A Discrete and Insular Minority: Behind the Headlines of *Murphy v. United Parcel Service, Inc.*

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Whether something is good or bad takes a long time to determine.

Upon graduating from Washburn University School of Law in 1987, I began practicing with the firm of Palmer, Marquardt & Snyder in Topeka, Kansas. Jerry Palmer is an excellent personal injury lawyer. Christel Marquardt now sits on the Kansas Court of Appeals, but at the time was the first woman president of the Kansas Bar Association. She had a strong domestic and employment law practice. Marty Snyder is now an attorney in the Disciplinary Administrator's office. In 1987, she had a strong workers' compensation and personal injury practice. The Kansas Legislature had just passed some of the most stringent tort reform in the country. No-fault tort thresholds in place for over a decade were being increased,[1] taking out all the small personal injury cases that young attorneys used to whet their teeth and learn the craft. At the same time, the $250,000 cap on all non-economic damages[2] took out all the big cases.

After less than a year of practice I got a call from the relative of a client stating that Doug Samsel had been in a terrible car accident and was paralyzed. He had been hit by a semi tractor-trailer that was hauling hazardous materials (read very large liability insurance). The semi had crossed the center line and hit Mr. Samsel head-on as he was on his way to Fort Riley, where he was stationed as a soldier. He had a two-year-old daughter and his wife was six months pregnant at the time. The case had constitutional challenge written all over it. We were going to claim that the $250,000 cap on non-economic damages was a violation of Mr. Samsel's constitutional right to due process and trial by jury.

We filed Mr. Samsel's case in federal court and certified the constitutional question of whether the damage cap violated the Kansas consti-

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1. *See* KAN. STAT. ANN. § 40-3117 (1993) (creating a two thousand dollar threshold for medical expenses).

2. *See* KAN. STAT. ANN. § 60-19a01 (1994).

tutional right to a jury trial and due process.[3] The Kansas Supreme Court considered the question while the Kansas Legislature was fuming about the *Malpractice Victims v. Bell*[4] case. In *Bell*, the court held that the medical malpractice cap on damages that protected only doctors violated the Kansas Constitution.[5] The Supreme Court of Kansas issued a one-paragraph decision in *Samsel* upholding the statutory cap on all non-economic damages.[6] The actual full opinion would be over a year in the coming.[7]

My idealism about the rule of law was blown to the wind. The court ruled that in exchange for a $250,000 cap on damages, the legislature had granted the quid pro quo of taking away the trial courts' authority to remit damages below "$250,000 when higher damages are awarded by the jury."[8] In theory, if a Kansas jury awarded over $250,000 in non-economic damages in a minimal whiplash case, the court could not remit below $250,000. In exchange, the legislature took away adequate compensation for the most severely injured and disabled in our state. The tortfeasor's quid has happened thousands of times while the quo has never happened and never will. We don't have a lot of run-away juries in Kansas.

This disaster in the Kansas tort world coincided with the biggest expansion of civil employment rights in twenty-five years. In 1990, Congress passed the Americans with Disabilities Act.[9] The law had been over a decade in the making and was modeled after the Rehabilitation Act of 1973[10] that prohibited disability discrimination in government employment or where federal funds were involved. The law passed with bi-partisan support and was signed into law by President Bush on July 26, 1990. In 1991, Congress enacted the Civil Rights Act of 1991[11] that amended the Civil Rights Act of 1964[12] and provided for compensatory damages and jury trials. The Americans with Disabilities Act ("ADA") was something that appeared to further lofty legal objectives, for it is good public policy to help people find and keep employment. Additionally, it seemed consistent with the American legal tradition to prevent discrimination against the physically challenged. And so I decided to become competent in the ADA and start taking cases. I

3. *See* Samsel v. Wheeler Transport Servs., Inc., 771 P.2d 71 (Kan. 1989) (mem.) (answering certified question).

4. Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988).

5. *See id.* at 264 ("The cap and annuity provisions . . . infringe upon a medical malpractice victim's constitutional right to a remedy by due course of law and no quid pro quo is provided in return.").

6. *See Samsel*, 771 P.2d at 71.

7. *See* Samsel v. Wheeler Transport Servs., Inc., 789 P.2d 541 (Kan. 1990).

8. *Id.* at 558.

9. 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).

