The Efforts of Texas Courts to Disable Disability Law in Texas

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I. Introduction

The Americans with Disabilities Act[1] ("ADA") was signed by President Bush on July 26, 1990, but did not become effective until two years later. During these two years, and even during the years preceding the passage of the Act, the entire country was generally aware of the prevailing trend of seeking reform in the area of anti-discrimination laws. In the area of disability law, the Rehabilitation Act of 1973 ("Rehab Act") had already been in place for years.[2] The operative section of the Rehab Act prohibits discrimination based on a disability by any program or activity that receives federal financial assistance.[3] Although the reach of the Rehab Act is broad in that many entities receive federal funding, Congress apparently thought that the coverage was not broad enough; so in 1990 Congress decided to respond to the pleas of some forty-three million Americans[4] who have one or more physical or mental disabilities and who have historically been isolated by society.[5]

The ADA is composed of five separate titles, each addressing a different area of disability discrimination. Title I, the employment title, specifies that a covered entity may not discriminate against a qualified individual with a disability in any term, condition or privilege of employment.[6] Title II makes the prohibition against discrimination on the basis of disability applicable to all programs, activities and services provided by public entities[7] and essentially extends the scope of § 504 of the Rehab Act beyond entities receiving federal funding. Title III extends the prohibition to all privately owned public accommodations,[8] as defined in the

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1. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).
2. The Rehabilitation Act of 1973, 29 U.S.C. § 701 (1988).
3. *Id.* § 706.
4. 42 U.S.C. § 12101(a)(1).
5. *Id.* § 12101(a)(2).
6. *Id.* § 12112(a).
7. *Id.* § 12132.
8. *Id.* § 12182(a).

act, such as movie theaters,[9] restaurants,[10] and museums.[11] Title IV deals with telecommunications,[12] and Title V contains miscellaneous provisions.[13] Both Titles IV and V are beyond the scope of this article.

Congress did not intend the ADA to apply retroactively to allegedly discriminatory acts that occurred before the effective date; the Fifth Circuit and district courts in Texas have expressly acknowledged this limitation.[14] Furthermore, courts have rejected the argument that a discriminatory act that occurred before July 26, 1992, the effective date of the Act, such as a firing should be considered a continuing violation because it has a continuing effect on the plaintiff.[15] Thus, claims can be brought under the ADA only for discriminatory acts that occurred after the effective date.

A plaintiff who might otherwise be barred from bringing a disability discrimination claim under the ADA, however, might still bring a claim under Texas' analogous anti-discrimination law, The Texas Commission on Human Rights Act ("TCHRA").[16] The TCHRA was passed by the Texas Legislature in 1983 and in effect for years before the ADA became law. Like Title I of the ADA, the TCHRA addresses only employment situations. Accordingly, an examination of the Texas courts' treatment of both the ADA and the TCHRA is necessary to understand the efforts of Texas courts to disable disability law.

A familiarity with the statutory language of the ADA is a predicate to understanding Texas courts' treatment of the ADA. Under the ADA, an aggrieved individual must show that she is disabled as defined in the act.[17] The definition given in the ADA of a "disability," which was taken nearly verbatim from the Rehab Act, provides a three-prong definition: a "disability" is a "physical or mental impairment that substantially limits one or more of the major life activities";[18] a "record of such impairment";[19]

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9. *Id.* § 12181(7)(C).

10. *Id.* § 12181(7)(B).

11. *Id.* § 12181(7)(H).

12. 47 U.S.C. §§ 225, 611 (1996) (codified as part of Communications Act).

13. 42 U.S.C. § 12201-12213.

14. O'Bryant v. City of Midland, 9 F.3d 421, 422 (5th Cir. 1993); Daniels v. Allied Elec. Contractors, Inc., 847 F. Supp. 514, 516 (E.D. Tex. 1994).

15. *Daniels*, 847 F. Supp. at 516; Malek v. Martin Marietta Corp., 64 Empl. Prac. Dec. (CCH) ¶ 42,930 (D. Kan. Oct. 15, 1993).

16. Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001 (Vernon 1993) (formerly TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon 1987) (repealed 1993)) [hereinafter TEX. LAB. CODE ANN. will refer to the current codified version; the older version will be referred to by citation to TEX. REV. CIV. STAT.]; *see Daniels*, 847 F. Supp. at 517.

17. 42 U.S.C. § 12102(2) (defining "disability").

18. *Id.* § 12102(2)(A) (following Rehab Act, 29 U.S.C. § 706(8)(B)(i)).

19. 42 U.S.C. § 12102(2)(B) (following Rehab Act, 29 U.S.C. § 706(8)(B)(ii)).

or "being regarded as having such an impairment."[20] According to the interpretive guidelines of the Equal Employment Opportunity Commission ("EEOC"), a "major life" activity can be anything from walking and seeing, to sleeping or even working.[21] Nevertheless, with regard to the life activity of working, for example, the ADA requires that the individual with a disability be "qualified"—that is, capable of performing the "essential functions" of the job "with or without reasonable accommodation."[22] Prior to its amendment in 1989, which closely tracks the three-prong definition of "disability" in the Rehab Act and the ADA, the TCHRA, however, had a different definition. According to § 2.01 of the TCHRA, a "handicap" meant "a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services . . . ."[23] Even though the Texas Legislature was interested in "securing freedom and rights for the handicapped," a 1987 Texas Supreme Court decision dictates that the operative language in the TCHRA was revised by the Texas Legislature because the legislature intended to limit those rights with the new legislation.[24]

Similarly, a later provision, which has been repealed, was used by the Texas Supreme Court to limit the coverage of the TCHRA. The provision stated that to discriminate "because of handicap" refers to "discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job."[25] As will be demonstrated, some Texas courts have deemed this language similar to the "otherwise qualified" language from the Rehab Act and the ADA, while other Texas courts, including the Texas Supreme Court, have construed this language to mean that an individual will be precluded from bringing a claim of discrimination if his or her disability affects performance of the job sought, and that it would be perfectly acceptable to discriminate against someone because of his or her ability to perform a job.[26] Since most impairments that qualify as disabilities under the TCHRA will likely affect an individual's ability to perform in some way or another, such a narrow interpretation could easily exclude many individuals from the intended

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20. 42 U.S.C. § 12102(2)(C) (following Rehab Act, 29 U.S.C. § 706(8)(B)(iii)).

21. 28 C.F.R. § 35.104 (1995) states that the phrase "major life activities" means functions such as caring for one's self, . . . walking, seeing, hearing, speaking, breathing, learning, and working."

22. 42 U.S.C. § 12111(8).

23. TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(B) (Vernon 1987) (repealed 1993).

24. Chevron Corp. v. Redmon, 745 S.W.2d 314 (Tex. 1987); *see* discussion *infra* part II.

25. TEX. REV. CIV. STAT. ANN. art. 5221k, § 1.04(b) (Vernon 1987) (repealed 1993).

26. *Redmon*, 745 S.W.2d at 314; *see* discussion *infra* part II.

coverage of the Act. Moreover, while one of the stated purposes of the TCHRA is to "provide for the execution of policies embodied in Title VII of the Civil Rights Act of 1964,"[27] Texas courts have not adhered to federal precedent. Texas courts have acknowledged that when reviewing a case brought under the TCHRA, the courts may correlate state law with federal, looking both to the relevant provisions of the state statute and to any analogous provisions contained in similar federal legislation.[28] Federal courts in Texas have also expressly embraced the use of more firmly established federal civil rights precedent (i.e., Title VII) to aid in the interpretation of the short-lived pre-1993 version of the TCHRA.[29] While well-settled rules of statutory interpretation suggest that the Texas courts would ultimately reach conclusions consistent with their federal counterparts, Texas courts in fact stray far afield of federal precedent.

As its title suggests, the purpose of this article is to explore, analyze, and critique disability jurisprudence in Texas. Part II focuses on the importance and effect of *Chevron Corp. v. Redmon*; Part III addresses Texas courts' disregard for the policy of the ADA; Part IV considers Texas courts' disregard for EEOC regulations; and Part V examines the hyper-technical approach that Texas courts use in disability cases.

II. *Chevron Corp. v. Redmon*

Chevron Corp. v. Redmon[30] is the leading Texas case interpreting the operative provisions of the TCHRA. Although certain holdings from this opinion have since been impliedly overruled by the passage of the ADA and the case law interpreting the ADA, many Texas cases incorrectly continue to cite it. Therefore, a discussion of this case is critical to an understanding of this area of law. In *Redmon*, the plaintiff had vision problems that could not be corrected to better than 20/60. Because the defendant employer required no less than 20/40 vision for the position for which the plaintiff applied, it is undisputed that the plaintiff was not hired because of her vision.[31] The court, looking to the various provisions of the TCHRA,

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27. TEX. LAB. CODE ANN. § 21.001 (1993); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1989).

28. City of Austin v. Gifford, 824 S.W.2d 735, 739 (Tex. App.—Austin 1992, no writ); Schroeder v. Texas Iron Works, 813 S.W.2d 483, 485 (Tex. 1991).

29. *Daniels*, 847 F. Supp. at 517. Although most cases discussed in this article deal with the version as it existed before the 1993 amendments, it is of utmost importance to note that one of the stated purposes in the current version of the TCHRA is "to provide for the execution of policies embodied in Title I of the [ADA] and its subsequent amendments." Act, 73rd Leg., R.S., ch. 276, § 1 (to be codified as an amendment to TEX. LAB. CODE ANN. § 21.001).

30. 745 S.W.2d 314 (Tex. 1987).

31. *Id.* at 315.

implicitly followed the three-pronged inquiry for stating a cause of action established in *Elstner v. Southwestern Bell Tel. Co.*[32] A plaintiff must establish (1) that he or she is "handicapped" as defined in the act; (2) that he or she was discriminated against because of the handicap; and (3) that the alleged discriminatory act was based solely on the handicap.[33]

The court, following the well-established burden of proof models from other anti-discrimination acts such as Title VII, first looked to whether the plaintiff showed that she was within the protected class[34] of "handicapped" persons based on the definition of "handicapped" in the TCHRA.[35] The court looked to whether the plaintiff's visual impairment constituted a "handicap" according to the TCHRA. To determine the intended scope of the term as used in the statute, the supreme court, rather than extensively dissecting the quoted definition, chose to examine the entire TCHRA, the predecessor acts, and the legislative history of those acts to determine the intended coverage of the TCHRA.[36] The court quoted extensively from the sections of Article 5221k, which set out the purposes of the TCHRA.[37] In specifically analyzing the definition of "disability" in the TCHRA, the supreme court inferred from language in the predecessor act[38] that "the

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32. 659 F. Supp. 1328, 1345 (S.D. Tex. 1987), *aff'd*, 836 F.2d 881 (5th Cir. 1988).

33. *Id.*

34. A discussion of whether or not "the disabled" should be considered a suspect class, thereby requiring legislation potentially affecting the class to be afforded a heightened level of scrutiny, is beyond the scope of this article. Nevertheless, it is important to note that in 1985, the United States Supreme Court in City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), a case which originated out of the Fifth Circuit, held that under the Equal Protection Clause, the mentally retarded should not be considered a suspect class. The Fifth Circuit had decided that legislation affecting such individuals does merit heightened scrutiny, but the Supreme Court rejected the conclusion, explaining that the existence of legislation such as the Rehab Act shows that the group is being addressed properly by the legislature and that therefore there is no need for "more intrusive oversight by the judiciary." *Id.* at 443. At least one critic has noted that "[i]n passing the ADA, Congress appears to have undercut the Supreme Court's decision in *Cleburne* by, in fact, requiring more 'intrusive oversight by the judiciary' and by considering persons with disabilities akin to that of a suspect class." Garth A. Corbett, *Americans With Disabilities Act*, 54 TEX. BAR J. 51, 54 (1991). In fact, in its findings and purposes, Congress expressly states "individuals with disabilities are a discrete and insular minority." 42 U.S.C. § 12101(a)(7). In light of several subsequent Fifth Circuit decisions that are discussed *infra*, it seems obvious that this Supreme Court decision had a chilling effect on courts' attempts to further the rights of the disabled.

35. *Redmon*, 745 S.W.2d at 316.

36. *Redmon*, 745 S.W.2d at 316.

37. § 1.02 also explicitly stated that one of the purposes of the act was to "provide for the execution of policies embodied in Title VII . . . ." TEX. LAB. CODE ANN. § 1.02(1). One of the stated purposes of the Texas Commission on Human Rights Act was "to secure for persons within the state freedom from discrimination in certain transactions concerning employment, and thereby to protect their interests in personal dignity; and to make available to the state their full productive capacities, . . . and to promote the interests, rights and privileges of individuals within the state." TEX. REV. CIV. STAT. ANN. art. 5221k, § 1.02(2) (Vernon 1987) (repealed 1993).

