



D a v i s G r a h a m & S t u b b s L L P

---

**NEW DEVELOPMENTS IN THE ADA**

*by David R. Hammond, Esq.*

I. When is an Employee “Disabled” within the Meaning of the ADA? *Toyota Motor Mfg. v. Williams*, 122 S.Ct. 681 (2002)

A. Facts and lower court decisions.

1. Ella Williams worked at Toyota’s automobile manufacturing plant in Georgetown, Kentucky. Initially, she worked on the engine fabrication assembly line.
2. Using pneumatic tools on the assembly line caused pain in her hands, wrists and arms. She was diagnosed with bilateral carpal tunnel syndrome and bilateral tendonitis. She was then given lifting and other restrictions.
3. Toyota placed her on its quality control team responsible for four tasks: assembly paint; paint second inspection; shell body audit; and surface repairs. However, Ms. Williams’ team was required to perform only the first two tasks. She could perform both of these jobs satisfactorily.
4. Toyota later decided that it wanted its quality control employees to be able to perform all four tasks. The “shell body audit” required the worker to wipe each car with oil and then inspect it.
5. Shortly after beginning this expanded job, Ms. Williams began to complain of neck and shoulder pain. She was diagnosed with an inflammation of the muscles and tendons around her shoulder blades, nerve irritation, and nerve pain in her arms.
6. Ms. Williams requested accommodation by being allowed to return to performing only the first two tasks of the quality control team, which she claimed she could still perform.
7. Ms. Williams was placed on a no-work-of-any-kind restriction. Toyota subsequently terminated her employment for poor attendance.
8. She then sued, claiming that Toyota had violated the ADA by failing to provide reasonable accommodation and by terminating her employment.
9. The District Court granted summary judgment for Toyota because Ms. Williams was not disabled within the meaning of the ADA.
10. The Sixth Circuit Court of Appeals reversed the lower court, holding that an ADA plaintiff must show that she is disabled due to a substantial limitation in the ability to perform manual tasks by producing evidence of a “class” of work-related manual activities which she could not perform. The Court of Appeals then entered partial summary judgment for the employee, finding that she was disabled.

B. The Supreme Court’s decision.

1. The Court noted that the parties agreed that the plaintiff's problems constituted "physical impairments" within the meaning of the ADA, but stated that she must also show that those impairments substantially limited her in the major life activity of performing manual tasks.
2. The Court stated that the terms "substantially" and "major" in the phrase "substantially limits a major life activity" must be construed strictly to avoid qualifying too many people as disabled.
3. The Court then 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." Toyota Motor Mfg. v. Williams, 122 S.Ct. 681, 691 (2002) (emphasis added).
4. The Court also found that the "impairment's impact must also be permanent or long-term." Id.
5. The Court then found that there must be an "individualized assessment of the effect of an impairment particularly . . . when the impairment is one whose symptoms vary widely from person to person." A diagnosis of carpal tunnel syndrome, by itself, would not qualify an individual as disabled. Id.
6. The Court rejected the Court of Appeals' notion that an employee must show that he cannot perform a "class" of activities because inability to perform a "class" of activities relating to a specific job does not show a substantial limitation. Instead, the plaintiff must show an inability to perform crucial daily tasks:
  - (1) When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.
- b) Id., at 693.
7. As the Court explained, the particular tasks which an employee cannot perform – such as repetitive work with hands and arms extended to or above shoulder levels for extended periods – may not be an important part of most people's daily lives. Id.
8. At the same time, the Court noted that activities clearly central to everyone's daily lives – such as household chores, bathing and teeth brushing – could be performed by the plaintiff. Id.
9. Although the plaintiff was restricted in performing some tasks – such as sweeping, playing with her children and gardening, the Court found that the restrictions were not sufficiently severe. Id.

#### C. Observations.

1. The Supreme Court's ruling continues its trend – starting with a trio of 1999 decisions – of restricting the ADA.
  - a) It should be clear now, if it was not already, that merely having an "impairment" does not satisfy the ADA standard for having a disability.

b) The phrases “substantially limited” and “major life activities” will continue to be strictly construed. Major life activities must be “central to daily life.”

2. Inquiries must be individualized. Merely having a particular condition will not qualify someone as disabled.

## **II. Must an Employer Violate a Seniority System to Accommodate a Disabled Worker? U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516 (2002)**

### A. Facts and lower court decisions.

1. After injuring his back while working in a cargo-handling position for U.S. Airways, Robert Barnett invoked his seniority rights to transfer to a less demanding mailroom position.

