IN THE SUPREME COURT OF FLORIDA

EARL L. CRAMER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 86,709**
	)	**DCA Case No. 95-1588**
BROEDELL PLUMBING SUPPLY, et al.,	)	
	)	
Respondents.	)	
	)	

On review of a decision
of the 1st District Court of Appeal,
certifying a question to be of great public importance

BRIEF OF INTERVENOR, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF WORKERS' COMPENSATION

In support of the position of Respondents

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INTEREST OF INTERVENOR

The legislature directed the Division of Workers' Compensation, Department of Labor and Employment Security, to "assume an active and forceful role" in the administration of the workers' compensation law to assure that the system "operates efficiently and with maximum benefit to both employers and employees." § 440.44(2), Fla. Stat. (1993). For this purpose, the legislature delegated particular functions to the Division, such as establishing a uniform permanent impairment rating schedule for the determination of all impairment income benefits. §§ 440.15(3)(a)2 and 3, Fla. Stat. (1993). The Division's statutory responsibilities are directly implicated by the question certified by the First District Court of Appeal, which asks "whether section 440.15(3)(b)4.d, Florida Statutes (1991), is subject to and comports with the requirements of Title I of the Americans With Disabilities Act" (ADA). 42 U.S.C. §§ 12111--117.

The Division intervenes pursuant to Florida Rules of Workers' Compensation Procedure 4.166(c).

STATEMENT OF THE CASE AND OF THE FACTS

For purposes of clarifying the statement of the case and of the facts contained in Petitioner's Initial Brief, the Division adds the following. Germane to this Court's review of the instant case is Barry v. Burdines, 20 Fla. Law Weekly D1923 (Aug. 23, 1995), which also is pending review in this Court. Of

interest is Cramer v. State, 885 F. Supp. 1545 (M.D. Fla. 1995) (appeal to the 11th Cir. pending), which involves parallel federal litigation.

Barry is instructive because it explains the rationale of the brief opinion of the district court below. In Barry the district court affirmed the Final Order of the judge of compensation claims on the stated basis that Barry had failed to establish an ADA violation. As such, Petitioner misstates the holding of Barry by concluding that workers' compensation laws are beyond the reach of the ADA. Initial Brief at 16.

Also, Barry relied on the decision of the federal district court in Cramer, which held that the workers' compensation law provides disabled individuals with protection at least equal to that of the ADA and therefore is not preempted by the ADA. 42 U.S.C. § 12201(b). It also held that the workers' compensation law made no impermissible distinction between disabled and non-disabled individuals. 42 U.S.C. § 12112(a).

The certified question in Barry and the instant case are identical and understandably much of the argument in the two cases before this Court overlaps. However, petitioners in each case advance sightly different theories, requiring different responses.

Finally, the certified question calls for an interpretation of the 1991 version of section 440.15(3)(b)4.d., Florida Statutes. Because Petitioner's injury occurred on November 22, 1993, the 1993 statute applies. The Division notes that the 1991

and 1993 versions are identical textually and that ultimately wage-loss was repealed by the Florida Legislature in special session. Ch. 93-415, § 20, 1993 Fla. Laws 62, 124.

SUMMARY OF THE ARGUMENT

Duration limits on workers' compensation wage-loss benefits do not violate the non-discrimination provision of Title I of the Americans With Disabilities Act. The wage-loss scheme survives federal constitutional scrutiny under several theories.

First, the Supremacy Clause presumes that Congress does not intend to displace state law. On its face, Title I contains no unambiguous, clear, and manifest purpose that preempts a state's ability to impose duration limits on wage-loss. Moreover, a wage-loss recipient is not necessarily a "qualified individual with a disability" within the protective ambit of Title I. Further, the ADA contains a savings clause that preserves state laws that provide protection at least equivalent to the ADA. Wage-loss benefits afford an additional right to employees with a permanent impairment who are unable to return to work.

Nor does Title I impliedly preempt the challenged wage-loss provision, which finds support in decisional law of the Supreme Court. Alexander v. Choate, 469 U.S. 287 (1985), supports a conclusion that the ADA does not compel the legislature to apportion wage-loss benefits equally among injured employees. And Traynor v. Turnage, 485 U.S. 535 (1988), respects state legislative balancing of interests by providing disability and

medical benefits to injured employees at a reasonable cost to employers. The ADA does not compel the state to allocate benefits equally among classes of disabled individuals, as Petitioner argues. Instead, the ADA proscribes discrimination of qualified disabled individuals in light of treatment accorded to non-disabled individuals. Therefore, the allocation of workers' compensation benefits between classes of injured employees is not inconsistent with the ADA.

