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Civil Rights of Individuals with Disabilities: The Opinions of Judge Alito

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Summary

Judge Samuel Alito Jr. was nominated by President Bush to the U.S. Supreme Court on October 31, 2005. This report examines the opinions written by Judge Alito relating to civil rights for individuals with disabilities and includes a discussion of cases relating to the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), section 504 of the Rehabilitation Act of 1973, and the Fair Housing Amendments Act. In addition, Judge Alito's federalism decisions are briefly analyzed and their potential impact on disability related issues is discussed. Decisions authored by Judge Alito, as well as selected dissents and decisions where he joined the majority are examined.

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Introduction

Judge Samuel Alito Jr. was nominated by President Bush to the U.S. Supreme Court on October 31, 2005. This report examines the opinions written by Judge Alito relating to civil rights for individuals with disabilities and includes a discussion of cases relating to the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), section 504 of the Rehabilitation Act of 1973, and the Fair Housing Amendments Act. In addition, Judge Alito's federalism decisions are briefly analyzed and their potential impact on disability related issues is discussed. Decisions authored by Judge Alito, as well as selected dissents and decisions where he joined the majority are examined.

The Americans with Disabilities Act (ADA)

Overview

The Americans with Disabilities Act has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964.¹ As stated in the act, its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”² It provides broad nondiscrimination protection for individuals with disabilities and is divided into five titles: employment (title I), public services (title II), public accommodation and services operated by private entities (title III), telecommunications (title IV) and miscellaneous provisions (title V).

Judge Alito has written or joined in numerous ADA decisions while on the third circuit. His decisions rely heavily on the facts presented and indicate a reliance on judicial precedent and regulatory interpretations. In many of the cases he has found for individuals with disabilities and has emphasized the necessity of a good faith

¹ For a more detailed discussion of the ADA see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

² 42 U.S.C. §12102(b)(1).

interactive process.³ However, several of his decisions have been criticized as limiting the rights of individuals with disabilities.⁴

Decisions on the Definition of Disability

Statutory Definition and Supreme Court Interpretations. The threshold issue in any ADA case is whether the individual alleging discrimination is an individual with a disability and issues involving the definition have been heavily litigated. The ADA definition is a functional one and does not list specific disabilities. It defines the term disability with respect to an individual as “(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.”⁵

The first Supreme Court ADA case to address the definitional issue was *Bragdon v. Abbott*, a 1998 case involving a dentist who refused to treat an HIV infected individual outside of a hospital.⁶ In *Bragdon*, the Court found that the plaintiff’s asymptomatic HIV infection was a physical impairment impacting on the major life activity of reproduction. Two other Supreme Court cases decided in 1999 involved whether the effects of medication or assistive devices should be taken into consideration in determining whether or not an individual has a disability. The Court in the landmark decision of *Sutton v. United Airlines*⁷ and in *Murphy v. United Parcel Service, Inc.*,⁸ held the “determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment....”⁹

³ See *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998); *Shapiro v. Township of Lakewood*, 292 F.3d 249 (3d Cir. 2001).

⁴ See e.g., *Doe v. National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999).

⁵ 42 U.S.C. §12102. The Equal Employment Opportunities Commission (EEOC) has promulgated regulations discussing the definition of disability. 29 C.F.R. §§1630 *et seq.*

⁶ 524 U.S. 624 (1998). For a more detailed discussion of this decision see CRS Report 98-599, *The Americans with Disabilities Act: HIV Infection is Covered Under the Act*, by Nancy Lee Jones.

⁷ 527 U.S. 471 (1999).

⁸ 527 U.S. 516 (1999).

⁹ *Sutton v. United Airlines*, *supra*. See also *Murphy v. United Parcel Service*, *supra*, where the Court held that the determination of whether the petitioner’s high blood pressure substantially limits one or more major life activities must be made considering the mitigating measures he employs, and *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999), where the Court held unanimously that the ADA requires proof that the limitation on a major life activity by the impairment is substantial.

The Supreme Court in the 2002 case of *Toyota Motor Manufacturing v. Williams*¹⁰ examined whether the plaintiff was an individual with a disability under the first prong of the definition of individual with a disability; that is, whether she had a physical or mental impairment that substantially limits a major life activity. Justice O'Connor, writing for the unanimous Court, determined that the word substantial "clearly precluded impairments that interfere in only a minor way with the performance of manual tasks." Similarly, the Court found that the term "major life activity" "refers to those activities that are of central importance to daily life." Finding that these terms are to be "interpreted strictly,"¹¹ the Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Significantly, the Court also stated that "[t]he impairment's impact must also be permanent or long-term."

Decisions Written and Joined by Judge Alito. Not surprisingly given the number of judicial decisions regarding the definition of disability, Judge Alito has written and joined in opinions on several cases on this issue. Generally, his decisions rely heavily on the facts presented and indicate a reliance on judicial precedent and regulatory interpretations.

In *Mondzelewski v. Pathmark Stores, Inc.*,¹² Judge Alito found that a butcher who had injured his back was an individual with a disability because he was substantially limited in the major life activity of working. The plaintiff, a 55 year old with a sixth grade education, had worked at Pathmark, a supermarket, for 35 years, first as a bagger and then as a meat cutter. In March 1992, he injured his back lifting boxes of meat and was treated and restricted from lifting objects weighing more than 25 pounds. He reinjured his back in December 1993 and was again treated and restricted from lifting objects weighing more than 25 pounds. He claimed that when he returned to work after his second injury, he was retaliated against for asserting his right to a reasonable accommodation under the ADA by being assigned "punishment shifts" and being given retaliatory reprimands.

The district court held that Mr. Mondzelewski was not disabled under the ADA because his back injury did not substantially limit him in the major life activities of lifting or working and that he could not assert a retaliation claim because he is not disabled. In reversing this decision, Judge Alito concluded, referencing the ADA regulations, that a court should consider an individual's training, skills and abilities in determining whether the individual is substantially limited in the major life activity of working. Judge Alito observed: "We accept this approach – under which an

¹⁰ 534 U.S. 184 (2002).

¹¹ Confirmation of the need for strict interpretation was found by the Court in the ADA's statement of findings and purposes where Congress stated that "some 43,000,000 Americans have one or more physical or mental disabilities." [42 U.S.C. §12101(a)(1)] Justice O'Connor observed that "if Congress had intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."