10. 29 U.S.C. §§ 701-797 (1994 & Supp. III 1997).

11. 42 U.S.C. § 1981a (1994 & Supp. III 1997).

12. 42 U.S.C. §§ 2000a-2000d (1994 & Supp. III 1997).

had already done some employment work in Title VII and state wrongful discharge and had been relatively successful.

Over the next four years I started working on a number of ADA and Rehabilitation Act cases. Some of the early cases settled. But as time wore on, the defendants' use of summary judgment was more and more successful. The ADA requires two basic elements of proof to meet the threshold of the statute. First, plaintiffs must prove that they are "disabled" enough to have rights under the ADA.[13] The statute does not cover all impairments. Only the "truly disabled" are covered—workers must show that their impairment substantially impairs one or more major life activities,[14] that they have a record of such an impairment,[15] or that they have been regarded as having such an impairment.[16] At the same time, they must prove that they are not too "disabled"—workers must prove that they are able to perform all the essential job functions (with reasonable accommodation, if necessary).[17] Therefore, to get in the front door of the ADA, a worker has to be disabled enough but not too disabled. The gap between the two should be wide, but few are they who have sailed past Scylla and Charybdis. This is documented by an American Bar Association survey that was followed up by Professor Ruth Colker from Ohio State University College of Law.[18] The survey reviewed all the ADA cases under Title I, the employment title, and found that over ninety-two percent of all cases were dismissed as a matter of law by the court prior to a jury trial.[19] Few are the cases making it in the front door of the ADA and getting to a jury trial.

On October 5, 1994, Vaughn Murphy walked into my office and told me he had just been fired by United Parcel Service, Inc. ("UPS") because of his hypertension. Mr. Murphy had worked as a mechanic for Ryder Trucks for almost twenty years in Salina, Kansas. When Ryder closed its Salina facility, Mr. Murphy applied to be a mechanic at UPS in Topeka, Kansas. He was hired in August of 1994. Because a marginal part of his job was to test drive the trucks, Mr. Murphy was required to go to Midwest Occupational Health Services in Topeka and submit to a Department of Transportation ("DOT") physical. He passed the physical and was given a DOT health card. The nurse certi-

13. *See* 42 U.S.C. § 12102(2) (1994) (defining "disability").
14. *See* 42 U.S.C. § 12102(2)(A).
15. *See* 42 U.S.C. § 12102(2)(B).
16. *See* 42 U.S.C. § 12102(2)(C).
17. *See* 42 U.S.C. § 12111(9) (1994) (defining "reasonable accommodation").
18. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n.9 (1999) (citing *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404 (1998)).
19. *See id.*

fied him as safe to drive although his blood pressure was 186/124.[20]

The DOT regulations state that: "A person is physically qualified to drive a motor vehicle if that person . . . has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely."[21] The standard is not that different from the ADA's defense of direct threat.[22] The ADA defense of direct threat provides that if a worker is a threat to himself or others based on case-specific, solid medical evidence, the employer may refuse to hire or even terminate employment.[23] Mr. Murphy had lived with high blood pressure since he was ten years old. It was a congenital condition, and he had been going to a doctor for years. His blood pressure was kept relatively under control with medication. He had an excellent safety record, and had never been a danger to himself or others.

Mr. Murphy worked for UPS, without complications, for almost two months. In September, the UPS company nurse in Kansas City reviewed Mr. Murphy's medical file and saw his high blood pressure. She immediately took him off work and ordered him to submit to another blood pressure test. Initially, she erroneously told him that a blood pressure reading above of 140/90 would result in his termination. The UPS nurse later changed the number to 160/90. Mr. Murphy went back to be tested, and his millimeters of mercury read 160/104 and 160/102. He was fired a few days later. He asked UPS to give him time to regulate his medication and lower his blood pressure or to obtain a medical waiver from the DOT. UPS refused. Mr. Murphy's termination was final, and so began the long story of *Murphy v. United Parcel Service, Inc.*[24]

I filed the case with the Equal Employment Opportunity Commission ("EEOC") and the Kansas Human Rights Commission. After the obligatory 180 day waiting period had passed, the case was filed in the United States District Court for the District of Kansas. United States Magistrate Judge Ronald C. Newman handled all the pretrial discovery. UPS retained the Kansas City, Missouri law firm of Bioff, Singer & Finucane. Brian Finucane and an associate with the firm, James Holland, handled the case. The case went through all the phases of pretrial discovery right on schedule. Interrogatories, requests for production of

20. The medical community generally considers a blood pressure reading of 120/80 to be normal. *See, e.g.,* American Medical Association, *Health Insight* (visited February 9, 2000) <http://www.ama-assn.org/insight/spec_con/bp/bp.htm#p01>.

