



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.

Federal Jury in Maryland Awards \$225,000 in Discrimination Case

For the past few years, the Epilepsy Foundation has received numerous reports about police department practices of screening out police officer candidates and incumbent officers based solely on their history of seizures. The Foundation believes blanket screening policies are unlawful because such policies abrogate an employer's obligation under the Americans with Disabilities Act (ADA) to individually evaluate whether an applicant or employee is qualified for a position with or without an accommodation.

In most instances, candidates and incumbent officers are screened out by employers who fail to conduct individualized assessments of their existing ability to safely perform in these positions. In other instances, officers who have been seizure free for several years are targeted for medical inquiries by police departments. This was the case in the matter of *Blake v. Baltimore County Police Department*. Blake, an undercover intelligence officer with the department, experienced a single seizure on the job in 1996. He was released by doctors to return to work three weeks after the seizure. He never showed any further evidence of illness or inability to perform his job duties.

In September 2006, the department ordered Blake to submit to a neurological electroencephalogram (EEG) and a fitness for duty examination without reviewing his personnel file or medical history. The department's request came shortly after Blake provided supportive testimony on behalf of his colleague, Philip Crumbecker, who was challenging a forced retirement after also experiencing a seizure on the job. Blake testified at Crumbecker's hearing before the County Board of Appeals that he also suffered a "potential seizure" while on duty, but was later able to perform his duties without opposition from the department. Blake submitted to the department's order to report for the fitness for duty examination without waiving his right to pursue legal action against the department. The County's doctor determined that Blake suffered a single seizure or seizure like episode and "there [was] no basis to prevent Officer Blake from continuing his work as a police officer." Despite the doctor's report, the department ordered Blake to submit to a compelled EEG. Blake filed a charge of discrimination with EEOC and later a lawsuit, asserting that the Baltimore County

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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 and legal support 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.



The U.S. Department of Justice also opened an investigation to review whether Baltimore County officials have a practice of violating the rights of employees....

Maryland ADA Case • *continued from p. 1*
police department's request was retaliatory. He also sought a permanent injunction to stop the department from compelling medical testing related to the 1996 incident and from further retaliatory actions.

The case went to trial in U.S. District Court for the District of Maryland in April 2010. After a six day trial, the jury awarded

Blake \$225,000. The U.S. Department of Justice also opened an investigation to review whether Baltimore County officials have a practice of violating the rights of employees under the ADA. Kathleen Cahill, a member of the Legal Defense Fund's attorney network, represents Blake and Crumbecker.

The Legal Defense Fund Helps File and Resolve Major Discrimination Cases

The following are some recent cases in which the Legal Defense Fund has provided support to 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 pleadings, contact the Fund at legalrights@efa.org.

Employment Cases

In re: J.B.: J.B. was offered a job as a Field Chemical Engineer with a corporation in Sugarland, TX to commence upon his college graduation. J.B. disclosed that he had epilepsy, which was well-controlled with medication. When J.B. contacted the employer about starting work, the company failed to place J.B. in the position offered despite medical clearance from the employer's physician. A Legal Defense Fund network attorney negotiated a settlement without the need to file a lawsuit.

Farmer v. St. Louis County Police Department. A confidential settlement was reached in this lawsuit filed under the Missouri Human Rights Act. Farmer applied for a position as a civilian security officer with the St. Louis County Police Department, but was denied the position because of his epilepsy and without any adequate consid-

eration of his fitness for the job. Farmer, who was cleared for work by his treating neurologist, had been seizure-free for some time, experienced only nocturnal seizures (seizures while sleeping), and had been successfully employed in a similar capacity without incident. This case was litigated by a Legal Defense Fund cooperating attorney.

Smith v. Consolidated Personnel Services, Inc. This lawsuit is the Fund's first case filed under the ADA Amendments Act (ADAAA). Smith was hired by a personnel services company as a Salesman in March 2006. He was diagnosed with epilepsy two years later. Smith disclosed his condition to his supervisor, who unlawfully revealed his condition to other employees. Smith was referred to as "seizure boy" and "old geezer," and labeled as "crazy" in front of other employees. Additionally, Smith requested an accommodation, but the company failed to engage in the interactive process to determine whether the accommodation was reasonable or necessary.

A Legal Defense Fund network attorney filed a lawsuit on Smith's behalf alleging unlawful discrimination under the ADAAA and the Age Discrimination in Employment Act (ADEA) for failure to accommodate, unlawful disclosure of his

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Medical Inquiries

A central issue in the Blake case was a medical inquiry. Title I of the ADA severely limits medical inquiries by employers. Employers cannot ask about medical conditions whenever they want, nor can they ask about medical conditions on employment applications. Under the ADA, medical inquiries are prohibited prior to an offer of employment. The ADA does not allow for medical inquiries for job applicants after a conditional offer of employment is given. After employment begins, employers can make medical inquiries but certain restrictions apply. The ADA's restrictions on medical inquiries apply to all employees, not just employees with disabilities. These provisions reflect Congress's intent to protect the rights of all employees from medical inquiries that do not serve a legitimate purpose.

