



Jeanne A. Carpenter

Epilepsy Legal Defense Fund newsletter

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

Issue No. 1 • Spring 2006

Targeted Legal Advocacy

The Fund has undertaken a number of legal advocacy initiatives addressing areas critical to persons with epilepsy.

Employment Discrimination — Blanket Exclusion Policies

One disturbing practice about which the Fund is particularly concerned is the use of blanket disqualification standards for certain types of jobs such as firefighter and police officer positions. Some employers are automatically disqualifying from consideration applicants with a history of seizures, even if the seizures are controlled by medication. The courts have found that a selection practice such as this — which does not involve an individualized assessment of the ability of an individual with a disability to perform the position — violates the Americans with Disabilities Act (ADA). The Fund is providing support to a number of law offices representing firefighters and others denied employment opportunities based solely on a history of seizures. Also, the Fund has provided to the Equal Employment Opportunity Commission (the federal agency which enforces the employment provisions of the ADA) recommendations on enhancing its enforcement activities on behalf of persons with epilepsy regarding this and other systemic discrimination issues.

Mishandling of Seizures by First Responders

First responders (such as police and EMTs) have on occasion responded to persons experi-

encing seizures by employing dangerous, sometimes deadly, forcible restraint methods such as “hog-tying,” or pinning individuals face-down with pressure applied to the body. These practices are sometimes used as a means of subduing persons who may appear to be combative, but are actually displaying typical symptoms of a seizure or post-seizure confusion and agitation. Such practices may lead to asphyxiation, and continued resistance may cause cardiac arrest. While the overwhelming majority of first responders do an outstanding job of recognizing and attending to persons experiencing seizures, severe injuries and even deaths still are occurring. To help address this issue on a national level, the Fund has collected litigation documents on related cases around the country and is making these available to attorneys handling such cases; and has identified counsel to take on significant cases, providing them with case support. Informational materials, including a position statement, background information and a case list, are available on the Fund’s Web site (www.EpilepsyLegal.org).

Medication in School and Day Care

Schools and day care facilities all too often refuse to permit their staff to administer a FDA-approved emergency medication, Diastat,[®] to treat children who have prolonged seizures accompanied by loss of

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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.



While the Fund is available to provide legal assistance on all epilepsy-related discrimination issues, we are especially eager to learn about individuals who are facing discrimination in any of these high priority areas. Individuals who may need legal assistance in these areas should contact the Fund.

Targeted Advocacy • *continued from p. 1*
consciousness. Instead, schools and day care facilities will frequently call 911 to transport the child to an emergency room for treatment, even if this practice is contrary to the care plan established by the child's neurologist. Delay in administering Diastat® for the time it takes emergency personnel to arrive could result in neurological damage or other serious health consequences.

In public schools, administrators frequently assert this practice is justified because their schools lack personnel with necessary expertise, or they may assert that state laws permit only RNs (who may not be immediately available at the school) to administer this medication. However, Diastat® may be appropriately administered by non-medical personnel. Courts and hearing officers have ruled that schools and day care centers are required to ensure that Diastat® (and similar medications such as for treatment of diabetes)

In order to address concerns raised by school officials, Epilepsy Foundation® affiliates have provided an array of training to them and have worked to change the state laws that may restrict school personnel from administering this medication. For instance, last year, largely as the result of the efforts by the Foundation affiliate based in Louisville, the Kentucky Governor signed into law a bill that provides for the administration of Disastat® (along with glucagon for diabetes treatment) in public, private and parochial schools.

The statute provides that schools shall require that at least one school employee, who has met state competency requirements (and consents to provide the med-

ication) be on duty at each school during the entire day to administer Disastat® (and glucagon) in an emergency. It specifies that this health service may be delegated by RNs, doctors and others to school employees. The law is available on the Kentucky Legislature's Web site at <http://www.lrc.ky.gov/record/05rs/HB88.htm> (click on the last link — "FCCR"). Prior to enactment of this bill, Kentucky law did not require any school employee, whether a nurse or other caregiver, to administer Diastat® in public schools. Although the policy of school districts had varied, the typical response to a child experiencing a prolonged seizure had been to call 911.