Second, the Equal Protection Clause likewise presumes the validity of state law. The wage-loss scheme is not entitled to some heightened level of scrutiny as Petitioner argues, but merely a rational basis standard, which requires Petitioner to negate every conceivable basis to support it. The legislative record reflects reasoned judgment. Limiting wage-loss was deemed necessary to avert a financial crisis in the workers' compensation industry. The scheme reflects the dual aims of restoring Florida's competitive economic position as compared to other states and of assuring the fiscal integrity of funds to protect injured employees.

Assuming for argument that the challenged section violates Title I of the ADA, Petitioner has not cited a basis for relief and asks this Court to speculate on criteria that would make him whole.

ARGUMENT

I. THE SUPREMACY CLAUSE PRESUMES THAT CONGRESS DID NOT INTEND THAT TITLE I OF THE ADA DISPLACE FLORIDA LAW.

The district court certified a question that asks whether the 1991 wage-loss provision is subject to and comports with Title I of the ADA. The question has federal constitutional significance due to the Supremacy Clause, which essentially provides that federal law preempts conflicting state law.[1] If, as the Division maintains, Congress did not preempt the wage-loss provision, then the state law is not subject to and need not comport with Title I. For that reason, the Division suggests rephrasing the question to ask whether the wage-loss section violates Title I.

Analysis under the Supremacy Clause begins with a basic assumption--"that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This principle is evident in the wide latitude that the Constitution shows to legislatures in exercising the police power. Id. To make secure the presumption against preemption, the federal constitution requires that Congress preempt the state law "by unambiguous congressional mandate," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963), in "'unmistakably clear'" language, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)(citation omitted), and with "'clear and manifest purpose.'" Cipollone v.

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[1]U.S. Const. art. VI, cl. 2 ("The Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

Liggett Group, Inc., 112 S.Ct. 2608, 2617 (1992)(citation omitted); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991)(same); English v. General Elec. Co., 496 U.S. 72, 82 (1990)(explaining that "'clear and manifest'" intent is required when Congress seeks to preempt areas traditionally occupied by states).

The surest indication of preemptive intent occurs in those instances where an act of Congress on its face supersedes state law. See, e.g., Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 24 n.26 (1983)(characterizing 29 U.S.C. §1144(a), the preemption clause of the Employee Retirement Income Security Act, as "virtually unique," for Congress declared expressly that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."); Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, __, 112 S.Ct. 2374, 2385 (1992)(construing 29 U.S.C. § 667(b) of the Occupational Safety and Health Act as vesting OSHA with exclusive jurisdiction on issues with respect to which the agency issues standards); id. at 2391 (Kennedy, J., concurring in part and concurring in judgment)(same).

The preemptive effect of a federal act is less certain when Congress omits express preemption language or fails to articulate clearly its preemption policy. In those instances, courts are left the task of ascertaining whether Congress impliedly preempted state laws. Courts have implied federal preemption of

state laws under two circumstances--when the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" Gade, 112 S.Ct. at 2383 (citations omitted), and when "'compliance with both federal and state regulations is a physical impossibility,'" or the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (citations omitted). Deciding whether Congress expressly or impliedly preempted state regulation does not turn on rigid distinctions. English, 496 U.S. at 79 n.5. Nor is preemption compelled any less because Congress's command is implied from the structure and purpose of the law as a whole rather than textually clear and manifest. See Gade, 112 S.Ct. at 2386 n.2.

A. TITLE I DOES NOT PREEMPT EXPRESSLY STATE WORKERS' COMPENSATION LAWS THAT PRESCRIBE WAGE-LOSS BENEFITS AND PRESERVES STATE LAWS THAT PROVIDE "EQUAL OR GREATER PROTECTION."

The declared purpose of the ADA is, in part, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[2] and "to allow individuals with disabilities to be part of the economic mainstream of our society."[3] The cornerstone of the non-

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[2]42 U.S.C. § 12101(1).

[3]H.Rep. No. 101-485(II), p.34 (1990), U.S.Code Cong. & Admin. News 1990, p. 316.

discrimination policy under Title I is a general rule, which provides:

> 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.

42 U.S.C. § 12112(a). The ADA defines "discriminate" by example, to include:

> (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;
> . . .
> (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 a common administrative control.

