



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

**THE EFFECT OF THE SUPREME COURT'S DECISIONS ON  
AMERICANS WITH DISABILITIES**

The following stories illustrate many of the problems that the Supreme Court has created for people with disabilities who seek protection from disability discrimination in employment. Through a series of decisions interpreting the Americans with Disabilities Act of 1990 (“ADA”), the Supreme Court has narrowed the law in ways that Congress never intended. First, in a trio of decisions decided in June 1999, the Supreme Court ruled that mitigating measures—medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment—must be considered in determining whether an individual has a disability under the ADA.<sup>i</sup> This means people with serious health conditions who are fortunate enough to find a treatment that makes them more capable and independent—and more able to work—often find that they are not protected by the ADA at all. Next, in a 2002 decision, the Supreme Court emphasized that courts should interpret the definition of “disability” strictly in order to create a demanding standard for qualifying as disabled.<sup>ii</sup>

In the wake of these restrictive rulings, individuals who Congress intended to protect—people with epilepsy, diabetes, cancer, HIV, mental illness—have been denied protection from disability discrimination. Either, the courts say, the person is impaired but not impaired enough to substantially limit a major life activity (like walking or working), or the impairment substantially limits something—like liver function—that does not qualify as a “major life activity.” Courts even deny ADA protection when the employer freely admits it terminated someone’s employment because of their disability. This has resulted in an absurd Catch-22 where an employer may say a person is “too disabled” to do the job but not “disabled enough” to be protected by the law. This is not what Congress intended.

Congress never intended to exclude people like Mary Ann Pimental, Carey McClure, Stephen Orr, or James Todd. Their stories are among those collected below, which demonstrate the problem created by the courts’ misinterpretation of the definition of disability. These stories make it clear this problem is not limited to a single judge, employer, or geographic area. This is a nationwide problem that requires an appropriate Congressional fix.

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**State: Florida**  
**Disability: Epilepsy**  
**Courts: 11<sup>th</sup> Circuit (AL, FL, GA)**

### *Charlotte Chenoweth*

Charlotte Chenoweth is a registered nurse from rural Florida with over fifteen years of nursing experience.<sup>iii</sup> In 1995, Charlotte started working for the county health department, where she reviews the files of hospital patients for whom the County is financially responsible.

Two years into her job with the county, Charlotte had a seizure and was diagnosed with epilepsy. Her doctor put Charlotte on an antiseizure medication and advised her not to use a stove or bathe alone, and not to drive until she had gone six months without another seizure.<sup>iv</sup> Charlotte's antiseizure medication also increases the risks of having a child with birth defects, and Charlotte decided not to have children as a result.

During the six-month period after starting antiseizure medication, Charlotte asked the health department if she could do document review work from home for two days per week as she and others had done in the past or, in the alternative, if her hours could be varied slightly to allow friends and family to drive her to work.<sup>v</sup> The health department refused. Believing that her requests were reasonable, Charlotte decided to challenge the county's decisions

The county initially agreed that epilepsy is a disability under the ADA. But, while Charlotte's case was still pending, the Supreme Court issued its 1999 "mitigating measures" decisions, and the county retracted this admission.<sup>vi</sup> Following those decisions, the county started arguing that Charlotte's epilepsy did not qualify as a "disability" and that she was not protected by the ADA at all.

The courts agreed. Even though Charlotte had been unable to cook, bathe by herself, or drive until she had gone six months without a seizure, the court found that Charlotte was not "disabled" because none of these activities are "major life activities" under the ADA. Though it recognized that having children is a major life activity, the court refused to consider whether Charlotte had a "disability" because of limitations on her ability to have children due to the increased risk of birth defects from her antiseizure medication. The court dismissed this evidence that Charlotte meets the ADA's definition of "disability" as irrelevant to her work for the county.<sup>vii</sup>

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**State: New Hampshire**  
**Disability: Breast Cancer**  
**Court: New Hampshire District Court 2002**

### ***Mary Ann Pimental***

Mary Ann was a registered nurse who lived in Hudson, New Hampshire with her husband and two children and worked in a hospital. Five years into her job as a staff nurse, the hospital promoted Mary Ann to its nurse management team. A little more than a year later, Mary Ann was diagnosed with stage III breast cancer.

Mary Ann initially took time from work to undergo surgery (mastectomy) and follow-up treatment (chemotherapy and radiation therapy). While Mary Ann was hospitalized and receiving treatment for cancer, the hospital reorganized its management team and eliminated Mary Ann's position. When Mary Ann was able to return to work, she applied for several different positions but was not hired. The hospital finally rehired her into a staff nurse position that provided only 20 hours of work each week. As a result, Mary Ann was not eligible for higher benefits offered to employees working 30 or more hours each week.