¹² 162 F.3d 778 (3d Cir. 1998).

individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working – because we owe 'substantial deference' to the EEOC regulation in which it is set out....and because it is entirely reasonable. Indeed, because the effect that a particular impairment will have on a person's ability to work varies depending on that person's background and skills, it is not easy to envision how any other approach could be taken."¹³

Judge Alito also found that the district court had erred in rejecting Mr. Mondzelewshi's claim of retaliation. Relying on a third circuit opinion issued after the district court's decision, Judge Alito found that a person's status as an individual with a disability was irrelevant to assessing a retaliation claim as the ADA statutory provision uses the phrase "any individual" and does not limit its retaliation prohibitions to individuals with disabilities.

In *Fiscus v. Wal-Mart Stores*,¹⁴ a woman with kidney failure was found to be an individual with a disability. Cathy Fiscus, an employee of Wal-Mart, had end-stage renal disease and while undergoing dialysis requested a reasonable accommodation from her employer. Wal-Mart denied the request and placed Ms. Fiscus on leave. After undergoing a kidney transplant, she was unable to return to work for five and one half months. While on leave, Wal-Mart fired Ms. Fiscus because she had not returned to work within one year. The district court found that Ms. Fiscus could not bring suit under the ADA since it held that she was not a person with a disability. The third circuit court of appeals in a decision authored by Judge Chertoff and joined by Judge Alito, rejected the district court's reasoning that "impaired elimination of waste and blood cleansing are nothing more than characteristics of kidney failure....Rather, they are the *effect* of kidney failure in the same way that impaired thinking is the *effect* of organic brain disease. And the fact that the effect of kidney failure is felt on an internal autonomous organic activity is, under *Bragdon*, not incompatible with a finding of substantial limitation of a major life activity."¹⁵

In *Kelly v. Drexel University*,¹⁶ the third circuit upheld the district court's grant of summary judgment to the employer, finding that the plaintiff was not a person with a disability. Francis Kelly had fractured his hip and had a limp and a degenerative joint disease which limited his walking and ability to climb stairs. When his employer, Drexel University, eliminated his position six years after the hip fracture, Mr. Kelly alleged discrimination under the ADA. The district court found that Mr. Kelly did not have a disability and the third circuit in an opinion written by Judge Greenberg and joined by Judge Alito, agreed stating: "While we are not unfeeling with respect to Kelly's condition, still we simply cannot regard it as a

¹³ *Id.* at 784.

¹⁴ 385 F.3d 378 (3d Cir. 2004).

¹⁵ *Id.* at 384.

¹⁶ 94 F.3d 102 (3d Cir. 1996).

disability under the ADA as it does not substantially limit him in the relevant major life activity, walking.”¹⁷

Similarly, in *Katekovich v. Team Rent a Car of Pittsburgh*,¹⁸ an unpublished opinion written by Judge Barry and joined by Judge Alito, the third circuit affirmed the district court’s summary judgment, finding that an employee with sleep disorders and depression was not an individual with a disability under the ADA. The court found that the plaintiff had not proved that these impairments substantially limited one or more of her major life activities. The court observed that Ms. Katekovich’s physicians had indicated she did not have substantial limitations and that “Katekovich’s own testimony did not demonstrate that she was substantially impaired.”¹⁹

The third prong of the definition of disability is “being regarded as having a disability.” Two cases were found where Judge Alito wrote or joined in opinions reversing summary judgment orders which had rejected arguments that an individual was “regarded as” having a disability. In *Polini v. Lucent Technologies*,²⁰ an unpublished opinion by Judge Alito, the district court’s decision for summary judgment for the employer was vacated and the case was remanded. The third circuit held that the rejection of a recalled worker based on a determination that she had failed the vision test created a genuine issue concerning whether Ms. Polini was regarded as having a disability. Similarly, in *Deane v. Pocono Medical Center*,²¹ an en banc third circuit decision by Chief Judge Becker, joined by Judge Alito, the court reversed and remanded the district court grant of summary judgment for the employer. In *Deane*, the plaintiff, a nurse, had been injured while lifting a patient. When she sought to return to light duty, her employer discharged her. Stacy Deane alleged that this was because the employer had regarded her as having a disability and had failed to make reasonable accommodations. The third circuit held: “Deane has thus adduced sufficient evidence that PMC regarded her as substantially more physically impaired than she actually was”²² and that she did not need to perform all the functions of her former job but only the essential job functions. After parsing the legal issues and examining the EEOC’s interpretive guidance, the court of appeals emphasized the need for communication between the parties and an “interactive process” observing that “an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA.”²³

¹⁷ *Id.* at 108.

¹⁸ 36 Fed. Appx 688 (3d Cir. 2002).

¹⁹ *Id.* at 689.

²⁰ 100 Fed. Appx 112 (3d Cir. 2004).

²¹ 142 F.3d 138 (3d Cir. 1998).

²² *Id.* at 145.

²³ *Id.* at 148.

However, in *Parker v. Port Authority of Allegheny County*²⁴ the third circuit in an unpublished *per curiam* decision joined by Judge Alito rejected an employee's claim that she was "regarded as" having a disability that substantially limited her in the major life activity of working. An employer's requirement that an employee provide medical information concerning her ability to drive a bus was not found to support the employee's claim.

Title I – Employment

Statutory Provisions and Relevant Supreme Court Decisions. Title I of the ADA provides that no covered entity shall discriminate against a qualified individual with a disability because of the disability 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.²⁵ The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees.²⁶ If the issue raised under the ADA is employment related, and the threshold issues of meeting the definition of an individual with a disability and involving an employer employing over fifteen individuals are met, the next step is to determine whether the individual is a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.

The Supreme Court in *U.S. Airways v. Barnett*²⁷ held that an employer's showing that a requested accommodation by an employee with a disability conflicts with the rules of a seniority system is ordinarily sufficient to establish that the requested accommodation is not "reasonable" within the meaning of the ADA. However, Justice Breyer found that there were some exceptions to this rule for "special circumstances." The Supreme Court applied a two prong approach to determining whether accommodation is reasonable: first the employee must show that the accommodation is a type that is reasonable and if it is found reasonable, then the burden shifts to the employer to show that granting the accommodation would impose an undue hardship.

The relationship between the receipt of SSDI benefits and the ability of an individual to pursue an ADA employment claim was the issue in *Cleveland v. Policy Management Systems Corp.*²⁸ The Supreme Court unanimously held that pursuit and receipt of SSDI benefits does not automatically stop a recipient from pursuing an ADA claim or even create a strong presumption against success under the ADA. Observing that the Social Security Act and the ADA both help individuals with disabilities but in different ways, the Court found that "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not

²⁴ 90 Fed. Appx. 600 (3d Cir. 2004).

²⁵ 42 U.S.C. §12112(a).

²⁶ 42 U.S.C. §12111(5).

²⁷ 535 U.S. 391 (2002).