42 U.S.C. § 12112(b)(1) and (3); 29 C.F.R. §§ 1630.5 and 1630.7.

A "qualified individual with a disability" under the ADA 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. . . ." 42 U.S.C. § 12111(8). With respect to an individual, "disability" means "(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."

42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Each term has special meaning under the Code.[4]

By their terms, Title I provisions cited above do not supersede state award of benefits to injured employees, or for that matter, state workers' compensation laws. Instead, the ADA expressly preserves state laws that provide at least equivalent protection.

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. . . .

42 U.S.C. § 12201(b).

The Division contends that wage-loss benefits afford an employee with a permanent impairment a right in addition to the ADA. The Florida workers' compensation law is a comprehensive system intended "to assure the quick and efficient delivery of disability and medical benefits to an injured worker at a reasonable cost to the employer." § 440.015, Fla. Stat. (1991). The law prescribes four benefit classifications. Two

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[4]See 29 C.F.R. § 1630.2(h)(defining "physical or mental impairment" as "(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities"); 29 C.F.R. § 1630.2(j)(defining "substantially limits"); 29 C.F.R. § 1630.2(i)(defining "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

classifications, "permanent total disability"[5] and "temporary total disability,"[6] authorize benefits for employees whose injuries prevent them from working indefinitely or for a specified time. In each instance, benefits are calculated as a percentage of the average weekly wage at the time of the injury. Under a third classification, "temporary partial disability," benefits are calculated as a percentage of the difference between the employee's average weekly wage at the time of injury and the remuneration the employee is able to earn during recovery.[7]

The fourth classification, entitled "permanent impairment and wage-loss benefits," arises after the employee has reached "maximum medical improvement" so that the injury prevents the employee from returning to his or her pre-injury physical condition. This is the focus of the instant cause and requires discussion.

Essentially, compensation for wage-loss benefits under this section is a percentage of the average weekly wage at injury,

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[5]An employee who suffers an injury specified in the statute, such as the loss of both hands, in the absence of conclusive proof of substantial earning capacity, is entitled to compensation. Other injuries may qualify as permanent total if established by the facts, in which event compensation is provided until the employee is not engaged in, or physically capable of engaging in, gainful employment. § 440.15(1), Fla. Stat. (1991).

[6]An employee with a disability that is "total in character but temporary in quality" is eligible to receive compensation, not to exceed 260 weeks. An employee who suffers an injury specified in the statute, such as loss of an arm, shall be paid temporary total disability not to exceed 6 months from the date of the accident. § 440.15(2), Fla. Stat. (1991).

[7]Benefits shall be paid for temporary partial disability not to exceed 260 weeks. § 440.15(4), Fla. Stat. (1991).

payable for a statutorily specified number of weeks that corresponds to the employee's impairment rating. The wage-loss benefit under this section is defined as follows:

> Each injured worker who suffers a permanent impairment, which permanent impairment is determined pursuant to the schedule adopted in accordance with subparagraph (a)3, is not based solely on subjective complaints, and results in one or more work-related physical restrictions which are directly attributable to the injury, may be entitled to wage-loss benefits under this subsection, provided that such permanent impairment results in a work-related physical restriction which affects such employee's ability to perform the activities of his usual or other appropriate employment. . . .

§ 440.15(3)(b)1., Fla. Stat. (1991).

Of importance, Florida workers' compensation law considers both "disability" and "permanent impairment" in awarding benefits. A "disability" refers to decreased wage-earning ability or direct economic harm. § 440.02(11), Fla. Stat. (1991)("incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury"). In comparison, "permanent impairment" is unrelated to the economic aspects of the injury and means "any anatomic or functional abnormality or loss, existing after the date of maximum medical improvement, which results from the injury." § 440.02(19), Fla. Stat. (1991).

Consequently, the workers' compensation definition of "disability" does not correspond to the definition of "disability" under the ADA. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g). Instead, the ADA definition of "disability" is more like the workers' compensation definition of "permanent

impairment," although the two definitions are not equivalents. For instance, an injured employee with a permanent impairment may be unable to "perform the essential functions of the employment position that such individual holds or desires," preventing him or her from invoking the protection of the ADA. 42 U.S.C. § 12111(8). Also, an injured employee with a broken leg that heals within several months may claim workers' compensation, but not relief under the ADA because the employee is not "disabled." These individuals could qualify for state wage-loss, yet fall outside the protective envelope of the ADA. Petitioner illustrates when one individual may seek relief under both laws--workers' compensation for medical and wage-loss benefits and the ADA for reasonable accommodation.