38. TEX. HUM. RES. CODE ANN. § 121.001 (Vernon 1990).

legislature obviously was not concerned with minor physical or mental defects, . . . [but rather with] serious impairments"[39] when it created the provision defining handicap. The court also pointed out that while the Texas Legislature expressly referred to Title VII of the Civil Rights Act, "the legislature obviously chose not to employ the definition of 'handicap' in the Federal Rehabilitation Act"[40] as evidenced by the fact that it "did not even refer to the Rehab Act in section 1.02 which described the purposes of the Act."[41] The court then expressly chose not to employ the definition from the Rehab Act,[42] but rather to follow a 1974 Wisconsin state court decision that had held that the test for handicap is whether the disability is one that is generally perceived as severely limiting a person in performing a work-related function.[43]

Ultimately, the court decided that "the question of whether a person is 'handicapped' is generally a question of fact for the fact finder," but then held that, "as a matter of law, Redmon's disabilities do not constitute those severe impairments which article 5221k was intended to protect."[44] Unfortunately, such contradictory conclusions seem to have started a trend among Texas cases of acknowledging that the determination of whether an individual is handicapped under article 5221k is usually a question of fact, and then holding that a particular plaintiff is not handicapped as a matter of law.[45]

It is within the sound discretion of the Texas Supreme Court to choose from where it will adopt a definition of "disability" and the interpretation of the word it deems best; however, the supreme court in *Redmon* did not *have to* construe the TCHRA and the term "handicap" the way it did. When the legislature selected the definition of "handicap" from a predecessor statute,

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39. *Redmon,* 745 S.W.2d at 317.

40. The definition of "handicap" in the Rehab Act, 29 U.S.C. § 706(8)(B), is a three-part definition that was incorporated nearly verbatim into the 1990 ADA. *See supra* part I.

41. *Redmon,* 745 S.W.2d at 318.

42. *Id.*

43. *Id.* (citing Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Department of Indus., Labor and Human Relations, 215 N.W.2d 443 (Wis. 1974)).

44. *Redmon,* 745 S.W.2d at 318.

45. *See, e.g.,* Jones v. Chevron, No. 01-90-00999-CV (Tex. App.—Houston [1st. Dist.] June 27, 1991, writ denied) (not designated for publication), 1991 Tex. App. LEXIS 1624, at *4 . Here, the court seemed to have the same problem, shifting between the statutory and non-statutory definitions of "disability," and unsure in its seemingly aimless inquiry as to whether such a determination is a question of law for the judge or a question of fact for the fact finder. The court, after acknowledging that "whether a person is 'handicapped' is a question of fact for the fact finder," and after referring to the definitions in the TCHRA, weighed the evidence before it and decided "as a matter of law, [that] none of these restrictions [affecting the plaintiff] are of the type that are generally perceived to severely limit a person's ability to perform work-related functions in general." (citing *Redmon,* 745 S.W.2d at 318).

the Texas Human Resources Code ("THRC"), as the operative language in the TCHRA instead of the three prong definition from the Rehab Act, it obviously had some purpose in mind. Although the legislature might not have referred to the Rehab Act in the statute, two of the stated purposes are to follow and integrate analogous federal law and to further the rights of the disabled. Yet, even when the court was called upon to define the limits of the Texas version of the definition of "handicap", it ironically explained that the THRC version is narrower in a perverse effort to uphold the new law. As if that was not enough, the Texas legislature did not mention the Wisconsin state court decision, which was the basis for the court's official interpretation of the term "handicap," in the initial sections of the Act, just as it made no reference to the Rehab Act.

Shortly after the *Redmon* decision, the Texas Legislature amended the definition of "disability" in 1989, *before* the passage of the ADA, to closely track the three prong definition from the Rehab Act. Since the ADA did not yet exist and since it is unlikely that the Texas Legislature was being visionary with these amendments, the legislature must have taken the language from the Rehab Act. It is not a far-fetched assertion, then, that it was the *Redmon* decision itself that opened the legislature's eyes to the fact that the courts of this state, namely the Texas Supreme Court, were misconstruing the legislature's intentions in enacting the TCHRA. The legislature may have realized that its stated purposes of "helping the disabled" and "using federal precedent" were too generalized; but at any rate, the legislature must have thought that the Supreme Court in *Redmon* should have been more lenient in its interpretation.

Justice Mauzy's hopeful dissent in *Redmon* is equally significant. Justice Mauzy reasoned that remedial provisions of statutes such as the TCHRA should be given the "most comprehensive liberal construction possible"; otherwise the interpretation of the provisions defeats the purpose of the legislation."[46] In addition, Justice Mauzy quoted the majority for the proposition "that the question of whether an individual is or is not a handicapped person constitutes a fact question for the jury's determination," and thereby suggested that the case be remanded so that the trial court could properly determine whether or not Redmon's vision constitutes a handicap and whether it would impair her ability to reasonably perform her job.[47] Notably, Justice Mauzy dissented not because he would have decided that the plaintiff was disabled under the TCHRA as a matter of law; rather, he

46. *Redmon*, 745 S.W.2d at 319 (Mauzy, J., dissenting) (citing City of Mason v. West Texas Utilities Co., 237 S.W.2d 273, 280 (Tex. 1951)).

47. *Id.* at 320 (Mauzy, J., dissenting).

disagreed with the majority for the very reason that it adopted a narrow interpretation and ultimately decided the issue as a matter of law. Justice Mauzy's approach is precisely what is necessary if Texas is to succeed in effecting change through anti-discrimination legislation.

III. Disregarding Policy

Following the lead of *Redmon*, Texas courts are misconstruing provisions of the TCHRA in a manner that ignores the stated purposes of the Act. A recent Texas District Court opinion supports this conclusion. In *McIntyre v. Kroger, Co.*,[48] the court held that the plaintiff had failed to meet the three-prong test under the TCHRA.[49] The plaintiff in *McIntyre* had alleged Kroger had discriminated against him due to his health condition by terminating him and by engaging in a discriminatory course of conduct by not allowing him to be downgraded from manager to member of the labor bargaining unit.[50] In its reasoning, the court cited § 1.02 of the act, which again states that one of the act's general purposes is "to secure for persons within the state, including disabled persons, freedom from discrimination in certain transactions concerning employment, and thereby to protect the personal dignity of persons within the state; and to make available to the state the full productive capacities of those persons."[51] The court, however, also stated that "protection of these stated goals is assured by requiring that the plaintiff show at least some evidence that the defendant's termination decision was based on [the] plaintiff's purported disability."[52] Not surprisingly, the court upheld the "rigid" requirements of the act and ultimately dismissed the plaintiff's case for failure to meet her burden on each element of the cause of action.[53] Furthermore, the court added the implicit requirement that "the TCHRA at least requires that evidence be shown by a plaintiff that points to some knowledge by the defendant that plaintiff suffered from a disability in order to charge defendant with discriminating against plaintiff because of that disability."[54] While the court claimed that it was interpreting § 1.04 of the Act, to "clarif[y]" and "elucidate" the meaning of "discriminat[ing] based on disability,"[55] it nevertheless viewed strictly holding the plaintiff to his or her burden as

48. McIntyre v. Kroger Co., 863 F. Supp. 355 (N.D. Tex. 1994).
49. *Id.* at 360.
50. *Id.* at 358.
51. TEX. LAB. CODE ANN. § 1.02.
52. *McIntyre*, 863 F. Supp. at 358.
53. *Id.* at 359.
54. *Id.*
55. *Id.* at 358.

necessary to safeguard the goals of the TCHRA. Although it is reasonable to require a plaintiff to prove that the defendant knew about the disability, and to conclude that a plaintiff should not be permitted to recover without the requisite proof, if a court were truly concerned with "protecting the stated goals" of the TCHRA, it would be less concerned with the plaintiff's burden and more concerned with disseminating the message that discriminatory conduct by employers must cease.