21. 49 C.F.R. § 391.41(b)(6) (1999).

22. *See* 42 U.S.C. § 12113(b) (1994).

23. *See id.*

24. 946 F. Supp. 872 (D. Kan. 1996), *aff'd*, No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998), *aff'd*, 119 S. Ct. 2133 (1999). For further discussion of *Murphy v. United Parcel Service, Inc.*, see Barbara M. Smith-Duer, comment, *Too Disabled or Not Disabled Enough: Between a Rock and a Hard Place After Murphy v. United Parcel Service, Inc., [Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999)]*, 39 WASHBURN L.J. 255 (2000).

documents, depositions, and experts were all handled with no need for intervention by the court. The defense was tough but courteous and professional. UPS filed a motion for summary judgment. UPS asked the court to dismiss the case, claiming that Mr. Murphy was not disabled in his medicated condition. In the alternative, UPS asked the court to dismiss because Mr. Murphy was too disabled, claiming he was not able to perform the essential functions of his job. Finally, UPS claimed the case should be dismissed because it did not discriminate against Mr. Murphy when firing him for his hypertension—UPS had to terminate him because of DOT regulations. In fact, it was UPS's misinterpretation of DOT regulations that caused the case in the first place. Because the DOT health card had been properly issued to Mr. Murphy, the DOT regulations did not "force" UPS to do anything. UPS failed to follow proper procedure under the DOT regulations and bulletins. UPS fired Mr. Murphy when he failed to comply with UPS's erroneous interpretation of the DOT regulations.

The court granted summary judgment on all grounds.[25] Judge Sam A. Crow ruled that Mr. Murphy was not disabled because his hypertension did not substantially limit a major life activity when he was evaluated in his medicated state.[26] The ADA is silent on whether a person's disability should be evaluated in its medicated or unmedicated state. The EEOC's regulations and the ADA's legislative history, however, suggest that a person's impairment should be evaluated in its unmedicated state.[27] Unmedicated, Mr. Murphy's hypertension is approximately 250/160. The DOT nurse and Mr. Murphy's physician testified that this level of blood pressure is the most severe form of hypertension. In a sense, Mr. Murphy is probably one of the most disabled persons ever to appear before the United States Supreme Court. He suffers from the most severe form of the deadliest disease in America. His condition is congenital, permanent, and will eventually cause his death. He was fired because of his disease, yet because the court ruled he was not disabled, the ADA could not protect him.

On November 20, 1996, a notice of appeal was filed with the Tenth Circuit Court of Appeals. A few months later, the EEOC filed an amicus brief and asked for some of Mr. Murphy's allotted time at oral argument. Lynn Bruner, an attorney for the EEOC in Washington, D.C., wrote the amicus brief and argued the case for the EEOC. They had been tracking the issue of "mitigating measures" all over the country.

In an unpublished opinion handed down in the spring of 1998, the court of appeals affirmed the dismissal of the case, agreeing that Mr.

25. *See Murphy*, 946 F. Supp. at 884.
26. *See id.* at 878-84.
27. *See id.* at 879-81 (discussing EEOC guidelines regarding medications).

Murphy was not disabled in his medicated state.[28] On June 9, 1998, plaintiff filed a Petition for Writ of Certiorari to the Supreme Court of the United States, one of thousands of petitions filed each year. The Court agrees to hear only approximately seventy to eighty cases a term. Nevertheless, the chances for this case were good because there was a well developed split in the circuit courts of appeal. The circuits were split, with seven for and two against plaintiff's position. The Supreme Court had, as of that time, not taken a Title I ADA employment case. The decision would potentially affect millions of workers.

