



Jeanne A. Carpenter

Epilepsy Legal Defense Fund newsletter

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Protecting the civil rights
of people with epilepsy
through education,
advocacy and increased
access to legal services.

ADA Amendments Signed into Law – Restores Employment Rights of Persons with Epilepsy

Based on a series of Supreme Court decisions which severely narrowed the scope of coverage under the Americans with Disabilities Act (ADA), most individuals with epilepsy (and some other chronic conditions) lost their protection against discrimination in employment under that law. As a result of the Supreme Court's decisions, other courts around the country have ruled that persons with epilepsy and certain other conditions which are controlled by medication or other measures are not considered to have a disability under the ADA because they are too functional. On September 25, 2008, President Bush signed into law the Americans with Disabilities Act Amendments Act (ADAAA). This law restores the right of persons with epilepsy to be protected under the ADA and to be treated fairly by employers.

The Epilepsy Foundation played a leadership role in helping draft the law and promoting its passage in Congress. There is detailed background information on the development of the legislation on the Foundation's Web site at www.epilepsyfoundation.org/advocacy. Further, a compilation of information on both the ADA and the ADAAA is available at www.archiveADA.org; this site includes the text of the ADAAA, legislative history documents, information on Supreme Court cases and policy and advocacy documents.

Overview of the ADA

The ADA prohibits discrimination on the basis of disability in employment, state and local government services, public accommodations, commercial facilities, transportation, and telecommunications.

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

Title I of the ADA requires employers with 15 or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of employment-related opportunities available to others. For example, it prohibits discrimination in recruitment, hiring, promotions, training, pay, social activities, and other privileges of employment. It restricts questions that can be asked about an applicant's disability before a job offer is made, and it requires that

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The Legal Defense Fund (a program of the Epilepsy Foundation®) provides legal guidance to individuals experiencing epilepsy-related discrimination and their families, along with referrals to a nationwide network of cooperating law offices. The Fund was established in memory of Jeanne A. Carpenter, a lawyer, Epilepsy Foundation® Board member, and a person with epilepsy. She was a tireless advocate for people with epilepsy from the time she was first diagnosed with the condition until her untimely passing in 2003.



The result [of Supreme Court decisions] was that persons with epilepsy and other conditions that are controlled with medication... generally had no protection from discrimination under federal law.... The new law effectively reverses [these decisions].... Based on the ADAAA, it seems virtually certain that persons with chronic seizures (epilepsy), whether or not controlled with medication, will be able to establish ADA coverage.

ADA Amendments • *continued from p. 1*
employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship.

In 1999, the Supreme Court ruled that, in determining whether a person's impairment is covered as a disability under the ADA, the effects of medication and other "mitigating" measures (such as prosthetic limbs or hearing aids) on that impairment must be considered. And in 2002, the Supreme Court ruled that in order to be protected from discrimination, an individual's disability must severely restrict or prevent him or her from engaging in major life activities such as walking, working or breathing. Based on these rulings, courts around the country have thrown out 90 percent or more of epilepsy-related discrimination cases, finding that persons with epilepsy whose condition is controlled with medication are too functional, and therefore, do not have a disability covered under the ADA. The result was that persons with epilepsy (and other conditions that are controlled on medication or do not severely restrict activities of daily living) generally had no protection against discrimination under federal law. Thus, without the law's protection, an employer could explicitly refuse to hire a person simply because that person has epilepsy.

