

2002 Leadership Challenges on Employment Policy

Audio Conference Series



ADA - Supreme Court Interpretations Analysis and Implications

January 31, 2002

Featured speakers:

Moderator, James Schmeling
Associate Director, Law, Health Policy & Disability Center
College of Law, University of Iowa

Peter Blanck
Director, Law, Health Policy & Disability Center
College of Law, University of Iowa

Robert Silverstein
Director of the Center for the Study and Advancement of Disability Policy

Leonard Sandler
Co-Director, Law, Health Policy & Disability Center and
Clinical Professor of Law
College of Law, University of Iowa

Mark Zaiger
Attorney, Shuttleworth & Ingersoll, PLC

For information about other audio conferences in this series or to listen to the archive of this conference, go to the following Web address:

http://www.its.uiowa.edu/law/events/LeadershipConf_audioseries.htm

James Schmeling: This is **James Schmeling** from the Univ. of Iowa, I am going to take a couple of minutes to introduce the calls the subjects and the people who are on the call and then we'll turn it over to Dr. Peter Blanck for some introductory remarks. We'll go to our first speaker.

Welcome to the 2002 leadership challenges on our employment policy audio-conference series. This first call is covering Supreme Court interpretations ... (cut off) ... our audience is ... (cut off) ... locations in 18 states. Participants include people from the Department of Labor? ... (cut off) ... Rehabilitation agencies, Work Incentive grantees, Workforce Development Centers, Developmental Disabilities, ... (cut off) ... , colleges and universities and community rehabilitation providers. We have several ADA experts joining us today including Dr. Peter Blanck, the Director of the Law, Health Policy and Disability Center, Robert Silverstein is the Director of the Center for the Study and Advancement of Disability Policy. Len Sandler is the co-director of the Law, Health Policy and Disability Center and Mark Zaiger who is an attorney from Shuttleworth and Ingersoll.

The call will start off with a 25-minute policy overview and notes about the cases decided by the Supreme Court by Robert Silverstein, followed by a 15-minute question and answer reaction time. We'll then move on to ... (cut off) ... Len Sandler and Mark Zaiger for a 45-minute discussion of overarching themes and the courts opinions such as the scope of the ADA and protected class, reference to agency regulations, underlying and competing policies of access to employment, and welfare role reduction and the meaning to the employment community, followed by another 15-minute discussion time. Finally we'll move into a 15-minute panel and interaction from all our presenters on the future of the ADA and other civil rights law. I'd like you to please hold your questions until the 15-minute discussion time if possible. This call is being recorded and will audio-streamed and transcribed by our website afterwards. If you have any objections to being recorded, please disconnect from the call.

I am going to turn it over to Dr. Peter Blanck for a brief introduction.

Peter Blanck: Well hello everybody. It is a pleasure to be with you from people from all over the country, from Alaska to Boston ... (cut off) ... The first of a series, which we hope will contribute to an interesting dialogue as James said that is sponsored by our center here the Law, Health Policy and Disability Center. Bobby Silverstein's center in Washington D.C., the Study and Advancement of Disability Policy by the US Department of Education, through our ... RRTC ... grants and through the Department of Labor through it's Labor, Employment and Training Administration division.

I want to welcome you all with an array of backgrounds. I also want to recognize Michael Morris who is a member of our staff here at our center and is director of the RRTC ... and he is participating in this call.

This call is very timely for us for a number of reasons. For me, we've filed a brief just yesterday in the United States Supreme Court in a case called *Echazabal v. Chevron* involving whether or not an employer can decide if that person can decide whether or not a person has a disability that

doesn't necessary effect others and the person is perfectly qualified ... (cut off) ... The person may become ill, or injured in the future. We're also at a high water mark—it is interesting, some of you may have seen an article by <inaudible> in the Washington Post and elsewhere about whether or not it is time to think about amending the ADA or whether or not we should send clearer signals to the courts, both at the federal and state level, and I think Bobby Silverstein will address many of these themes in his opening comments. But I hope that you will all feel free to participate and will all learn together about some very important issues that have a wide range of impact. I'd like to turn it now to really a very distinguished member of this call, many of you may know him, who is instrumental with disability policy and law, Bobby Silverstein.

Bobby Silverstein: Thank you. For the next 25 minutes or so, I'm going to try to describe, walk through the 12 Supreme Court cases and the three cases pending before the court. Just to try to lay a foundation framework for our subsequent discussion in terms of themes and then what to do next. But before I talk about the Supreme Court cases, I think it is very, very critical to have a framework for making such an analysis, and this framework which I ... (cut off) ... call the Disability Policy framework is based on trying to look at all the laws we've passed over the last decade and a half for people with disabilities and see if there are a common set of themes. Many of you know that I was a Staff Director and Chief Counsel of the Senates ... (cut off) ... Disability Policy, chaired by Senator Harkin for ten or so years. After I left, I thought that it was very critical that we develop a framework for analysis, whether it's for analyzing court cases or analyzing disability programs or analyzing generic programs, like Workforce or Welfare to see how we stack up against this framework. This framework is described in a law review article called "The Emerging Disability Policy Framework, a Guidepost for Analyzing Public Policy," published in the Iowa Law Review in August, 2000. We will put up in this site, hopefully James I will talk to you later, how to get a copy of the article,(cut off).....how to get a copy of the summary of the article. ... (cut off) ... I am using the PowerPoint handouts that are in the website for the Univ. of Iowa that was in that introductory materials. There you can either get a memo form or PowerPoint handout. I am going to basically be following—so my presentation in other words, is based on a handout, that if you don't have now, you can get after the conference is over.

To understand the Supreme Court cases then, we have to start with how we dealt with people with disabilities historically in this country. Public policy approach was basically based on the following premise that people with disabilities were defective and in need of fixing. If we couldn't fix them, we had excluded them, we segregated them, we treated them based on charity and a dependency, paternalistic model. Let me give you a quick example of the way policy makers used to treat people with disabilities, prior to the enactment of IDEA. It was a Supreme Court case in the state of Wisconsin dealing with a child, Merrit [sp?], who had cerebral palsy. The court described Merrit as being a "defective child." They said that he produced a "depressing and nauseating effect on teachers and the school children" and the court concluded that Merrit had cerebral palsy should be totally excluded from public education because his presence is "is harmful to the best interest of the school." When we passed the ADA, we rejected this old approach, this whole paradigm and instead then, we recognized that disability is a physical condition that affects the ability of the person to function in the world. That what we really should be doing is focusing on fixing the environment, not fixing the individual. And thus we came up with the basic premise that disability is a natural and normal part of the human

experience, that in no way diminishes a persons right to fully participate in all aspects of society. In other words, we established a new protected class for civil rights laws. Just like women and minorities are covered, the ADA said that people with disability should be covered so that they can enjoy, fully participate in all aspects of society. The ADA announced four goals for disability policy: quality of opportunity, full participation, independent living and economic self-sufficiency. And these are key again, because when we look at the Supreme Court and how they dealt with the cases, we are going to test it against these goals.

The first goal is equality of opportunity. We should focus on people with disabilities as individuals, based on fact, based on science, based on objective evidence; not fear, ignorance and prejudice. Secondly, we must provide meaningful opportunity for people with disabilities. It is not okay to just provide opportunities for the “average person.” We need to provide meaningful opportunity, which may be an interpreter for a person who is deaf. It may be alternative accessibility standards for those who are blind. It may be physical accessibility. It may be reasonable accommodation. It may be a reasonable modification. But the key concept here is not necessarily equal opportunity, but the opportunity must be meaningful and effective. And the third is inclusion and integration. People should not give up their right to interact with non-disabled folks in order to receive services and benefits. The second goal is full participation. That means informed choice and empowerment self-determination for people with disabilities they should be involved, not only in areas affecting them individually, but also at the system level. The third goal is independent living. This is a legitimate outcome of public policy. And the fourth goal is economic self-sufficiency. That includes cash assistance where necessary, as well as work incentives. Now let’s use that framework now for looking at Supreme Court cases.

The first case that come down on June 15 – a nine to nothing decision – was *Yeskey*. The case was very simple. Whether title two state local governments – title II the ADA dealing with state and local government – covers prisons. The court said “yes.” All state programs including programs operated by prisons are included. In the sense, what they were saying is we need to fix the environment and that environment includes all aspects of society, including prisons.

The next case was called *Bragdon v. Abbott*, decided June 25, 1998. It was a five to four decision, a close decision. There were two issues in that case. The first was whether HIV infection is a disability under the ADA, when the infection has not yet progressed to the so-called “symptomatic phase.” So this dealt with the issue ... (cut off) ... of the protected class. The second issue was whether or not this individual who was infected with HIV posed a direct threat to the health and safety of the dentist who he was trying to get his, who he went to and was trying to get his teeth examined. The court held that with this individual, the infection – HIV – was in fact a disability because it substantially limited a major life activity, in this case reproduction.

