities,* 552 So. 2d 1099, 1102 (Fla. 1989) (finding "terms" of employment include "entire spectrum of disparate treatment" between men and women (cites omitted)). By analogy, terms of employment include the "entire spectrum" of disparate treatment of the disabled. *See also* House Report 101-485(II) at 54 (Section 12112 "is intended to include the range of employment decisions" including "any" compensation and "fringe benefits").

The ADA defines discrimination as including contractual relations with an entity that discriminates in "providing fringe benefits to an employee." 42 U.S.C. § 12112(b)(2). It is unlawful to discriminate against a disabled person with regard to any "fringe benefits available by virtue of employment, whether or not administered by the covered entity." 29 C.F.R. §1630.4(f).

Thus, "fringe benefits" are unequivocally within the scope of Title I of the ADA. This Court has twice recognized workers' compensation benefits are "fringe benefits." *See Sasso v. Ram Property Management,* 452 So. 2d 932, 934 n3 (Fla. 1984) ("reducing fringe benefits (the workers' compensation benefits at issue) to reflect a productivity decline with age" was an acceptable reason for ending workers compensation benefits at age 65); *Acosta v. Kraco, Inc.,* 471 So. 2d 24, 25 (Fla. 1984)(same

holding), *cert. denied,* 474 U.S. 1022, 106 S.Ct. 576, 88 L.Ed.2d 559 (1985). Respondents assert only that this Court did not mean workers' compensation benefits were fringe benefits with regard to the ADA. However, Plaintiffs respectfully assert that this Court held workers' compensation benefits are fringe benefits in the analogous cases of age discrimination and as both the ADA and the age discrimination laws are similar in language and goal, this holding is applicable here. Logically (and fairly) speaking, workers' compensation benefits may not be fringe benefits in one case and not fringe benefits in another.

As such, workers' compensation insurance is directly within the scope of the ADA as a fringe benefits and as a term of employment under Title I. Being within the scope of the ADA means workers' compensation benefits can not then be "in addition to" benefits protected by the ADA.

(B) The ADA does preempt Florida's wage loss scheme as it is impossible to comply with both laws simultaneously.

Respondents erroneously assert that no preemption occurred in this case as the ADA and Florida's workers' compensation laws may simultaneously be applied. Not so! It is a physical impossibility to apply the discriminatory classifications in section 440.15 **and** still honor the ADA's prohibition against discriminatory classifications. Florida's wage loss scheme uses classifications which terminated Petitioner' benefits according to certain "conclusively presumed" determinations, *see Magic City Bottle & Supply Co. v. Robinson,* 116 So. 2d 240, 243 (Fla. 1959); yet Congressional intent in adopting the ADA was to preclude classifications based upon "presumptions." *See* House Report 101-

485(II) at 58 (addressing "averages and group-based predictions" and stating: "This legislation requires individual assessments which are incompatible with such an approach [as group based predictions].") Hence, it is impossible to honor the prohibition against group based presumptions in classifications at the same time Respondents apply group based presumption and classifications. Where it is impossible to apply both the federal law and the state law, the federal law preempts the state law. *E.g., California Fed. Savings & Loan Ass'n v. Querra,* 479 U.S. 272, 280-81, 93 L.Ed.2d 613, 107 S.Ct. 683 (1987) The ADA, thus, preempts Florida's wage loss classifications.

When faced with an analogous preemption question, the federal court in *Wood v. County of Alameda*, 875 F.Supp. 659, 663 (N.D. Cal. 1995) applied standard preemption principles and held the ADA preempted the California workers' compensation law challenged there. *Id.* at 661-664 (and cases cited therein). "Where such [state] provisions are incompatible with the federal statute, they must be denied effect." *Id.* at 664. As the law challenged here is "incompatible" with the ADA, it "must be denied effect."

Wood v. County of Alameda held section 12201(b), which states laws offering equal or greater protection are not preempted, "is to maximize the options available to plaintiffs by ensuring that federal statutes provide a 'floor' for a plaintiff's rights and remedies while guaranteeing that such statutes never serve as a 'ceiling...." *Id.* at 663-4. The Florida's workers' compensation law challenged in this appeal

does conflict with the ADA and does not offer additional protection. The ADA must not be a "ceiling" against Petitioner' claim for fair, non-discriminatory treatment.

