SUPREME COURT OF FLORIDA

EARL L. CRAMER,

Petitioner

v.

BROEDELL PLUMBING SUPPLY, ET AL,

Respondents.

CASE NO. 86,709

District Court of Appeal,
First District
No. 95-1588

APPEAL FROM THE COMPENSATION ORDER
DATED APRIL 24, 1995
BY THE HONORABLE JOSEPH E. WILLIS
JUDGE OF COMPENSATION CLAIMS
and
APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER EARL L . CRAMER

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STATEMENT OF THE FACTS

Respondents, without any cite to the record, argue they never conceded Petitioner was a "qualified individual." Yet the Order on appeal, signed by Judge Willis, states the parties agreed Petitioner was a "qualified individual." (Order on Appeal, p. 2, n. 2; amended appendix at 0-2). Regardless of who wrote the order, Judge Willis signed it and nothing in the record supports a view that Respondents filed any objection to this order or this statement. Given the lack of any contrary support to this statement, this Court must presume it is accurate. *See Schneider v. Currey,* 584 So. 2d 86, 87 (Fla. 2d DCA 1991)(holding "unproven utterances documented only by an attorney are not fact that... this Court can acknowledge").

LEGAL ARGUMENT

Respondents misread *Martin v. Voinovich,* 840 F. Supp. 1175, 1209 (S.D. Ohio 1993) as limited solely to the mentally retarded. Yet that case's specific, quoted reliance upon 42 U.S.C. § 12101(a)(7)("individuals with disabilities are a discrete and insular minority...") shows *Martin's* analysis applies to all "*individuals with disabilities*"--a status which clearly includes Petitioner. Thus, the quasi-suspect argument advanced in reliance upon *Martin* applies to Petitioner.

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

Respondents over simplify Petitioner's argument by concluding Petitioner merely asks for the same benefits for "all categories of disabled persons." While fair benefits for all is

certainly an aspect of his claim, what Petitioner asks for is exactly what the ADA guarantees him--to be free from presumptive classifications which deny him the the right to continuing wage loss benefits without even the benefit of a factual hearing. In fact, these presumptive classifications found in section 440.15(3)(b)4.d., Florida Statutes, may best rebut Respondent's assertion that the ADA does not preempt the wage loss scheme.

The challenged 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 presumptions 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 under the "implied" preemption analysis.

Petitioner also asserted in his initial brief that the ADA expressly preempts any conflicting law which does not offer

greater, or at least equal, protection than the ADA. (*See* Petitioner's Initial Brief, pages 10-12). Respondents do not directly attack this argument, but do argue in another context that workers' compensation benefits are greater than the ADA's benefits, and, thus, are not terms of employment. As shown below, this is not the case; hence, as the only potential rebuttal to an express preemption argument is erroneously flawed in its premise, explicit preemption of a conflicting state law may be found.

(B) 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.

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.

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,'") 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. The analogy between a pension plan and workers' compensation defeats Respondents' theory. In both pension plans and workers' compensation, eligibility for the plan benefits is by virtue of the employment status. But--in both a retirement plan and the wage loss situation challenged here--an employee does not actually collect benefits until he or she is *no longer actually, actively working on the job.* 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, "fringe benefits" are unequivocally within the scope of Title I. 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); *Acosta v. Kraco, Inc.,* 471 So. 2d 24, 25 (Fla. 1984) *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 because this Court also gave other reasons to justify the age discrimination at issue in those two cases. That other reasons were cited does not erase the plain fact that this Court twice recognized workers' compensation benefits are fringe benefits. If this Court has not so recognized, it would not have used the precise language and rationale it did in upholding the lower court's ruling, but instead would have stated something along the lines that "while workers' compensation benefits are not fringe benefits, we nonetheless uphold the First District upon alternative grounds..." 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.

(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.

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).

Respondents attempt to refute this impact of the term "or" by arguing "obviously" the statute meant "and," not "or." However, the term "or" used in a statute indicates that "alternatives" are meant, *see Sparkman v. McClure,* 498 So. 2d 892, 895 (Fla. 1986).

Respondents further try to save their position that "and" was meant by arguing that if "or" is used to join the quoted phrases that a qualified individual need not be disabled and an employee with a disability need not be "qualified." This position

overlooks the fact that a qualified individual is defined in the statute as a person with a disability; hence, by definition, the qualified individual in section 12111(b)(2) has a disability. Further, the fact the "employee with a disability" is already an "employee" logically dictates a conclusion he or she was "qualified" or they would not have been hired in the first place. Accordingly, Respondents' position is not supported.

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. Such an inconsistent result is not intended; Petitioner--as an employee with a disability at the pivotal time--is covered by the ADA.

Additionally, or alternatively, whether Petitioner is a

qualified individual is a fact question which can not be determined on a motion to dismiss. *See, e.g., Hogue v. MQS Inspection, Inc.*, 875 F. Supp. 714, 719 (D.C. Colo. 1995).

(D) Respondents are proper defendants.

Respondents contend they are not proper parties as Petitioner failed "to show" either defendant fits the definition of "employer." Since Petitioner's claim was dismissed without allowing him to present evidence, it is hard to imagine how he might "show" Broedell--which was Petitioner's employer--has the requisite number of employees. This must be viewed in the light most favorable to Petitioner at this junction of the case.

Further, FEISCO, as the insurer is also a proper defendant. In *Arizona Governing Committee v. Norris,* 463 U.S. at 1090, no less authority than the U.S. Supreme Court held (after noting the state had contracted with an insurance company): "[I]t is well established that *both parties* to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions." *See also United States v. State of Illinois, City of Aurora, et all,* 1994 U.S. Dist. LEXIS 12890, 4-6 (N.D. Ill. No. 93 C 7741 Sept. 9, 1994) and cases cited therein supporting view insurers are proper parties in ADA cases.