The second issue, the way the court resolved it, was that they said the existence of a direct threat to the dentist must be based on medical or other objective evidence. Not what the doctor thought – not what he reasonably thought was going to be a direct threat – but based on objective evidence, and had great deference to public health ... (cut off) ... Again the key issue here is that the court got it with respect to individualization. Focus on science, objective evidence, not fear, ignorance and prejudice. They got the notion of inclusion. They got the notion of

independent living as being a key goal, because if folks cannot go to places like doctor's offices, or a dentist office, they cannot live independently. And finally they basically said let science decide. So even though it was a close decision, the court got the essence of ADA.

The next case was called *Caroline Cleveland v. Policy Management Systems*, decided May 24th 1999. A nine to nothing decision. This was a very complex case and it was a surprising and positive result. The case tried to deal with the issue of whether ADA erects a special presumption that would significantly impact those receiving SSDI benefits from also simultaneously pursuing an ADA case. In the essence here the case is, how can you say you disabled and get cash benefits and at the same time say that you are capable of working. The court recognized that both of these laws are trying to provide cash assistance for certain individuals, but DI has ... includes work incentives, and ADA is all about economic self-sufficiency. So if they found that you couldn't pursue an ADA case effectively, it would be saying that the only thing a person can do is be dependant on cash assistance. So they got the core underlying policy of ADA and recognized that for purposes of SSDI, the tests of whether you're disabled are different than they are under the ADA. For example, the issue of reasonable accommodation does not come up under SSDI. They make a determination for example, based on listings. In contrast, ADA is individualized and you determine qualified based on with whether you can perform the job with a reasonable accommodation. So, this was a case where they really got the underlying policy issues.

The next set of cases, the trilogy of *Sutton v. United Airlines*, *Murphy v. UPS* and *Albertson's v. Kirkingburg*, decided on June 22, 1999; Sutton was a 7-2 decision, Murphy 7-2 decision, Albertson was a 9-to ... (cut off) ... decision. The issue in these cases in a nutshell, is whether a disability is determined, with or without reference to corrective measures, such as medications, or assistive technology devices, and services. The court held that disability is determined with reference to corrective actions – with corrective measures. In other words, if somebody with a corrective measure, in this case the plaintiffs, had twins had 20/200 and 20/400 vision without glasses, but with glasses they were 20/20. There were ... another plaintiff had hypertension, but with medication, it was under control. The court said, you look at the person with the medication, with the technology, and if, with it, they don't have a substantial limitation of a major life activity; they are not considered disabled under the law, therefore they are not part of the protected class; therefore they cannot claim discrimination on bases of disability. This is an extremely disappointing case, because it narrowed the protected class significantly and as the dissent points out, the irony here – that the ADA safeguards to ensure economic self-sufficiency – vanish when an individual makes him or herself more employable. So this case was a significant blow for people with disabilities who wanted nothing more than to be employed. And again, the court said, “you are not part of the protected class, therefore you cannot prove that you are qualified or that you have been discriminated against.”

The next case was *Olmstead v. L.C.*, decided on June 22, 1999. It was a 6 to 3 decision. The issue in this case was whether discrimination under the ADA requires placement of persons with disabilities in community settings rather than in institutions. And the court said, “yes,” with qualifications. The state's treatment professionals ... these are the qualifications: The state's treatment professionals must have determined that community placement is appropriate. Two, the effective individual does not oppose the transfer to the community. Three, the placement can

reasonably be accommodated, taking into account resources of valuable in the state. And four, appropriate relief must take into consider the range of facilities the state maintains and it's obligation to administer services with an even hand. And they said one means of compliance was the development of a comprehensive effectively working plan. In a nutshell then, what this case does, is say that inclusion is absolutely a goal of the ADA; that choice must be recognized; that people with disabilities must be involved at the decision making level – in this case at the systems level – in terms of policy in the development of this comprehensive effective working plan; and that independent living is indeed a legitimate outcome of public policy.

The next case was *Garrett v. Univ. of Alabama* ... (cut off), a five-four decision on Feb. 2, 2001. Another significant blow to folks with disabilities. The issue here was whether employees of the state may recover monetary damages by reason of the state's failure to comply with the ADA. The court said "no." You may not recover monetary damages because congress does not have the constitutional authority under the Equal Protection Clause of the Fourteenth Amendment to abrogate a state sovereign immunity. In other words, you cannot bring an employee of a state agency, cannot bring a suit for monetary damages. The court did, however, say that an employee can still bring a claim against the state for injunctive relief to make the state stop what they are doing and change their policy to comply with the ADA. There are some ... from an employment perspective there are some troubling dicta – that is statements by the court. One of the statements was states are not required by the Equal Protection clause of the fourteenth amendment to make special accommodations for the disabled, so as long as the actions toward them are reasonable. So in other words, the Equal Protection Clause does not require with respect to state agencies meaningful and effective opportunity for people with disabilities that can be remedied by monetary damages. Under other provisions of the U.S. Constitution, it is permissible for Congress to include reasonable accommodations as a provision. And local agencies and private entities are still subject to that, and states are too, but only with respect to injunctive relief; that is, you can force them to do it, but you cannot get a remedy of damages.

This again was a real setback for people with disabilities and what is fascinating about this case, if one reads the concurring opinion of Kennedy and O'Connor, that is they were part of the majority. It is fascinating because they got every aspect of the disability policy framework. The concept of individualization, of meaningful opportunity, of full participation, of inclusion, and yet they were afraid to rule on behalf of people with disabilities because in other contexts, in other Supreme Court cases dealing with age and gender, they had significantly reduced the scope of congressional authority to implement the Equal Protection Clause of the Fourteenth Amendment. And they were afraid, in my opinion to stop the momentum of restricting Congress's authority to implement the Fourteenth Amendment.

The next case was *Casey Martin – PGA Tour v. Martin*. A 7-2 decision decided on May 29, 2001. In my opinion, one of the most important Supreme Court cases. Because the issue here, there were two issues, but I'm going to focus on the second one. Whether a disabled contestant may be denied the use of a golf cart, because it would "fundamentally alter the nature of the tournament." The real issue here was not golf, and not professional golfers. The issue is – was – really whether or not the court understood the concept of meaningful and effective opportunity. And the court got it. They said for Casey Martin, you don't look at the rule. In this case, you can't drive a cart. You look at the purpose and function of the rule, which was to test stamina.

And you see if there are alternative ways for people with disabilities – that is modify rules – and still accomplish the function and purpose. And they found based on facts, based on an individualized determination for Casey Martin, that it is in fact his stamina was still being tested because he walked 25% of the time. In fact they said in the district court that it was like he was running a marathon and everyone else was walking. And so the key here is that the court affirmed the principle that equality of opportunity includes meaningful and effective participation. Not always the same rules.

The next case was *Buckhannon*. May 29th 2001, a 5 to 4 decision. This was another blow to all civil rights laws, not only ADA. The issue was whether or not you get attorney's fees if you win. That is somebody – you file a claim and you won, something could change and in fact the entity you sued changes their policy, but they do it through a settlement, without having to go into court and fight it out. So, the issue before --- the issue is whether, what's called the catalyst theory, that is, if you file a suit and people change their behavior and there is a settlement, you get attorney's fees. The court said, "no." You have to go into court and win in order to get attorney's fees. This overturned twenty years of precedent in almost every circuit court in this country which had accepted the catalyst theory, which said that if you win – in other words people change their behavior – you should get attorney's fees.

The next case was *Toyota v. Williams*, decided Jan 8, 2002. This was a nine to nothing loss. Another case dealing with the scope of the protected class. This issue here was what is the proper standard for accessing whether an individual has a substantial limitation in a major life activity; in this case the major life activity of performing manual tasks. The Court held that you make this determination by not just looking at what your doing on the job, but you look at activities that are of central importance to most people's daily lives.

Now there was another case decided on Jan. 15th *EEOC v. Waffle House*. A 6 to 3 decision. And in this case the issue was whether EEOC, the Equal Employment Opportunity Commission, can bring a suit even though the employee and employer had entered into a voluntary agreement to arbitrate all decisions between the employee and the employer. The court decided that EEOC could bring a claim against the employer because, among other reasons, they were not part of the agreement to arbitrate, but more importantly, that EEOC should be able to file a case to vindicate the public interest, in the language of the Supreme Court. And when they vindicate the public interest they should also be allowed to get victim-specific relief including monetary damages.