(C) Petitioner is a qualified individuals under the ADA; further, he is entitled to the protection of the ADA by virtue of being an "employee" at the time his claims arose.

Respondents argue that Petitioner is not a qualified individual because he is unable to work with or without reasonable accommodations. However, Petitioner's status as an "employee with a disability" grants him the protection of the ADA in the context of this case. Further, whether he is a qualified individual is a fact question which can not be resolved against him at this juncture of the case.

No one disputes that Petitioner is disabled. To further qualify for protection under Title I, Petitioner must also show that either he is a "qualified individual" under section 12111(8) or that he is an employee under section 12111(4). *See* 42 U.S.C. § 12111 (4)(8) and § 12112 (b)(2). The heart of Petitioner' claims arises from section 12112 (b)(1), which precludes classifying an "***employee*** in a way that adversely affects the opportunities or status of such...***employee,***" and from section 12112 (b)(2), which precludes participating in a contractual arrangement that has the "effect of subjecting a covered entity's qualified applicant ***or employee with a disability*** to the discrimination prohibited by this chapter." 42 U.S.C. § 12112 (b)(1),(2).

With regard to section 12112 (b)(2), the term "or" particularly supports Petitioner's assertion that he is protected by the ADA simply because he was an employee with a disability at

the operative time. The legislation speaks of a "qualified applicant ***or employee with a disability.***" 42 U.S.C. § 12111(b)(2). "Or" is a conjunctive term signaling alternatives choices; Petitioner need be only 1) a qualified applicant "or" 2) an "employee with a disability," but he need *not* be both. Petitioner's claims for wage loss and under the ADA arose at the same time as it is the method of administration of the wage loss benefits that gives rise to the ADA claim.

Logic and the plain language of the ADA dictate that the term "qualified individual" applies to hiring, retention and wrongful discharge cases under the ADA, but not to certain fringe benefit claims. Use of the term "employee" in connection with "fringe benefits," shows being a "qualified individual" is not a prerequisite to an ADA fringe benefit claim or to certain "terms" of employment claims. As previously established, pension plans are a "term" of employment, *see Arizona Governing Committee v. Norris,* 463 U.S. at 1079. One person might retire with a disability which prevents him or her from further employment; another person might voluntarily retire with a disability, but still be perfectly able to continue employment. In other words, the first individual is not a qualified individual, but the second one is. Applying Respondents' rationale would require a finding that the first individual's pension plan may discriminate on the basis of disability while the second person's pension plan may not discriminate on the basis of disability. Obviously such an inconsistent result is not intended; Petitioner--as an employee with a disability at the pivotal time--need not also be

a qualified individual.

Additionally, or alternatively, whether Petitioner is a qualified individual is a fact question which can not be determined against Petitioner on a motion to dismiss. *See, e.g., Hogue v. MQS Inspection, Inc.*, 875 F. Supp. 714, 719 (D.C. Colo. 1995). Petitioner asserts he is a qualified individuals and this must be accepted as true at this juncture of the case. Because the judge dismissed the complaint without giving him the opportunity to present evidence on this factual issue, this Court can not resolve it against Petitioner. *See, e.g. Schever v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

(D) Prohibited Discrimination occurred against Petitioner.

Congressional intent was to preclude classifications based upon "presumptions" and to require employers to "make employment decisions based on facts applicable to individual applicants or employees." House Report No. 101-485(II) at 58. Addressing fears based on "averages and group-based predictions," the House Report states: "This legislation requires individual assessments which are incompatible with such an approach." House Report 101-485(II) at 58. "Group based predictions" such as those reflected in section 440.15(3)(b)4.d. must defer to "individual assessments."

Under Florida's scheme, "the effect on earning capacity is a *conclusively presumed one, based on observed probabilities in many similar cases, instead of a specifically proven one based on the individual's actual wage loss experience." See Magic City Bottle & Supply Co. v. Robinson,* 116 So. 2d at 243. This "conclusively presumed" form of classification based on "observed

probabilities" is precisely what Congress ruled out in stating that classifications based upon "averages and group-based predictions" are precluded in favor of "individual assessments."