Conversely, in a 1993 Texas district court case, *Thompson v. City of Arlington*,[56] the court applied proper reasoning in finding that a plaintiff did not meet his burden. The *Thompson* court was faced with a set of conclusory allegations that merely tracked the language of the act under which the plaintiff sued. This was a sex discrimination case in which the plaintiff incorporated an ADA claim merely by reference, and described the ADA cause of action as follows:

> The Defendants are 'employers' within the meaning of the statute. Thompson [the plaintiff] is, or is considered to be, 'disabled' within the meaning of the [ADA]. Thompson is a 'qualified individual with a disability' as defined in the ADA. Defendant's refusal to employ her as a police officer . . . violate[s] the provisions of the ADA that prohibit discrimination against an otherwise qualified employee because she is disabled, or because she is considered to be disabled.[57]

The *Thompson* court concluded that "[t]he mere fact that the City has put her on restricted duty until it satisfies itself that she is qualified to return to regular duty does not suggest that the City regards her as having an impairment of the kind contemplated by ADA."[58] Basically, this was a meritless sex discrimination claim couched in terms of, among other things, the ADA, which failed not only because the ADA was not meant to address sex discrimination claims, but more importantly, because the plaintiff made only bare conclusory allegations in an attempt to sustain her burden.[59] If the *McIntyre* court were faced with a similar set of conclusory allegations that merely traced the language of the ADA in an effort to provide proof of each element required, its language regarding "protecting the stated goals of the act" and "requiring [a] plaintiff to come forward with some evidence" would have been more understandable.

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56. Thompson v. City of Arlington, 838 F. Supp. 1137 (N.D. Tex. 1993).
57. *Id.* at 1152.
58. *Id.*
59. *Id.*

A case that nicely illustrates the court's ability to deal with the issue of what to require of a plaintiff under the TCHRA is *Dees v. Austin Travis County Mental Health and Mental Retardation*.[60] In *Dees*, a disability rights advocate with a borderline personality disorder alleged that a community center violated the ADA by holding board meetings at a time that was inaccessible to individuals with certain types of mental illnesses. The evidence presented in the case established that the plaintiff, although active in the community as an advocate for the mentally ill, was unable to work full time because of her illness and the side effects of her medication.[61] Specifically, because of the sedative effects of the plaintiff's medication, her ability to function in the morning hours before 10:00 a.m. was severely limited. Based on this evidence and on the fact that the plaintiff met the essential eligibility requirements for the receipt of Austin Travis County Mental Health and Mental Retardation ("ATCMHMR") services, programs and activities, the court found her to be a "qualified individual with a disability" under Title II of the ADA.[62] Under Title II, "a public entity must make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally change the nature of the service, program, or activity."[63] ATCMHMR claimed that changing the time of the meetings would create an "undue financial and administrative burden," and would also cause it to lose membership, thereby "fundamentally altering" the nature of the board.[64] The court did not find any evidence in the record to support these conclusory allegations and therefore held for the plaintiff.

Moreover, the *Dees* court acknowledged that the regulations and the comments interpreting Title II of the ADA primarily address the physical accessibility of the programs, but nevertheless declared that the standards appear to be applicable to the instant case.[65] The court was well aware of the fears of critics of the ADA: that liberal opinions that provide redress to plaintiffs whom the act was not meant to address will only exacerbate the problem by giving rise to lawsuits. Nevertheless, the court held as it did, explaining in dicta:

> The Court believes that [the plaintiff and her attorneys] had

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60. 860 F. Supp. 1186 (W.D. Tex. 1994).
61. *Id.* at 1187.
62. *Dees*, 860 F. Supp. at 1189; *see* ADA, 42 U.S.C. § 12131(2).
63. 28 C.F.R. § 35.130(b)(7) (1995).
64. *Dees*, 860 F. Supp. at 1191.
65. *Id.* at 1190 n.7.

> good intentions in bringing this suit and notes that they made repeated efforts to settle the suit over a period of months. Additionally, the Court has noted that the [plaintiff's] initial complaints fell on deaf ears; not until the demand letter was sent did the board begin to take any action. However, the Court cannot help but be disappointed over the necessity for judicial intervention in a matter such as this and can only hope that the result does not work to create additional litigation by others with different disabilities. When the Court is presented with litigation between two parties that should be on the same side and working toward the same goals instead of against each other, the Court cannot help but feel concern.
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> In particular, the Court has concerns that abuses of the ADA by over-zealous advocates may have the ironic effect of harming the interests of those it was designed to protect. If well-qualified and dedicated community members who wish to actively participate as volunteers in community services must suffer fear of legal reprisal for their well-intended efforts, their willingness to participate and the resulting benefit of their skills and efforts may well be lost. Accordingly, the Court hopes those who the ADA is designed to assist and protect exercise good judgment and common sense in invoking its remedies.[66]

This court was able to dispose of the issue properly despite the possibility that its opinion might be abused in the future; few courts have followed suit.

For instance, two federal district courts in Texas reached identical conclusions regarding the extent to which a well-known national fast-food chain, American Dairy Queen Corp. ("ADQ") is obligated by the ADA to ensure that franchises owned and operated by entities other than ADQ are in compliance with the access requirements of § 12182(a) of the ADA.[67] In both *Young v. American Dairy Queen Corp.*[68] and *Neff v. American Dairy Queen Corp.*,[69] the issue facing the courts was whether the prohibition in § 12182(a) of the ADA was applicable in light of the fact that ADQ was only

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66. *Id.* at 1191-92.

67. 42 U.S.C. § 12182(a) states that "no individual shall be discriminated against on the basis of disability . . . by any person who owns . . . or operates a place of public accommodation." Among the types of discrimination prohibited by § 12182 and Title III is a failure to remove both architectural and communication barriers where such removal is readily achievable. *Id.* § 12182(b)(2)(A)(iv).