²⁸ 526 U.S. 795 (1999).

inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here.” The fact that the ADA defines a qualified individual as one who can perform the essential functions of the job with or without reasonable accommodation was seen as a key distinction between the ADA and the Social Security Act.

Decisions Written and Joined by Judge Alito. In *Shapiro v. Township of Lakewood*,²⁹ Judge Alito held that the fact the employee did not formally apply for vacant positions but wrote letters regarding them, did not excuse the township of Lakewood from its ADA obligations to engage in a good-faith interactive process to reach an accommodation. Howard Shapiro had injured his back while employed as an EMT and requested reasonable accommodation, suggesting several vacant positions to which he could be transferred. Since he had not formally applied for these positions, the district court granted summary judgment to the employer. However, the third circuit applied the two prong approach of determining whether an accommodation is reasonable enunciated in *U.S. Airways, Inc. v. Barnett, supra*, and concluded “the District Court’s decision in this case—entering summary judgment against Shapiro simply because he did not comply with Lakewood’s policy regarding transfer applications—cannot be reconciled with *Barnett* and must therefore be reversed.”³⁰

Qualifications for a job were at issue in another ADA employment case, *Smith v. Davis*.³¹ Rodney Smith was an alcoholic who alleged a violation of the ADA and title VII of the Civil Rights Act of 1964 when he was terminated from his employment as a county probation enforcement officer. The district court granted a motion for summary judgment finding that Mr. Smith had a history of absenteeism which rendered him unqualified to perform his job. The third circuit in an opinion by Judge Schwarzer, joined by Judge Alito, reversed and remanded the case regarding the ADA claim stating: “The record thus raises an issue of fact as to whether Smith’s termination was for a legitimate, nondiscriminatory reason or whether it was a pretext for discrimination in violation of the ADA. Because the explanation provided by defendants—violations of the drug and alcohol policy—(apart from not being the ground on which summary judgment was granted) did not tell Smith what he did to bring about his termination, it is not legally sufficient to entitle defendants to judgment as a matter of law.”³²

In *Straining v. AT&T Wireless Services*,³³ the third circuit in an unreported decision by Judge Aldisert, joined by Judge Alito, found there was no genuine issue of fact and affirmed the district court’s grant of summary judgment for the employer. Linda Straining had rheumatoid arthritis and applied for a job by taking written tests. Based on these tests and without knowledge of her disability, a decision was made

²⁹ 292 F.3d 356 (3d Cir. 2002).

³⁰ *Id.* at 361.

³¹ 248 F.3d 249 (3d Cir. 2001).

³² *Id.* at 252.

³³ 144 Fed. App. 229 (3d Cir. 2005).

not to hire her. The court found no evidence on which a reasonable fact finder could rely to find that discrimination was likely to be a motivating or determinative cause of the employment decision.

In *Dewyer v. Temple University*³⁴ Judge Alito joined in an unpublished opinion affirming the district court's decision rejecting Judith DeWyer's ADA claims. The third circuit held that she failed to present sufficient evidence concerning her request for accommodation and that the evidence presented suggested that the employer attempted to accommodate her.

ADA issues regarding essential functions and a good faith interactive process for accommodations were considered in *McLaughlin v. City of Atlantic City*,³⁵ an unpublished *per curiam* decision in which Judge Alito joined. In *McLaughlin*, although the court noted that the employee had a disability (epilepsy), he did not participate in good faith in the interactive process since he ignored the employer's requests for further evaluation to determine whether suitable accommodations could be made. Although the employer had accommodated the employee by allowing him to start work an hour later, the record indicated that he repeatedly did not show up and therefore failed to perform the essential functions of his job, which in part required regular attendance.

Similarly, *Motley v. New Jersey State Police*³⁶ an opinion by Judge Nygaard and joined by Judge Alito, held that a former state trooper who had been injured on the job could not perform the essential functions of the job. The state trooper had applied for an accidental disability pension and declared that he was permanently and totally incapacitated. Noting that the Supreme Court in *Cleveland*³⁷ had held that the receipt of Social Security Disability Insurance benefits did not automatically bar an ADA claim but that any apparent inconsistencies must be explained, the third circuit held that the state trooper's disabilities as discussed in his pension application were inconsistent with his ability to perform the essential functions of the job.

Title II – Public Services

Statutory Language and Relevant Supreme Court Decision. Title II of the ADA provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.³⁸ “Public entity” is defined as state and local governments, any department or other instrumentality of a state or local government and certain transportation authorities.

³⁴ 89 Fed. Appx. 811 (3d Cir. 2004).

³⁵ 143 Fed. Appx. (3d Cir. 2005).

³⁶ 196 F.3d 160 (3d Cir. 1999).

³⁷ 526 U.S. 795 (1999).

³⁸ 42 U.S.C. §§12131-12133.

In *Olmstead v. Georgia*,³⁹ the Supreme Court examined issues raised by state mental health institutions and held that Title II of the ADA requires states to place individuals with mental disabilities in community settings rather than institutions when the State's treatment professionals have determined that community placement is appropriate, community placement is not opposed by the individual with a disability, and the placement can be reasonably accommodated.⁴⁰ "Unjustified isolation...is properly regarded as discrimination based on disability."⁴¹

Decision Joined by Judge Alito. In a complicated case involving allegations of discrimination under title II of the ADA and section 504 of the Rehabilitation Act⁴² as well as Title VI of the Civil Rights Act of 1964⁴³ (prohibiting racial discrimination), the third circuit in a decision by Judge Fuentes, joined by Judge Alito, reversed a grant of summary judgment by the district court for the defendant county. The main issue in *Doe v. County of Centre Pennsylvania*,⁴⁴ concerned whether Centre County had violated the ADA, section 504, and Title VI by not allowing an interracial couple to become foster parents because their son has HIV and AIDS. After being presented with the request, the county adopted a policy providing that foster families, one of whose members has a "serious infectious disease," may only care for children with the same disease unless the biological parents are informed of the potential foster parents' child's condition and execute a written consent releasing the county from potential liability. The couple filed suit alleging discrimination and the district court granted summary judgment to the county finding that the policy was appropriate under the ADA's exception regarding direct threat "since foster children placed with the Does could sexually assault Adam and contract HIV."⁴⁵ Rejecting this reasoning, the third circuit found that there was not enough evidence to support summary judgment because "a reasonable fact finder could not find, based on the summary judgment record, that an individual with HIV would always pose a significant risk to a foster child placed by the County in that individual's home. This generalization fails to address, for example, the placement of tender-aged and disabled foster children. The County therefore failed to conduct the ADA-mandated individualized determination, and the District Court erred in concluding that the ADA's direct threat exception applied."⁴⁶

³⁹ 527 U.S. 581 (1999).