I'm running overtime, so I am not at this point and time going to talk about three cases pending before the Supreme Court unless people have questions. So I'm going to open this up to questions now for the next 12 minutes.

James Schmeling: This is **James Schmeling**. I would like to request that everybody, as they ask a question, please identify yourself before you ask them. It will help our transcription and be useful to us. Thank you.

Bobby Silverstein: Ok, I'll fill the time, if nobody has a question by describing the three cases before the court. The first is *U.S. Airways v. Barnett*. And the issue here is whether or not a reasonable accommodation includes a reassignment to a vacant position. The dilemma

here was that the company – the employer – had established a seniority system to bid for the vacant positions. This was not subject to a collective bargaining agreement and the question is whether or not ... what happens, can you reassign somebody to a vacant position when somebody else based on seniority has the right to compete for that. There was oral argument on that case on December 5th.

The next case which Peter made reference to, *Echazabal* is ... the issue here was whether or not there is a defense in the employment context to a claim of discrimination. An employer can show that there's a direct threat to health and safety. The issue here is whether it's health and safety of you, the individual with the disability, or health and safety of other employees; others at the plant. And the language of the ADA talks about direct safety to the health and safety of others. The EEOC on its own, back in the 1990's added injury to self or others. The court will have to decide the issue of whether or not you will go forward with the paternalism of the old paradigm of "we should figure it out for a person with a disability, what is a health safety factor for them," rather than focus on the health and safety of others.

And the final one, on Jan. 11, 2001, the Supreme Court granted certiorari, that is, they agreed to review the case of *Barnes v. Gorman* and the issue here is whether you can get punitive damages under ADA against a city.

Michael Morris: Bobby, this is **Michael Morris**. I will throw one question at you that I do hear people confused by. And that is, there is a different standard of eligibility for a person to receive social security benefits, whether their SSI, or SSDI from the standard as to whether you are a person with disability under ADA. The Toyota decision appears to pretty significantly limit coverage of whether or not a person would be considered disabled. Will that have any impact on whether or not a person would be able to receive social security benefits?

Bobby Silverstein: No. I mean again, what the court in *Cleveland* clearly said, is that they recognize that there were two distinct public policies. Under SSDI for example, you have to go through a five-step process. The first step is that you are not working, but the third step for example, might be are you – is your disability under a list, are you at that certain level. And in order to qualify you do not get into questions—specific questions – about individuals on a case by case basis with respect to a particular job, whether or not you can with that job perform reasonable accommodations. The *Toyota* case Michael, dealt with the technical issue of what is a substantial ... how do you show a substantial limitation of a major life activity? They did not look at the issue of a major life activity of work, which is actually listed in the regs as an example of a major life activity. There is dicta in the case that say, we know that the regs recognize work as a major life activity and we are not quite sure if that makes sense, but we are not going to decide that issue today, we are simply deciding the limited issue of whether or not a major life activity includes performing manual tasks and in determining whether you are performing manual tasks. The court said you look not only at what you do on the job, but you also look at other aspects like at home, whether you brush your teeth, ect.

Participant: This is **Mona Mc Aleese** from Anchorage Alaska. How are you? I have a question specifically on that statement. I was reading through there and it hit me that they are using the manual tasks almost in a gender biased way. I mean what if she were the only

– the sole – caretaker of the household having to do window cleaning ... da,da,da ... things above her head. I was really taken back by that.

Bobby Silverstein: See, in my interpretation of the cases, they did not find it against the individual. What they did is called remand the case. That is, they sent it back down to the lower court, to make a factual determination as to whether or not this individual, when you look at tasks at work and tasks at home, was in fact substantially limited. So, all the Court said is you can't just look at what you are doing at the job you have to also look at what you are doing in other environments to make the decision as to whether or not you are substantially limited in the major life activity of "performing manual tasks."

Participant: Bobby, this is **Kathy Gibbs** from the New England ADA Center in Boston. I was wondering if you could just use the working as a major life activity scenario a little bit more. Performing manual tasks somewhat seems to be either off the table or just a difficult thing to prove. Do you think we should sort of be pushing correction when they are having difficulties with tasks at work at looking at working.

Bobby Silverstein: Well, you know there is some very interesting comments by the Supreme Court with respect to whether work is or is not a major life activity. They actually say that it's a question ... (cut off) ... whether or not you can use work to prove that you are in the protected class. And they make reference ... their language, which says, you know, "we are not deciding that issue today," but we think that this whole argument is circular as to whether work is the reason that will trigger you being you being in the "protected class". And in fact, if you look back at, I believe it was, and I'm going to have find the case. There is actually an entire discussion, I think it could have been in *Bragdon*, on this case. And this is what they kind of said; I think it was *Bragdon*, they say it is circular. If you are trying to show that you have a substantial limitation of a major life activity, and you say that it is work, then how can that be a substantial limitation if in fact you tried to show that you are discriminated in the work environment? I don't buy what they are saying, but they are troubled by using work as the bases for qualifying as being a "individual with a disability." So, in answer your question, I would still try to be using the other major life activity as listed in the regulations, before I use work. And there is a second reason for not only is it because of a potential reluctance by the Supreme Court, but the second reason is that the regulations issued by EEOC are very difficult to comply with, because you have to show that you are unable to perform a whole class of work. Not just a particular job, and the Supreme Court in the Sutton Trilogy really limited the notion of what is a class verses a particular job. So I would still be focusing on the other major life activity such as walking, seeing, hearing.

Participant: I have a question. This is **Darren Jernigan** in Nashville Tennessee. Could you clarify a little bit on the Buckhannon decision just a little bit. For instance, let me give you a hypothetical. If a class action is brought against the city and say they went to mediation, and the city rolled over. The attorneys would not get paid in that decision? Is that correct?

Bobby Silverstein: If you went to mediation, and you settled, and you didn't go to the court, they would not be able to get attorney's fees.

Darren Jernigan: Ok, and how is that going to relate to the new... to the court case now with the punitive damages to the cities?

Bobby Silverstein: Well again, that depends on what the court says there. Again, remember there is a difference. When *Garrett* was decided, it said there is sovereign immunity for states, but *Garrett*, with respect to an individual employee suing. *Garrett* also made it clear that there was no immunity under the Eleventh Amendment for cities. This other case is, I don't believe ... let me look quickly before I make an incorrect statement. Yes, the other case, *Barnes v. Gorman*, is not an employment case. It involves the fact that an individual who was using a wheelchair was arrested for trespassing at a country western bar. The cops took him away and put him in an inaccessible van and he got hurt and got injured and had to have surgery to repair a shoulder and his back. And he got punitive damages for this; and that's the issue, is whether you can get punitive damages.

Darren Jernigan: Okay, I see. Thank you.

Bobby Silverstein: I'm at 1:45 Jim.

James Schmeling: I have about a minute difference on my watch.

Bobby Silverstein: Okay. Any other questions then?

Participant: Bobby, this is **Mark Zeider** in Iowa, and I have a question about the number 43 million. If you could please, for the group, perhaps you could give a little better idea of where that came from and what the consequences of various rules are that the court has ...

Bobby Silverstein: What's really fascinating, and I've talked to Peter Blanck about pursuing this; when we were dealing with the ADA in congress back in 1989 first ... the first bill that was introduced was basically a bill drafted by the National Council on Disability, which had developed the ADA. It included I think thirty seven million at that point in time. When we redid the ADA, in 1990, we updated it, because that number is approximately 1/5 of the population, to include 43 million. The purpose of using that number was to explain to the world that there were a lot of people with disabilities affected by discrimination, based on stereotypes, fear, ignorance, prejudice, pernicious mythologies. So we were trying to ... or the National Congress on Disability and Congress was trying to say there was a significant number of folks. The irony of the cases that deal with the protected class, both in the *Sutton* Trilogy and more recently in *Toyota*, is that the Court is using ... is afraid of opening up the flood gates and is using the 43 million as to show how Congress wanted to *limit* the scope of the class. But by some of their actions, it may be very difficult for people with diabetes, epilepsy, using certain kinds of technology, even possibly learning disabilities, to be able to prove that they are in the protected class. And my question right now, have they reduced our 43 million, which in 2002 is probably 54 million, to ten or fifteen million because of the fear of "opening up the floodgates." So the 43 million to summarize was to show how expansive this law was and the Court was using it as an excuse to narrow the scope of the class.

James Schmeling: I'd like to turn it over to Peter Blanck now.