The Fund is working with several law offices to ensure this medication is administered in both day care programs and schools, and is glad to provide resources to others.

each client referred with a free initial consultation and services to a maximum of three hours, and to consider, as appropriate, continuing representation on a pro bono, sliding fee scale or contingency fee basis (many referrals

A Few (or More) Good Attorneys Wanted

The Fund is seeking to expand its growing network of cooperating attorneys (both those with or without experience in disability law are welcome). Each network participant is asked to commit to providing

each client referred with a free initial consultation and services to a maximum of three hours, and to consider, as appropriate, continuing representation on a pro bono, sliding fee scale or contingency fee basis (many referrals

will involve only short-term assistance such as providing oral advice or making a call to resolve a dispute). In return, the Fund's staff offers technical assistance and a variety of resources (see box at right). The Fund maintains a database on the practice areas of cooperating attorneys and the type of case referrals desired, and always limits referrals based on this information.

Individual attorneys and law offices may register on-line directly from the Fund's Web site to start receiving case referrals. 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.

Cooperating Attorney Profile

The Fund greatly appreciates the advocacy services of Christopher Kenney, a partner in the Litigation Department of the Boston law firm of Sherin and Logden LLP, who recently joined the Fund as a cooperating attorney. Mr. Kenney successfully negotiated two employment discrimination matters on behalf of two individuals referred by the Fund (see below for details). Mr. Kenney, who is a member of the firm's Management Committee and co-chairs the Construction Law Group, focuses his practice in trial and appellate advocacy. He has extensive experience in the litigation of tort and contract claims, including all types of business disputes, employment law, insurance law, maritime, construction and real estate disputes. *Boston Magazine* ranks Mr. Kenney as one of the Top 100 Lawyers in Massachusetts. For more information about Mr. Kenney, visit <http://www.sherin.com/attorney.asp?b=34>.

The first case referred to Mr. Kenney by the Fund involved Ms. T, a cashier at a bakery, who experienced a seizure at work. Ms. T requested an accommodation in the form of coverage of her register whenever she sensed

Resources for Attorneys, Affiliates and Consumers

The Fund has recently developed or updated the following resources, which are available to network attorneys, the Foundation's affiliates and consumers to assist with advocacy efforts.

WEB SITE RESOURCES (www.epilepsylegal.org)

- *Brief Bank* – These materials are available to "members only" – i.e., only attorneys registered with the Fund and the Foundation's affiliates.
- *Case Database* – A searchable database of epilepsy-related discrimination cases; this is also a "members only" resource.
- *Resources for Attorneys and Consumers* – A range of advocacy tools and links to guidance on disability rights issues contained on federal agency Web sites.
- *Legal Fact Sheets* – Outlines of major areas of disability law impacting persons with epilepsy, written for non-attorneys.
- *On-line Discussion Forum* – Cooperating attorneys can post queries and share information on case developments, best practices and other matters — and receive advice and other feedback from their peers around the country.

OTHER RESOURCES — which can be provided upon request

- *Dockets* – An outline of current and recently resolved epilepsy-related cases (handled by network attorneys and others) in key areas of law, with contact information for attorneys handling the case.
- *Case Lists* – The Fund can make available lists of cases on critical issues, such as epilepsy as a covered disability under the ADA.
- *Referrals to Expert Witnesses* – The Fund is glad to help locate experts on such issues as epilepsy treatment, vocational rehabilitation and workplace accommodations.
- *Amicus Participation* – The Epilepsy Foundation will file amicus briefs in selected cases of national significance. For more information, visit <http://www.epilepsyfoundation.org/epilepsylegal/amicusbrief.cfm>.
- *Case Financial Support* – The Fund provides limited financial support to defray litigation costs in selected critical cases. For more information, visit <http://www.epilepsyfoundation.org/epilepsylegal/financialsupport.cfm>.

the onset of a seizure, but was denied. Ms. T's employment was terminated approximately one month later and the employer asserted that the basis for the termination was a lack of knowledge regarding job duties and a failure to disclose her health condition prior to hiring.