⁴⁰ *Olmstead* has focused federal and state attention on the development of policies that would expand home and community-based care for individuals with disabilities. For a discussion of these policy issues and legislation see CRS Report RS20992, *Long Term Care: 107th Congress Legislation*, by Carol O'Shaughnessy and Bob Lyke.

⁴¹ 527 U.S. 581, 597 (1999).

⁴² 29 U.S.C. §794.

⁴³ 42 U.S.C. §2000d(1)(7).

⁴⁴ 242 F.3d 437 (3d Cir. 2001).

⁴⁵ *Id.* at 441.

⁴⁶ *Id.* at 451.

Community Based Services. In *Helen L. v. DiDario*⁴⁷ the third circuit in a 1995 pre-*Olmstead* decision held that the Pennsylvania Department of Public Welfare violated the ADA by requiring a nursing home resident to receive care in a nursing home rather than in her own home with attendant care. The third circuit held that the ADA “clearly” defined unnecessary segregation as illegal discrimination and reversed the district court’s decision. Although Judge Alito took no part in this decision, a petition for rehearing *en banc* was filed. The majority of judges voted not to rehear the case but Judge Alito, along with several other judges, would have voted to grant the rehearing.⁴⁸ There were no reasons given for the votes so it cannot be determined exactly why Judge Alito voted for a rehearing. In addition, Judge Alito’s vote for a rehearing was prior to the Supreme Court’s determination of rights to community based services in *Olmstead*. This vote, however, has been seen by some disability advocates as potentially indicative of a more restrictive view of title II of the ADA and since Justice O’Connor had voted with the majority in *Olmstead*, it could be argued that if Judge Alito had been presented with the issue, he might have decided it differently from Justice O’Connor.⁴⁹ On the other hand, it could be argued that these views are speculative since it is not known why Judge Alito voted to rehear the case and the facts in *Helen L.* and *Olmstead* may have also lent themselves to differing interpretations.

Title III – Public Accommodations and Services Operated by Private Entities

Statutory Language. Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.⁵⁰ Entities that are covered by the term “public accommodation” are listed, and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools, day care centers, professional offices of health care providers, and gymnasiums.⁵¹

Decisions Written and Joined by Judge Alito. In *Caruso v. Blockbuster-Sony Music Entertainment Centre*,⁵² Judge Alito addressed the issue of the ADA’s requirements concerning lines of sight and access to a place of public accommodation. William Caruso sued the entertainment facility alleging it violated the ADA because the wheelchair areas in the pavilion did not provide wheelchair

⁴⁷ 46 F.3d 325 (3d Cir. 1995).

⁴⁸ 1995 U.S. App. LEXIS 3896 (3d Cir. Feb. 24. 1995).

⁴⁹ One disability group has stated: “While we cannot know exactly what Judge Alito’s reasoning was, his vote to vacate and rehear one of the most important victories for people with disabilities does not bode well.” [http://www.bazon.org/takeaction/alerts/alitosrecord-details.htm]

⁵⁰ 42 U.S.C. §12182.

⁵¹ 42 U.S.C. §12181.

⁵² 193 F.3d 730 (3d Cir. 1999).

users with lines of sight over standing spectators and the lawn area was not wheelchair accessible. Judge Alito found no violation of the ADA relating to lines of sight. The language in the Access Board's guidelines as adopted by the Justice Department (DOJ) requires lines of sight comparable to those for the general public. Judge Alito read this language with the requirement for the dispersal of wheelchair locations in facilities with fixed seating plans to require that "if a facility's seating plan provides members of the general public with different lines of sight to the field or stage,it must also provide wheelchair users with a comparable opportunity to view the field or stage from a variety of angles."⁵³ This language, Judge Alito found, did not require that there be vertical lines of sight despite language in the DOJ technical assistance manual requiring lines of sight over spectators who stand.⁵⁴

Judge Alito rejected the Entertainment Centre's arguments that (1) it could not provide wheelchair access to the lawn area due to structural impracticability, (2) the DOJ standards only require wheelchair seating to be provided when there is fixed seating for the general public and (3) that the Centre had provided "equivalent facilitation" for individuals using wheelchairs. With regard to the "equivalent facilitation" argument, Judge Alito stated: "The principal problem with the E-Centre's 'equivalent facilitation' argument is that it treats the ADA's requirement of equal access for people with disabilities as a 'particular technical and scoping requirement.' This is simply not the case. Rather, equal access is an explicit requirement of both the statute itself and the general provisions of the DOJ's regulations."⁵⁵

In the same year as the *Caruso* decision, Judge Alito joined in a decision by Judge Becker holding that flagging the medical licensing examination of a medical student with multiple sclerosis to indicate that the student had been given an accommodation did not violate the ADA. The ADA generally prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."⁵⁶ More specifically, the ADA provides that "any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."⁵⁷ The third circuit in *Doe v. National Board of Medical Examiners*⁵⁸ concluded that the specific ADA provision on examinations did not prohibit flagging a score and that "in the absence of a statutory proscription against annotating the test scores of examinees who receive accommodations, we do

⁵³ *Id.* at 732.

⁵⁴ 1994 DOJ Technical Assistance Manual Supp. P III-7.5180, Conditional App. At 49.

⁵⁵ 193 F.3d 730, 739 (3d Cir. 1999).

⁵⁶ 42 U.S.C. §12182.

⁵⁷ 42 U.S.C. §12189.

⁵⁸ 199 F.3d 146 (3d Cir. 1999).

not view the annotation of Doe's scoreas itself constituting a denial of access."⁵⁹ Similarly, the arguments raised concerning a violation of the ADA's general title III prohibition of discrimination were rejected. "Doe has not demonstrated that flagging his score makes the service that the NBME provided to him substantively unequal to the service it provides to other examinees. Like other examinees, Doe took the exam and received a score. Doe has not demonstrated that this score is comparable to the scores of candidates who take the exam under standard conditions and thus that flagging his score imposes an inequality on him."⁶⁰ This decision has been seen as problematic by the Bazelon Center for Mental Health Law which argued that "Congress meant the ADA to cover a broad range of circumstances, and did not spell out each specific practice that might be prohibited by the law. The *Doe v. National Board of Medical Examiners* decision would have serious consequences for people with disabilities who experience the many types of discrimination that are not explicitly spelled out in the ADA."⁶¹

Title V – Insurance

Statutory Language. Title V contains an amalgam of provisions several of which generated considerable controversy during ADA debate. Section 501 concerns the relationship of the ADA to other statutes and bodies of law. Subpart (c) of Section 501 limits the application of the act with respect to the coverage of insurance; however, the subsection may not be used as a subterfuge to evade the purposes of Titles I and III. Subsection (c) states:

(c) Insurance.— Title I through IV of this Act shall not be construed to prohibit or restrict— (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or (3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance. Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes or title I and III.⁶²

The exact parameters of insurance coverage under the ADA are somewhat uncertain. As the EEOC has stated: "the interplay between the nondiscrimination

⁵⁹ *Id.* at 156.