Respondents wish to escape the consequences of applying presumptive classifications to terminate Petitioner's wage loss by asserting he was given an individual assessment of his impairment rating. Such a position is akin to arguing in an insurance coverage case that an evidentiary hearing on whether a plaintiff sustained a covered injury also determined the second issue of whether the medical charges were "reasonable and necessary." Determination of the first inquiry in favor of the plaintiff is only a prerequisite to the second factual inquiry and does not preclude the right to an evidentiary finding on the second inquiry. In other words, it is the old adage of apples and oranges. The same principle applies here--a factual inquiry on the separate issue of what Petitioner's impairment rating is does not fulfill the ADA's requirement that he is also entitled to an evidentiary hearing on his claim for further wage loss benefits.

Respondents' reliance on the Minnesota Guidelines in an attempt to justify the use of the precluded presumptive classifications does not excuse the discrimination. Even actuarial studies may not support discrimination. In *Arizona Governing Committee v. Norris,* 463 U.S. at 1083, the Court rejected the idea that women could be treated differently under annuity contracts just because actuarial studies showed as a class they live longer than men. "Title VII requires employers to treat their employees as individuals, not 'as simply components

of a...national class'(cites ommitted)." *Id.* Under that analysis, classifications which "conclusively presumed" that a certain impairment correlates to a certain level of wage loss, *see Magic City Bottle & Supply Co. v. Robinson, supra,* is suspect as such presumptions do not treat disabled workers as individuals.

Despite Respondents protestations to the contrary, wage loss classifications are analogous to caps on certain conditions in health insurance coverage. As detailed in the initial brief and the brief of Amicus Academy of Florida Trial Attorneys, placing a 78 week cap on wage loss solely because of a classification is akin to a health insurance policy which places a $5,000 cap on a particular disease, but not on other diseases such as MD. In both situations, benefits are limited by classifications based upon particular conditions. Yet such caps in health insurance are violations of the ADA which the EEOC has "vigorously pursued." McFadden, *The Americans with Disabilities Act: Fighting Discrimination,* 31 Trial 67, 69 (Sept. 1995)(and cases therein)

Petitioner has a 78 week "cap" on his wage loss benefits just like the AIDs patient has a $5,000 "cap" on his health insurance. Respondents say this is not so because in the workers' compensation situation all disabled workers are eligible for workers' compensation benefits and have "equal" access But 78 weeks of workers' compensation versus 112 weeks of workers' compensation benefits is *not* equal access. Further, the fact all injured workers' are eligible does not take this case outside of the insurance discrimination analogy because there too both the AIDS' patient with a $5,000 cap on benefits and the MD patient

with a million dollar cap have *access* to health insurance; due to classifications, the AIDS patient has less benefits.

Despite Respondents' reliance upon state law as a defense, relying upon state law is not regarded as a total defense. *See The Interpretative Guidance on Title of the Americans with Disabilities Act,* appendix to 29 C.F.R. § 1630, § 1630 (b)&(c).

(E) The ADA precludes discrimination *among* the disabled.

Despite Respondents' reliance on distinguishable cases, the Congressional intent behind the ADA included an intent to prohibit discrimination *among* classes of the disabled as well as against the disabled as a class. Congress stated:

> Virtually all States prohibit unfair discrimination *among* persons of the same class and equal expectation of life. The ADA adopts this prohibition of discrimination.

House Report 101-485(II) at 136.

Discrimination in Title I is defined to include standards that screen out, or tend to screen out, "an individual with a disability or *a class of individuals with disabilities."* 42 U.S.C. § 12112(b)(6). The EEOC states: "Disparate impact means, with respect to Title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on *a class of individuals with disabilities." See The Interpretative Guidance on Title I, supra,* at § 1630.15 (b)&(c), App. Thus, it is unlawful discrimination to negatively target "a" class of the disabled within "the" class of the disabled as a whole. Discrimination *among* the disabled is precluded. *Id.; Helen L. v. DiDario,* 46 F.3d 325 (3d Cir.1995) and *Martin v. Voinovich,* 840

F. Supp. 1175 (S.D. Ohio 1993) (and cases cited therein).

That discrimination is *not* allowed *among* the disabled is supported by the EEOC's actions in vigorously pursuing insurers who place caps only on certain illnesses without similar caps on all illness as such discrimination is discrimination *among* the disabled. Assume a person with AIDS has a $5,000 cap on benefits while a person with muscular dystrophy (MD) has a $1 million cap (as do other covered conditions). Both the person with AIDS and the person with MD are within the whole class of disabled persons. Discrimination against the person with AIDS, but not against the person with MD, is discrimination "among" the disabled-- discrimination against "a" class of persons with AIDS in favor of "a" class of persons with MD. This is not a case of discrimination against the disabled versus the non-disabled as the non-disabled person and the disabled person with MD are both offered the same insurance coverage; only the AIDs sufferer is discriminated against by being offered less coverage. The EEOC has "vigorously pursued" discrimination *among* the disabled.