ADA Amendments Act of 2008

On September 25, 2008, President Bush signed into law the ADAAA. The ADAAA became effective on January 1, 2009 (it applies to discrimination occurring on or after that date). The new law effectively reverses the Supreme Court decisions which had severely limited protection under the ADA for persons with epilepsy and other disabilities. Although the ADAAA retains the ADA's basic definition of an individual with a "disability" — one who has an actual or perceived substantially limiting impairment or a record of such impairment — the amendments change the way that these statutory terms should be interpreted in several ways:

1. Mitigating measures such as use of medication, assistive devices or learned

behavioral adaptations (e.g., compensating for the loss of vision in one eye) shall not be considered in assessing whether an individual has a disability. The amendments reverse the Supreme Court decisions that had ruled to the contrary

2. Congress explicitly rejected the Supreme Court decision which ruled that an impairment must severely restrict major life activities in order to be covered, finding that this is too high a standard. Congress directed the Equal Employment Opportunity Commission (EEOC) to revise its current ADA regulations to clarify this issue in a manner consistent with the amendments
3. The definition of disability shall be interpreted in favor of broad coverage of persons under the ADA
4. Impairments which substantially limit major bodily functions — including the neurological function — are covered as disabilities
5. Episodic conditions or those in remission are covered disabilities if they would substantially limit a major life activity when active
6. An individual can succeed on a claim that he or she was "regarded as" having a disability under the ADA by showing that he or she was denied an employment opportunity based on an impairment (real or perceived), whether or not it substantially limits a major life activity. However, persons who are covered solely under this section of the definition (that is, the "regarded as" section) of the ADA will not have the right to a reasonable accommodation to that impairment.

Epilepsy is a Covered Disability

Based on the ADAAA, it seems virtually certain that persons with chronic seizures (epilepsy), whether or not controlled with medication, will be able to establish ADA coverage. For instance, there can be little doubt that epilepsy substantially limits the neurological system, and therefore, is covered. Further assurance regarding epilepsy's coverage

is provided in the amendment regarding episodic conditions. Clearly, epilepsy, when active — that is, when one experiences a seizure — is substantially limiting. Similarly, if one evaluates an impairment in the untreated state — that is, as if the person was not taking

medication for their seizures — to determine whether they are covered by the ADA, coverage of people with epilepsy should be required. The EEOC's revised regulations should carry out the mandate of the law and ensure broad coverage for epilepsy and other disabilities.

The Fund Helps File and Resolve Major Discrimination Cases

The following outlines some cases in which the Fund has provided support to its cooperating attorneys — helping persons with epilepsy fight discrimination. For more information about these and other cases handled by the Fund's cooperating attorneys, and for copies of briefs and other litigation documents, contact the Fund at legalrights@efa.org.

Employment Cases — Police/Firefighters

Cerminara v. City of Pittsburgh. A 27-year veteran Pittsburgh Fire Department captain was suspended from his position after being diagnosed with epilepsy, despite the fact that his treating neurologist cleared him to return to work after placing him on antiseizure medication. He had experienced only two seizures, both while asleep, and did not pose a safety risk on the job. The City suspended Mr. Cerminara based on a policy issued by a non profit standards-setting association, the National Fire Protection Association (NFPA), requiring that firefighters with epilepsy must be off antiseizure medications and seizure-free for one year before returning to work (or if on antiseizure medication, seizure-free for five years). The Foundation believes that this off-medication policy is not medically justified and actually encourages risk taking that is directly contrary to promoting public safety.

A union arbitrator found that the fire department improperly terminated Mr. Cerminara, and awarded him at least \$38,000 to compensate for lost wages. The arbitrator determined that that the one-year seizure-free policy was improperly applied to him, as it is intended to apply only to new recruits, and that the City failed to fulfill its obligation

under the union contract to attempt to accommodate Mr. Cerminara. The Fund is working with one of its participating attorneys, who filed suit under the ADA, claiming that the City's policy discriminates against

How the Fund Can Help

Consumers: Individuals experiencing discrimination related to epilepsy and their representatives are invited to request legal guidance or a referral to an attorney through the Fund's Web site, www.epilepsylegal.org, or by calling 1-800-332-1000. The Fund's staff will provide prompt legal guidance and determine whether a referral to a lawyer is necessary for direct legal advice or representation. The lawyers to whom the Fund refers cases have agreed to provide an initial consultation and services to a maximum of three hours at no cost (sometimes additional services are available at no charge or a reduced hourly rate). Once a referral is made, the lawyer will evaluate a potential case and advise on the next steps.