⁶⁰ *Id.* at 157.

⁶¹ [<http://www.bazelon.org/takeaction/alerts/alitosrecord-details.htm>]

⁶² 42 U.S.C. §12201(c).

principles of the ADA and employer provided health insurance, which is predicated on the ability to make health-related distinctions, is both unique and complex.”⁶³

Concurrence by Judge Alito. In *Ford v. Schering-Plough Corp.*,⁶⁴ the third circuit, in an opinion by Judge Cowen, upheld the district court’s dismissal of a suit alleging a violation of the ADA due to a disparity between coverage of mental and physical disabilities in the provision of disability benefits. Judge Alito wrote a concurrence agreeing with the conclusion that the plaintiff failed to state a claim but basing his conclusion on the insurance “safe harbor” provision in title V.⁶⁵ He stated: “Given the effect of section 501(c) on Ford’s claims, I do not think that it is necessary for the court to conclude that distinguishing between people with different disabilities for insurance purposes is not discrimination based on disability.....In fact, it would seem that making such distinctions does constitute discrimination in the most basis sense of the word.....However, we need not wrestle with the question of what might or might not constitute unlawful insurance discrimination under the ADA had Congress not addressed the issue; Congress did address the issue and provided an explicit answer in section 501(c).”⁶⁶

The Individuals with Disabilities Education Act (IDEA)

Overview of IDEA

The Individuals with Disabilities Education Act⁶⁷ is both a grants statute and a civil rights statute. It provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE) in the least restrictive environment (LRE). The statute also contains detailed due process provisions to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions

⁶³ EEOC, “Interim Policy Guidance on ADA and Health Insurance,” BNA’s Americans with Disabilities Act Manual 70:1051 (June 8, 1993). This guidance deals solely with the ADA implications of disability-based health insurance plan distinctions and states that “insurance distinctions that are not based on disability, and that are applied equally to all insured employees, do not discriminate on the basis of disability and so do not violate the ADA.”

⁶⁴ 145 F.3d 601 (3d Cir. 1998).

⁶⁵ 42 U.S.C. §12201(c).

⁶⁶ *Id.* at 615.

⁶⁷ 20 U.S.C. §1400 et seq. For a detailed discussion of IDEA as amended by the 2004 reauthorization, see CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.⁶⁸

Judicial Decisions Written and Joined by Judge Alito

Provision of a Free Appropriate Public Education. In *Shore Regional High School v. P.S.*,⁶⁹ Judge Alito reversed a district court opinion on whether the school district had failed to provide a free appropriate public education. The child, P.S., attended public school and had been the victim of “relentless physical and verbal harassment as well as social isolation by his classmates.”⁷⁰ The harassment led to poor school work and depression and on the advice of the school psychologist, P.S. received psychiatric counseling and medication. He was evaluated and determined eligible for special education based on a perceptual impairment. After continuing harassment, P.S. attempted suicide in the eighth grade and after a period of home schooling was found eligible for special education services due to emotional disturbance. P.S.’s parents determined that he should not attend the local high school, Shore Regional High, with the same children who had been harassing him but asked for placement in a neighboring district. Shore Regional High disagreed and at the due process hearing the administrative law judge concluded that Shore Regional High School could not provide P.S. with a free appropriate education because of the legitimate fear of continued bullying. The district court reversed the administrative law judge’s decision, rejecting testimony from a psychologist and a member of the special education child study team.

Judge Alito held that the district court did not give due weight to the administrative law judge’s decision. Deference should be accorded to these decisions, Judge Alito opined, especially if the state administrative agency has heard live testimony and found the testimony of one witness to be more convincing than that of another. In sum, Judge Alito concluded, the rulings of hearing officers should be given “essentially the same standard of review given to a trial court’s findings of fact by a federal appellate court.”⁷¹

In *T.R. v. Kingwood Township Board of Education*,⁷² the plaintiffs asked for the reimbursement of private school tuition and support services claiming that the board of education had failed to provide a free appropriate public education (FAPE) in the least restrictive environment (LRE). The third circuit, in an opinion by Judge Alito, affirmed the district court’s decision that sufficient educational benefit was provided to meet the standard of a free appropriate public education. However, the district court’s holding regarding the least restrictive environment was vacated and remanded

⁶⁸ For a more detailed discussion of the congressional intent behind the enactment of P.L. 94-142 see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by Nancy Lee Jones.

⁶⁹ 381 F.3d 194 (3d Cir. 2004).

⁷⁰ *Id.* at 195.

⁷¹ *Id.* at 199.

⁷² 205 F.3d 572 (3d Cir. 2000).

for a determination of whether the board of education failed to consider any appropriate placements.

In examining the district court’s finding concerning the provision of FAPE, Judge Alito noted that the most recent case discussing the issue in the third circuit, *Ridgewood Board of Education v. N.E.*,⁷³ held that the FAPE standard was not met by “the provision of merely ‘more than a trivial educational benefit.’”⁷⁴ Although the district court was found to apply the incorrect legal standard by not inquiring into whether the school’s proposed individualized educational placement (IEP) met the standard enunciated by *Ridgewood*, the evidence on which the district court relied was seen as satisfying this more stringent meaningful benefit test and was upheld.

With regard to the LRE requirement, Judge Alito examined previous third circuit decisions, including *Oberti v. Board of Education*,⁷⁵ which adopted a two part test to determine compliance with LRE. Under *Oberti*, first a court must determine “whether education in the regular classroom with the use of supplementary aids and services can be achieved satisfactorily”⁷⁶ and then must evaluate “whether the school has mainstreamed the child to the maximum extent appropriate.”⁷⁷ Judge Alito found that the “peculiar facts” of the T.R. case made “a mechanical application of the *Oberti* test difficult.”⁷⁸ The school district in T.R. ran a preschool program that was half children with disabilities and half children without disabilities which Judge Alito described as “under the terms of the IDEA, more restrictive than a ‘regular’, fully-mainstreamed preschool class would be.”⁷⁹ This meant, Judge Alito determined, that the district court “erred in not inquiring into whether regular classroom options were available within a reasonable distance to implement ... (the child’s) IEP, and we remand so the District Court may consider this question.”⁸⁰

In another decision regarding the provision of FAPE, *Falzett v. Pocono Mountain School District*,⁸¹ Judge Alito joined an unpublished *per curiam* decision holding that the child had been provided a meaningful educational benefit. In *Falzett*, the child had contracted an illness that required him to stay at home. The school district provided home instruction but the child’s parents alleged that it was provided sporadically and that the school district should pay for the tutors they had hired. The court examined the facts, noting the child had received straight A’s, and

⁷³ 172 F.3d 238 (3d Cir. 1999).