Given her strong work history, and because she was asked about her ongoing cancer treatments and ability to handle work with the stress of battling cancer, Mary Ann believed that the hospital failed to rehire her into a better position because of her breast cancer. She decided to challenge these decisions, and filed a claim under the ADA.

The hospital argued that she wasn't protected by the ADA because she didn't have a "disability."

So Mary Ann provided highly personal, sometimes embarrassing, evidence to her employer and the courts of how her impairment – breast cancer – impacted her life in a severe and substantial way. That impact included:

- hospitalization for a mastectomy, chemotherapy, and radiation therapy;
- problems concentrating, memory loss, extreme fatigue, and shortness of breath;
- premature menopause brought on by chemotherapy, and burns from radiation therapy;
- problems in her shoulder resulting in an inability to lift her left arm over her head;
- sleep-deprivation caused by nightmares about dying from the cancer;
- difficulty in intimate relations with her husband because of premature menopause and Mary Ann's discomfort and self-consciousness following the mastectomy; and
- the need for assistance from her husband and mother in order to care for herself and for the couple's two children because of extreme fatigue, and difficulties performing basic tasks like climbing stairs or carrying household items.

When Mary Ann returned to work she still was undergoing radiation therapy and suffering from fatigue. She still could not lift her arm above her head, still experienced concentration and memory problems, and still received help at home from her husband and mother.

The hospital insisted that any impact from her breast cancer had been relatively short-lived and that Mary Ann did not have a “disability” under the ADA because she hadn’t shown a substantial limitation of a major life activity.

The courts agreed. While “[t]here is no question that plaintiff’s cancer has dramatically affected her life, and that the associated impairment has been real and extraordinarily difficult for her and her family,” Mary Ann failed to show that she had been limited by breast cancer on a “permanent or long-term basis.”<sup>viii</sup>

Mary Ann Pimental died of breast cancer four months after the court issued this decision.

Because the courts found that Mary Ann did not have a “disability,” the hospital’s refusal to rehire her into several positions was never questioned.

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**State: Nebraska**

**Disability: Diabetes**

**Court: 8<sup>th</sup> Circuit 2003 [AR, IA, MN, MO, NE, ND, SD]**

### *Stephen Orr*

Stephen is a pharmacist in Chandron, Nebraska, a town of 6,000 nestled in the rural northwestern part of the state. One of the few jobs for a pharmacist in the area is at the local Wal-Mart. Stephen interviewed there and was hired in early 1998. During his interview, he told his soon-to-be boss, Ronald Coleman, that he has diabetes and needs to take regular, uninterrupted lunch breaks. Mr. Coleman authorized Stephen to take a 30-minute lunch break during his ten-hour work shift.

Doctors diagnosed Stephen Orr with diabetes in 1986. He requires injections of insulin to manage the disease and wears a pump, attached to his body at all times, to maintain a regular course of insulin treatment. In order to keep his blood sugar stable, Stephen must follow a strictly regimented diet, monitoring what and when he eats. If he does not, he experiences episodes of either hypoglycemia (low blood sugar) or hyperglycemia (high blood sugar).

When his blood sugar levels are not in his target range, Stephen experiences:

- trouble talking;
- the need to urinate frequently;
- lack of physical strength and energy;
- coordination problems;
- difficulty reading or typing; and
- impaired concentration and memory.

Complications caused by fluctuating blood sugar levels can, and have, resulted in hospitalization.

After he started working, Stephen took lunch breaks as agreed, closing the pharmacy to eat without being interrupted. During this time, Stephen did not suffer any hypoglycemic attacks and performed his job well. No one complained about the pharmacy being closed for the half hour that Stephen was taking lunch.

When a new district manager took over for Mr. Coleman, he told Stephen to stop closing the pharmacy, and to eat lunch when possible during down times in the pharmacy.

Stephen obeyed this order, but started having problems with low blood sugar because he was no longer able to control the times that he ate. Stephen told his new boss that, because of the no-lunch-break order, he had experienced several hypoglycemic incidents and that he needed to resume his noon lunch breaks to control his blood sugar. Stephen's boss then fired him.

Stephen decided to challenge his firing and filed a claim against Wal-Mart under the ADA.

Wal-Mart responded that Stephen did not have a "disability" because Stephen was able to manage his diabetes with insulin and diet.