The challenged section contains two functional components. The first prescribes a method of calculating wage loss:

> Such benefits shall be based on actual wage loss and shall not be subject to the minimum compensation rate set forth in s. 440.12(2). Subject to the maximum compensation rate as set forth in s. 440.12(2), such wage-loss benefits shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn after reaching maximum medical improvement, as compared weekly; however, the weekly wage-loss benefits shall not exceed an amount equal to 66⅔% of the employee's average weekly wage at the time of injury. . . .

§ 440.15(3)(b)1., Fla. Stat. (1991). The second prescribes the period of benefit eligibility for injuries occurring after June 30, 1990:

> 4. The right to wage-loss benefits shall terminate upon the occurrence of the earliest of the following:
> . . .

> d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:
>
> . . .
>
> (III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9 percent.

§ 440.15(3)(b)4.d.(III). In sum, this section awards wage-loss benefits for permanent impairment during weeks of wage-loss, in direct proportion to the impairment rating, and for a statutorily determined period based on the impairment rating.

Having reviewed the state and federal laws cited above, the federal district court in the parallel litigation found that the state law provided protection "at least equal" to that of the ADA. It also characterized the state law as "different and complementary," owing to the availability of wage-loss to protect injured employees when they are unable to work. Cramer, 885 F. Supp. at 1553.

Title I contains no textually "unambiguous congressional mandate" that displaces either the granting or limiting workers' compensation wage-loss benefits. Florida Lime & Avocado Growers, Inc., 373 U.S. at 146-47. Moreover, workers' compensation wage-loss benefits fall within a safe harbor Congress created in 42 U.S.C. § 12201(b).

B. TITLE I DOES NOT PREEMPT IMPLIEDLY THE LIMITATION OF WAGE-LOSS BENEFITS TO AN EMPLOYEE WITH A PERMANENT IMPAIRMENT.

Petitioner maintains that Title I impliedly preempts section 440.15(3)(b)4.d, and avoids squarely addressing the text of

section 12201(b). He argues that the state law conflicts with the ADA because it uses an arbitrary classification to terminate benefits at 78 weeks and discriminates among classes of disabled.[8] Petitioner's failure to establish a prima facie case of discrimination suggests that Congress did not intend impliedly to overcome the presumption against preemption.

Petitioner has the burden of proving a claim under the ADA. United States Equal Employment Opportunity Comm'n v. AIC Security Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993). The elements of a prima facie case under Title I require proof that Petitioner is disabled within the meaning of the ADA; that Petitioner is qualified, with or without reasonable accommodation, to perform the essential functions of the job; and that the employer subjected Petitioner to an adverse decision on account of a disability. Failure to establish one element ends the inquiry. Owens v. United States Postal Serv., 37 F.3d 1326 (8th Cir. 1994).

As to several elements, Petitioner's theory is inconsistent with the basic teachings of the United States Supreme Court, notably Alexander v. Choate, 469 U.S. 287 (1985), and Traynor v. Turnage, 485 U.S. 535, 549 (1988). Each of those cases construed the related non-discrimination provision of the Rehabilitation Act of 1973.[9]

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[8]Initial Brief at 12.

[9]In terms comparable to the non-discrimination provision of the ADA, the Rehabilitation Act states:

In Choate, the Court considered whether Tennessee could properly institute a cost-saving measure that reduced from 20 to 14 annual days the inpatient hospital care covered by the state Medicaid program. Medicaid recipients challenged the measure, claiming that the reduction disproportionately affected the handicapped.

The case focused on the quality of the access that a program must provide to handicapped individuals. The Court observed the following admonition:

> Any interpretation of Sec. 504 must . . . be responsive to two powerful but countervailing considerations--the need to give effect to the statutory objectives and the desire to keep Sec. 504 within manageable bounds. . . . We reject the boundless notion that all disparate-impact showings constitute prima facie cases under Sec. 504.

Choate, 469 U.S. at 299. On one side, the balance recognizes that an "otherwise qualified handicapped individual" must have meaningful access to a benefit. Tennessee's 14-day limit on inpatient hospital care did not deny Medicaid recipients meaningful access.

> Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the

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> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794. In 1984, the Congress amended the section, in part, substituting "qualified individual with a disability" for "qualified handicapped individual."