68. No. 93-CV-253-C, 1994 WL 761233 (N.D. Tex. May 11, 1994).

69. 879 F. Supp. 57 (W.D. Tex. 1994), *aff'd*, 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct 704 (1996).

the franchisor of the stores in question and supposedly did not run its day-to-day operations. An establishment such as a Dairy Queen franchise that serves food and drink is considered a place of "public accommodation" according to Title III of the ADA,[70] and therefore would be prohibited by that title from discriminating on the basis of disability if it "owns" or "operates" a public accommodation.[71] The complainants in the cases allege that certain ADQ stores are inaccessible to people with disabilities because of, among other things, the location of parking spaces, doors, restrooms, access ramps, and the height of water fountains, service counters and drive-through windows.[72] Since neither the ADA itself nor the regulations implementing it define the term "operates," the courts were forced to base their decisions on the evidence presented at trial. In granting summary judgment in both instances, the Texas courts reach a counter-intuitive conclusion, holding that a franchisor who exercises considerable control over its franchisees does not "operate" a place of public accommodation within the meaning of the ADA. Such premature dismissals strongly suggest that neither case law nor policy considerations were entertained, as the court carefully selected and relied upon only parts of the evidence presented to grant summary judgments in both cases.

The evidence presented to the trial court established that ADQ exercises a considerable amount of control over its franchisees, including the following: ADQ requires written permission by the franchisor, itself, prior to any reconstruction or modification to existing structures; ADQ retains the right to terminate any franchise agreement if the franchisee fails to comply with the standards and specifications set out in the franchise agreement; and, the franchisee must build its store in accordance with blueprints furnished by ADQ. ADQ apparently has the power to dictate how the stores are built and how they operate. In light of such evidence, a reasonable conclusion would have been that, if the stores in question are not in compliance with the ADA accessibility guidelines, and if ADQ, through its blueprints and franchise agreements mandates the structure of each location, then the stores are not in compliance because ADQ has not mandated it. Nevertheless, the trial court in *Neff* concluded that merely retaining architectural veto power does not amount to "operating" the facility,[73] adding in dicta that no evidence was offered to show that ADQ had exercised its rights as franchisor in any

70. 42 U.S.C. § 12181(7)(B).
71. 42 U.S.C. § 12182(a).
72. *Neff*, 879 F. Supp at 58.
73. *Neff*, 879 F. Supp. at 58-59.

way inconsistent with the ADA.[74] Such a conclusion strongly suggests that the court either did not consider all the evidence before it or did not understand it. Because Texas courts were aware of the underlying purpose of the ADA, it is difficult to comprehend how the courts could grant summary judgments in these instances based on a narrow construction of the word "operate."

In its brief as *amicus curiae*, the federal government takes the position that "the narrow interpretation given to the term 'operates' by the district court will adversely affect the government's ability to enforce compliance with the Act."[75] In addition, the U.S. government states that it has "received a large number of complaints alleging discrimination in places of public accommodation such as chain hotels, restaurants, and other businesses that use the franchise method of operation."[76] Thus, because franchise agreements are common in many of the categories of facilities considered "public accommodations" by the ADA, these holdings "will frustrate the intent of Congress in enacting the ADA . . . by insulating franchisors in this large segment of the business community from compliance with the act's mandates."[77] The Fifth Circuit apparently rejected the federal government's arguments and affirmed the district court's grant of summary judgment.[78] The court reviewed the grant de novo but agreed with the trial court that the term "operate" requires specific control over the modifications necessary to make the stores comply with the ADA.[79]

In the context of a landlord-tenant relationship, the result is quite different. The ADA regulations on Title III regarding leased premises expressly state that "both the landlord that owns the building . . . as well as the tenant that owns or operates the place of public accommodation are . . . subject to the requirements of [the Act] . . . . [T]he committee reports suggest that liability may be allocated."[80] In other words, both will remain liable for violations of the law, even though the parties will be allowed to allocate the responsibility for compliance between them. The ADQ cases, however, fail to analogize the landlord-tenant relationship to that of franchisor-franchisee, and consequently fail to hold both landlord and tenant liable.

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74. *Id.* at 59.

75. Amicus brief of Federal Government at 2, *Neff* (No. SA-94-CA-280).

76. *Id.* at 1.

77. *Id.* at 8-9.

78. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996).

79. Id. at 1066-67.

80. 28 C.F.R. pt. 36 app. B (1996) (elaborating on 28 C.F.R. § 36.201(b)).

IV. Disregarding EEOC regulations

In their attempt to effectuate the purposes of the ADA, Texas courts disregard not only policy and logic, but also the EEOC regulations that implement the act. In *Chiari v. City of League City*,[81] the Fifth Circuit recognized that regulations may serve as pronouncements of congressional intent. The *Chiari* court was faced with a situation in which an individual diagnosed with Parkinson's Disease was terminated from his position as construction inspector because the city, after advice from several doctors, concluded that he could no longer meet the physical demands of the job without posing a danger to both himself and his fellow co-workers. Since the defendant city conceded that Parkinson's is a "handicap" within the meaning of the act, the case centered on whether the plaintiff was "otherwise qualified."[82] The court, in its analysis of whether the plaintiff was "otherwise qualified," followed the approach laid out by the U.S. Supreme Court in *School Board of Nassau County v. Arline*,[83] which was guided by the Department of Health and Human Services ("DHHS") regulations on point. It is of utmost importance to note that the regulations enacted by DHHS implementing § 504 have been cited by the U.S. Supreme Court in *Arline* as pronouncements of congressional intent.[84] The same is true for the EEOC regulations implementing the ADA. Furthermore, in *Chiari*, the Fifth Circuit declared that "[t]his circuit has held that the regulations promulgated to accompany section 501 'accurately express Congressional intent.'"[85] The Fifth Circuit in this case not only relied on regulations promulgated to implement the various provisions at issue, but also cited cases from both the Fifth Circuit and the U.S. Supreme Court holding that the regulations do express congressional intent. Applying such regulations, the court ultimately dismisses the plaintiff's complaint on the ground that he failed to prove he was "otherwise qualified." Other courts, though, inexplicably declare the same regulations not even "analogous."

For instance, in *Coghlan v. Heinz Co.*,[86] a case in which the court had the opportunity to pass on the validity of applicable EEOC regulations, the court expressly held that the regulations at issue were directly at odds

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81. Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991).

82. *Id.* at 315.

83. School Bd. of Nassau v. Arline, 480 U.S. 273 (1987).

84. *Id.* at 279.

85. *Chiari*, 920 F.2d at 317 n.6 (quoting Prewitt v. United States Postal Service, 662 F.2d 292, 308-09 (5th Cir. 1981)).

86. Ore-Ida's motions are addressed in Coghlan v. H.J. Heinz, Co., 851 F. Supp. 815 (N.D. Tex. 1994), and Heinz's motions are addressed in Coghlan v. H.J. Heinz, Co., 851 F. Supp. 808 (N.D. Tex. 1994).

with the statutory language involved in the case, and therefore the court disregarded them. The plaintiff in *Coghlan* was an insulin-dependent diabetic who claimed he was discharged because of, among other things, his disability. He brought his claims under both the ADA and the TCHRA. Heinz Co. and Ore-Ida Foods, Inc., were both defendants in the cause of action, but the court addressed each defendant's Motion to Dismiss in separate opinions. For simplicity, the opinion addressing Heinz's motion will be referred to as *Coghlan I* and the opinion addressing Ore-Ida's motion will be referred to as *Coghlan II*.