Peter Blanck: Hello everybody. Thank you Bobby, that was really very helpful, a great summary. I want to accomplish a couple of things and also encourage interaction as we go. What I would like to do is to lay out a couple of themes that I have discussed with Bobby based on his analysis. Tell you a little bit about the *Echazabal* case and the brief we filed yesterday for the National Counsel on Disability which is now on our website. And I want to turn to Mark Zaiger and ask you, Mark, to talk to the group about the employer perspective; in particular what do you think the employers' responses will be in light of these cases. And then I want to turn it to Len Sandler, sitting here to talk to you guys about, well, what is it going to take then to resurrect a plaintiff's case in light of the Supreme Court decision. And finally I'd like to hear from you guys and have a discussion among ourselves about well, what are the employers you are dealing with, thinking about what's going on and what are you having to deal with in interacting with them.

Several of the themes that Bobby talked about are ... were laid out by him and quite apparent with regard to the Supreme Court decision making. The first is, of course, who is in this class, what is the scope of the class, how are we going to define the class, and it's extraordinarily difficult as we'll see, to be a person with a disability for purposes of the American's with Disabilities Act these days. A second theme that we'll talk about is, in light of, for example, the *Echazabal* case, to what extent should we be deferred to agency regulations and interpretations of this law to help guide us in our decision making? Third, which we've touched on already, and that is the underlying and competing policies of access to employment and welfare reduction and that's of course the interplay as we've talked about and that's SSDI and TWWIA and Workforce Investment Act, and how those will come together to support the goal of inclusion and self determination. Then as I've said, the last thing I think which I think is relevant to all of us, is what is the meaning of everything we're talking about here to the employment community, and what does that mean for how we do our jobs to achieve our ultimate goal, and that is to help qualified individuals with disabilities - our customers - get meaningful employment above the poverty level.

I want to tell you a little bit about the *Echazabal* facts, as we have basically interpreted them, although you could talk to Chevron's lawyers and they might have a different state. In our view, Mario Echazabal really exemplifies the situation that Bobby was talking about, that the ADA was really intended to prevent, and that is, notions of paternalism and a lack of self-determination, a lack of choice. What happened in the *Echazabal v. Chevron* case, which the court will hear an oral argument of Feb. 27th, was basically this guy Mario Echazabal worked for a contractor for about 20 years successfully at Chevron's refinery in a coker unit. And he did this without accident or injury to himself or to anybody else, and was perfectly capable of making independent and informed decisions about his health and his employment. He also had hepatitis C, in the active stage, and the record had established, however, that he continued to work in his livelihood by his choice with full knowledge of his medical condition in consultation with his doctors and the consultation with Chevron's treating physicians. So Chevron was fully aware and apprised of Echazabal's health status and one day - Echazabal actually had applied a couple of times - but he applied for work as an employee for Chevron in this same position

which he had been doing for twenty years. Ultimately Chevron turned him down. They turned him down twice. They turned him down not because he couldn't do the job, or because he could risk hurting others in the workplace. They turned him down because the EEOC had written a regulation which actually had expanded the literal scope of the ADA, which Bobby had talked about – direct threats to others – to include direct threat to self. That is, Chevron argued that because their doctors perceived that him working in this unit could create a risk that this guy's health – Echazabal's health – that is was a defense to a charge of discrimination and they did not have to hire him.

More interestingly and more important, which is also going to be heard by the United States Supreme Court, is the argument by Chevron which was rejected by the ninth circuit that health and safety considerations, with regard to the person's own health, should be considered as an essential function of any job. And that's a very troubling expansion of the law. That would mean that an employer could put in the job descriptions at an essential function of a job, is that you do it safely in ways that will not harm yourself. For various reasons in our brief, we argue that these approaches are very inconsistent with the law. Number one, because the essential functions as you know are focused on job tasks, what about the person with a history of mental disability who comes to a "stressful work environment" and the employer says, "well this is going to be too stressful for you, for your own good, we are not going to hire you." Well, what about a person with a history of back surgery, who is cleared by his doctor, but the company's doctor now says, "you can hurt yourself so you cannot be allowed to work in our workplace." But you can see that it is a very important case and we've tried to come down on the side of moderation, that is, Congress, Bobby, I'd be interested in your reaction to this, Congress was quite clear in the way it drafted the Act. It did not include, in any form a threat to self as a defense for an employer specifically, because of the reasons I just talked about. Specifically because employers were used as a paternalistic excuse not to hire employees, who by the way could waive any sort of tort liability, and of course the workers comp situation, should they be injured on a job, did not ... (cut off) ... in anyway. So, *Echazabal* I think is a very interesting opportunity for the court to decide the extent to which people with disabilities, legitimate disabilities, will have a say in where they work, and how they work, and be in a position to make those decisions for themselves. Now of course that is not to say that we would suggest to you, or suggest to any employer that you have to hire somebody in a particular job, who is going to injure someone else, or is going to just blatantly injure themselves because they cannot do certain essential functions. That is to say, that when the person is otherwise qualified, that these issues should not be taken into account. So, what I'd like to do is turn it to Mark first, as kind of a moderator here. And Mark, who represents, who does both plaintiff and defense work and is a very distinguished ADA lawyer in his own right, work with us on the NCD brief. Mark, what do you make of the employer's perspective in response to a particular to this string of ADA Supreme Court cases and in response also, what do you tell your employers to do in light of these cases?

Mark Zaiger: Well, Peter I'm not sure if I am doing the right thing frankly, because my approach traditionally has been in cases and in advising employer clients in speeches to basically communicate to employers and their lawyers that because the ADA is set up in such a way to focus on what I think of as the last question first, an employer would be foolish not to assume that the ADA covers a particular situation. And let me illustrate a little bit of what I am

trying to say. The ADA applies to a qualified individual with a disability. In order to make the determination of what a qualified individual with a disability is, you must know the essential functions of the job, and you must know whether or not some accommodation can enable the individual to perform the job. So, my approach had been to try to make certain that there was no misunderstanding; that employers knew that juries typically make those decisions about what is a reasonable accommodation and what isn't. And even in cases submitting the essential job function – despite statutory language that might lead somebody the other direction – submitting essential job functions to jury for consideration and that by doing that what my approach has been, was to move everyone into what I think the guts of the ADA really is, and that is the informal interactive process and the question of seeing whether or not some minor modification may enable an individual to have employment. Now from the employer's standpoint of course it is not ... I've never articulated it quite that way. Rather it is, from a perspective of litigation avoidance. Why decide to descend into a course of conduct that is likely to lead the litigation when the ADA really establishes what I consider to be a very fair process on the informal and interactive process and going through that to determine accommodations.

Peter Blanck: Well Mark, how do you account such a strong reactive negative response by many employers to the reach of the ADA. Many large companies are spending so much money on litigation strategies which could be spent much less on accommodating those same employees?

Mark Zaiger: I am not sure that I can, and today I have my plaintiff's hat on, in the middle of a plaintiff's ADA case. I think it's been made into something that it isn't, the statute, at least the way that I look at it, and it's been made scary. There has been a substantial amount of media about it. People talking about the horror of the little construction at a post office and those sorts of things and it's become a far more a political issue than I think is appropriate. But they are doing that and they are spending – what I talk about with my clients is what does an attorney's fee petition look like? What are attorney's fees likely to be in the event that they guess wrong? In the event that we get a judge who disagrees? In the event that the jury can't see what is reasonable? I don't know how to explain it, Peter, and I would look to others on that issue because I can't explain it. I don't communicate with my clients that way, because my clients, I don't think care so much about being right if they do care about not being in court. Now, maybe I am doing it wrong and then if I were more interested in what I ought to be interested in, I could drum up more work, but it just doesn't seem to me to make sense.

Peter Blanck: Well Mark, let me go to Len then and ask you, Len Sandler, who is a leading plaintiff's attorney here, how do you go about resurrecting a plaintiff's case in light of these Supreme Court decisions? After Len speaks, I'd like you, and Mark – and we can all moderate together – really what you guys are interested in, and what you guys on the phone, about what you need to be telling your employers to dispel some of these myths; and perhaps your employees and clients as well. Len.

Len Sandler: Thank you Peter. And I'll follow up a little bit on Bobby's and Mark's ... We have been doing representation as well as some research with regard to people with disabilities; in particular people with mental illness, mental retardation, diagnosis of developmental disabilities. In focus groups, when we ask them what is the significance or the

importance of the American's with Disabilities Act was we were, I think in some respect rather shocked because, law professors and also attorneys, that their expectations were extremely low, that they thought the law offered very little, if any, protections for them as far as applying for work or remaining at work in the event that they didn't have the support or in any way faltered on the job. And they were really wary of the responses, more so of their co-workers than they were almost anyone else. So that's the framework, and against the backdrop of the popular press, which has portrayed the cases and the Supreme Court cases and outcomes to embolden employers who really do want to resist hiring people with disabilities to become more vigorous in different ways on the job. For example, I think that the press and the AP when the *Toyota* decision was released was saying people with disabilities don't get any special treatment. And that Justice Scalia, I think showing that he might read that 43 million and reduce it by half, talked about carpal tunnel syndrome as I think a relatively minor problem. And that during the course of the deliberations Justice O'Connor made a statement signaling that the ADA was really to protect the wheelchair bound, which gives you some idea of how employers and the public are reading some of these cases, if they actually take the time to read the Supreme Court cases rather than the press.