Attorneys: Those representing persons experiencing epilepsy-related discrimination may contact the Fund for assistance via email (legalrights@efa.org) or by calling 301-459-3700. The Fund can provide a variety of resources such as: legal research, briefs, case lists, expert referrals, and medical information. In cases of national significance, we can consider filing an amicus brief and/or providing a grant to help defray litigation costs. For more information, see <http://epilepsyfoundation.org/epilepsylegal/attysources.cfm>.

Accepting Case Referrals: Individual attorneys and law offices that wish to assist the Fund by accepting case referrals may register with the Fund on-line directly from the Fund's Web site. Simply go to www.epilepsylegal.org, click on "Register as an Attorney," and provide the requested information. Soon after a registration is completed, the Fund sends out a welcome package, with resources and background information.

firefighters with epilepsy without fairly evaluating their ability to safely perform their duties.

Blake v. Baltimore County Police Department.

William Blake, who had experienced a seizure twelve years ago, was required by the police

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Discrimination Cases • *continued from p. 3*
department to undergo an EEG to determine the likelihood of future seizures. An attorney cooperating with the Fund filed an ADA action, claiming that the exam is not justified by business necessity (a reasonable belief that an employee's condition will impair job performance or pose a safety threat), as is required under the ADA regarding medical exams of employees. The attorney argued, based on the testimony of experts, that the EEG exam might trigger a seizure and would not reveal any useful information about the risk of Mr. Blake experiencing future seizures. The court in a written opinion agreed with this reasoning, found the department violated the ADA and issued an order prohibiting the exam.

tary movements caused by complex partial seizures (e.g., such as flailing of arms, repetitive movements and shouting) as combativeness; also, post-seizure confusion and the inability to communicate may be perceived as defiance.

In order to better assist attorneys handling these cases and to advise first responder agencies on appropriate practices, the Fund has developed Web site resources on this subject (see www.epilepsyfoundation.org/about/professionals/emergency/index.cfm). This site contains the Foundation's training curriculum for police departments, press releases, position statements and information on litigation.

Wells v. County of Stanislaus and Taser International. The Fund is currently providing technical assistance to lawyers who filed a wrongful death action against the Stanislaus County (CA) Police Department on behalf of the parents of a man with epilepsy, Mr. Wells, who died after being tasered (possibly multiple times) and restrained by police who were responding to seizure-related behavior. (Police were responding to a call about Mr. Wells' attempt to forcibly enter a neighbor's home — his behavior was the result of post-seizure confusion.) The action alleges that when Mr. Wells was not responsive to their commands, officers immediately tried to subdue Mr. Wells by striking him with a baton and tasering him, and then handcuffing him behind the back and possibly kneeling on him. The evidence indicates that one cause of death was asphyxiation, allegedly the result of restraint. Importantly, the suit names as a co-defendant Taser International, the manufacturer of Tasers, claiming the company failed to adequately warn the police department about the dangers of the device. The parties are now engaged in pre-trial discovery.

Access to Emergency Medication in Child Care Epilepsy Foundation and Gottlieb v. Pearland. In November, a settlement was reached in this litigation challenging, as a violation of the ADA, a New York child care provider's refusal to agree to administer emergency anti-seizure medication to a child who experiences prolonged seizures. Such seizures can result

New Manual on Advocacy for Students with Epilepsy

The Epilepsy Foundation has published a new legal resource, *Legal Rights of Children with Epilepsy in School & Child Care: An Advocate's Manual*. This manual provides detailed practical guidance — for both parents and attorneys — on effective advocacy strategies in these areas. In addition to the great information on epilepsy-related education and child care issues, the manual provides a very useful reference on special education issues generally. Topics covered include the special education process, with a focus on the rights of children with epilepsy; the obligation of schools and child care centers to administer anti-seizure medication and provide other accommodations; and methods to resolve disputes. The manual provides many suggested strategies for resolving common problems, along with sample model policies.