Coghlan II seems to impliedly overrule *Redmon*'s narrow interpretation of the definition of "disability." The defendant's arguments, stemming from *Redmon*, asserted that a person may not sue if his disability impairs his ability to do that particular job, and that for a handicap to be considered a disability in the first place, it must be one that is generally perceived as severely limiting a person in performing work-related functions.[87] The court agreed with the defendant that the Fifth Circuit had expressly recognized the Texas Supreme Court's narrow construction of the word "disability," quoting the Fifth Circuit as saying that "*Redmon* adopts a 'very restrictive definition of "handicap" for the purposes of the Texas Commission on Human Rights Act.'"[88] Countering these arguments, the plaintiff claimed that even though the Texas Legislature might have "ignored" the Rehab Act on the issue of the meaning of "handicap," as *Redmon* claims,[89] the Texas Legislature amended the TCHRA in 1989, changing the word "handicap" to "disability" and thereby changing the focus from the Human Resources Code (the predecessor to the TCHRA) to the ADA.[90] The current language virtually tracks the definition in the ADA. Fortunately, the court in *Coghlan II* realized that "although *Redmon* might retard the plaintiff's cause [of action], it construes language that the Legislature has since amended," and, in construing the new language, the court denied both defendants' Motions to Dismiss on the disability issue.

Even though the court winds up with the correct result—denying both defendants' motions to dismiss on the issue of whether the plaintiff was "disabled" under the applicable laws—the court's logic in its analysis of the regulations and the scope of the term "disabled" leaves much to be desired.

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87. *Coghlan II*, 851 F. Supp. at 817.

88. *Id.* (quoting Chandler v. City of Dallas, 2 F.3d 1385, 1397 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994)).

89. See discussion of *Redmon*, *supra* part II.

90. The definition of "disability" was changed in the TCHRA to "a mental or physical impairment that substantially limits at least one major life activity . . ., a record of such an impairment, or being regarded as having such an impairment." TEX. LAB. CODE ANN. § 21.002(6).

It is well established—in fact, it is even stated in the ADA itself—that Congress has charged the EEOC with issuing regulations to implement Title I, the employment discrimination title.[91] Under this Congressional mandate, the EEOC has not only issued regulations, but it has also issued an appendix to these regulations entitled "Interpretive Guidance on Title I of the Americans with Disabilities Act."[92] Conveniently, one of the interpretations offered in this Appendix deals with insulin-dependent diabetics such as the plaintiff in this case, and states the following: "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication."[93] One would think that a court that is aware of the EEOC's interpretation of the ADA and that is eager to eliminate discrimination against individuals with disabilities would end the inquiry at this point; or at least, a court should end the inquiry into whether an insulin-dependent diabetic should be considered "disabled" for purposes of the act. Some Texas courts are, of course, not satisfied.

Instead of following the U.S. Supreme Court and previous Fifth Circuit declarations that the EEOC regulations do indeed state Congressional intent,[94] the *Coghlan* court searches other jurisdictions as done in *Redmon* and ignored the readily available precedent from the Fifth Circuit and the United States Supreme Court until it found a case that supports the point of view it sought to uphold. In particular, the *Coghlan I* court cited a case from another jurisdiction for the proposition that "courts are in general agreement that interpretive rules simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties."[95] First, it is clear that the EEOC regulations are not the equivalent of "law," but they are not to be disregarded whimsically either. Secondly, if the court wanted to properly determine the weight to be given to the regulations, it should have cited the proper case for the that holding, namely *Chevron Corp. v. National Resources Defense Council.*[96] This seminal U.S. Supreme Court case defines the relationship between administrative

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91. 42 U.S.C. § 12116. This provision actually means that the Commission empowered to issue the regulations on Title I is the "Equal Employment Opportunity Commission established by 42 U.S.C. § 2000e-4 [Title VII of the Civil Rights Act of 1964]." 42 U.S.C. § 12111(1). In other words, this is yet another link between the ADA and Title VII that the Texas courts have been unable to discern.

92. EEOC's Interpretive Guidance on Title I of the ADA, 29 C.F.R. pt. 1630 app. (1996).

93. *Id.* at 1630.2(j).

94. *See* discussion of School Bd. of Nassau v. Arline and Chiari v. City of League City, *infra* text accompanying notes 81-85.

95. *Coghlan I*, 851 F. Supp. 808, 812 (quoting Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207 (4th Cir. 1989)).

96. Chevron Corp. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

guidelines stating that "the judiciary is the final authority on the issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent"[97] and the related statutes. In the instant case, the applicable approach to legislative intent was that "disability" should be looked into *without* regard to aids or medication that the individual might need. This is an easy concept to understand. For example, consider an individual who is confined to a wheelchair, but competes on a national level in wheelchair basketball and wheelchair marathons. This individual is probably more agile and mobile than a majority of people, even in the wheelchair. He is not limited when he has the use of this mobility aid. However, he is limited *without* his wheelchair. Further, take someone with a prosthetic leg; with modern technology, such an individual can be sprinting in track races and climbing the steepest mountains. With his prosthesis, he is not that "disabled"; without the false leg, he obviously is. Similarly, looking to whether an insulin-dependent diabetic is "disabled" within the meaning of the statute should be done without regard to any aids such as medication, as the EEOC suggests. Not only is such an interpretation *not* "contrary to clear congressional intent," as when *Chevron Corp. v. Natural Resources Defense Council* would warrant judicial intervention, but not accepting the EEOC's interpretation leads to counter-intuitive results. Nevertheless, the *Coghlan I* court decided that

> *Arline* dealt primarily with a different component of the analysis than is pertinent here—the record-of-impairment prong rather than the substantially-limits part of the test—and that the HHS language that the Supreme Court considered was only vaguely, if at all, comparable to the EEOC's guidelines . . . . [T]he case simply does not address directly the issue, or even an analogous one, of whether the EEOC interpretative guidelines should be given deference in the Court's consideration of Defendant's motion.[98]

Although *Arline* is distinguishable from this case, even a biased observer would have to deem a U.S. Supreme Court discussion on the import of administrative guidelines on the scope of the definition provision at least "vaguely comparable," if not, in fact, "analogous." Ultimately, the *Coghlan I* court reasons that the EEOC interpretive guidelines "read the word 'limits' right out of the statute because an insulin dependent diabetic who takes insulin could perform major life activities and would therefore not be

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97. *Chevron*, 467 U.S. at 843, n.9.
98. *Coghlan I*, 851 F. Supp. at 813.

limited."[99] Moreover, the court states that because the EEOC interpretive guidance allows someone with "no limitation"[100] to satisfy a condition that clearly requires limitation, the EEOC's interpretive guidance is directly at odds with the statutory language from §12102(2)(A).[101] The court therefore rejects the EEOC's interpretation, and consequently holds that plaintiff's condition as an insulin-dependent diabetic does not constitute a *per se* disability according to § 12102(2)(A).[102]

Did the court ultimately reach the conclusion that it was going to deny the defendants' motions to dismiss on the issue of "disability"? Apparently, it looked to the EEOC interpretive guidance on the clauses "substantially limits" and "major life activity" found in the C.F.R.[103] and concluded that since the plaintiff's condition affects such major life activities as eating and sleeping, the defendant's motion must be denied.[104] The court devotes most of the opinion to disparaging EEOC regulations on the scope of the ADA, yet ultimately relies on EEOC regulations for its holding.