⁷⁴ *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999), cited by *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 577 (3d Cir. 2000).

⁷⁵ 995 F.2d 1204 (3d. Cir. 1993).

⁷⁶ *Oberti v. Board of Education*, 995 F.2d 1204, 1215 (3d. Cir. 1993).

⁷⁷ *Id.*

⁷⁸ 205 F.3d 572, 579 (3d Cir. 2000).

⁷⁹ *Id.*

⁸⁰ *Id.* at 580.

⁸¹ 2005 U.S. App. LEXIS (3d Cir. October 11, 2005).

had increased his standardized test scores, and concluded that FAPE had been provided.

*Tallman v. Barnegat Board of Education*⁸² upheld a grant of summary judgment for the defendant school system in a case involving numerous allegations of IDEA violations including the failure to develop an IEP. In a per curiam decision joined by Judge Alito, the court examined the factual issues involving the education of an emotionally disturbed child who died after being restrained at a residential school where he had been placed. Although the court lamented the tragedy, it rejected the argument that if the school had not failed to adopt an IEP, the child would not have died and observed that the parents had entered into a settlement about the delayed IEP prior to the child's placement in the residential facility.

Procedural Issues. In *Beth V. v. Carroll*,⁸³ Judge Alito joined in a decision by Chief Judge Sloviter which reversed a grant of summary judgment and held that the plaintiffs had an express right of action under IDEA. The plaintiffs, learning disabled children and their mothers, had filed complaints with the Pennsylvania Department of Education alleging that the state had failed to maintain a timely and effective state-level complaint resolution system as required by IDEA. The court of appeals noted that "the issue of the plaintiffs' right to sue under IDEA based on a claim that the state has failed to implement DOE's regulations for a complaint resolution procedure is an important one in the effectuation of the substantive rights established under IDEA."⁸⁴

In *C.M. & R.M. v. Board of Education of the Union County Regional High School District*,⁸⁵ an unpublished per curiam decision in which Judge Alito joined, the third circuit held that IDEA claims were not moot due to the child's graduation and remanded the case for consideration of the requests for declaratory and injunctive relief. The dismissal of damage claims by the district court was upheld.

Attorneys' fees were at issue in several decisions joined by Judge Alito. In *Maria C. v. School District of Philadelphia*,⁸⁶ the third circuit in an unpublished decision by Judge Rosenn in which Judge Alito joined, found that the plaintiff was not a prevailing party, and therefore not entitled to attorneys' fees, with the exception of proceedings occurring in 2000. The arguments for attorneys' fees were rejected in years other than 2000 since the revisions to the child's IEP in those years were brought about by negotiations and voluntary agreements. In another fee related case, *L.L. v. Vineland Board of Education*,⁸⁷ a per curiam decision was joined by Judge Alito found that if, on remand, the district court was to determine that the plaintiff

⁸² 43 Fed. Appx. 490 (3d Cir. 2002).

⁸³ 87 F.3d 80 (3d Cir. 1996).

⁸⁴ *Id.* at 85.

⁸⁵ 128 Fed. Appx. 876 (3d Cir. 2005).

⁸⁶ 142 Fed. Appx. 78 (3d Cir. 2005).

⁸⁷ 128 Fed. Appx. 916 (3d Cir. 2005).

was a prevailing party, she would be entitled to receive costs for a lay advocate for educational consulting but not for lay advocacy.

Section 504 of the Rehabilitation Act

Statutory Provisions

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an otherwise qualified individual with a disability, solely on the basis of the disability, in any program or activity that receives federal financial assistance, the executive agencies, or the U.S. Postal Service.⁸⁸ Many of the concepts used in the ADA originated in Section 504 and its interpretations; however, there is one major difference. While Section 504's prohibition against discrimination is tied to the receipt of federal financial assistance, the ADA also covers entities not receiving such funds. In addition, the federal executive agencies and the U.S. Postal Service are covered under Section 504, not the ADA.

Judge Alito's Opinions, Concurrences and Dissents

In *Donahue v. Consolidated Rail Corporation*,⁸⁹ Judge Alito found that the failure to employ an individual with significant heart problems as a train dispatcher was not a violation of section 504. In addition, Judge Alito found that the employer had not failed to provide a reasonable accommodation. Charles Donahue had sued the railway company under §504 of the Rehabilitation Act alleging that the company had violated the act by failing to accommodate him by offering to transfer him to a position he could perform. He had had one heart attack and had twice passed out at work in less than a year. Donahue's cardiologist had refused to clear him to work near trains. The district court found that the plaintiff failed to show there was a vacant funded position that he could have performed without presenting a significant safety risk. The court of appeals affirmed, holding that employing Donahue as a train dispatcher would have created a significant risk to others.

In another employment case, *Antol v. Perry*,⁹⁰ Judge Alito concurred with the majority opinion reversing and remanding a summary judgment on the disability discrimination claims of a Vietnam era veteran. In his concurrence, Judge Alito clarified his position on the significance of the agency's violations of its Vietnam Era Veterans Readjustment Assistance Act (VEVRA)⁹¹ affirmative action plan. He stated: "The VEVRA affirmative action plan required the Agency to give Antol more favorable treatment than either (a) an identical applicant without a disability or (b) an identical applicant with a disability who did not fall within VEVRA's coverage. While I agree that evidence of the Agency's violation of the VEVRA affirmative

⁸⁸ 29 U.S.C. §794.

⁸⁹ 224 F.3d 226 (3d Cir. 2000).

⁹⁰ 82 F.3d 1291 (3d Cir. 1996).