With regard to social security and the *Toyota* decision, a lot of people said, how is it going to make a difference with social security? I think now in light of *Toyota*, the court is actually saying when you are going to evaluate whether or not a ... (cut off) ... worker is a person with a disability and is substantially limited in the major life activity of performing manual tasks, it's getting closer and closer to the social security description of what are the activities of daily living in the regulations, which, if you were severely limited in those, or ... then you might have a severe impairment. And I think we are getting closer and closer or returning to the disability or medical model as a threshold question of who in fact is disabled or not. I agree with Bobby that – I think it's in Sutton – it's dangerous if not impossible for anyone to really argue that working is a major life activity. If you can't demonstrate that somehow other major life activity that your client is substantially limited in, you're hard-pressed to make a case. And second, it's also really difficult to get attorneys to take the cases now in light of the Supreme Court decisions and the expense of putting on expert witnesses. That would mean a vocational expert to describe the broad range of job their client is foreclosed – or customer – is foreclosed from performing. If you'll notice in the *Toyota* case, Ella Williams actually did have some proof in their about the workers comp. claim she had, which said she had a 20% reduction of function because she had successfully filed a workers comp claim before she returned to work.

Another thing that sort of stacks the deck, I think, against people and makes them weary of the ADA is how long it takes to the decision. Ella Williams in the *Toyota* case last worked for Toyota in 1996 and now, the Supreme Court, after all these years, says, "We still don't know whether or not you are disabled, within the meaning of the act, and we are going to go back down and give it to the lower court. And you're really going to start from scratch." And when clients here how long it might take to relief, they look at the law and they go, "well look maybe I'll try another job, or maybe I'll return to social security, or I'll try the pension or I'll take a different umbrella."

The second issue that I see more and more from employers, is when a worker suffers an injury on the job. In light of the Supreme Court decisions they are demanding people prove that they

are still qualified to do the job they want to return to. And they are being asked to sign releases of information for the release of all their medical information. And they should only have to know, and should only be required to ask what physical health with regard to any accommodation they might need. Employers are also asking people to come in by the employer physician, at least in Iowa. To me that seems that they've gotten this signal that merely because you have an injury if it's not of a long term duration, if its not a significant impact then you are not protected and they ... in very subtle ways on the job, and many of you know that, will cut off) ... out of a workplace. So those ... and the EEOC released guidance on medical examinations and other requests for a proof of disability after a person has been hired, from around the country on that as well.

And I would just recommend that if you want to see... or to demonstrate the vehemence with which employers approach these issues, I really recommend that you go on the Supreme Court website and read some of the Friend of the Court [amicus] briefs filed by the employer and manufacturers. One is the Society for Human Resource Management and the other is the Chamber of Commerce. And there is a tenor and a tone and an attitude about who is in charge in the workplace and who gets to make decisions ... (cut off).

Unknown: Society of Human Resource Management?

Len Sandler: Yes. They filed a friend of the court brief, SHRM, and also manufacturers, the Chamber of Commerce; occupational physicians did. Everyone is now against Mario Echazabal in this case. So, if you go in the Mario Echazabal place on the website, you will find it. I think it will paint a different picture if you actually read one of the decisions. I know they really may not make a difference to your client, or your customers in trying to help them get a job or increase their employment opportunities, to give you some picture about how the world is responding as from a policy and judicial level.

Peter Blanck: This is **Peter Blanck**. What I would like to do now is open it up to you guys. By the way the Center – our Law, Health Policy and Disability Center - and the other centers that have sponsored this; one of our major goals is to work with you guys to do empirical research to debunk many of the myths we are talking about and to work in collaborative ways with employers and others. And we are doing that. And I would suggest you look at some of our Sears studies or ManPower studies or other studies that we've done on proactive ways to approach these issues.

I'd like to turn it now to James and Len who field questions out from you guys about what specifically would you like to be able to discuss with your clients and the employers you are dealing with in light of these decisions. So, I'll turn it to James now to moderate that discussion. We'll have ... how many minutes James?

James Schmeling: Well, we've still got about 20 minutes left to discuss issues and then there's some more discussion time. So a little over a half an hour.

Peter Blanck: That's good. I think one of the major ... I think one of the major goals of this is to encourage discussion and to raise as many questions as we answer. So I'm

happy to err on the side of discussion, so don't be shy and I'll turn it now to James now to recognize folks.

James Schmeling: Do we have any questions that we would like to start with?

Participant: Hi James. This is **Pat Steele** from Des Moines Iowa. Peter, I want to comment ... I think that at the beginning of this conference call you made a statement about ... that some advocates are now even reconsidering reopening the ADA perhaps to better state what Congress really intended and to perhaps to even clarify some things of maybe that may have gotten muddled in some of the court decisions. I guess I am curious as to what your opinion is on whether reopening ADA would be a good strategy and what some of the other panelists might think.

Peter Blanck: You've probably just sent a chill down Bobby Silverstein's spine. My view is that you can take this with the grain of salt, but my own perspective is baggage with it. (cut off) ... Now with this group of players it's opening this law, because once you open it ... (not clear) ... So my view is ... what might be a particularly interesting fact is that as a result of this kind of federalism in the United States Supreme Court the push decision making backlash ... (cut off) ... That we will see rolling state advocacy, for example in North Carolina, North Carolina recently passed a state law in response to *Garrett*, I understand, where they waived sovereign immunity in Title II ADA cases, so that's taken care of *Garrett* in state court. California, I believe, basically modified its state law so that mitigating measures would not be taken into account disability. So we might see some interesting grass-roots developments at the state level, but my view – and others may disagree – now is really not the time to be opening this law because once you open it, as I say, you can lose as much as you can gain. Bobby and Len may think differently. Bobby—

Bobby Silverstein: The way I approach it Peter, that issue similar to the way you do, with minor modification. I am always looking for what we call a window of opportunity to open in Congress for fixing some of what ... the havoc in my opinion, that the Supreme Court has done to the ADA. Taking for example, the corrective measures issue. Congress wrote explicitly in the report language to say that you do not take into consideration mitigating factors. The Senate Report, the House Report the Fuller Statements ... they all say that. Nowwithstanding, the court said, we don't have to look at legislative history because we know exactly what Congress intended in looking at the plain language, which has come from 504 and there had never, ever been a problem with the issue of mitigating factors in the past. So, we know that they just totally ignored congressional intent, and so the natural reaction is just "fix it". Well, as Peter said you may fix that if someone else may open it up. But it's not black or white as in "don't do it," or "do do it." I think the better course is to have your amendments ready to go and there may be a window that opens up that there may be a willingness and a big bill to trade something else for ADA fixes and then it just kind of breezes through Congress as a non-issue because there are bigger fish to fry in that legislation. So, would I open it up and have a major debate on ADA in order to fix this? Absolutely not. Would I be looking for these windows of opportunity? Yes, I would at the federal level, and I would also fully endorse what Peter said at the state level.

If I can just quickly comment on some of the other things that were said. When I look at the ADA I look at it two ways. I look at it as a broad statement of public policy and an effort to change attitudes and perceptions. And I also look at it as a handle for individual people with disabilities who have been discriminated against. I think there has been significant damage with respect to individual claimants in terms of narrowing the protected class in some of the interpretations. But, I believe that the broad principles that ADA establishes of individualization and meaningful opportunity, and inclusion, and empowerment and independent living are still absolutely, even after these cases, are still sound. I would take the approach suggested by our first speaker that we have to continue to work with employers and the employment community to focus on these universal principles that are the essence of ADA. What they come down to is to treat employees as assets, not as liabilities. This is not just the disabled folks, but to treat people to make reasonable modifications because everybody is not “the average person.” So that we can make room for a greater number of folks through things like accommodations, modifications of policies. Not just for people with disabilities, but for all employees. We should take the lessons and the principles of ADA and continue to apply them at the broad policy level. And I think, as I said, I think all those principles, because of the Martin case, because of the Olmstead case, are still very much intact.