2. Under the airline’s seniority system, the mailroom position, like others, periodically becomes open to seniority-based employee bidding.

3. When Barnett learned that two employees more senior than he intended to bid for his position, he asked U.S. Airways to accommodate his disability by allowing him to remain in the mailroom, notwithstanding the seniority system.

4. Because U.S. Airways decided not to make an exception, Barnett lost his job.

5. He then sued under the ADA, claiming that U.S. Airways discriminated against him by refusing to make the allegedly reasonable accommodation of allowing Barnett to retain the mailroom job.

6. The District Court granted summary judgment for U.S. Airways, finding that disregarding the airline’s long-established seniority system would be an “undue hardship.”

7. The Ninth Circuit Court of Appeals reversed, holding that the seniority system was merely one factor to consider in the hardship analysis.

### B. The Supreme Court’s decision.

1. The Supreme Court began its analysis by reviewing the ADA’s legal framework:

a) Under the ADA, an employer cannot “discriminate against a qualified individual with a disability.” 42 U.S.C. § 12112(a).

b) A “qualified” individual includes someone “with a disability who, with or without reasonable accommodation, can perform the essential functions of . . . the relevant employment position.” 42 U.S.C. § 12111(8).

c) “Discrimination” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.” 42 U.S.C. § 12112(b)(5)(A).

d) Reasonable accommodation may include reassignment to a vacant position. 42 U.S.C. § 12111(9)(B).

2. The Court then rejected U.S. Airways' argument that a seniority system should always trump a conflicting accommodation request. Although the airline argued that a disabled person should receive only "equal" treatment, the Court found that preferential treatment must, upon occasion, be granted to disabled workers to achieve the ADA's purposes. Therefore, the fact that the requested accommodation would violate a rule does not, by itself, establish that an accommodation is not reasonable. U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516, 1521 (2002).

3. At the same time, the Court rejected Barnett's contention that "reasonable accommodation" means "effective accommodation." Under this formulation, the only question would be whether the requested accommodation would meet an individual's disability-related needs. Id., at 1522. According to the Court, this argument attempts to delete the word "reasonable" from "reasonable accommodation." Id., at 1522-1523.

4. The Court then held that, in most cases, it will not be reasonable to override a company's seniority system. The Court found that seniority systems provide important employee benefits by creating and fulfilling expectations of fair, uniform treatment. Id., at 1524. Because determining on a case-by-case basis whether a seniority system should be modified would be difficult, the Court held that it will be "ordinarily sufficient" for an employer to show that a requested accommodation will violate a seniority system. Id., at 1525.

5. However, the Court then allowed for the possibility that special circumstances might warrant a finding that a requested accommodation is reasonable even if it would violate a seniority system.

C. Open questions.

1. The next round of litigation on this issue will focus upon whether special circumstances exist which require an exception to a seniority system.

a) Employees could, for example, show that an employer has retained the right to change the seniority system unilaterally and has done so in the past.

b) Employees could also show that the seniority system contains exceptions, so that one more exception would not matter.

**III. Can An Employer Refuse To Hire An Individual Because Performing The Job Could Endanger The Applicant's Health? Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002)**

A. Facts and lower court decisions.

1. Mario Echazabal worked for an independent contractor at a Chevron U.S.A. oil refinery.

2. Twice, he applied for a job directly with Chevron, which offered to hire him if he could pass the company's physical examination.

3. However, the physical examination showed liver damage caused by Hepatitis C. The company's doctors were concerned that Echazabal's condition would be aggravated by continued exposure to the refinery's toxins.

4. Each time Chevron withdrew its offer, and the second time it asked his employer to either reassign Echazabal to a job in which he would not be exposed to harmful chemicals or to remove him from a refinery job. His employer chose to lay him off.

5. Echazabal filed suit under the ADA, claiming that Chevron improperly refused to hire him or even to let him continue working at the plant because of his disability, his liver condition.

6. Chevron responded that an EEOC regulation, 29 C.F.R. § 1630.15(b)(2)(2001), justified its actions because performing both Chevron's job or his current job would pose a "direct threat" to his own health.

7. The District Court granted Chevron's summary judgment motion, but the Ninth Circuit Court of Appeals reversed.

#### B. The Supreme Court's decision.

1. The Court recognized that the ADA prohibits "discrimination against a qualified individual with a disability because of the disability," including with regard to hiring. 42 U.S.C. § 12112(a). "Discrimination" includes "using qualification standards . . . that screen out or tend to screen out an individual with a disability." 42 U.S.C. § 12112(b)(6).