(E) Prohibited Discrimination occurred against Petitioner.

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 rely on Title IV to support their position that the presumptive classifications are allowed by the ADA. While the ADA does allow "legitimate classifications in *risks* in insurance plans in accordance with the state law," such plans must not "evade the purposes of this Act." House Report 101-485(II) at 70; 42 U.S.C. § 12201(c).

Wage loss benefits are not classifications of "risk," but classifications of "impairment." The provisions of the ADA which allow for "legitimate classifications in *risks*" would not apply. However, *if* wage loss benefits are deemed within section 12201(c), whether Respondents fit this exception is a fact question and the burden is upon Respondents. *EEOC Interim Enforcement Guidance: Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (EEOC Notice No. N-915.002)(6-8-93). *See also Piquard v. City of East Peoria,* 887 F. Supp.

1106, 1125-6 (C.D. Ill. 1995)(defendants must prove they fall within the "legitimate classifications" insurance exception and this can not be resolved by a motion to dismiss). Even actuarial studies may not always justify discrimination. *See Arizona Governing Comm. v. Norris,* 463 U.S. at 1083, (women can not be treated differently under annuity contracts just because actuarial studies showed as a class they live longer than men).

Intervenor raised the defense of "undue hardship." Yet this is a factual defense and the burden is upon a defendant; it can not be resolved upon a motion to dismiss. *See Wolford by Mackey v. Lewis,* 860 F. Supp. 1123, 1136 (S.D.W.Va. 1994)

(F) 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. As fully quoted in the initial brief and *not* addressed by Respondents, 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; *see also 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).

Despite Respondents' attempts to distinguish *Helen L. v. DiDario,* 46 F.3d at 335-33, the essence of 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 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. As previously indicated, a careful look at the *Traynor* progeny indicates this only means ineffectual, wasteful, impossible remedies, or those which reward willful misconduct as in *Traynor,* need not be granted. *Cf. Easley v. Snider,* 36 F.3d 297, 303, 306 (3d Cir. 1994)("ineffectual" remedy not required). Petitioner's view reconciles *Easley* and *Helen L.*, both Third Circuit cases and presumed consistent; however Respondents' view would have these cases be in direct conflict--this despite the fact the *Helen L.* case cites to *Easley.*

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.

Respondents' reliance upon *Chiari v. League City,* 920 F.2d 311 (5th Cir. 1991) is similarly distinguishable: the plaintiff in *Chiari* was not able to perform the essential functions of his job without endangering himself and no practical way to restructure the job existed; hence, the remedy sought was impossible. In *Wolford v. Lewis,* 860 F.Supp. 1123, 1135 (S.D.W.Va. 1994), the court acknowledged conflicting authority to its holding that "in general" only "even handed" treatment between the disabled and the non-disabled was required. Further, that case involved a "sub-class" of the disabled who were eligible for Medicaid but lacked transportation to the services of health care providers. The court held they were entitled to accommodations in the form of transportation. Thus, to some degree, *Wolford* did provide remedies which helped provide "even handed" treatment *among* the disabled by requiring additional services to a "sub-class" of the disabled with additional disabilities. *Modderno v. King,* 871 F. Supp. 40 (D.C. 1994), relied upon by Respondents, would not properly be decided the way it was under the ADA in light of the EEOC's vigorous pursuit of

discrimination among the disabled in health insurance. (See Petitioner's initial brief, pages 34-7, 40-1) *Fowler v. Frank,* 702 F. Supp. 143, 147 (E.D. Mich. 1988), relied upon by Respondents, concerned a disabled employee's suit for a transfer to another department even though the employer had "already placed the plaintiff in a position designed to accommodate her physical limitations." The court's analysis focused upon what was a "reasonable accommodation" and found the employer had made "reasonable accommodations." Thus, despite the court's casual reliance on *Traynor* in a procedural matter concerning tolling a time frame, this case is ultimately of no real value to Respondents. Nor is the distinguishable case of *Concerned Parents v. City of West Palm Beach,* 846 F. Supp. 986, 989 (S.D. Fla. 1994) of any value to Respondents. That case dealt with a situation in which the "effective result was that *all* previously existing programs for persons with disabilities were completely eliminated." Thus, that case dealt with discrimination between the disabled as a whole class and persons who are not disabled. As such, this case does not add anything to the discussion of discrimination *among* the disabled and is of no value to Respondents.

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). *See also Garrily v.*

Gallen, 522 F. Supp. 171, 217 (D.N.H. 1981)(federally funded programs, "*when viewed in their entirety,* must be readily accessible to all handicapped persons," and thus the "profoundly retarded" must also be served to the same extent as the "mildly retarded."(original emphasis). In other words, discrimination *among* the disabled due to the severity of the disability is not proper. *Id.* Discrimination *among* the disabled is not allowed by the ADA.

Conclusion

Contrary to Intervenor's position that no remedy exists, Petitioner's remedy is a remand of his claim so that he might present evidence of a continuing need for wage loss benefits. This would restore Petitioner to the position he would have been in had the presumptive classifications not limited his benefits to 78 weeks. Intervenor's reference to the absence of a factual record would thus be cured by the evidentiary hearing so far denied Petitioner on this point. Respondents could present the factual defenses they assert prematurely in this appeal, just as Petitioner could present his evidence. Further, Interventor's assertion that the ultimate outcome is uncertain is no justification for affirming the dismissal as the ultimate outcome for any party seeking to overturn a dismissal of a complaint is always uncertain. Petitioner is confident he can present a winning evidentiary basis for further wage loss benefits *if* he is but given the opportunity. Accordingly, he requests this Court to reinstate his claim and grant him that opportunity.

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