Participant: I have a question. My name is **Don Brandon** from Juneau, Alaska. Is any work going to be coming out, or discussions, monographs, that are targeting major life activities? One of the things that I see happening regularly is people’s minds seem to wrap their heads around a ... (cut off) ... are you planning on any research in those directions discussing more clearly, because the EEOC or the Department of Justice hasn’t come up with enough information in that regard and so are you all planning putting research together separating out major life activities like manual tasks and working ... (cut off) ... I’m sorry; somebody keeps interrupting, but are you planning on doing research in that area?

James Schmeling: At that point we haven’t begun to look at that here. What we will do largely is revolving around the definitions and explaining the definitions that have come out with the Supreme Court cases. We haven’t looked at empirical research in this area yet.

Bobby Silverstein: This is **Bobby**. There is a professor at Georgetown Univ. Law Center – Chai Feldbloom, who has put together, or her student – she has a federal legislation clinic – who has put together a memo that looks at how the courts have dealt with the various interpretations of major life activities. Jim, at one point we were going to put that up for the participants.

James Schmeling: I think there is something that we could go ahead and put up.

Bobby Silverstein: Would that be helpful?

Don Brandon: That would be great because one of the things I find in explaining this information to managers, supervisors and employers is that if you have a disability that effects major life activity in like, in walking, it’s also going to effect your ability to work. They then get confused about why the EEOC separated working as a major life activity as a separate deal. So, if somebody could help me maybe clarify that, it would be super.

Bobby Silverstein: Ok, Jim, you have a copy, and if you don't, I'll get you another one.

James Schmeling: I do have a copy. We'll put something up for now.

Don Brandon: When you say put it up, where are you putting it up?

James Schmeling: On the website, which was mentioned in all the e-mails that went out confirming your call in numbers and they link to the Law, Health Policy and Disability Center website at the bottom of that e-mail. If you go to that page then there is a section on this audio conference series and you'll be able to get access to that.

Don Brandon: Ok, great, thank you.

Bobby Silverstein: So, for example, hopefully my presentation describing the different cases was available on PowerPoint and in Word memo form and we'd add to that a reference to the law review article and some other things on the emerging disability policy framework and now we'll also add this memo.

Don Brandon: Thank you very much.

Len Sandler: It's very difficult to do research on this kind of issue. The *Toyota* case, the Court is winnowing it down, for example. For something like gardening activity. And Courts in different parts of the country some have said that "relating to others" is a major life activity. Some "sleeping," and some not. With *Toyota*, they are saying is that it has to be something of central importance. It has to be major. There are two sources I would look to. One is the EEOC website has interpretive guidance on ... (cut off) After *Sutton*, they had to revise it, because they had then say mitigating factors are taken into account with regard to whether you are substantially limited. Expect that in light of *Toyota* they are going to issue revised guides. Another good site is the Bazelon Center. They have a really remarkable section with regard to people, especially with mental illness should be doing in light of *Sutton*, and *Albertson* and the *Murphy* case. For example, that where diabetes may be under control or controlled by medication, but the medication would have certain effects that would still substantially limit your ability to do ... (cut off) ... or to breath. And that's really ... (cut off) ... advice for both you and ... (cut off) ... whether they are the employee with the disability.

Mark Zaiger: This is **Mark Zaiger** and I have a question which really is, in light of the narrowing of the Court's definition of disability and major life activity in the *Toyota* case or others, why is it that it does not appear that the courts have focused more on the other two prongs of the definition of a disabled person; the "regarded as" prong or the "record of" prong. I am sort of confused in my own mind why that hasn't been the natural consequence of the retraction and contraction.

James Schmeling: Bobby, would you like to start with that answer?

Bobby Silverstein: Well in part, if you do in fact look at the trilogy the issue – the *Sutton* trilogy – the Court actually looked also at the question of “regarded as” in the case, and concluded that the twins in *Sutton* also could not meet the “regarded as” test. So, there is some actual discussion there and many of the lower courts – and I’d ask some of the others on the call to comment on that – have also narrowed, the “regarded as” provision as well. But my question, which is a follow up of your question, rather than an answer to some of the other panelists, is what about the second prong? Because if you had mitigating factors now, currently before ... take someone with diabetes, before they had medication, they had diabetes that wasn’t treated. How ... (cut off) ... when they assert that there was a history of a physical/mental impairment which substantially limited a life activity? Are they able to use that to get into the “protected class?”

James Schmeling: Len would you like to answer; provide those perspectives.

Len Sandler: It is sort of an interesting issue for two reasons. One is how these cases are generally decided. And many of them are decided without a trial. It’s said people take sworn testimony and they file medical evidence and the trial judge says, “okay, here are the two accounts of what a person can do, or can’t do.” And if there’s no dispute as to when an important fact the issue is called summary judgment. No one testifies before a judge or a jury. With regard to the ... (cut off) ... Bobby is absolutely correct and Mark, that they have really narrowed it gravely, because ... (cut off) ... employees assert that their limited in the major life activity of work. Now they have to show that the employer has regarded them foreclosed of a broad range of jobs, or a broad classification of jobs, not just the job they are holding. And it is awfully hard to get a smoking gun. Employers are savvy enough ... (cut off) ... and Ella Williams case in *Toyota* and to a broad range of jobs. We are just saying you can’t do all the four jobs at this station we wanted you to perform at the factory, or four isn’t a significant enough number. There is also a troubling ... (cut off) ... in our own judicial circuit which is in the Midwest and there an employer ... (cut off) ... post-offer tests, and they identified everyone who’s had a certain repetitive stress injury that’s applied for one job. The EEOC is litigating this case. They’ve made the claim that the employer was regarding them as disabled and the court here said, no they didn’t, all they said is that the people with this repetitive stress injury cannot perform that one job. They don’t state whatsoever about whether they have other jobs they might have or that the person might be qualified. It was a selective test. I think that is being appealed, but I don’t know whether the Supreme Court ... (cut off) ... that would allow people to target one function and as long as they are not regarding them as substantially limited in lifting or gripping or performing manual tasks the employer is able ... (cut off) ... of the job applicants. In history very few people in the aftermath ... I read every case that comes out unfortunately. I can’t bore you with them or remember all of them. But many people, just because they have a documented health problem in their record, as long as the employer is wise enough to say they thought it rose to the level of a disability ... (cut off) ... ADA have really not been successful that I’ve been able to see. But below the surface is that despite all the horrendous court cases that are being publicized, that is Mark’s point. Employers are very conscious of ... (cut off) ... to litigate these claims and many of the people that we just intervene and call the employer and say here is what our employee can do. Here is what they can do in your workplace: try to get their vocational experts or their insurers involved; this is what it is going to cost, this is why their a productive worker. And then also to point out to them that there are sometimes state tax credits

that would enable the employer to get tax incentives for improving the workplace, for providing assisted technology, and for otherwise accommodating the employee provided that they can prove it's unnecessary. In some respects you forget the court cases. The task being from this corner is that there are state laws, some of which are much stronger and there are other federal laws that they apply such as the Rehabilitation Act, the ... (cut off) ... circuit is not only alive and well, because our court here, has said that they had waived sovereign immunity by accepting federal funds but until the Supreme Court overturns it; if punitive damages are available under the Rehabilitation Act for violation of the nondiscrimination provision. The Supreme Court took certiorari and they'll here that, Peter, this session I think.

James Schmeling: Are there any other questions in this area?

Participant: Yes, **Judy Moeckel.**

James Schmeling: Go ahead Judy.

Judy Moeckel: The ADA has recently commissioned ... (cut off) ... to find out how advocacy groups should ... (cut off) ... the ADA and they looked nation wide at the effectiveness of going for a waiver of sovereign immunity, basically came out. Their finding was that Minnesota was the only place where it was truly successful. It has been overturned, I guess or vetoed in a lot of other states that have tried getting a waiver. So I wonder what Bobby particularly, or anyone thinks of putting the focus of advocacy groups more on trying to get the protections of the ADA codified into state statutes rather than favoring the issue sovereign immunity. Does that make sense?

Bobby Silverstein: Yes, and I think from a ... trying to answer that question from a national perspective. Each state though is unique. And so, if there is a Minnesota out there to do that ... California I understand, Peter talked about it, and North Carolina. I think you said North Carolina, Peter. As a general proposition, I would agree with Judy that the approach is to try to get the state laws to reflect the principles that we thought we were doing here in Washington. And again, I promise you that in Washington, we are just not sitting here and saying we can't do anything, we are just looking for that window.

Judy Moeckel: Thanks.

James Schmeling: Len?