Not surprisingly, more than one Texas court has called upon itself to decide that the EEOC is not correct. Aside from the Dallas U.S. District Court in the *Coghlan I* and *Coghlan II* opinions, the Fifth Circuit has also held that the EEOC's interpretation of this insulin-dependent diabetic issue is not sufficient. In *Chandler v. City of Dallas*,[105] the court was faced with the same situation—deciding if an insulin-dependent diabetic is "disabled" within the meaning of the act—and thus had occasion to quote the same provision from the EEOC Interpretive Guidelines.[106] The Fifth Circuit states, "the EEOC apparently considers that any insulin-dependent diabetic has a disability per se under the ADA."[107] The Fifth Circuit then went on to conclude that "the issue remains whether this statement mandates that such a person also has a handicap per se under the Act."[108] On what basis could the court conclude that the issue still remains? Such a statement is about as insightful as the *Redmon* court's statement that the Texas Legislature obviously chose to ignore the definition in the Rehab Act, even though the

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99. *Id.*

100. If the plaintiff had a prosthetic leg instead of being diabetic, it is doubtful that the court would go through the same analysis and still assert that such a condition imposed "no limitation."

101. *Coghlan I*, 851 F. Supp. at 814. Section 12102(2)(A) states that a disability is a physical or mental impairment that substantially limits a major life activity.

102. *Coghlan I*, 851 F. Supp. at 814.

103. 29 C.F.R. § 1630.2(j) (1996).

104. *Coghlan I*, 851 F. Supp. at 814.

105. Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994).

106. 29 C.F.R. § 1630.2(j) (1996).

107. *Id.* at 1391.

108. *Id.*

legislature expressly stated that one of the stated purposes of the TCHRA was to integrate federal precedent.

V. Hyper-Technical Analysis

Hilton v. Southwestern Bell Telephone Co.[109] was the first of several cases that, in light of the purpose behind these anti-discrimination statutes, improperly used strict constructionist interpretations of the provisions at issue to defeat legislative intent. In *Hilton*, summary judgment was granted to the defendant, and upheld by the Fifth Circuit, based on the district court's finding that the plaintiff was not handicapped for purposes of the TCHRA.[110] In this case, the Fifth Circuit began its analysis with the subsections of the TCHRA that define "handicapped person"[111] and "handicap."[112] The court correctly noted that the "use of the word 'includes' immediately preceding the list of specific handicaps precludes that list from being interpreted as exclusive,"[113] but then proceeded to analyze the definition in an overly technical and grammatical manner that led the court to conclude that AIDS-related conditions are not to be included in the definition. The court reasoned that "the only interpretive tool available is the classic *ejusdem generis* rule," which is a rule of "limitation, restricting general terms, such as 'any other' and 'and the like', which follow specific terms, to matters similar to those specified."[114] The court decided that since the case definitely does not deal with any mental handicaps, it would therefore limit its analysis to the other parts of the definition. Applying the narrow rule of construction, the court determined that the element common to each of the remaining conditions on the list is that each is physiological. "Thus, a proper application of the *ejusdem generis* rule leads us to conclude that, other than the particular physical conditions identified in the list, the only physical health conditions capable of constituting a 'handicap' for purposes of the TCHRA are those which may properly be classified as

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109. Hilton v. S.W. Bell Tel. Co., 936 F.2d 823 (5th Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

110. *Id.* at 823.

111. *Id.* at 827; *see* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(A) (Vernon 1987) (repealed 1993) ("'Handicapped person' means a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services . . . .").

112. *Hilton*, 936 F.2d at 828; *see* TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(B) (Vernon 1987) (repealed 1993) ("'Handicap' means a condition either mental or physical that includes mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment that requires special ambulatory devices or services . . . .").

113. *Hilton*, 936 F.2d at 828.

114. *Id.* at 828.

physiological impairments."[115] The court then concludes that since "every individual condition in the non-exclusive list is a physiological health impairment, so any 'other' condition must be a physiological impairment," and furthermore, that any "other" impairment must also "require special ambulatory devices or services" under § 2.01 of the TCHRA.[116] In other words, the court—in what seems to be an extremely analytical approach, but what amounts to no more than a roundabout way of reaching the conclusion it set out to reach—excludes a wide range of impairments from the definition without acknowledging what it has done. Needless to say, the plaintiff in *Hilton* did not have any physical manifestations of the disease that would fit within the court's narrow definition.

Notably, the ADA, the Rehab Act, Title VII, and even the current version of the TCHRA[117] all have provisions to the effect that an individual with AIDS-related complications is a "qualified individual with a disability" for the purposes of the respective acts as long as the condition does not cause the individual to pose a direct threat to the health and safety of others, and as long as he or she can still perform the essential functions of the job in question. AIDS, in other words, has become a per se disability, and therefore, if a plaintiff with AIDS brings a discrimination suit under the ADA, the usual threshold inquiry—whether the plaintiff has a "disability" as defined in the act—is not necessary. Although the Fifth Circuit's decision in *Hilton* came down on July 30, 1991, whereas the ADA did not become effective in Texas until at earliest July 26, 1992, the ADA was passed in July of 1990. Even though the court ultimately held that such complications were not within the definition of the TCHRA, the provision in the ADA making AIDS a per se disability at least merits reference. Not only was there not a single reference to this provision or the provisions of the analogous federal acts, but even more absurd is the court's statement that it is "forced to reject Hilton's urgings that we be guided by cases that have classified AIDS and AIDS related conditions as handicaps under the Federal Rehabilitation Act [because] [t]he Texas Supreme court in *Redmon* forbids such unwarranted analogy."[118] The fact that the court in *Hilton* is ignoring the provision in an attempt to reach its conclusion suggests that the court itself is guilty of possessing precisely the preconceived stereotypes that both the ADA and the TCHRA aim to eradicate.