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Connecting with the Fund

Over 150 law offices now participate in the Fund's referral network (agreeing to provide up to three hours of pro bono assistance), with about 200 open cases on which the Fund is providing assistance. The Fund provides legal guidance and lawyer referrals on a broad range of discrimination issues, such as the following:

- Employment discrimination
- Accommodations needed in school and day care programs
- Criminal justice matters (such as arrest for seizure-related behavior)
- Federal entitlement programs
- Driving restrictions
- Improper handling of seizures by first responders

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, and selecting option 4 when prompted. Attorneys representing persons experiencing such discrimination may contact the Fund for assistance via email (Legalrights@efa.org) or by calling 1-301-459-3700.

Attorney Profile • *continued from p. 5*

The woman filed a discrimination complaint with the state human rights agency.

Mr. Kenney represented the woman pro bono in a mediation hearing with the agency. As a result of Mr. Kinney's advocacy, the employer agreed to provide a monetary settlement to cover the woman's lost wages. She did not wish to seek reinstatement. Ms. T was extremely pleased with the Mr. Kenney's efforts on her behalf.

In the second matter, Mr. Kenney advocated pro bono on behalf of an information technology worker, Mr. S, whose employer was requiring him to be on call from home late at night to respond to work requests. The employer refused to modify this requirement despite the fact Mr. S had informed the employer that disturbances in his sleep pattern (that would result from this job requirement) can trigger his seizures. After Mr. Kenney sent the employer a couple of letters advising it of the need to waive this requirement as a reasonable accommodation, the employer agreed to do so.

Selected Recent Cases in which the Fund has Provided Support

- *Jibben v. UPS* (D. Nev. Settled 2005). A United Parcel Service manager who experienced nocturnal seizures was terminated when the company declined to provide an accommodation — allowing a slight reduction in his hours. This accommodation was needed in order to allow Mr. Jibben to maintain a stable sleep pattern, which would help prevent recurrent seizures. The Fund filed an amicus brief, after which the court denied UPS' motion to dismiss case. The court found that Mr. Jibben's epilepsy may indeed entitle him to protection from discrimination under the ADA, but left final resolution of the issue for a trial. Additionally, the Fund provided assistance with the trial brief and limited funds to help defray some lit-

igation costs. The case was settled on the eve of trial, and the terms of the settlement are confidential.

- *Morris v. Oldham County Sheriff's Department* (pending Ky. State court). Mr. Morris, a deputy sheriff, was terminated after reporting that he experienced a seizure (off the job), and filed litigation in Kentucky State Court under the ADA and the State employment discrimination statute. The Sheriff's Department claimed that his condition rendered him incapable of performing critical law enforcement duties in a safe manner; however medical evidence does not support this and Mr. Morris claims that the

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The Fund filed an amicus brief, after which the court denied UPS' motion to dismiss case.

How to Prove Discrimination Involving Workers with Epilepsy

As a result of several Supreme Court decisions in 1999 narrowing the scope of coverage under the ADA, people with epilepsy and other so-called “correctable” or “treatable” conditions (such as diabetes) have had difficulty proving in court that they have a disability covered under that law. (See, for instance, *Sutton v. United Airlines*, 527 U.S. 471, 482 (1999).) Under the ADA, in order to qualify for protection from discrimination in the workplace (as well as in public accommodations and other areas), it must be shown that the individual has a physical or mental impairment that “substantially limits” one or more major life activities. In these Supreme Court cases, it was ruled that, in determining whether a condition is “substantially limiting,” the effects, both negative and positive, of “mitigating measures” — such as medication — must be considered. This represents a reversal in the trend of cases decided prior to the *Sutton* case, and the lower courts, applying the *Sutton* decision, have generally found that people with epilepsy are not substantially limited if their seizures are well-controlled by medication.