Len Sandler: In Iowa, I think it is very difficult together in mobilized ... (cut off) ... people with disabilities ... especially on the employment statutes, because I think the *Olmstead* mandate has occupied almost everyone's time; the development of services for people with disabilities. It really is a key to employment in the long run and to try to keep an eye, find out the funding that is coming into this state and how to reroute that – the services. So at least in our world it would be very difficult to sustain advocacy efforts and we have a legislature that is dominated by ... we have a democratic governor, but the house and senate are controlled by

republicans who generally have not been as ... (cut off) ... a party with regard to the civil rights protections.

James Schmeling: Are there more questions? I know that there were a couple of people that had noted that they would have ... (cut off) ... before this call and said that they would go ahead with those. I am going to just go ahead and ask, Barbara Hollingsworth, if you wanted to go ahead with the question that you were talking to Len about earlier this morning that might be of interest to this audience, and ...

Participant: Yes, and it's **Brenda Hollingsworth**, and I am with the Iowa Consortium for Mental Health here at the University of Iowa. We look at policy also as far as community services to the seriously mentally ill. And the one thing that is happening with the *Olmstead* decision is that of course people are being ... or the intent is to move people out of residential care facilities. Because some of the seriously mentally ill have other illnesses that are also serious as well as a decrease in cognitive abilities that not always – and I am talking for just a small percentage – but not always is it advantageous for them to live out in the community, in their own independent apartment. In our state there is not an array of housing choices in each county, nor in each community, and given the budgetary crunch here, and the seriousness, I was wondering how will the *Olmstead* decision be implemented given some of these considerations that I don't hear people talking about?

James Schmeling: Bobby, would you like to address that?

Bobby Silverstein: Again to me the important part is to, when we are looking at *Olmstead*, to recognize again, the disability framework. We are starting with the principle of individualization. We are talking about providing appropriate services for people based on their individual needs. And then we are saying though, that you should not unnecessarily or unjustifiably isolate or segregate an individual and force them to choose between receiving appropriate services and interacting with nondisabled persons. We're also talking in *Olmstead* about even-handed treatment to try to eliminate the current institutional bias in the Medicaid and other state financing systems. So, in answer to your question, nobody should be inappropriately served. But we have to look at options not just in terms of what is currently there, which has 75% or 80% of the money going to support institutional placements. Step back and think about redesigning, reengineering the system that is funding neutral with respect to placement, so that somebody can actually be ... receive the appropriate support services that they need; so that the housing options are expanded, so that the community options are expanded. So, it's not simply a choice between a state institution on the one hand and being in your own apartment. There may be a range of options that appropriately respond. So, I don't know if that's a responsive answer to your question, but I always step back to what is it that we are trying to achieve here. It's not to just say we're not dumping people, we are trying to figure out what's appropriate and make sure that the finance systems within the state support what's appropriate rather than limit choices based on what's available, based on historical bias.

Brenda Hollingsworth: I think I do not disagree with that decision, but it's a case of that when policy is formulated it is implemented at the street level, and there's many times not a match with the intent and the outcome. And that is of concern now.

Bobby Silverstein: And to me that occurs often times when you lose sight of the guiding principles and instead you use hyperbole of community placement verses ... and there's a hope of ... (cut off) ... of real choice of self determination, of appropriate service based on individual determinations, as well as the notion of not having unjustified or unnecessary segregation in order to get benefits. It's a series of these principles that should guide the policy response at the local level.

Brenda Hollingsworth: Thank you very much.

James Schmeling: Do we have other questions? I would like to go ahead, and go region by region to encourage some people to ask questions who might be hesitating for fear of jumping in front of somebody else. I'll start with Alaska. Is there anyone there that has any questions you'd like to address?

Participant: This is [**Anchorage participant**] at Anchorage, and I'm not really sure I'm articulating this in my mind let alone ... (cut off) ... articulating at all? I'm curious as to whether or not you're alluding to get around the unfavorable decisions on the ADA somehow. Did I hear that?

Bobby Silverstein: Allude on how to get around them?

Anchorage participant: How to use *Olmstead* to sort of ... (cut off) ... I guess that I didn't hear that, is that correct.

James Schmeling: I'm not sure that I understand the question, but at least here what I have a problem with is that there were cut-outs while you were asking the question, so I'm not sure if we all heard the complete question. Would you ask that again, I am sorry.

Anchorage participant: A while back when you were discussing *Olmstead*, I heard you suggest that we might be able to use *Olmstead* sort of, as a counterpoint for ADA decisions. And I'm wondering if there actually was that suggestion, and if there were that suggestion, how that might be implemented?

Bobby Silverstein: Ok, I made the comment early on, or within the last 20 minutes, that there are really two issues. One is, can an individual pursue his or her rights particularly in the employment context. I'm saying the court has significantly narrowed who's in the protected class, and therefore, who as an individual can make a claim. But then I was saying but when it comes to the policy pronouncements that we have not had a negative Supreme Court case yet. They get the notion of meaningful opportunity through the *Casey Martin* case in terms of needs for reasonable modifications. They get the notion of inclusion and unnecessary segregation. They get the notion of economic self-sufficiency as a legitimate outcome in the *Cleveland* case. So what I'm suggesting is that I think it is critical for folks concerned with advancing the employment of people with disabilities to focus on the policies. To focus on the underlying goals and policy pronouncements and continue to advocate and discuss and talk with the employer community that these policies are still absolutely there and don't focus on individuals.

Focus on as a matter of fact that a company should be thinking about how they are going to interact with disabled folks in terms of providing on a case-by-case basis accommodations. What kind of policies have the unintended effect of denying opportunities for certain people? Let's change those policies; let's adjust them; let's look at the issue of making our facilities accessible in general. So what I'm suggesting is that there are two trends at the Supreme Court. The policies have not been limited. The individuals who can make the claims have, and we need to distinguish between the two in our discussions and dialogue with the employer community.

Len Sandler: Also as a backup, this administration and the New Freedom Initiative has really singled out support ... if you go on the website with regard to disability and the government and all the initiatives that are there, they grocery list the tax incentives; they describe the policies initiative by every agency, from labor to health and human services, how they are going to implement *Olmstead*; what they are going to do rather specifically rather than in the general amorphous terms that a lot of people think. So they put ... (cut off) ... and I think that the degree to which we use it Bobby says catch it, and use it as an advocacy tool at every level is really ... (cut off)

James Schmeling: Are there any other questions? On the west coast possibly?

Participant: Yes, this is [**Anchorage participant**] from Anchorage Alaska I just want to know how many people at the conferences are of people of color? Because this is a very culturally biased. ... (cut off) ... white people ... <inaudible> ... Also in Alaska, like *Olmstead* ... <inaudible> ... we don't need an *Olmstead* ... <inaudible> ... we already have all kinds of plans, so we are left out from all the goodies you are talking about, all the grounds you are talking about ... <inaudible> ... in the state of Alaska. And if someone can answer me to help us?

Len Sandler: Typically, the issue of disability is cross-cultural. I know there is going to be biases just from our background and I've lived three states: New York, which is diverse, and I've lived in Vermont and Iowa, which aren't noted for the diversity of the population. But then again, the people we represent are people ... (cut off) ... American Indian and African American, Laotian, Mexican American, so in my perspective, it's a multicultural diversity issue. ... (cut off) ... Supreme Court outcomes to deal with, ... (cut off) ... as an individualized basis, we are representing that person.

Anchorage participant: That's the basic initiative, we can't go to Washington DC directly, we have to go through state, and if this state doesn't do it, we have nothing.

Len Sandler: It's fairly similar here. Money ... (cut off) ... grants and research through the universities. The money that comes in for the state work both in developmental disabilities implement the *Olmstead*. We are in the same position, is that we have in our department of human services ask for additional Medicaid waivers. You have to force that and lobby hard, because that isn't federal grant money. So I don't think we are abundant in riches in that sense at all, in fact our state has just suffered one of the biggest budget shortfalls in its history. It is reducing its services across ... (cut off) ... and it's the ... (cut off) ...

James Schmeling: As I'm looking at the time, I have about 15 minutes left on what the future direction of the ADA and other civil rights laws should be, and what we think it will be. I'd like to turn first to Professor Peter Blanck and let him start that discussion.