Despite Respondents' attempts to distinguish *Helen L. v. DiDario*, 46 F.3d at 335-33, the claim there is the same as raised by Petitioner. In *DiDario*, the plaintiff--like Petitioner here--alleged she was discriminated against under the ADA in part because she was treated differently than other persons with similar disabilities to her own. Respondents in *DiDario*--as here--raised *Traynor* for the notion that any discrimination against her was merely discrimination *among* the disabled and therefore acceptable. The Third Circuit rejected this view.

Respondents overstep the meaning of *Traynor v. Turnage,* 488 U.S. 535 (1988) that a benefit extended to one category of the disabled need not be extended to all other disabled. In other words, seeing eye dogs need not be provided to the deaf just because they are provided to the blind. *Cf. Easley v. Snider,* 36 F.3d 297, 303, 306 (3d Cir. 1994)(excluding disabled persons from program for which they were not sufficiently mentally alert is not violation of the ADA as the services, in effect, would be wasted). *Easley* held: "This is not a case of state discrimination against a subgroup of the people who are physically disabled. On the contrary, this is a case where an additional handicap, a severe degree of mental disability, renders participation in the program *ineffectual." Id.* at 306.

A comparison between *Easley* and *Helen L.* (both Third Circuit cases and presumed consistent) illustrates that *Traynor* does not stand for the idea that discrimination among the disabled is allowed. *Traynor* only acknowledges that benefits provided to one group do not have to be provided to another group when: 1) to do so would be "ineffectual" as in *Easley,* or 2) would reward persons for their willful misconduct as in *Traynor* (or in the categories previously explained in the initial brief).

Cases relied upon by Respondents all may be distinguished on the basis of "willful misconduct" or "ineffectual" or impossible remedy. For example, in *P.C. v. McLaughlin,* 913 F.2d 1033, 1037 (2d Cir. 1990), the plaintiff's aggressive behavior, belligerence and drinking created a "vicious circle" which made finding an appropriate residential program for him impossible. *Williams* v.

Sec'y of Executive Office, 609 N.E.2d 447 (Mass. 1993) is simply another case where the remedy sought was "unworkable." Further the plaintiffs there suffered from "dual diagnoses" which made it impossible to place them in integrated housing programs--just like *Easley*. In *Williams, Traynor* was cited for the notion that "an agency does not obligate itself to make services available to persons with different or complicating disabilities simply by treating individuals with a single disability." *Williams,* 609 N.E.2d at 453. In other words, seeing eyes dogs need not be provided to those who are both blind and suffering from additional disabilities which would make seeing eye dogs "ineffectual." The instant case does not present such a case. *Spragens v. Shalala,* 36 F.3d 947 (10th Cir. 1994), which concerned a challenge to a social security regulation, held that classifications by which government money is spent to aid the public welfare need not be "perfect" classifications. But the money at issue here is not government money like social security benefits; rather the money here comes from Respondents. Furthermore, the ADA precludes discriminatory and presumptive classifications so the issue of whether these classifications are "perfect" begs the question. Under the ADA, *Spragens* would have been decided differently. As *Martin* held, the "[ADA] evinces an intent to eliminate handicap-based discrimination....A strict rule that [it] can never apply between persons with different disabilities would thwart that goal. Such a rule would, in effect, allow discrimination on the basis of disability." *Martin v. Voinovich,* 840 F. Supp. at 1192 (and cases therein).

Conclusion

Petitioner request that this Court reverse the dismissal of their complaint, find that Florida's wage loss scheme is superseded by the ADA, and remand their reinstated complaint for evidentiary proceedings.

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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of this brief has been supplied by U.S. Mail to the counsel on the attached service list on this 6 day of December, 1995.

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