⁹¹ 38 U.S.C. §4214.

action plan meets the low standard of relevance set out in Fed.R. Evid. 401, this evidence seems to me to have very little probative value for the purpose of proving intentional discrimination against Antol. However, even without this evidence, I think that the proof in the record is sufficient to defeat summary judgment for the Agency....”⁹²

In *Nathanson v. Medical College of Pennsylvania*,⁹³ a complicated section 504 case alleging a failure to accommodate the disability of a medical student at the Medical College of Pennsylvania (MCP) and tortious interference with contract, the third circuit upheld the district court’s summary judgment ruling regarding the tortious interference with contract but reversed the summary judgment regarding the section 504 issue and remanded the case. Judge Alito agreed with the majority on upholding the summary judgment regarding tortious interference with contract but also would have upheld the summary judgment regarding the section 504 claim. He examined the complex facts at issue and noted that “In my judgment, Nathanson failed to provide sufficient evidence that MCP acted unreasonably during any of the three periods leading up to her second voluntary withdrawal on September 5, 1986, and therefore the district court properly granted summary judgment in favor of MCP on Nathanson’s Section 504 claim....I would affirm the judgment of the district court in all respects. MCP should not be compelled to bear the expense and risk of further litigation in this case.”⁹⁴ The majority for the third circuit took issue with Judge Alito’s dissent, noting that they believed he had resolved several issues of disputed fact while the issue to be dealt with was whether the plaintiff had provided sufficient evidence to raise a genuine issue of material fact to be determined on remand. The third circuit majority further stated: “We believe, however, that few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual’s request for accommodation. Under the dissent’s approach, an institution could justify rejecting an ‘otherwise qualified’ applicant’s reasonable request by rationalizing that even if such accommodations were provided, the applicant still might not be able to continue in a particular program and thus would eventually withdraw.”⁹⁵ Disability advocates have criticized Judge Alito’s dissent in *Nathanson* finding his reasoning, especially his statement that the Medical College should not be compelled to bear the expense and risk of further litigation, to be unduly supportive of business interests.⁹⁶

Judge Alito joined in other third circuit §504 decisions as well. In *Mengine v. Runyon*,⁹⁷ a section 504 case alleging a failure to accommodate a disability, the third circuit in an opinion by Judge Scirica, joined by Judge Alito, upheld a summary judgment in favor of the U.S. Postal Service. The employee, a letter carrier for the

⁹² 82 F.3d 1291, 1303 (3d Cir. 1996).

⁹³ 926 F.2d 1368 (3d Cir. 1991).

⁹⁴ *Id.* at 1396.

⁹⁵ *Id.* at 1397, footnote 13.

⁹⁶ For a detailed discussion of this case from a disability rights perspective see [http://www.raggededgemagazine.com/blogs/edgecentric/archives/2005/11/a_special_chair]

⁹⁷ 114 F.3d 415 (3d Cir. 1997).

U.S. Postal Service, was no longer able to carry out his duties following hip surgery. He requested a job reassignment but no permanent, vacant funded position was identified and suit was filed alleging that the Postal Service impeded his search for such a position. The court of appeals rejected this argument finding that “Mengine and the Postal Service engaged in the interactive process contemplated by the federal regulations. The uncontradicted evidence shows the parties exchanged many letters in their mutual attempt to identify a vacant, funded position for reassignment....The Postal Service made reasonable efforts to assist Mengine, communicated with him in good faith, and did not act to impede his investigation.”⁹⁸

In *ADAPT v. Department of Housing and Urban Development*,⁹⁹ organizations that represent and advocate for individuals with disabilities brought suit against the U.S. Department of Housing and Urban Development (HUD) alleging that HUD failed to comply with the Fair Housing Act or its own regulations under section 504 of the Rehabilitation Act. Judge Nygaard, in an opinion joined by Judge Alito, held that the presumption that HUD investigative and enforcement policies were not subject to judicial review was not rebutted and the claims were not subject to review under the Administrative Procedure Act (APA).

Fair Housing Act Amendments

Statutory Provisions

The Fair Housing Act (FHA) was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."¹⁰⁰ The original 1968 Act prohibited discrimination on the basis of "race, color, religion, or national origin" in the sale or rental of housing, the financing of housing, or the provision of brokerage services.¹⁰¹ In 1974, the act was amended to add sex discrimination to the list of prohibited activities¹⁰² and in 1988 the act was amended to prohibit discrimination in housing on the additional grounds of physical or mental disability, as well as familial status.¹⁰³

Judicial Decision Joined by Judge Alito

In addition to *ADAPT v. Department of Housing and Urban Development*, which was discussed in the preceding section on section 504 of the Rehabilitation Act, Judge Alito also joined in the third circuit opinion in *Lapid-Laurel v. Zoning*

⁹⁸ *Id.* at 421.

⁹⁹ 170 F.3d 381 (3d Cir. 1999).

¹⁰⁰ 42 U.S.C. §3601. For a detailed discussion of this act see CRS Report 95-710, *The Fair Housing Act: A Legal Overview*, by Jody Feder.

¹⁰¹ 42 U.S.C. §§3604-3606.

¹⁰² P.L. 93-383.

¹⁰³ P.L. 100-430.

*Board of Adjustment of the Township of Scotch Plains.*¹⁰⁴ In an opinion by Chief Judge Becker, joined by Judge Alito, the third circuit rejected a claim under the Fair Housing Amendments Act holding (1) that the development firm failed to produce sufficient evidence that the accommodations it requested were necessary to afford individuals with disabilities an equal opportunity to housing and (2) that the requested accommodations were unreasonable. The requested accommodations were found to be unreasonable based largely on problems with traffic safety and access for emergency vehicles. The court observed: “While a plaintiff is in the best position to show what it necessary to afford its clients (i.e. the handicapped population that it wishes to serve) an equal opportunity to use and enjoy housing, a defendant municipality is in the best position to provide evidence concerning what is reasonable or unreasonable within the context of its zoning scheme.”¹⁰⁵

Federalism

Overview

The U.S. Constitution delineates the authority between the federal and state governments and requires that laws enacted by Congress be based on a constitutional grant of power.¹⁰⁶ Many of the statutes discussed above, such as section 504 and the Individuals with Disabilities Education Act, are based at least in part on the spending power since they provide funds. However, the ADA and the Fair Housing Act were enacted based on other constitutional provisions. The ADA specifically states as its constitutional authority the Fourteenth Amendment and the commerce clause.¹⁰⁷ The commerce power is, then, significant to the discussion of disability issues since it is specifically mentioned as the constitutional basis of the ADA and limitations on its reach could effect the constitutionality of the ADA.

The Eleventh Amendment provides for state sovereign immunity but can be abrogated in certain circumstances by section 5 of the Fourteenth Amendment which states: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” The exact circumstances where the Eleventh Amendment may be abrogated have been the subject of a much discussed line of Supreme Court decisions which have generally restrained congressional authority. Several of these cases have been brought under the ADA.¹⁰⁸ This issue is significant since if the

¹⁰⁴ 284 F.3d 442 (3d Cir. 2002).

¹⁰⁵ *Id.* at 458.