Great news came on November 18, 1998. The Supreme Court entered an order requesting the Solicitor General to file a brief on whether the Court should take our case. Unfortunately, the Court also wanted advice on whether it should take the *Sutton v. United Airlines, Inc.*[29] case. *Sutton* was another Tenth Circuit case holding that the judiciary was not bound by the EEOC's regulations on mitigating measures.[30] *Sutton* involved airline pilots with severe myopia,[31] although with glasses their vision was 20/20.[32] United Airlines had argued that the Suttons were too disabled to work for the airline but not disabled as defined by the ADA. The Tenth Circuit agreed.[33]

The Solicitor General filed a brief with the Supreme Court requesting that the Court grant certiorari on *Murphy* but deny it on *Sutton*. At the time, I did not know that the Court was also considering another ADA vision case, *Albertson's, Inc. v. Kirkingburg*.[34] Kirkingburg was a longtime truck driver with an excellent driving record who had monocular vision (vision in only one eye).[35]

Our fate was sealed on January 8, 1999. The Supreme Court did not take the Solicitor General's advice to only accept *Murphy*. Instead, the Court granted certiorari on all three cases.[36] This created the problem that would plague the rest of the case. Mr. Murphy, one of the most disabled persons ever to go before the Supreme Court, had to defend his cause of action in the shadow of vision cases. The press had a heyday with the vision cases—asserting that the ADA was a runaway statute. Business was being crushed by the ADA—the unfunded mandate to the states and the pariah to all business. If the Court held that

28. *See* Murphy v. United Parcel Serv., Inc., No. 96-3380, 1998 WL 105933, at *2 (10th Cir. Mar. 11, 1998).

29. No. 96-S-121, 1996 WL 588917 (D. Colo. 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

30. *See* Sutton v. United Airlines, Inc., 130 F.3d 893, 902 (10th Cir. 1997).

31. *See id.* at 895.

32. *See id.*

33. *See id.* at 902.

34. 143 F.3d 1228 (9th Cir. 1998), *rev'd*, 119 S. Ct. 2162 (1999).

35. *See Kirkingburg*, 143 F.3d at 1230.

36. *See id.*, *cert. granted*, 119 S. Ct. 791 (1999); Murphy v. United Parcel Serv., Inc., No. 96-3380, 1998 WL 105933 (10th Cir. Mar. 11, 1998), *cert. granted*, 119 S. Ct. 790 (1999); Sutton v. American Airlines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999).

the vision cases were covered by the ADA, it was believed that the floodgates would open for a deluge not seen since the time of Noah. These fears are unjustified because the ADA requires the plaintiff to prove that he is fired on account of his disability. Few people are fired because they wear eyeglasses.

Once certiorari was granted, everything started to fly. The press came down like Hitchcock's seagulls. I had to assemble and print the joint appendix. UPS retained Gibson, Dunn & Crutcher, a D.C. law firm specializing in Supreme Court cases. Amici had to be assembled. Most of all, the brief had to be written. I felt like I was dropped in the Kansas River during the flood of 1993. Then I heard about Steve McAllister, a law professor at the University of Kansas School of Law, who was from Lucas, Kansas. After law school he clerked for Judge Posner, then went on to clerk for Justice White and Justice Thomas. He had worked on and argued several Supreme Court cases. We talked to him and he was willing to help us on very reasonable terms. He would write the brief and argue the case. I would handle the client, joint appendix, amici, and the press.

I received wonderful and gracious help from my wife, Professor Jalen O'Neil, from Dean James Concannon, and from the professors at Washburn University School of Law. Without their help, I would have been up a river without a paddle. Professor Ruth Colker from Ohio State University and Professor Bonnie Tucker from Arizona State University provided much help, background material, and editing on the brief. Professor Chai Feldblum, one of the people who helped write the ADA, organized the moot courts at Georgetown Law School.

Excellent amicus briefs were written by the Solicitor General, Claudia Center for the Employment Law Center, Paula Brantner and Gary Phalen for the National Employment Lawyers Association, Thomas F. Reilly, Attorney General of Massachusetts for a coalition of attorneys general including Attorney General Carla Stovall of Kansas, Michael Greene for the American Diabetes Association, and finally Arlene Mayerson for Senators Harkin, Dole (J.D., 1952, Washburn University) and Kennedy.