Consider All Limitations Imposed by Epilepsy and Medication. Attorneys representing persons claiming epilepsy-related employment discrimination should carefully consider all possible ways in which their client is substantially limited in the ability to work or engage in some other daily life activity such as sleeping, self-care, and reproduction. Advocates may also show that the treatment itself causes a substantial limitation; for instance, medications may significantly interfere with cognition, memory, and reproduction, among other activities. In addition, many people’s seizures are not completely controlled by medication. These individuals may have seizures on the job, rendering them completely unable to perform the functions of the job for the duration of the seizure and often, for a period of time following the seizure activity. Individuals who fall into this category might find themselves substantially impaired because of the frequency of seizure activity or the effects of the seizures when they do occur. And for many people with seizures, there is no such thing as being “completely controlled.” One can be well-controlled for a period of time and then have “breakthrough” seizures.

These points are illustrated in a recent favorable decision: In *Bley v. Bristol Twp. Sch. Dist.*, 2006 U.S. Dist. LEXIS 3113 (D. Pa. Jan. 25, 2006), the court found that a woman whose epilepsy is fairly “well-controlled” with medication may indeed be entitled to ADA protection. The court, in denying the employer’s claim for a summary judgment that Ms. Bley does not have a covered disability, noted that her epilepsy *clearly severely restricts her from several major life activities (walking, talking, thinking) while she is experiencing and shortly after a seizure. Although she currently takes four different anti-epileptic medications twice daily, her epilepsy remains unpredictable and difficult to manage and she continues to suffer from grand mal seizures some 3-4 times per year. Plaintiff is permanently restricted from driving because of the epilepsy and the medications that she takes to control her condition. While it is true that unless she is having a seizure, Plaintiff’s life is unaffected by her epilepsy and that while the frequency of her seizures are somewhat controlled by medication, she is not able to control when her seizures occur or their severity and thus we find that her impairment is not altogether remedied by these measures.*

The Fund has developed a detailed fact sheet analyzing the impact of epilepsy on major life activities, and an accompanying client worksheet. These materials may be used to elicit information from a client on his or her particular condition and how it affects the ability to participate in common life activities. These materials are available on the Fund’s Web site at <http://www.epilepsyfoundation.org/epilepsylegal/majlifeactivities.cfm>. Another helpful resource is the EEOC’s guidance — *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing “Disability” and “Qualified.”* This guidance is available on the EEOC Web site at www.eeoc.gov/policy/docs.field-ada.html.

Consider whether the Individual is “Regarding as Substantially Limited in Working.” Additionally, attorneys should consider claiming discrimination based on an employer’s perception that the employee’s or applicant’s epilepsy substantially limits the individual in the major life activity of

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Lawyers' Corner • *continued from p. 5*

working. The ADA applies to an individual if he or she is “regarded as” having a substantial limitation, whether or not the perception is accurate. Congress included this provision in recognition of the prejudice which results from archaic attitudes and insensitivity to individuals with a disability; while the individual’s impairment might not actually diminish his or her physical or mental capability, it could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment. See School Board of Nassau County, Fla. v Arline, 480 U.S. 273 (1987).

And even if this perceived limitation relates only the individual’s ability to work, that may be sufficient to prevail in an ADA case. However, it is necessary to show that the employer, in denying an employment opportunity, regarded the individual as incapable of performing an entire class of jobs or a broad range of jobs (see EEOC regulations implementing the ADA at 29 C.F.R. § 1630.2(j)(3)(i)). A class of jobs is defined as including jobs utilizing similar training, knowledge, skills or abilities such as heavy labor, maintenance, manufacturing, truck driving, data entry, mechanic, nursing, teaching and security jobs. Recently, workers with epilepsy, and a condition which can have a similar impact on daily activities (such as loss of consciousness) — diabetes — have been successful in pursuing such claims. Some examples are briefly outlined below:

- Rodriguez v. ConAgra Grocery Products Company, 2006 U.S. App. LEXIS 565, 2006 WL 45857 (5th Cir. January 10, 2006). The court of appeals, finding that a man with diabetes, Mr. Rodriguez, was rejected for a laborer position in violation of the ADA, ruled that the employer regarded the individual as substantially limited in the major life activity of working. This finding was based in part on evidence showing that the human resources manager believed that Mr. Rodriguez was unable to perform the job because of the risk of dizziness and blackouts and that there were essentially no manual labor jobs for which he would be qualified. The company’s physician similarly expressed the opinion that Mr. Rodriguez would present an unacceptable safety risk unless he worked in a “padded room,” indicating his belief that Mr. Rodriguez would be unqualified for any manual labor job (and thus, would be unfit for a “class of jobs”).
- Equal Employment Opportunity Commission v. Northwest Airlines, Inc., 246 2d. 916 (W.D. Tenn. 2002). The court found that a man with diabetes who was rejected from an airline baggage handler position was regarded as substantially limited in working based on the employer’s stated belief that he is at risk for loss of consciousness. The employer determined that because of this concern, the worker could not be allowed to drive, operate heavy equipment or work at heights; therefore, the court found that based on these perceived limitations, the individual would be excluded from a broad range of jobs.
- Taylor v. USF-Red Star Express, Inc., 2005 U.S. Dist. Lexis 3600 (E.D. Penn. March 8, 2005), appeal pending. The court refused to overturn a jury verdict awarding \$159,000 to a dock worker whom a jury had found was improperly placed on leave in violation of the ADA, based on the employer’s erroneous belief that the employee had epilepsy (the individual in fact experienced seizures as the result of taking a nutritional supplement). The court found that the employer mistakenly perceived Mr. Taylor as prone to seizures and to sudden loss of consciousness and as a danger to the public. The court stated that “If the Jury believed these statements, they could easily have believed that Defendant regarded Plaintiff as being substantially limited in one or more major life activities, such as walking or talking.” (Presumably, this finding would extend to the activity of working, but the court did not address this point.)
- Thompson v. AT&T Corp., 2006 WL 89931 (Jan. 12, 2006 W.D. Pa.), 17 A.D. Cases 884. The court ruled that a call center customer service representative with epilepsy (who handles billing and customer service calls) can go forward with her claim of “regarded as discrimination,” defeating a motion for summary judgment, after finding that a reasonable fact finder could find that AT&T regarded her as unable to perform a wide range of jobs. The court gave weight to plaintiff’s deposition testimony stating that she was constantly reminded by her supervisor that there were certain jobs that a person with her disability could not perform.

Recent Cases • *continued from p. 4*

Sheriff's Department failed to offer adequate accommodations. The Fund helped prepare the lawsuit and a brief opposing the Department's motion to dismiss the case.

- *Brun v. Truckee Tahoe Airport District* (pending Ca. State Ct.). A local airport terminated Mr. Brun, an aircraft mechanic whom the employer asserts violated airport safety rules. A lawsuit was filed claiming (under California State law) harassment based on Mr. Brun's epilepsy and that the safety violation either never occurred or was related to a memory impairment resulting from epilepsy medication, which the employer failed to accommodate. The Fund provided briefs and other resources and is continuing to provide assistance.
- *Simpson v. Raytheon Co.* (E.D. Tex., filed 2005). Ms. Simpson was employed as an engineer by Raytheon for several years before being diagnosed with a form of epilepsy in which her seizures are triggered by chemical exposure. Although informed of this sensitivity, Raytheon refused to grant Ms. Simpson's request to disclose information on the extent of her chemical exposure in the workplace, so as to allow her to take precautions, and Ms. Simpson was terminated. The Fund referred the individual to Advocacy Inc., the designated protection and advocacy agency for Texas, which filed a lawsuit alleging violations of the ADA and state law. Trial is scheduled for September.
- *Grant v. Alamo Community College District*, (W.D. Tex., filed 2005). Plaintiff, who has a seizure disorder, was discharged from her position as a child care worker at a college day care center. The plaintiff was discharged despite the fact that she had been cleared to return to work (after experiencing a couple of seizures) with some minimal restrictions that would

not interfere with essential job duties. The employer failed to respond to the plaintiff's request to consider reassigning her to another position as a possible accommodation.