The law says that an employer's medical inquiry must be job-related and consistent with business necessity. This means that the employer must reasonably believe, based upon objective evidence, an employee's medical condition poses *a significant risk to the health and safety of himself or others* or the medical condition *will impair his ability to perform essential job functions*. Medical inquiries may also be allowed under the ADA under other circumstances such as to evaluate or validate the need for a workplace accommodation or if the employee's medical condition is attributed to work performance issues.

Employees and job candidates with epilepsy are often sent to occupational doctors who have a contractual relationship with employers. In most cases, these doctors have limited knowledge about epilepsy and the individual's unique medical condition. These doctors often classify employees or job candidates unfit for duty, usually citing safety reasons. In these situations, the person's neurologist is the best person to counter the employer's attempt to disqualify the employee or applicant.

Doctors Responding to Medical Inquiries

Before responding to medical inquiries, a doctor

should request a copy of the job description so that he is aware of the specific job duties. After obtaining the job description, the doctor can prepare a detailed opinion letter regarding the person's medical fitness to perform the job duties. Some employers ask doctors to respond to a standardized medical inquiry form. However, it is best for doctors to attach an opinion letter that best describes the patient's health condition and employability. The letter should include information about the patient's seizure precipitants, seizure warning signs, seizure manifestation, recovery times, first aid for seizures and recommendations for reasonable accommodations.

Doctors responding to medical inquiries should avoid using broad, vague statements in their responses. For example, statements such as "employee should avoid duties that put him/her at risk" or "employee is barred from climbing or heights" are vague and can be problematic because employers use them to justify the disqualification of employees and job candidates. Instead, doctors should highlight the employee's ability to perform the essential job duties and include recommendations for reasonable accommodations (e.g., safety belt/harness, rubber matting around work area, helmet). Doctors can get additional suggestions of workplace accommodations for people with epilepsy from the Job Accommodations Network website (<http://askjan.org/media/epilepsy.html>) and view sample medical response letters on the American Epilepsy Society website (<http://www.aesnet.org/go/practice/practice-tools/epilepsy-and-employment-resource-central/physician-s-guide-responding-to-work-site-safety-issues>).

When in doubt about whether a medical inquiry is appropriate, an employee should always consult an experienced attorney about his legal rights and any recourse available. Employees or job applicants with questions may contact the Legal Defense Fund (www.epilepsylegal.org) for assistance.

Information provided is based on guidance issued by the EEOC (www.eeoc.gov) and AES (www.aesnet.org).

Discrimination Cases • *continued from p. 2*
confidential medical information, wrongful discharge, and hostile work environment. This case is pending before the U.S. District Court for Arizona.

Arrest for Seizure Related Behavior

In re: P.M.: P.M. was tasered, beaten by police, and arrested after experiencing a tonic-clonic seizure while parked along the side of the road in Palo Alto, California. He was charged with drunk driving and willfully resisting arrest. Medical testing at a local

Access to Medication in Schools and Childcare

In re: I.W.: The Legal Defense Fund recommended that a parent file a complaint with the Louisiana Department of Education after her child, I.W., was denied access to a public preschool by a local school board because the school lacked a nurse to administer Diastat. The school district offered a more restrictive school setting or home schooling as an alternative; however, the parent refused. The parent of I.W. placed her in a private school setting at her own expense and filed the complaint. The department determined that the school district failed to provide a free and appropriate public education (FAPE) in the least restrictive environment by denying the student's enrollment in the preschool program and offering only self-contained or home services. The school district was required to reimburse the parent for the expense of having to place the student in a private school. I.W.'s parent is currently negotiating with the school to administer the medication for this school year. She is receiving assistance from a Legal Defense Fund network attorney.

In re: A.W.: A.W., who was diagnosed with epilepsy in July 2008, was prescribed Diastat. She attended a federally funded child care program in New York City. The child care center refused to administer Diastat, which caused A.W.'s parent to wait at a nearby café daily to be available to administer the medication if necessary. With the assistance of the Legal Defense Fund's network attorney and the Department of Justice, the child care center agreed to change its policies and practices to provide reasonable accommodations to children with epilepsy or similar medical conditions that may require medications such as Diastat.

Higher Education

In re: C.H.: C.H., a photography student at the Art Institute of Colorado, was not allowed to return to school after she withdrew the previous semester to get her

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

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/attyresources.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 materials with resources and background information.

hospital revealed that only antiepileptic drugs were in his system. With technical assistance from the Fund, P.M.'s attorney was able to get the charges dismissed.

seizure activity under control. When she attempted to register for the next semester, she was told that she could not return unless her neurologist could guarantee that she would remain 100% seizure free during the school year. A Legal Defense Fund cooperating attorney set up mediation with the school and the Colorado Civil Rights Division. The issues were resolved and she was allowed to return to the Art Institute.