I used to think that I was an above-average legal writer before I married a law professor who teaches research and writing. I was relieved when she agreed that Professor McAllister did a fantastic job on the brief. Our arguments were classic statutory construction, legislative history, and *Chevron*[37] deference to the EEOC. Our focal argument was that the plain language and structure of the ADA required that

37. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (giving deference to a governmental agency's interpretation when a statute is unclear, vague, or ambiguous).

mitigating measures not be taken into consideration when determining whether a person's impairment substantially limits a major life activity. Our biggest advantage was that the Supreme Court had only granted certiorari on the issue of whether Mr. Murphy had an actual impairment that substantially limited a major life activity, or whether UPS regarded him as having such an impairment. The Court did not grant certiorari on the essential job functions issue or whether he was able to perform all the essential job functions with reasonable accommodation. Therefore, we could focus our argument on how disabled and impaired Mr. Murphy was without getting caught between a rock and a hard place.[38] We could turn the Catch-22 that had been read into the law by the courts back on them. How could UPS fire Mr. Murphy for being too disabled and claim that he is not protected by the ADA, whose purpose it is to prohibit discrimination on the basis of disability? The question was asked but never really answered.

After the briefs were written, Professor McAllister went through some grueling moot courts. Then we did more moot courts at Georgetown Law School with Professor Chai Feldblum, Arlene Mayerson, the Solicitor Generals on the case, Seth Galanter from the Justice Department, and an attorney who had just argued another ADA case that week. The key discussion focused on how to best convince the Court that Mr. Murphy should be considered disabled under the ADA—either by showing that Mr. Murphy was actually disabled[39] or that his employers simply regarded him as disabled.[40] My inclination was to fight for the actual disability element just as strongly as for the "regarded as" prong. In the end, however, it all turned out to be academic anyway.

Our case was set for oral argument on Tuesday, April 27th, 1999. *Murphy* was to be the first of the three ADA cases to be argued. We had always seen it as a good sign that the cases were not consolidated even though the issues were the same in each case. Mr. Murphy clearly had the most serious disability. At 9:00 a.m. we were allowed to proceed upstairs to the receiving room for counsel. On the way up, Professor McAllister and I touched John Marshall's boot for good luck. Mr. Suter, the Clerk of the Court, dressed in his formal morning suit, gave

38. The "rock and a hard place" is epitomized in the district court's opinion. *See* Murphy v. United Parcel Serv., Inc, 946 F. Supp. 872, 878-79 (D. Kan. 1996).

> In its response, UPS argues that Murphy is trying to have it both ways. To demonstrate that he is disabled, Murphy sets forth several of the serious consequences which can result from his high blood pressure. Then in a subsequent section of his brief, Murphy, in an effort to demonstrate that he is qualified for the position with UPS, essentially argues that his high blood pressure posed no threat or obstacle to the performance of his duties as mechanic.

Id.

39. *See* 42 U.S.C. § 12102(2)(A) (1994).

40. *See* 42 U.S.C. § 12102(2)(C) (1994).

us words of wisdom. "Move quickly up to the table. Address the Court only with the magic words 'Mr. Chief Justice—May it Please the Court.' Don't look at the clock directly above the Chief." Apparently, the week before, an attorney had looked at the clock and was scolded by Chief Justice Rehnquist. He also warned us not to be alarmed when the Chief Justice got up and walked behind the curtain during the oral argument. He said that every day the Chief Justice gets up at exactly twenty minutes after ten, goes behind the curtain, walks back and forth for ninety seconds to stretch his back, and then returns. Reasonable accommodation is a good thing.

We proceeded upstairs, were seated, and listened to the first arguments. Then our case was called, and Professor McAllister proceeded to the lectern. He started with our wonderful statutory construction argument and almost got a minute into it when Justice Scalia started to play with his glasses. He sat up on the edge of his chair, snapping his thick glasses back and forth on his face: "Counsel, are you trying to tell me that if I take my glasses off I am disabled?" The press laughed. No gavel bang would be forthcoming from the Chief Justice on that one. On and on he went about the eyeglasses. Mr. Murphy's eyesight is perfectly fine, yet he was one of the most disabled people to come before the Court. He has a serious disability that will eventually kill him, but all the Justices would talk about were eyeglasses, floodgates, and forty-three million people.