2. At the same time, the Court acknowledged that the ADA creates an affirmative defense for action taken under a qualification standard "shown to be job-related for the position in question and . . . consistent with business necessity." 42 U.S.C. § 12113(a).

3. A qualification standard could include a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b).

4. The EEOC regulations go one step further by allowing an employer to screen out a potential worker with a disability not only for risks that he/she would pose to others in the workplace but for risks on the job to his/her own health or safety. 29 C.F.R. § 1630.15(b)(2)(2001).

5. The Supreme Court held that this regulation was authorized by the ADA, even though the statute does not refer to a defense arising in situations in which performing the job would pose a direct threat to the worker's own health or safety.

#### C. Observations and open questions.

1. The Court admitted that there is an open question as to whether an employer would be liable under OSHA for hiring an individual who knowingly consents to the particular dangers the job would pose to him/her.

a) However, it also stated that an employer who allowed such employment would be taking a chance because OSHA's purpose is "to assure so far as possible every working man and woman in the nation safe and healthful working conditions," 29 U.S.C. § 651(b), and it requires employers to "furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(i).

2. The ADA is designed to eliminate "overprotective rules and policies," which can be a form of discrimination. 42 U.S.C. § 12101(a)(5). Instead of requiring employers to expose employees to dangers, the statute is aimed at sham protection which prevents a disabled employee from getting a fair chance while claiming to protect him in reliance upon untested or pretextual stereotypes.

3. As with most other ADA decisions, the key is to make the determination based on as much specific information as possible based upon individual circumstances:

(1) The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job, reached after considering, among other things, the imminence of the risk and the severity of the harm portended.

b) Echazabal, 122 S. Ct. at 2052, 2053 (emphasis added).

4. Of course, any qualification standards must be job related and consistent with business necessity.

#### **IV. When Does the Duty to Accommodate Arise? Whitney v. Board of Education of Grand County, 2002 WL 1316489 (10th Cir. June 18, 2002)**

##### A. Facts and lower court decision.

1. Helen Whitney was an experienced, tenured elementary school teacher.
2. Several parents asked that their children be transferred from Whitney's class because she had allegedly yelled at and ridiculed students and cried in the classroom. The principal met with Whitney and, on a subsequent occasion, provided her with a written evaluation concerning these issues.
3. Then, a student claimed physical abuse. A state agency found that the claim and several allegations of emotional abuse were substantiated.
4. After the state agency submitted its report, the teacher responded with a letter attributing her problem to "an actual or perceived disability relating to my mental competency" and requesting "reasonable accommodation."
5. The principal and teacher then exchanged letters concerning the school district's desire for additional information and evaluation. The teacher contended that she must have more specific information about her allegedly improper conduct.
6. The school district then advised her that her employment was terminated. The school district's letter stated that it was not aware of any disability or of any possible accommodation.
7. In anticipation of a hearing before the district's school board, the teacher was evaluated by a psychiatrist, who found that she was clinically depressed but that her condition was remediable if the teacher were provided with a three-month leave of absence. The school board, however, upheld the termination.
8. The teacher then filed suit, and the trial court granted summary judgment for the school district.

##### B. The Tenth Circuit's decision.

1. The ADA requires employees to make reasonable accommodations for an employee's known disability. Because the psychiatrist's evaluation was presented to the

school board before it terminated the teacher's employment, there was a factual issue as to whether the school board knew of her disability.

**V. Is Medical Leave a Reasonable Accommodation under the ADA? Smith v. Diffie Ford-Lincoln-Mercury, Inc., 298 F.3d 955 (10th Cir. 2002)**

A. Facts and trial court decision.

1. Diantha Smith was employed as a clerk at an automobile dealership.
2. Her employer became disappointed with her training of more junior clerks. However, before she could complete the training, she was forced to take a medical leave for breast cancer.
3. During her leave, her employer determined that Smith's training on a junior clerk was inadequate and terminated her employment.
4. Smith then asserted FMLA and ADA claims, contending that her request for medical leave was a request for reasonable accommodation under the ADA.
5. The trial court granted summary judgment for the employer, finding that there was no evidence that Smith was discriminated against because of her disability.

B. The Tenth Circuit's decision.

1. The Court of Appeals overturned the summary judgment award for the employer because there were disputed issues of fact concerning whether she would have kept her job if she had not taken medical leave.

C. Observation.

1. Limited leave for medical treatment may qualify as a reasonable accommodation under the ADA.
2. In this case, the ADA medical leave did not exceed the time for FMLA leave. However, ADA medical leave may sometimes be required for time in addition to FMLA leave.