¹⁰⁶ For a detailed discussion of federalism and recent Supreme Court decisions see CRS Report RL30315, *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

¹⁰⁷ 42 U.S.C. §12101(b)(4).

¹⁰⁸ See *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Garrett v. University of Alabama*, 531 U.S. 356 (2001). The Supreme Court granted *certiorari* in another case *Goodman v. Ray*, 120 Fed. Appx. 785, *cert. granted*, 161 L.Ed. 2d 1057, 125 S. Ct. 2256 (2005). For a (continued...)

Eleventh Amendment is not found to be successfully abrogated, limitations may be imposed on the ability of individuals with disabilities to sue the states for damages under the ADA.

Judge Alito's Decisions

Although Judge Alito has not addressed federalism issues in the context of the ADA, two of his decisions give some insight into how he might approach such cases. In *Chittister v. Department of Community and Economic Development*,¹⁰⁹ Judge Alito was presented with the issue of whether Congress had validly abrogated the states' Eleventh Amendment immunity when it enacted the Family and Medical Leave Act of 1993 (FMLA).¹¹⁰ Finding no valid abrogation, Judge Alito noted that in the FMLA Congress identified the unconstitutional conduct as the potential for employment discrimination on the basis of sex. Therefore, based on *City of Boerne v. Flores*,¹¹¹ he reasoned there must be a congruence and proportionality between the potential for employment discrimination on the basis of sex and the FMLA's provision of 12 weeks of leave to eligible employees in order to find the Eleventh Amendment validly abrogated. Judge Alito concluded: "It is apparent that this standard cannot be met here....Congress did not find that public employers refused to permit as much sick leave as the FMLA mandates with the intent of disadvantaging employees of one gender....Nor are we aware of any substantial evidence of such violations in the legislative record."¹¹²

In *United States v. Rybar*,¹¹³ the third circuit, in an opinion by Chief Judge Sloviter, upheld the constitutionality of a federal law prohibiting the transfer or possession of a machine gun, finding that the law was within constitutional authority under the Commerce Clause. Judge Alito dissented, finding that *United States v. Lopez*,¹¹⁴ limited the federal power to impose such limitations. The majority's opinion was seen by Judge Alito as going "far toward converting Congress's authority to regulate interstate commerce into a 'plenary police power.'"¹¹⁵ Judge Alito concluded: "In sum, we are left with no congressional findings and no appreciable empirical support for the proposition that the purely intrastate possession of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the

¹⁰⁸ (...continued)

more detailed discussion of the ADA and the Eleventh Amendment see CRS Report 98-921, *The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues*, by Nancy Lee Jones.

¹⁰⁹ 226 F.3d 223 (3d Cir. 2000).

¹¹⁰ 29 U.S.C. §2601 et seq.

¹¹¹ 521 U.S. 507 (1997).

¹¹² *Id.* at 228.

¹¹³ 103 F.3d 273 (3d Cir. 1996), *cert denied*, 522 U.S. 807 (1997).

¹¹⁴ 514 U.S. 549 (1995).

¹¹⁵ 103 F.3d 273, 291 (3d Cir. 1996).

statutory provisions at issue here can be sustained—unless, contrary to the lesson that I take from *Lopez*, the ‘substantial effects’ test is to be drained of all practical significance. As *Lopez* reminded us, the ‘constitutionally mandated division of authority [between the federal government and the states] ‘was adopted by the Framers to ensure protection of our fundamental liberties.’”¹¹⁶ However, Judge Alito also indicated that Congress could have negated this conclusion. Judge Alito stated he “would view this case differently if Congress as a whole or even one of the responsible congressional committees had made a finding that intrastate machine gun possession, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce.”¹¹⁷

Judge Alito’s record in these two cases has been described by disability groups as troubling. The Bazelon Center for Mental Health Law stated that Judge Alito’s rulings “demonstrate cramped views of Congress’s powers that would put critical disability rights laws at risk. Justice Sandra Day O’Connor, whose seat on the court Alito is nominated to fill, was frequently the pivotal vote in cases about Congress’ power to pass the ADA, the FMLA and other important laws. If Judge Alito is confirmed, there is every reason to expect that many important decisions about federal power would come out differently—against people with disabilities. His record suggests he would become the critical fifth vote to strike down portions of these laws as unconstitutional.”¹¹⁸ However, it could also be argued that in the case of *Chittister*, Judge Alito was continuing in the line of Supreme Court cases and did not anticipate the Supreme Court’s subsequent decision in *Nevada Dept. of Human Resources v. Hibbs*,¹¹⁹ which upheld the Family and Medical Leave Act as a valid exercise of congressional power pursuant to section 5 of the Fourteenth Amendment.¹²⁰

Judge Alito’s dissent in *United States v. Rybar* has been criticized as “an extremely restrictive view of Congress’s power to regulate interstate commerce.”¹²¹ The Supreme Court denied review in *Rybar* and subsequently used similar arguments to those Judge Alito rejected in determining in *Gonzales v. Raich* that Congress could regulate marijuana even if it did not cross state lines and was grown only for personal

¹¹⁶ *Id.* at 294 (citing *United States v. Lopez*).

¹¹⁷ *Id.* at 292.

¹¹⁸ [<http://www.bazelon.org/takeaction/alerts/alitosrecord-details.htm>] See also [<http://www.adaction.org/AlitoInfo.htm>]

¹¹⁹ 103 F.3d 273 (3d Cir. 1996), *cert denied*, 522 U.S. 807 (1997).

¹²⁰ One commentator observed concerning the *Chittister* decision, that “this seemed at the time like a natural consequence of the damage the Supreme Court had done; indeed, other circuits ruled the same way. But then, the Supreme Court backtracked, unexpectedly distinguishing a different provision of the leave act from the previous cases. This move gives opponents certain rhetorical ammunition against Judge Alito. But it actually says more about the inconsistency of the high court’s own approach to the 11th Amendment than it does about any of the lower-court judges caught in its bait-and-switch.” “Judge Alito on the States,” *Washington Post* A14 (November 21, 2005).

¹²¹ [<http://www.bazelon.org/takeaction/alerts/alitosrecord-details.htm>]

use.¹²² Like *Chittister v. Department of Community and Economic Development*, Judge Alito's dissent was prior to the Supreme Court's subsequent ruling in *Gonzales* and it could be argued that he was only following the Supreme Court's decision in *United States v. Lopez* and that he left open the possibility of a different decision if a congressional committee had made the appropriate findings. However, a distinction could be drawn in that Judge Alito was dissenting in *Rybar*, which indicated that other judges did not view the Supreme Court's *Lopez* decision as restrictively.

¹²² *Gonzales v. Raich*, 125 S.Ct. 2195 (2005).