Justice Scalia and several other Justices commented about Congress' first finding in the preliminary section of the ADA statute.[41] "[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."[42] The Justices questioned whether Congress could have intended for the disabled to be viewed in their unmitigated state for purposes of coverage under the act because that would raise the number of disabled to 100 million or more. I felt like I was reading the book of the Apocalypse and God had said: "And thou hast sinned and so forty-three million alone are chosen and only forty-three million. None shall enter the kingdom after the last of my chosen forty-three million has entered." We had the plain language of the statute, the Solicitor General, the EEOC, the Justice department, seven to two in our favor in the circuit courts, *Chevron* deference, legislative history, and clear EEOC regulations. All UPS had was its own plain language interpretation and the argument of the forty-three million.

The highlight of oral argument for me came during UPS's argument. I was seated on the right, less than ten feet away from the Jus-

41. *See* 42 U.S.C. § 12101 (1994).
42. 42 U.S.C. § 12101(a)(1).

tices. Justice Breyer and Justice Thomas were closest to me and I could hear them whispering to each other. Justice Souter asked a very intelligent question to counsel for UPS about the intricacies of the Catch-22 Mr. Murphy was in, and Justice Breyer whispered to Justice Thomas: "Oh my, that is so counter-intuitive." I'll take what I can get.

The next day was more of the same on *Sutton* and *Kirkingburg*. I was hoping that maybe they would at least ask them about *Murphy* and hypertension. No such luck—they stayed focused on the vision cases. Standing in line waiting to get in to the Court, one of our amici asked me how I thought it went. I said I thought it went very well. She said she thought that was overly optimistic. I told her that Judicial Darwinism had killed off all but the absolute optimists.

On June 26, 1999, it killed me off, too. I received a call from the Clerk's office. She said the Court had decided our case and had affirmed.

This term the Court has taken two cases to decide whether the ADA can withstand Eleventh Amendment state immunity. The Court has created new and expanded Eleventh Amendment immunity for the states in every case it has taken in the last five years. For example, in January, the Court ruled that the Age Discrimination in Employment Act[43] was not a valid exercise of Congressional authority under section five of the Fourteenth Amendment.[44] One of the Court's primary rationales for its decision is that the class of persons over forty years of age is not a discrete and insular minority that has suffered a history of discrimination by the states.[45] Maybe the loss of *Murphy* and *Samsel* will save the ADA as it applies to the states.

In *Samsel*, the Supreme Court of Kansas notes that Kansas Statutes Annotated section 60-19a01, the $250,000 damage cap, discriminated against the most severely disabled and injured in the State of Kansas.[46] The court acknowledges that the legislature must be aware of the harsh impact the damage cap levies against injured plaintiffs, but the court concludes that if the legislature wants to discriminate against severally impaired plaintiffs—so there can be lower insurance premiums—that was within its legislative discretion.[47] *Samsel* and the legislative history

43. 29 U.S.C. §§ 621-634 (1994 & Supp. III 1997).

44. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

45. *See id.* at 645-50.

46. *See* Samsel v. Wheeler Transport Servs., Inc., 789 P.2d 541, 558 (1990) ("The legislature is aware that the cap on noneconomic damages will affect the right to recover by those most severely injured in Kansas.") (citation omitted).

47. *See id.*

> Laws that restrict those who suffer the greatest pain, mental anguish, and disfigurement from a case-by-case determination of individual damages by a jury are harsh. However, our determination is that, under proper circumstances, the legislature may limit recovery of noneconomic losses of those individuals whose quality of life has been most affected.

Id.

cited by the court, shows how the State of Kansas has knowingly passed laws that discriminate against the disabled.[48]

Justice Breyer, in his dissent in *Sutton*, said that the Court was faced with a decision of whether to exclude workers Congress clearly intended to be protected by the ADA or include some workers who were probably not intended to be protected.[49] The Court chose to limit the class of disabled protected by the ADA. UPS argued, and the Court agreed, that up to 150 million people would likely be covered if it decided the mitigating measures issue in favor of Mr. Murphy. Instead, the Court created per se classes of non-disability for hypertension, epilepsy, correctable vision, correctable hearing, many mental impairments, and most diabetics.[50] If one takes *Murphy* and the fact that ninety-two percent of all cases are dismissed as a matter of law, the "truly disabled" may be the smallest and most discrete and insular minority in America.

48. *See id.*
49. *See* Sutton v. American Airlines, Inc., 119 S. Ct. 2139, 2161 (1999) (Breyer, J., dissenting).
50. *See id.* at 2147-49.