> general aim of assuring that individuals will receive necessary medical care, but the benefit remains the individual services offered--not "adequate health care."

Id. at 303. The Court concluded that "[t]he Act does not . . . guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." Id. at 304 (citation omitted).

By extension, Choate supports a conclusion that the ADA does not compel the legislature to apportion wage-loss benefits equally among injured employees with a permanent impairment. Like Tennessee's Medicaid, Florida's workers' compensation scheme need not precisely tailor benefits to meet the needs of an individual injured employee. And like Medicaid, the scheme takes into account employee-specific information in establishing a wage-loss benefit level, including the physical evaluation to arrive at a rate of impairment and lost wages.

On the other side, the balance respects the state's interest in maintaining the fiscal integrity of state programs. Pandazides v. Virginia Bd. of Educ., 946 F.2d 345, 350 (4th Cir. 1991)(citation omitted). Congress's ADA policy echoes this balancing by excusing a covered entity from making a reasonable accommodation if the accommodation imposes "an undue hardship on the operation of the business of such covered entity," 42 U.S.C. § 12112(b)(5)(A), or requires "significant difficulty or expense" on the part of the entity. H.Rep. No. 101-485(II), p.68 (1990), U.S.Code Cong. & Admin. News 1990, p. 350.

The wage-loss payment calculus of section 440.15 respects a similar balancing of interests--providing disability and medical benefits to injured employees at a reasonable cost to employers. § 440.015, Fla. Stat. (1991).

Finally, the Medicaid recipients in Choate claimed that the inclusion of an annual durational limit on inpatient coverage rendered the entirety of Tennessee's Medicaid plan in conflict with the Act. The Court rejected this argument, concluding that "nothing in the pre- or post-1973 legislative discussion of Sec. 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." Choate, 469 U.S. at 307 (emphasis added). Likewise, the ADA contains no textually certain expression of Congress's desire to interfere with the policy choices of state legislatures in targeting workers' compensation benefits to particular injured employees and setting time-limits on eligibility.

In Traynor, the Court reviewed a decision of the Veterans' Administration that denied a request for an extension by two honorably discharged veterans to use their educational assistance benefits under the "GI Bill." The Bill required veterans to exhaust the benefits within 10 years of discharge unless they were prevented from using their benefit within 10 years due to "a physical or mental disability which was not the result of [their] own willful misconduct." The veterans sought an extension,

explaining that they were disabled on account of alcoholism. Applying its rule, which established a conclusive presumption that alcoholism that is not the product of mental illness is considered to be "willful misconduct," the Administration denied the requests.

The veterans charged that the Bill violated the Rehabilitation Act by creating a special benefit for disabled veterans who are disabled through no fault of their own. Alternatively stated, the Bill treats disabled veterans, who may obtain extensions provided they do not become disabled by their own "willful misconduct," different from able-bodied veterans, who are precluded absolutely from obtaining an extension.

A majority of the justices upheld the Administration decision, agreeing that "Congress is entitled to establish priorities for the allocation of limited resources." Traynor, 485 U.S. at 549. Further, they observed that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to other categories of handicapped persons." Id.; see also Modderno v. King, 871 F. Supp. 40, 43 (D.C. 1994)(concluding that the allocation of benefits in the treatment of mental illness and physical illness was within the agency's discretion to allocate benefits "amongst an encyclopedia of illnesses," and that mere disparity in the allocation presented no cognizable claim under Section 504).

Traynor supports a conclusion that the allocation of workers' compensation benefits between classes of injured employees is not inconsistent with the ADA, even though one or more classes may not be entitled to receive equal benefits.

Petitioner contends that Traynor can be distinguished on the basis of Helen L. v. DiDario, 46 F.3d 325 (3d Cir.), cert. denied sub nom. Pennsylvania Secretary of Public Welfare v. Idell S., 116 S.Ct. 64 (1995), which concerned the operation of two Pennsylvania programs to assist the physically disabled. One program operated institutional nursing homes and the other operated attendant care, which enabled an individual to live at home. Plaintiff qualified for the attendant care program, but due to lack of funding, the Commonwealth placed her in a nursing home and wait-listed her for attendant care. Plaintiff was required to receive services in the nursing home, which lacked contacts with non-disabled persons. She alleged that the Commonwealth violated Title II of the ADA "by providing services in a nursing home rather than in the 'most integrated setting appropriate.'" Id. at 328 (citing 28 C.F.R. § 41.51(d)).