The manual is available for down loading at www.epilepsyfoundation.org/epilepsylegal/genattyresources.cfm. Bound copies may also be ordered from the Foundation's Web site at www.epilepsyfoundation.org (go to "store" at the top of the page and then to "Employment and Legal Issues"). Alternatively, the manual can be ordered by calling 866-330-2718 and requesting item number 137535.

Improper Handling of Seizures by First Responders

The Fund continues to receive reports about the use of inappropriate force (including dangerous restraint practices and taser) by law enforcement and other first responders when encountering persons experiencing seizures. Police sometimes respond in this manner because they may mistakenly perceive involun-

in brain damage if not treated promptly with this type of medication. The Foundation joined the case as co-plaintiff (along with the affected child and his parent) in order to represent other children with epilepsy who may

be denied this service in the future. Prior to the settlement, the court issued a ruling that the Foundation does have authority to act as a representative in this manner. The settlement terms are confidential.

Cooperating Attorney Profile*

The Legal Defense Fund recognizes the passionate advocacy of cooperating network attorney Jason Johnson, who is an employment attorney in Illinois. Having been diagnosed with epilepsy himself (while in law school), Mr. Johnson has a special interest in disability issues and strives to make a difference in the lives of people with his condition. Mr. Johnson earned his law degree at George Mason University School of Law in Arlington, VA and his baccalaureate, magna cum laude, in International Studies from Brigham Young University. For more information on his practice, see <http://www.jmjohnsonlaw.com>.

Mr. Johnson represents clients in administrative cases before the Equal Employment Opportunity Commission (EEOC), the Illinois Departments of Human Rights, Employment Security and Labor, as well as in litigation matters in federal and state court. He has substantial trial experience, which includes serving as a lead counsel for a reverse race discrimination case against the federal government.

Mr. Johnson has actively advised individuals who have been referred by the Fund. He is currently working with an electrician with epilepsy, who is seeking reasonable accommodations from his employer, and is advocating to ensure that medical assessments are conducted fairly and by the most qualified practitioner. In another matter, a client with epilepsy lost her job as a college language instructor after an accommodation she had received for 18 years was revoked. The accommodation permitted the individual to teach daytime, rather than nighttime, classes, in order to avoid fatigue, which triggered her seizures. A new supervisor refused to continue this arrangement, even though co-workers were willing to

trade shifts. Mr. Johnson filed a charge of discrimination with the EEOC, which issued a finding in favor of the employee. The case is currently being litigated in federal court.

Mr. Johnson suggests the following practical strategies that attorneys and other advocates can use in advocating for the employment rights of clients with epilepsy: Work with a client's doctor — who should be asked to review the relevant job description — to get a strong letter supporting the conclusion that the individual is qualified for a position and can be accommodated, if appropriate. The letter should highlight the individual's ability to perform the essential functions of the job and deemphasize his or her limitations. The doctor's note must cut through the myths and stereotypes associated with epilepsy. If possible, an epileptologist should provide the evaluation because such a specialist will have the best expertise to render an opinion on the individual's capabilities and limitations. Moreover, it may be effective to provide the doctor written guidance (e.g., model language) to help in drafting the letter.

In addition to working with the Legal Defense Fund, Mr. Johnson works closely with the Epilepsy Foundation's Chicago affiliate. Most recently, he did a presentation on job accommodations at an affiliate-sponsored function. He also works with the advocacy network of the American Diabetes Association and is an active member of the National Employment Lawyers Association (Illinois Chapter), the Chicago Bar Association and the Illinois State Bar Association.

The Fund applauds Mr. Johnson's commitment to protecting the rights of persons with epilepsy.

* This article was drafted by Cherree Sanders, the Fund's Case Coordinator.

[Attorneys should] work with a client's doctor — who should be asked to review the relevant job description — to get a strong letter supporting the [client's ability to perform the job].... The doctor's note must cut through the myths and stereotypes associated with epilepsy.