The courts agreed. Because the Supreme Court has directed courts to consider "mitigating measures" in deciding whether an individual has a disability, the courts found that Stephen did so well managing his condition that he was not disabled enough to be protected by the ADA.<sup>ix</sup>

Wal-Mart's refusal to allow Stephen to take a lunch break was never questioned.

Although Wal-Mart vigorously defended its refusal to allow Stephen a lunch break, Wal-Mart voluntarily changed company policy in 2000 to allow one-pharmacist pharmacies to close for 30 minutes at lunch because of "retention" problems.

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**State: Texas**

**Disability: Muscular Dystrophy**

**Court: 5<sup>th</sup> Circuit 2003 [LA, MS, TX]**

### *Carey McClure*

Since age 15, Carey McClure has suffered from a form of muscular dystrophy that affects the muscles in his upper arms and shoulders. Carey has difficulty raising his arms above shoulder level and has constant pain in his shoulders. In his work as a professional electrician, Carey performs most of his job functions without modification, and has adapted how he performs overhead tasks like changing light fixtures or working on ceiling wiring. Carey performs these job functions by (a) throwing his arms over his head to perform the work, (b) repositioning his body so that he can raise his arms, (c) supporting his arms on an

adjacent ladder, or (d) using a ladder, step-stool, or hydraulic lift so that it is not necessary for him to raise his arms above shoulder level.

Carey was living in Georgia and had 20 years of experience working as an electrician when he applied for a better opportunity at a General Motors' assembly plant in Arlington, Texas. GM offered Carey the job pending completion of a pre-employment physical examination. During that exam, GM's physician asked Carey to raise his arms above his head. When he saw that Carey could only get his arms to shoulder level, the physician asked how Carey would perform overhead work. Carey, who had performed such work in the past, responded that he would use a ladder. Despite the fact that other electricians in the plant often used ladders or hydraulic lifts to do overhead work, the physician revoked GM's offer of employment.

Carey challenged GM's decision. Even though GM revoked its job offer because of limitations resulting from Carey's muscular dystrophy, GM argued that Carey did not have a "disability" and was not protected by the ADA.

Carey responded with highly personal information regarding the many ways that his muscular dystrophy limits his daily life activities. Carey explained that:

- he is able to wash his hair, brush his teeth, and comb his hair only by supporting one arm with the other;
- he wears button down shirts because it is too difficult for him to pull a t-shirt over his head;
- he must rest his elbows on the table in order to eat, and lowers his head down over the plate so that he can get the food to his mouth;
- he cannot exercise or play sports, and cannot care for his grandchildren by himself; and
- his ability to engage in sexual activities is limited by his muscular dystrophy.

GM argued that – because Carey had adapted so well – he was not substantially limited in any major life activity.

The courts agreed –

“[Carey] has adapted how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or ladder. . . . [Carey's] ability to overcome the obstacles that life has placed in his path is admirable. In light of this ability, however, we cannot say that the record supports the conclusion that his impairment substantially limits his ability to engage in one or more major life activities.”<sup>x</sup>

Because the courts found that Carey did not have a “disability,” GM's decision to revoke his offer because of limits resulting from his muscular dystrophy was never questioned.

**State: Texas**  
**Disability: Epilepsy**  
**Court: Southern District Texas 1999**

### ***James Todd***

James Todd has lived with epilepsy since he was five years old. While medication helps to minimize the duration and intensity of his seizures, it does not cure his epilepsy – he still has seizures about once a week. His seizures follow a familiar pattern, beginning with a tingling sensation that signals the onset of a seizure. During a seizure, which can last anywhere from five to fifteen seconds, James is unable to speak, the left side of his body shakes involuntarily, and his thinking becomes clouded. James removes himself from the company of others as soon as he feels a seizure coming on, and lies down until the seizure is over.

In September of 1996, sporting goods giant Academy Corporation hired James as a stocking clerk, whose job it was to inventory and stock merchandise. Several weeks into the job, James had his first seizure at work, and was forced to tell all of his supervisors that he had epilepsy.

Several months later, when James was out sick for five consecutive days, Academy fired him. Although James notified his supervisor of his illness and unavoidable absence each day as required by the company's written work policy, Academy told him that he had violated an "unwritten policy" that prohibits taking more than three consecutive days off without sick- or vacation-leave. James decided to challenge Academy's decision to fire him, and filed a complaint under the ADA.