- *Jardine v. City of Tempe Arizona* (Az. Superior Ct. case dismissed 2005). Mr. Jardine, an Arizona State University student died in 1999, following a seizure on campus, after EMTs forcibly restrained him face-down while he was handcuffed behind the back. Apparently, Mr. Jardine appeared combative as a result of post-seizure confusion, prompting EMTs to restrain him when they misunderstood the nature of his behavior. Despite the submission of expert testimony at trial that this prone restraint caused Mr. Jardine to die of asphyxiation, the jury issued a verdict finding that the EMTs involved were not responsible for his death. However, one of the defendants, Arizona State University, reached a settlement with the family in which the University agreed to pay \$800,000 and establish a scholarship for students with disabilities. The Fund had provided a number of resources to assist the family's attorneys.
- *Estate of Becerra v. City of Nashville* (Tn. Fed. Ct. filed 2005). In this case, similar to the one above, Nashville EMTs, paramedics and firefighters, responding to a man experiencing a complex partial seizure (Mr. Becerra), allegedly forced the man onto his stomach, and restrained him, tying his hands and ankles behind his back. Mr. Becerra died shortly after being restrained in this manner, potentially the result of asphyxiation or cardiac arrest. The action, which is pending, raises civil rights claims and seeks monetary damages. The Fund assisted in finding a law firm to represent the family and is providing legal support.

The Fund
referred the
individual to
Advocacy Inc.,
the designated
protection and
advocacy agency
for Texas, which
filed a lawsuit
alleging violations
of the ADA
and state law.
Trial is scheduled
for September.

RESOURCES

LOCAL FOUNDATION AFFILIATE SERVICES

The Epilepsy Foundation's affiliates provide valuable assistance to individuals with epilepsy and their representatives. The Epilepsy Foundation® is a system of community-based, affiliated organizations that work to provide people with epilepsy and their families with access to critical services where they live and work. Locally-based Epilepsy Foundations provide information and referral services tailored to their communities, sponsor professional education seminars for allied health professionals and educators, mobilize individuals to serve as advocates, and participate in public education campaigns. To locate an affiliate serving a particular community, go to <http://www.epilepsyfoundation.org/aboutus/AffiliateLookup.cfm>.

EEOC RESOURCES

The Equal Employment Opportunity Commission issued a set of questions and answers on Epilepsy in the Workplace and the ADA, available at <http://www.eeoc.gov/facts/epilepsy.html>.

The EEOC also recently issued an opinion letter which discusses permissible medical inquiries for employees experiencing seizures on the job, and employers' duty to provide alternative transportation to a work site for an employee prohibited from driving due to recent seizures (available at <http://epilepsyfoundation.org/epilepsylegal/genattypesources.cfm>).

RESOURCES AVAILABLE FROM THE JOB ACCOMMODATION NETWORK (JAN)

JAN, a free consulting and technical assistance provider, is a service of the Office of Disability Employment Policy, U.S. Department of Labor. JAN is an extremely useful tool for advocates and consumers on devising workplace accommodation strategies for people with disabilities, including those with seizure disorders. JAN also provides technical assistance regarding the ADA and other disability rights legislation. The service can be contacted at 1-800-526-7234 or <http://www.jan.wvu.edu>. The following may be of particular interest:

- *Fact Sheets on Accommodations for Persons with Epilepsy.* Consumer-friendly fact sheets on epilepsy issues are available at <http://www.jan.wvu.edu/media/epil.htm>.
- *Low Cost Audio/WebTraining Series.* JAN will unite national experts on job accommodation and disability employment law to provide training opportunities via one-hour audio conferences and Webcasts in 2006. The Accommodation and Compliance Training Series provides a convenient opportunity for a range of professionals to discover ways to enhance an organization's ability to accommodate and employ people with disabilities. For more information and registration, go to <http://www.jan.wvu.edu/teleconf/Teleconf.htm>.



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