THE ADVOCATES' CORNER

Service Animals for People with Epilepsy

Service animals can be trained in a variety of capacities to help people with epilepsy. For instance, a service dog can be taught to stay with a person throughout a seizure to help protect against injury; and, by barking or other behaviors, a service dog can alert others to come to the individual's aid. During a period of post-seizure confusion and disorientation, the animal can provide comfort and help the person regain awareness to his or her environment. Moreover, because it is well-recognized that animals can provide emotional support, helping to lower stress in many — a common seizure trigger — their presence can help decrease seizure frequency.

The Fund has received a number of reports from persons with epilepsy regarding the resistance of some public accommodations, such as stores, restaurants, hotels, and theatres, to permit access to their service animals. Others report that public accommodations sometimes subject them to inappropriate and intrusive questioning about their service animals. Title III of the Americans with Disabilities Act (ADA) provides a number of protections for people with epilepsy and other disabilities who may need the help of service animals in public accommodations. (The ADA and other federal laws also provide protections with regard to the use of service animals in employment, public housing and other areas; for more information, contact the Fund.) Below is an outline of these legal protections and a list of resources for additional information.

The ADA prohibits discrimination based on disability by public accommodations, such as businesses that serve the public. Regulations implementing the law require public accommodations to “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” 28 Code of Federal Regulations, Section 36.302(c)(1). The ADA regulations define a “service animal” as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” 28 CFR 36.104

The Department of Justice, which enforces Title III of the ADA, has issued at least two documents providing guidance (supplementing its regulations) on the rights of individuals with service animals in places of public accommodation. Both items are available on the Department of Justice's Web site:

- ADA Business Brief: Service Animals (<http://www.ada.gov/svcanimb.htm>)
- Commonly Asked Questions About Service Animals in Places of Business (<http://www.ada.gov/archive/qasrvc.htm>)

These guidance documents state the Department of Justice's position on important issues. The guidance provides the following clarifications, among others:

- “Service animals” include animals that are able to protect a person who is having a seizure
- Businesses and organizations that serve the public must allow people with disabilities to bring their service animals into all areas of the facility where customers are normally allowed to go
- A public accommodation must not ask about the nature or extent of a person's disability, nor require proof of service animal certification or licensing. Rather, a public accommodation may ask only: (i) If the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform

Other more general resources on service animals include:

- Facts About Service Animals (<http://www.deltasociety.org/ServiceArticlesFAQ.htm>) – from the Delta Society, a non-profit organization that promotes access to service animals
- Service Dogs for People With Epilepsy (<http://www.deltasociety.org/ServiceArticlesSeizure.htm>) — also from the Delta Society — discusses issues unique to persons with epilepsy

Recently, the Department of Justice published proposed amendments to its ADA regulations that would clarify many of the rights of persons with epilepsy and other disabilities to be accompanied by service animals. (The publication sets out proposed

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Foundation Disputes DOT Panel's Recommendation to Retain Truck Driver Rules

As discussed in the last issue of the newsletter, the U.S. Department of Transportation's (DOT) Medical Review Board (MRB) rejected a recommendation by a panel of epilepsy experts to significantly relax DOT's current rules governing the medical certification of interstate truck drivers with epilepsy. (The MRB is charged with reviewing all DOT medical standards for truck drivers and developing revision recommendations.)

The current DOT rules prohibit driving of commercial motor vehicles (those weighing more than 10,000 pounds) across state lines by anyone with a diagnosis of epilepsy or who uses anti-seizure medication. However, guidance issued for the current rules states that truck drivers with a history of epilepsy may be certified to drive if they have been off anti-seizure medication and have been seizure-free for 10 years or more. (It appears that this guidance is discretionary and that the regulatory ban is frequently applied.)