The court never reached his discrimination claim. Instead, the court concluded that since James was able to control his seizures with medication, he was not disabled enough to claim protection under the ADA. According to the court, "[e]xcept for a time period of fifteen seconds per week, [James] is able to work, walk, talk, think and learn" and thus "cannot be considered 'disabled' under the ADA."<sup>xi</sup> The fact that James lay shaking on the floor and unable to talk for fifteen seconds per week amounted to "only" a "momentary physical limitation[]" which could not be classified as substantial."<sup>xii</sup>

Had James Todd's case been decided just two months earlier, before the Supreme Court's decision in *Sutton v. United Airlines*, James would have received protection under the ADA. As the court noted, before *Sutton*,

"epilepsy would, without question, be considered a substantial limitation on several major life activities, and a person suffering from epilepsy would receive nearly automatic ADA protection."<sup>xiii</sup>

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**State: Utah**  
**Disability: Multiple Sclerosis**  
**Court: 10<sup>th</sup> Circuit 1999 [CO, KS, NM, OK, UT, WY]**

## *Laura Sorensen*

Laura Sorensen started working as a clinical nurse for the University of Utah Hospital in 1990.<sup>xiv</sup> A year later, the Hospital hired her to work as a flight nurse for its helicopter ambulance service.

Two years into her dream job, Laura was diagnosed with multiple sclerosis and hospitalized for five days.

Laura's physician cleared her to return to work within two weeks, but Laura's supervisors initially refused to allow her to return as a flight nurse. Laura agreed to return as a regular nurse for an evaluation period, and worked successfully in the burn unit, the surgical intensive care unit, and emergency room. After a two-month evaluation period, a neurologist examined Laura and cleared her to return to work as a flight nurse.

Laura's AirMed supervisor still refused to allow Laura to return in the flight nurse position because the neurologist could not guarantee that Laura would never experience symptoms related to her multiple sclerosis while on duty. Laura's AirMed supervisor felt that this justified his decision to keep Laura grounded indefinitely.<sup>xv</sup>

Laura continued working for the Hospital for a few more months, resigning after it became clear that she would never be allowed to work as a flight nurse.

Laura believed, consistent with her evaluating neurologist, that she could perform the flight nurse job safely. Because she felt that she was demoted because of unjustified fears about her disability, Laura decided to challenge the Hospital's decision.<sup>xvi</sup>

The Hospital responded that Laura's multiple sclerosis did not qualify as a "disability" under the ADA, even though it was the sole reason that Laura was barred from working as a flight nurse.

The court agreed.

According to the court, even though Laura "could not perform any life activities during her hospitalization," her hospital stay had not been permanent or long-term enough to qualify Laura as disabled under the ADA.<sup>xvii</sup> And even though the Hospital based its decision on Laura's multiple sclerosis, its refusal to hire her in the "single job" of flight nurse was not enough to show that it regarded her as disabled.<sup>xviii</sup>

In an interview with the Salt Lake Tribune following the court's dismissal of her case, Laura explained that "[t]he university took a red paintbrush and put a scarlet 'MS' on my forehead. I was a disease from that point on. I can do that job—that's the bottom line."<sup>xix</sup>

Laura proved this point by leaving Utah briefly to work as a flight nurse in Arizona. Upon her return to Utah, Laura won the Utah Emergency Room Nurse of the Year Award,<sup>xx</sup> but still has not been allowed to work as a flight nurse in her home state.

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**State: Wyoming**  
**Disability: Depression**  
**Court: D. Wyoming (2004)**

### ***Michael McMullin***

Michael McMullin has lived and worked as a law enforcement officer in Wyoming his entire adult life. In 1973, he started his career as an officer with the Casper, Wyoming Police Department. Thirteen years into that job, Michael started experiencing symptoms of depression, including insomnia and severe sleep deprivation. After struggling with these symptoms for a few years – during which he periodically got only 2-3 hours of sleep a night – Michael became suicidal and sought medical leave and assistance. His physician referred him to a psychiatrist, who diagnosed Michael with clinical depression and prescribed medication to treat his depression, insomnia, and sleep deprivation. This treatment controlled Michael’s symptoms and he was able to return to work after five months of medical leave.

Michael stayed with the Casper Police Department for another 8 years, receiving numerous awards and commendations. In 1996, Michael left Casper and moved to Cheyenne, Wyoming where he was hired by the Capitol Police Department to provide security and protection to the Wyoming Governor and First Family. At the time of his hiring, Michael told the Capitol Police Department about his clinical depression, and asked that he not be assigned regularly to the graveyard shift. Michael successfully served as a security officer for the Governor for five years, until 2001, when he decided to apply for a job as a court security officer at the federal building in Cheyenne.

