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Seeing Through A Glass Darkly: The Supreme Court's Narrowed Definition of Disability

Scott E. Ferrin*

The Supreme Court's recent decisions in *Albertsons Inc. v. Kirkingburg*,¹ *Sutton v. United Air Lines, Inc.*,² *Murphy v. United Parcel Service, Inc.*,³ and *New York State Board of Law Examiners v. Bartlett*,⁴ have narrowed the definition of disability for the purposes of the Americans With Disabilities Act [ADA].⁵ Collectively analyzed, these decisions may add up to a narrowly tailored refinement that aids judicial and political economy in a difficult area of the law, or they may be manifestations of a tunnel vision that ignores the rights and needs of individuals the ADA was intended to cover. It appears that the narrow definition of disability enunciated in these cases impact higher education, and to a lesser degree may come to impact schools in providing ameliorating measures and accommodations for students with special needs or disabilities—especially learning disabilities.

In *Albertsons*, *Sutton*, and *Murphy* the Supreme Court narrowly defined who is considered to have a disability and thus narrowed who has the right to "reasonable accommodation" under the ADA. For example, in *Sutton*, the Court determined that those whose disabilities can be corrected or alleviated by corrective devices, such as eyeglasses or medication are no longer regarded as "having a disability." The three cases together declare that those having high blood pressure, myopia, and/or monocular vision do not qualify as individuals with disabilities if such conditions can be corrected with blood pressure medication or glasses. The slightly unusual outcome of this

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1. 527 U.S. 555 (1999).

2. 527 U.S. 471 (1999).

3. 527 U.S. 516 (1999).

4. 1999 U.S. LEXIS 4425; 119 S. Ct. 2388 (1999).

5. 42 U.S.C. §12101 (1990).

narrowing of the definitions of disability is that if a condition is correctable, (e.g., if an employee's vision is adequate with corrective lenses), those employees can be fired or denied a job as a pilot or truck driver. However, if an employee or individual's situation or disability is uncorrectable, they may not be denied a job, or lose employment without being offered reasonable accommodations.⁶

This narrowing of the definition of disability also has implications in dealing with learning disabilities of students in schools and colleges, and in certifying boards. In *New York State Board of Law Examiners v. Bartlett*, a recent law school graduate, holding a doctorate in educational administration, charged that the New York Board of Law Examiners' failure to accommodate her reading disability during the bar exam violated her rights under the ADA.⁷ The court noted that

[s]ince 1991, Dr. Bartlett has taken the bar examination five times. On at least three and possibly four separate occasions, she has applied as a reading disabled candidate to take the bar examination with accommodations. . . . The Board has denied her request each time, contending that her application does not support a diagnosis of a reading disability or dyslexia. In total, Dr. Bartlett has taken the examination four times without accommodations and has yet to pass. In her complaint, she sought, among . . . other things, injunctive relief in the form of reasonable testing accommodations and compensatory damages for fees paid in connection with past attempts to pass the examination.⁸

Accordingly, the lower court held that Bartlett's disability had to be evaluated as to whether it was a disability, with no regard to mitigating measures such as providing more time during an exam.⁹ Using that evaluative stance, the Second Circuit found that Bartlett did have a disability, and thus the Board of Law Examiners was required to reasonably accommodate her disability.

6. See *Sutton*, 527 U.S. at 490.

7. See 1999 U.S. LEXIS 4425; 119 S. Ct. 2388 (1999).

8. *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 324-35 (2nd Cir. 1999).

9. See *id.*

However, the Supreme Court vacated the Second Circuit's decision in *Bartlett* and remanded for reconsideration based on the standards of *Albertsons*, *Sutton*, and *Murphy*. In harmony with these cases, it appears that if a mitigating measure, such as providing more time to take tests, will correct the problem, then a student or a bar applicant does not have a right to reasonable accommodation during testing.

This relatively unusual outcome, evidently mandated by *Albertsons*, *Sutton*, and *Murphy*, has already been commented upon in an unpublished dissenting opinion from the Sixth Circuit. In his dissent Judge Ronald Gilman states:

In essence, the magistrate judge concluded that *a person does not have a disability for purposes of the ADA if he or she can function adequately with special accommodations not required by the average person in the general population. This accords with no one's understanding of the word "disability" either as the word is used in the ADA or in the English language generally.* The Supreme Court, of course, has held that corrective measures, such as eyeglasses and high-blood pressure medication, must be taken into account in determining whether a person has a disability for purposes of the ADA. . . . But I do not believe that the assistance of other human beings in digesting school material could conceivably be considered a "corrective measure" like eyeglasses are for the nearsighted, or high-blood pressure medication for the hypertensive. *The question that the magistrate judge should have asked—but did not—was whether Shepler [the plaintiff] produced evidence from which a reasonable factfinder could conclude that she is significantly restricted in the manner in which she learns as compared to the average person in the general population. . . . At the very least, this evidence raises a genuine issue of material fact regarding Shepler's disability*¹⁰

It is not yet entirely clear how *Albertsons*, *Sutton*, and *Murphy* will come to be applied in testing and learning disabili-

10. *Shepler v. Northwest Ohio Developmental Center*, 2000 WL 191496, at *6 (6th Cir.1999) (Gilman, J., dissenting) (emphasis added).

ties cases in the future. It appears that the Supreme Court's decision may come to have the effect of limiting the universe of potential plaintiffs seeking accommodations for various learning disabilities, ranging from "math anxiety" to dyslexia, that confront educational institutions. However, the impact of *Bartlett*, and by reference *Albertsons*, *Sutton*, and *Murphy*, on learning disabled students will require further elucidation by the courts.

In the meantime, Judge Gilman's dissenting opinion in *Shepler* provides a useful rationale that could be applied in the case of learning disabilities. In educational settings, perhaps the question should be whether there is "evidence from which a reasonable factfinder could conclude that [a plaintiff] is significantly restricted in the manner in which [s]he learns as compared to the average person in the general population."¹¹ Such a factual determination or evaluative posture seems more in harmony with the ADA's intentions in the relatively challenging environment of cognitive and learning disabilities. Adherence to too narrow a view on such disabilities, such as has been demonstrated by the Supreme Court, may foster a debilitating mode of analysis that is blind to the larger expanse of conditions and individuals the ADA was meant to protect.

11. *Id.* (Gilman, J., dissenting).