A panel of the Third Circuit ruled that the plaintiff was entitled to summary judgment. The court regarded Traynor as "easily distinguished," id. at 335, explaining that Traynor was unconcerned with the "integration mandate" of the ADA. Id. at 336. Moreover, "Congress has stated that 'discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization.' If Congress were only concerned

about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled persons are institutionalized." Id. (citation omitted).

The circuit court's decision in Helen L. offers insufficient logic to break with United States Supreme Court precedent in the circumstances of this case. First, the circuit court dealt with the "integration mandate," which requires federally assisted program recipients to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." Title I expresses no such particular responsibility in connection with a "covered entity."

Second, Traynor interpreted the non-discrimination provision of the Rehabilitation Act of 1973, which is the forerunner of the non-discrimination provision of Title I. As such, Traynor is highly relevant. Helen L. considered eligibility for services under alternative care programs, not wage-loss benefits under workers' compensation. As noted above, not all permanently impaired employees are "disabled" within the meaning of the ADA. Finally, the Third Circuit panel advocates for an interpretation of the ADA that ought to emerge from Congress rather than the courts.

In conclusion, Petitioner's failure to establish a prima facie case of discrimination under Title I is strong evidence that Congress did not intend to displace state-mandated wage-loss benefits. Moreover, the ADA and workers' compensation law

advance separate aims and wage-loss does not stand as "'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Gade, 112 S. Ct. at 2383 (citation omitted). As such, Title I does not defeat the presumptive validity given to the challenged wage-loss provision by the Supremacy Clause.

II. THE DURATION LIMITS ON WAGE-LOSS BENEFITS REFLECT REASONED LEGISLATIVE JUDGMENT AND DO NOT IMPINGE THE EQUAL PROTECTION CLAUSE.

Petitioner claims that section 440.15(3)(b)4 impermissibly discriminates against disabled persons by denying "the chance to present any factual evidence on his continuing need for wage loss benefits," thereby triggering some level of heightened scrutiny.[10] The Division understands Petitioner's challenge to proceed under the Equal Protection Clause.[11]

Like the Supremacy Clause discussed above, the federal Equal Protection Clause presumes the validity of state social and economic laws. Illinois v. Krull, 480 U.S. 340, 351 (1987); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Moreover, the Florida Legislature is entitled to great deference because of this threshold presumption, even though its laws result in some inequality in practice. Panama City Medical Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir.) (citation omitted), cert. denied, 115 S. Ct. 93 (1994).

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[10]Initial Brief at 5-6.

[11]U.S. Const. amend. XIV, § 1.

Deciding what standard of review is appropriate turns on the nature of the classification. The ADA does not compel a heightened level of scrutiny and the challenged statute is subject to the rational basis test, which courts traditionally apply to social legislation. See, e.g., Winn Dixie v. Resnikoff, 659 So. 2d 1297, 1299 (Fla. 1st DCA 1995)(rejecting claim that injured employees are suspect class and construing § 440.15(3)(b)4.d., Fla. Stat. (1991), as a cumulative and reasonable limitation on eligibility for wage-loss); United States v. Santiago-Martinez, 58 F.3d 422, 423 n.1 (9th Cir. 1995) (noting that Congress's recognition of obese persons as a class deserving protection under the ADA does not compel "heightened scrutiny" under the Equal Protection Clause), petition for cert. filed, 64 U.S.L.W. 3287 (Sept. 18, 1995).

On a rational basis review, the challenger has the burden "'to negative every conceivable basis which might support it.'" Federal Communications Comm'n v. Beach Communications, Inc., 113 S.Ct. 2096, 2102 (1992)(citation omitted). To preserve the presumption of validity of Florida's law, the Equal Protection Clause will strike the law "only if based on reasons totally unrelated" to a legitimate state end. McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969).

The certified question posed by the district court requires review of the rationale for limiting eligibility for wage-loss. Aside from claiming that the limits discriminate improperly among the class of disabled individuals and deny an individual

determination of benefits, Petitioner advances not a solitary basis to negative the legislature's choice.