Michael again disclosed his clinical depression when he applied for employment and was assured that – as long as his depression was under control and treated with medication – it would not pose an obstacle to employment as a court security officer. Michael took the required pre-employment medical examination and answered questions about his medical history and use of medication. The examining physician found that Michael could perform the job without limitation, and Michael started working as a court security officer.

Michael performed the job without any complaints from supervisors until another doctor reviewed his medical files and decided that he was “not medically qualified” because of his depression and use of medication.<sup>xxi</sup> Michael was suspended without pay, and was then medically disqualified from working as a court security officer. Michael filed an internal appeal, providing his previous employment evaluations – including those from the State of Wyoming – and letters from doctors stating that he was fully capable of performing law enforcement duties. After his internal appeal was denied, Michael decided to challenge his medical disqualification and filed claims of disability discrimination under the Americans with Disabilities Act and the Rehabilitation Act of 1973.

After firing him because of his clinical depression, his employers argued that Michael’s depression did not qualify as a “disability” under federal law, even though it was the admitted basis for its termination decision.

The court agreed.

Because Michael's medication successfully managed his symptoms, his depression was not disabling enough. With regard to his history of sleep deprivation and insomnia, the court decided that:

“sleep deprivation which results in a plaintiff getting only two to three hours of sleep per night is not ‘severe’ enough to constitute a major life activity of sleeping.”<sup>xxii</sup>

As for limitations on his ability to work, the court found that – while Michael had been excluded from working as a court security officer – he was still able to perform other jobs and, therefore, was not substantially limited in his ability to work.<sup>xxiii</sup> Even though his depression had prevented him from working in the past, the “five month period in which [Michael] actually missed work in 1988 was of limited duration; this weighs against a finding of substantial limitation.”<sup>xxiv</sup> Finally, his employers had not “regarded” Michael as disabled because they had only barred him from “a single job rather than a class of jobs.”<sup>xxv</sup>

Because the definition of disability is the same for claims under either the ADA or Rehabilitation Act, the court dismissed Michael's disability discrimination claims. As a result, his employers' decision to rescind their initial medical clearance and to ignore Michael's 30 years of law enforcement experience went unchallenged.

The court recognized the unfairness of this result, and that its hands were tied by current interpretations of the law:

“[t]his is one of the rare, but not unheard of cases in which many of the plaintiff's claims are favored by equity, but foreclosed by the law.”<sup>xxvi</sup>

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<sup>i</sup> *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

<sup>ii</sup> *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002)

<sup>iii</sup> *Chenoweth v. Hillsborough County*, 250 F.3d 1328 (11th Cir. 2001).

<sup>iv</sup> Brief for Appellant, 2000 WL 33988759, at \*4.

<sup>v</sup> *Id.* at \*5.

<sup>vi</sup> *Id.* at \*4.

<sup>vii</sup> *Chenoweth*, 250 F.3d at 1330.

<sup>viii</sup> *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 184, 188 (D.N.H. 2002).

<sup>ix</sup> *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8<sup>th</sup> Cir. 2002).

<sup>x</sup> *McClure v. General Motors Corp.*, 75 Fed. Appx. 983 (5<sup>th</sup> Cir. 2003).

<sup>xi</sup> *Todd v. Academy Corp.*, 57 F.Supp. 2d 448, 454 (S.D. Tex. 1999).

<sup>xii</sup> *Id.* at 453-454.

<sup>xiii</sup> *Id.* at 452.

<sup>xiv</sup> *Sorensen v. University of Utah Hosp.*, 194 F.3d 1084 (10th Cir. 1999).

<sup>xv</sup> *Id.*

<sup>xvi</sup> *Id.* at 1086.

<sup>xvii</sup> *Id.* at 1087-88.

<sup>xviii</sup> *Id.* at 1088.

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<sup>xix</sup> Sheila R. McCann, *Former Flight Nurse With MS Frustrated by Disability Ruling*, SALT LAKE TRIB., Apr. 6, 1998, at D1.

<sup>xx</sup> *Id.*

<sup>xxi</sup> *McMullin v. Ashcroft*, 337 F.Supp. 2d 1281, 1289 (D.Wyo.. 2004)

<sup>xxii</sup> *Id.* at 1297.

<sup>xxiii</sup> *Id.* at 1296.

<sup>xxiv</sup> *Id.* at 1297.

<sup>xxv</sup> *Id.* at 1298.

<sup>xxvi</sup> *Id.* at 1286.