First Responder Wrongful Death Settlement
Wells v. County of Stanislaus, et al. The Legal Defense Fund provided technical assistance to attorneys who filed a wrongful death action against the Stanislaus County

California Police Department on behalf of the parents of a man with epilepsy. Wells was tasered and restrained by police after EMTs were called because he was having a seizure. According to reports, Wells was in a postictal state of confusion when he attempted to enter a neighbor's home. When Wells was not responsive to the officers' commands, they immediately tried to subdue him by striking him with a baton, tasering him and handcuffing him behind his back while kneeling on him. The evidence indicated the cause of death was asphyxiation (allegedly the result of the restraint). The parties reached a confidential settlement in June 2010.

Cooperating Attorney Profile

The Legal Defense Fund acknowledges Kathleen Cahill, a Baltimore, Maryland attorney, for her commitment to advocating for employees in all areas of employment rights, including disability discrimination. She also represents victims of sexual assault, medical malpractice, and other serious injuries.

Ms. Cahill began her career over 25 years ago at Piper & Marbury (now DLA Piper). After a couple of years with Piper she founded her own law firm where she has successfully resolved many disputes through negotiation, mediation or litigation. Most recently, Ms. Cahill successfully represented a Baltimore County police detective in a federal ADA employment case in which the Court found in favor of her client.

Ms. Cahill shared her thoughts about litigating employment discrimination cases in which an employer's medical inquiries are at issue.

- The most critical thing is to be dexterous. One should dedicate himself equally to the rigors of managing the challenging legal issues and the substan-

tial medical issues, while casting the case as a compelling, accessible human story that will resonate with the jury. Balancing those three components — legal, medical, and the human story — makes practicing in this area extremely interesting and demands the most of my analytic and advocacy skills. Managing those components — legal, medical, and the human story — also is the key to navigating the litigation process, in particular avoiding summary judgment and convincing the court to give good jury instructions, and ultimately, to conveying my client's story in a compelling way that moves the jury to deliver full justice.

- In the more esoteric area of medical inquiries, it is important to bear in mind that few courts have encountered this "niche" of the ADA. A prohibited or excessive medical inquiry can be seen as a mere technical violation, of little consequence compared to loss of employment or failure to hire. It is critical to

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Attorney Profile • *continued from p. 5*
elevate the perceived minimal impact of the violation in the eyes of the judge and ultimately the jury.

- What is most striking and motivating about this area of the ADA is that there is no other scenario where an employee suddenly ends up all alone before an agent of the employer to be “grilled” and physically probed, where there are no procedural safeguards or balance, and usually no sense that the employee has any rights at all. And yet the area of scrutiny — confidential medical information and bodily integrity — is more sacrosanct than most. Add to that that when these medical inquiries or compelled “fitness-for-duty examinations” transpire, the prospect of being

terminated looms large, making the employee more frantic to comply. It is a worthy ambition to spread the word to workers, particularly those with a disability, medical issues or a history of either, that they do have legal rights when ordered to turn over medical information or submit to a medical evaluation at the hands of the employer’s chosen healthcare provider. Interest groups and lawyers can then be called upon to provide information about the targeted worker’s rights before damage is done. This would serve the end of balancing this woefully unlevel playing field. Otherwise, many workers will continue to surrender their precious medical privacy in a desperate attempt to save their employment, with only a few left to fight about it after the fact, often from a position of unemployment.

New Resources for Consumers and Their Advocates

Factsheet for Merchant Mariners with History of Seizures. The Fund has prepared a factsheet to assist Merchant Mariners who are applying for or requesting license renewal through the National Maritime Center (NMC), a division of the United States Coast Guard. The NMC is tasked with licensing and credentialing Merchant Mariners. The factsheet provides information on how merchant mariners can appeal the denial of a license renewal.

Fact Sheet on Family Medical Leave Act. The Foundation has issued an updated fact sheet summarizing the Family Medical Leave Act (FMLA) which is the federal law that protects the jobs of people who must take time off from work for treatment of serious medical conditions.

See <http://epilepsyfoundation.org/epilepsylegal/LegalFactSheets.cfm> for updated factsheets.

In addition to managing her law firm, Ms. Cahill teaches trial advocacy at the University of Baltimore School of Law. She is also the current Chair of Maryland Employment Lawyers Association (“MELA”). Furthermore, Ms. Cahill has been selected as a Super-Lawyer, as Baltimore’s Best Employment Lawyer, and for inclusion in The Best Lawyers in America.

The Fund appreciates Ms. Cahill’s commitment to workplace fairness and her advocacy on behalf of people with epilepsy.

Written by Cherree Sanders, the Fund’s Case Coordinator.



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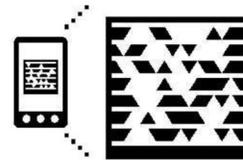
Contact the Epilepsy Foundation Government
Affairs Department for more information at:
(301) 918-3766 or aostrom@efa.org



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, go to <http://tinyurl.com/2b62hwg>. You will be

directed to the Legal Defense Fund donation site, or scan this tag with your Smartphone and instantly go to the Legal Defense Fund donation page to make your charitable donation now.

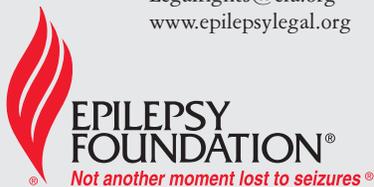


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