Instead, several conceivable rational bases exist to support the 1991 law. In that law the legislature enacted a schedule of durational limits and repealed the 1989 version, which provided simply that eligibility would terminate within 525 weeks for injuries after July 1, 1980. § 440.15(3)(b)4.c., Fla. Stat. (1989). The amendment reflected input from various interest groups, which reported that workers' compensation insurance faced a financial crisis, placing Florida in a competitive disadvantage relative to other states. Moreover, workers' compensation insurance and indemnity benefits exceeded the rates experienced nationally, as well as in southeastern and contiguous states. The section reflects the legislative conclusion that reduction in benefits was necessary to restore economic competitiveness to industry and concomitantly assure the availability of funds to compensate employees injured in the workplace. Ch. 91-1, preamble, 1991 Fla. Laws 21, 22-24; see also § 440.015, Fla. Stat. (1991).

It is equally possible that the duration schedule itself reflects principled legislative linedrawing that is predicated on a sound actuarial basis. "[E]ven if the assumptions underlying the rationales were erroneous, 'the very fact that they are 'arguable' is sufficient, on a rational-basis review, to 'immuniz[e] the [legislative] choice from constitutional challenge.'" Panama City Medical Diagnostic, 13 F.3d at 1547

(citation omitted). Florida's wage-loss provision does no violence to the guarantees of the Equal Protection Clause.

III. THE FINAL ORDER OF THE JUDGE OF COMPENSATION CLAIMS, EXPRESSING MERE DICTA THAT THE BENEFIT SCHEDULE UNDER THE CHALLENGED STATUTE VIOLATES THE ADA, COMES TO THIS COURT WITH NO SPECIAL DIGNITY.

Petitioner argues that the Final Order of the judge of compensation claims granting Respondents' motion to dismiss deserves heightened importance. For reasons that follow, the Final Order under review comes to this Court with no special dignity.

The judge of compensation claims dismissed Petitioner's ADA claim for lack of jurisdiction. There is no question about the correctness of that ruling, for the legislature delegated to judges of compensation claims only those powers pertaining to disputes under the workers' compensation law, not to federal questions. See §§ 440.29 and .33, Fla. Stat. (1991).

Nonetheless, Petitioner argues that this Court is bound by statements expressed in that order. For instance, Petitioner argues that "factual disputes must be resolved in favor of Petitioner at this juncture." Initial Brief at 1, 5, and 24. Petitioner borrows from Hishon v. King & Spalding, 467 U.S. 69 (1984), where the Supreme Court reviewed an order of the district court that dismissed a complaint under the Civil Rights Act of 1964. The district court ruled that the act did not protect a woman associate attorney from discrimination by the partnership in deciding whether to promote her to partner. On review of that

decision, the Supreme Court stated that an appellate court "must accept petitioner's allegations as true" when answering the question whether allegations in the complaint stated a claim under the act. Id. at 73.

Hishon's directive does not apply here. In that case, the federal district court was empowered to consider and to rule on issues under the Civil Rights Act. Unlike the district judge in Hishon, the judge of compensation claims below lacked the competence to consider and to rule on Petitioner's ADA claim. Consequently, there exists no need to resolve factual issues in his favor because no relief from the Final Order "could be granted under any set of facts." Id. at 73; Conley v. Gibson, 355 U.S. 41, 46 (1957). To grant a motion to dismiss for failure to state a claim under Title I of the ADA, a trial court must consider, at least in part, the merits of the pleadings, whereas the trial court need not consider the merits to grant a motion to dismiss for lack of jurisdiction. Therefore, Petitioner cannot meaningfully maintain that the judge of compensation claims made certain findings[12] or admissions[13] that must be viewed in a light most favorable to Petitioner.

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[12]See Initial Brief at 3 (characterizing as a "finding" a statement by the judge of compensation claims that Petitioner is a "qualified individual with a disability" under Title I).

[13]See Initial Brief at 27 (declaring that the judge of compensation admitted that the challenged wage-loss section "uses 'standards, criteria or methods of administration'" as contemplated by Title I).

Statements in the Final Order as to the ADA are mere dicta and do not relieve Petitioner of his burden of establishing a prima facie case as to all elements in a claim of discrimination under Title I.

IV. ASSUMING FOR ARGUMENT THAT THE CHALLENGED WAGE-LOSS SECTION VIOLATES CONSTITUTIONAL PROTECTIONS, PETITIONER HAS NOT CITED A BASIS FOR RELIEF AND ASKS THIS COURT TO SPECULATE ON CRITERIA THAT WOULD MAKE HIM WHOLE.