[break in tape]

Peter Blanck: Well it's kind of a total order and there are many on this phone who have different perspectives ... and the ... (cut off) ... the speakers and you guys and the audience, and I don't see a simple answer to that question. My little corner of the world in working with folks like yourselves on the phone, it has been to document at the grass roots level exactly what are the capabilities and myths and misconceptions. Almost for me as a researcher I'm kind of coming full circle with Pat Steele and others; kind of taking it one company and one ... (cut off) ... one at a time. Maybe that's not a big picture view as ... (cut off) ... as a different perspective than that, but I continue to believe that there is strength and power in fact, and that this debate has been significantly skewed by political and factual efforts that really don't ... (unclear) ... to what this law is designed to do. As you may have talked about, I think a large part of the debate on the ADA has nothing to do with the ADA, it has to do with other forces related to use of federalism and states rights and issues about who should control factors in the workplace. And we really haven't spoke all that much about the health insurance debate, what's involved with that, and who is going to pick up the tab for that. So I don't want to monopolize. I'd really like to get more of your actions in that regard. I would emphasize also, and Bobby and others – many of us are speaking in other countries now about the ADA and what we've learned, and there are many looking to us, based on our experiences so far and increasingly ask accountability issues: how many people really have really have gone to work, what have been the major improvements of the ... (cut off) ... workers with disabilities, are people in sheltered workshops getting out of sheltered workshops who work in competitive ... (cut off) So that's not ducking the question. It's still big for me now to get a handle it the way it was asked. Perhaps Bobby or others – Bobby or Michael Morris, what do you think about that question? Michael Morris?

Michael Morris: Peter, I would probably respond in two ways: one would be an affirmation of strategies that Len and Bobby and others on this call have already talked about, which is that given the political realities of Washington DC, in these days, and probably in the coming years, the greatest amount of activity should be people with disabilities, advocates, others working together at the state level in terms of continuing the push forward from a grassroots dealing with civil rights protections with state legislatures. That would be sort of a one significant strategy that needs to be pursued. The second is, and I'd be interested in asking Bobby this, is although the interest I think would not be today to modify the ADA, to what degree would congressional hearings be a good or not so good idea in terms of highlighting, particularly on the positive side, the policy framework, which you articulated here, and has been your key to your research and in explaining your framework of disability policy as articulated in the ADA. Then, second the point you make is this most recent decision, is limiting the impact of those polices to a smaller number of people who will be in the protected class. To what degree would that get a positive hearing on Capital Hill? Or, is it too naive to think that again, although not pushing for legislative change, just the visibility on the issue also would open it up to other

people who have much more negative things and much more negative agendas to want to bring out.

Bobby Silverstein: This is Bobby. Again, the question of hearing or no hearing is a question of strategy. The real question is what is the purpose and function of a hearing? We have hearings sometimes to pass legislation. We have hearings sometimes to get the attention of the executive agencies, to change their policy. We have hearings sometimes to change the public perception. We have hearings sometimes to energize the grass roots. Those are four reasons why we have hearings, and so the question would be are there any reasons that can be furthered through having a hearing? And I'm not sure I would answer that question in the affirmative in this point and time. There may be other forms and other approaches that might produce better—achieve some of those objectives – more directly if New Freedom Initiative by President Bush talks about full and vigorous enforcement of the ADA. Do we hold the hearing to try to see how the administration is dealing with that? Maybe yes. So in other words, the hearing would be about Supreme Court cases, but it might be on implementation, enforcement and monitoring of the ADA. So, part of it, Michael, to me, is figuring out how to narrow and articulate the purpose and then proceed with a hearing if that's what you want to do.

To touch on the broader question is, at the national level, we're stuck in this conundrum with ADA ... (cut off) ... so the policy. I think we're ... in terms of the protected class the scope of coverage, we do okay as I've said in terms of the policy. We do terribly with respect of the protected class. And then we don't do ... we haven't done real well in terms of *Garrett*, in terms of issues of damages and whether or not the ADA really implements the Fourteenth Amendment of the Equal Protection Clause. When you look at all these things, it kind of ... we are in an era where civil rights is in some respects, in terms of ... The courts are trying to limit the role of the courts, the role of the federal courts, the access to courts, as a broad principle. There are also limiting the reach of the federal government vis-à-vis state governments. And sometimes we get stuck in the middle of the bigger debate. I think that is what happened in, what I said earlier in *Garrett*. They really bought the changes, the policy changes. But to on the one hand, say that meaningful opportunity and inclusion and eliminating stereotypes is legitimate public policy, but then saying "that's not okay under the Equal Protection Clause of the Fourteenth Amendment" is bizarre. So, we're stuck in this dilemma where they get it on the one hand, but other statements that they've made in terms of the role of Congress run counter, and we get stuck. So, at the national level it is very difficult to try to convince people to make major changes in laws like the ADA. Again, that's not to say that we are going to not try to figure out and find a window, but I'm afraid that the macro movement issues in terms of where this country is right now; it's not really amendable to it. So, if you were to ask me the question if we didn't have an ADA in 1990 and we tried to pass one now in 2002, could we get it through the Congress? And my answer is "I don't think so."

James Schmeling: If there is any final comments I'd like to hear those, but I'd also like to invite people to send an e-mail to me with any further follow up or question and I will pass those on to the people that you would like to hear from or further discuss this with. Everyone that was on this call should have gotten an e-mail from me with the pass-code. All of my numbers in the e-mail are available there, so please take advantage of that opportunity as well. Are there any other final comments?

Participant: Excuse me. This is **Judy from Cincinnati**. You may have already explained this, but with the ... <inaudible> ... era in not being able to sue the state,

Bobby Silverstein: ... without monetary damages ...

Judy: Right, is that implication not only to the state, does it apply to private?

Bobby Silverstein: No it does not. This is truly an issue of sovereign immunity, and it doesn't even apply to local communities. It only applies to the state, and only with respect to monetary damages.

Judy: So they can't fight it, and say well ... (cut off) ...

Bobby Silverstein: An employer is still subject to all the provisions as well as the remedies; a local government is still subject to all the provisions and all the remedies.

Judy: Ok, thank you.

Michael Morris: Bobby this is **Michael Morris**. I thought of another question I get so frequently and maybe other people in this call are confused by it too. With all the activity going on within this new administration continuing from the previous one around *Olmstead*, every state has an *Olmstead* planning committee. Every state is suppose to be looking at ways it's directing it's resources to support increased choices for people with disabilities in terms of community living opportunities. The part of *Olmstead* that seems to be confusing and perhaps because it was not clearly articulated in the decision has to do with ... does it also cover in terms of opportunities in community, support for a person who could be more productive in terms of employment? And how do you make ... how do you bring that board to focus and how do you get states, who are looking at what they are doing post-*Olmstead* to focus more on employment opportunities and employment supports for people with disabilities?

Bobby Silverstein: Well, I would answer the question two ways. First the *Olmstead* case itself, dealt with the issue of whether or not somebody, in order to get long-term services and supports, should be unnecessarily and unjustifiably segregated. That is, give up their ability to interact with the non-disabled peers. So, the case itself was narrow in that regard, dealt mostly with long-term services and supports; more we'll call them, health related. But when they talk about a comprehensive effective working plan for allowing folks to have the choice to live in the community, it seems to me that what they're really saying is one should be establishing a comprehensive effective working plan for achieving the four goals articulated in the ADA. And so that equality of opportunity is one; self-determination, full participation is two, but then independent living, which is *Olmstead*, is three; but the fourth is economic self-sufficiency. You cannot have a comprehensive effect of working plan for folks to have the option to live in the community if it does not have an employment component. To me, employment is as essential as having community living options, housing options, other services and supports that enable you to live in the community, but employment and productivity is a center of many of our lives and

many people with significant disabilities. And so, if that is not included as a component, in my opinion, we as people within the disability community are missing the boat.

Michael Morris: Thank you Bobby.

Participant: This is [**Anchorage participant**] and I am a consumer employer, so I employ lots of mentally ill people as well as other disabled people. ... (cut off) ... one way street. I am asking you to put yourself into employer's shoes. I have lot's and lot's of problems with unreasonable requests to me. So we better start working together.

Bobby Silverstein: And if your message is, we need to work together in partnership ... this is Bobby ... I just couldn't agree more. There are no devils or angels in trying to enhance the employment of people with disabilities. We need advocates. We need providers. We need employers. We need policy makers at various levels all working together to achieve that ultimate gain. It doesn't help when it's a "we-them" situation. The best situations are when the Des Moines Chamber of Commerce works with the protection and advocacy system or another disability group to work together to implement the ADA. That's always the best scenario.

Len Sandler: ... (cut off) ... the business community and the two houses of the Iowa General Assembly really lobby and ... (cut off) ... the tax credit pass, knowing that small business was of critical part of the economy in Iowa and would serve two purposes, to support them and to also give relief or independence for people; for that partnership.

James Schmeling: On that note, thank you for your attendance at this call. You may keep an eye on our website, which was in the e-mail, for updates ... (cut off) ... out on audio again, so if you missed anything or would like to hear it, you'll be able to do that. Additionally, there will be a transcript up. That may be two weeks before that's up, so that you can read ... (cut off) ... as well. Thank you again for your participation.