A medical expert panel (MEP) on epilepsy, established by the DOT to advise its MRB, found that these standards are inappropriate and overly restrictive. In place of the current standards, the MEP proposed a more medically justifiable standard: truck drivers with epilepsy should be eligible for certification if they have been seizure-free for eight years whether they are on antiseizure medication (assuming they are on a stable medication regimen) or off such medication. The MEP, based on an exhaustive review of medical studies, concluded that persons meeting this standard have an acceptable level of seizure risk to drive, noting that this same level of risk has been adopted by other countries in their regulation of commercial drivers. The MRB rejected this proposal and found that the current 10-year-off-medication rule should be retained. The DOT will consider this determination in developing revisions to its regulations.

In a September letter to DOT, the Epilepsy Foundation concluded that the MEP's recommendations should be accepted as the basis for

revisions to the regulations and that the MRB's decision to reject the recommendations was not based on adequate medical evidence. A copy of the Foundation's letter is available at www.epilepsylegal.org (click "What's New"). The Foundation argued that the current standard is based on a flawed analysis of "acceptable risk." A second deficiency with the current standard was highlighted: it disqualifies all persons with epilepsy who are on medication — without regard to the length of time they have been

Updated Summary of State Driver Licensing Laws

The Foundation has updated its state-by-state summary of laws on driver licensing eligibility for persons with epilepsy. Every state regulates driver's license eligibility of persons with certain medical conditions. The most common requirement for people with epilepsy is that they be seizure-free for a specific period of time and submit a physician's evaluation of their ability to drive safely. However, many states do not prescribe a specific seizure-free period and allow for a doctor's recommendation. Six states — California, Delaware, Nevada, New Jersey, Oregon and Pennsylvania — require physicians to report to the DMV their epilepsy patients.

The updated compilation reflects information available as of November 2008. To review a specific state's law, go to <http://www.epilepsyfoundation.org/living/wellness/transportation/drivinglaws.cfm>. It is recommended that interested persons also consult with their DMV to learn about any changes in applicable laws.

seizure-free. There are no data supporting the idea that people with epilepsy who are seizure-free for an extended period, but on medication, are less safe than those who are off medication. Also, the Foundation believes that requiring that one be off medication actually encourages risk taking that is directly contrary to promoting public safety.

For more information on the DOT rules, see <http://www.mrb.fmcsa.dot.gov>. Also see the fall 2006 issue of this newsletter (available at www.epilepsylegal.org) for information on how one can apply for an exemption from the rules, and obtain certification to drive despite a history of epilepsy. DOT has yet to rule on any of the dozen or more exemption requests submitted to date.

Advocates' Corner • *continued from p. 6*
revisions to many other parts of the Title III rules — for the full text of the proposal go to <http://www.ada.gov/NPRM2008/t3nprm08.pdf>.) For instance, the proposed rule would clarify that “assisting an individual during a seizure” is a recognized task performed by service animals. The proposal also states that, although service animals should be trained to perform the tasks noted in the definition of the term, there is no obligation that a service animal undergo formal training requirements and/or a requirement for a

training certification. Importantly, the proposal notes that appropriate training for service animals can include “individual training on how to respond to the onset of medical conditions, such as seizures.” And the proposed rules would formally adopt the Department’s above-stated guidance on permissible and impermissible inquiries about service animals. The proposal regulations, which are currently being reviewed by the White House Office of Management and Budget, are expected to be finalized soon.

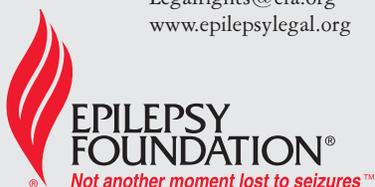
DONATING TO THE FUND

Won't you consider making a contribution to help support the Jeanne A. Carpenter Epilepsy Legal Defense Fund? Your donation will expand our capacity to provide legal assistance to the many people around the country who experience epilepsy-related discrimination every day. To make a tax deductible contribution, simply click on “make a donation,” which appears at the top of the Defense Fund’s Web site (www.epilepsylegal.org).



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