Petitioner's Initial Brief proceeds exclusively on the stated basis that the wage-loss provision is preempted by the ADA. Assuming for argument that Florida's wage-loss provision violates the non-discrimination standard of Title I of the ADA, the Division confesses difficulty in answering the prayer for relief.

Ordinarily a state law that conflicts with a federal law is without effect. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981), and cases cited. Striking the wage-loss provision leaves employees with a permanent partial injury without wage-loss benefits. Moreover, the exclusivity provision provides an employer with a defense against a tort claim for wage-loss. § 440.11, Fla. Stat. (1991).

Alternatively, Petitioner asks this Court to rewrite section 440.15(3)(b)4. Petitioner cites no statute or decisional law that would remedy violations of Title I of the ADA. The Division understands that the ADA imports the enforcement provisions of

Title VII of the Civil Rights Act of 1964.[14] 42 U.S.C. § 12117(a). Further, state and federal courts have concurrent jurisdiction to adjudicate Title VII claims. Yellow Freight Syst., Inc. v. Donnelly, 494 U.S. 820, 826 (1990). A principal purpose of Title VII is to provide an enforcement mechanism for ADA claims, that is, "'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" A remedy ought to restore persons as nearly as possible to the position they would have been in had the wrong not occurred. Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1090 (1983) (plurality)(citation omitted).

Even so, Petitioner provides no guiding principles that would permit this Court to fashion relief appropriate to a Title I violation. The bottom line is that Petitioner wants "further benefits," that is, more money.[15] He asks this Court "to reinstate" his claim for wage-loss benefits and to remand to the judge of compensation claims "for a factual determination based upon evidence."[16] The "cure" for the asserted defects in the wage-loss scheme would have the judge render a decision based on an "individual, factual determination,"[17] although he proposes no facts that are required constitutionally in this or other cases.

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[14]42 U.S.C. §§ 2000e-4, 5, 6, 8, and 9.

[15]Initial Brief at 43.

[16]Initial Brief at 8, 10, and 48.

[17]Initial Brief at 29-30.

He presumes that the judiciary is equipped to redefine the social and economic values of wage-loss, a task that is constitutionally within the province of the legislature and made difficult by the absence of a record. Unlike Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), where the Court rehabilitated the Florida Contraband Forfeiture Act by prescribing minimal due process requirements, the instant cause presents a claim of substantive complexity. Further complicating the search for appropriate relief, Petitioner proposes no solutions as to how this Court ought to remix those factors in light of the balancing of interests inherent in a fiscally sound benefit plan. Choate, 469 U.S. at 299.

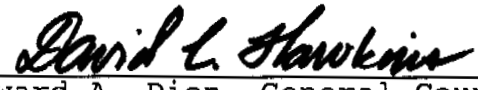
Petitioner also assumes that, if the section did all he wants, he would be entitled to "further benefits." The premise is neither logical nor legally supportable. The ADA does not mandate that legislatures provide particular services, Williams v. Secretary of the Executive Office of Human Services, 609 N.E. 2d 447, 452 (Mass. 1993), or establish system-wide percentages of benefits. Id. at 453. Nor does the ADA guarantee that greater benefits alone will remedy a violation. It is pure speculation whether a rewrite of the section to require an "individual, factual determination" will yield greater, or possibly lesser, benefits.

The absence of a clearly stated basis for relief makes difficult the crafting of appropriate remedy by this Court or by a lower tribunal on remand.

CONCLUSION

For the reasons expressed above, the Division urges this Court to decline Petitioner's invitation to find conflict between the workers' compensation law and the ADA and to declare that section 440.15(3)(b)4.d., Florida Statutes (1991), does not violate the non-discrimination provision of Title I. Further, the Division asks this Court to approve the decision of the district court.

Respectfully submitted this 13th day of December 1995.



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CERTIFICATE OF SERVICE

I hereby certify that an original and seven copies of the foregoing Brief of Intervenor, Department of Labor and Employment Security, Division of Workers' Compensation, have been filed with Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399, and that a true and correct copy was furnished by U.S. mail to Alex Lancaster, Esq., and Amy L. Sergent, Esq., Lancaster & Eure, P.A., Post Office Drawer 4257, Sarasota, FL 34230, and Claire Hamner Matturro, Esq., 869 Lee Road, Cairo, GA 31728, attorneys for Petitioner; and to James G. Trope, Esq., and Elizabeth J. Muller, Esq., 2601 Cattlemen Road, Sarasota, FL 34232-6249, attorney for Respondents, this 13th day of December 1995.