Another case in which a Texas court felt compelled to utilize the same

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115. *Id.*
116. *Id.*
117. TEX. LAB. CODE ANN. § 21.002(4)(B).
118. *Hilton*, 936 F.2d at 830 (citing Chevron Corp. v. Redmon, 745 S.W.2d 314, 318 (Tex. 1987)).

construction is *Central Power & Light Co. v. Bradbury.*[119] In this case, an individual was fired by his employer because a skin condition prevented the man from working full time at his usual job because the work site was located in a room that was cooled in a way that exacerbated his condition.[120] The sole issue before the court was whether the respondent's (plaintiff in original case) skin condition constituted a handicap according to the TCHRA, thus entitling him to the protection against discriminatory employment practices prohibited by the Act.[121] The court was presented with testimony from the respondent's dermatologist to the effect that

> the skin condition precluded [the respondent] from participating in social and economic life, but that it did not preclude him from being gainfully employed or from achieving independence. . . . [It was true, however that] the respondent could only work in an air conditioned environment if the humidity and temperature were within a comfort zone. Moreover, the condition limit[ed] his performance of work related functions because he must be careful about the things he contacts at work.[122]

The statements by the respondent's doctor regarding the fact that the respondent's skin condition "did not preclude him . . . from achieving independence" were probably the result of good lawyering by the counsel for the petitioner;[123] regardless, the court should have looked beyond these labels to the substance of what was at issue, perhaps utilizing regulations on "substantially limits" and the major life activity of working, as a proper analysis would entail.

The *Bradbury* court also quotes the definition of "handicap" from the TCHRA and proceeds to follow *Hilton* for the proposition that "this section of the Act must be interpreted by the rule of *ejusdem generis.*"[124] The court then states that "Bradbury admitted that his claimed handicap was not based upon mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, [or] being crippled . . . ."[125] The only clause, therefore, which the respondent could claim applies to his condition would be the last clause: "other health impairment that requires special

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119. Central Power & Light Co. v. Bradbury, 871 S.W. 2d 860 (Tex.App.—Corpus Christi 1994, writ denied).

120. *Id.*

121. *Id.* at 862.

122. *Id.* at 863.

123. *Id.*

124. *Id.*

125. *Id.*

ambulatory devices or services."[126] The court noted that "[t]he record contains no evidence that [the respondent's] condition is a health impairment that requires special ambulatory devices or services as defined under the Act," and thus easily concludes that the respondent has failed to meet his threshold burden of proving he was handicapped under the statute.[127] The court, in dicta, cited *Chevron v. Redmon*[128] for the non-statutory definition of handicap: "a condition 'which is generally perceived as limiting one in performing work-related functions in general,'"[129] and even adds that there was evidence presented that showed that the plaintiff "suffers greatly from a capricious ailment, which . . . can cause him severe difficulty."[130] Despite such testimony, the court declared that even if the plaintiff's impairment is one that is "generally perceived as severely limiting the performance of work-related functions," and would therefore constitute a "handicap" under *Redmon*, the court still "cannot disregard the statutory requirement that an 'other health impairment' be characterized by the need for 'special ambulatory devices or services.'"[131] The court is sacrificing substance for form. This respondent had at least enough evidence to survive summary judgment on the issue of whether he was disabled under the statute, especially in light of the fact that such a determination is supposed to be a fact issue. Moreover, not only was he discriminated against because of this impairment without an attempt to accommodate him, but the statute was not meant to be interpreted in such a strict manner as to exclude rightful plaintiffs from the protection of the law.

Not all Texas cases follow this line of analysis; in 1990, one court of appeals was called upon to decide whether summary judgment was proper in a case in which the lower court decided that Bipolar Affective Disorder, also known as manic depression, did not constitute a "handicap" under the TCHRA, as a matter of law.[132] On appeal, the defendant argued that summary judgment was proper because the plaintiff's condition can only be characterized as an emotional disorder, and "because the Act specifically addresses physical and mental conditions without reference to emotional conditions, we should presume the legislature intentionally excluded

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126. *Id.*
127. *Id.* at 864.
128. *Redmon*, 745 S.W.2d 314.
129. *Bradbury*, 871 S.W.2d at 864 (quoting *Redmon*).
130. *Bradbury*, 871 S.W.2d at 864.
131. *Id.*
132. Finney v. Baylor Medical Ctr. Grapevine, 792 S.W.2d 859 (Tex. App.—Fort Worth 1990, writ denied).

'emotional conditions' from the Act."[133] The court analyzed the exact same sections of the TCHRA where the definitions of "handicap" and "handicapped persons" are located, quoted the same language from *Redmon* regarding both the non-statutory definition and the fact that the determination is usually one for the fact finder, and decided simply that "the issue of whether the [plaintiff] is 'handicapped' under article 5221k is one of material fact which must be resolved by the fact finder," thereby holding that the trial court erred in granting summary judgment.[134] Instead of analyzing the definition of "disability" from § 2.01 in a hyper-technical manner, as if the court were on a mission to deny the plaintiff his or her day in court, this court opted for the sound approach of weighing the summary judgment evidence with the underlying purposes of the act in mind, perhaps giving the plaintiff the benefit of the doubt and at least letting him go to trial.

VI. Conclusion

Many Texas courts have acknowledged that there is little case law on the TCHRA and have therefore embraced the use of more firmly established federal precedent. In addition, many courts, including the U.S. Supreme Court, have declared the EEOC regulations interpreting the federal anti-discrimination acts are pronouncements of Congressional intent. Nevertheless, one does not have to search extensively to find a Texas case either refusing to follow federal precedent or refusing to follow generally accepted administrative guidelines, not to mention Texas cases that assert that federal cases on the point are vaguely, if at all, analogous. The consequences of taking such an approach are readily apparent in opinions such as *Bradbury*, where the court held that even though the plaintiff's condition was generally perceived as severely limiting, the condition nevertheless did not require an ambulatory device and therefore did not constitute a disability, and in cases such as *Coghlan*, where the court tries to make the argument that an insulin-dependent diabetic should not be considered disabled so long as he takes his medication.

Redmon created two trends: (1) looking to courts of other jurisdictions for authority that supported a court's point of view, while disregarding readily available precedent from its own jurisdiction, and (2) offering that the determination of whether an individual is disabled is usually a question of fact, and then proceeding to grant summary judgments to defendants on that very issue. In addition, although the TCHRA obviously prohibits discrimination based on one's disability, because of opinions such as

133. *Id.* at 860.
134. *Id.* at 862.

Redmon, several Texas courts have construed the language in the Act to mean that it is perfectly acceptable to discriminate against someone if the disability affects his or her ability to perform the job in question. Because most impairments affect one's ability to perform in general, for that is precisely what an "impairment" is, the narrow interpretations that these courts have given this language tends to exclude many individuals from the intended protection of the Act. This author is not the only critic to take the viewpoint that these narrow interpretations defeat the very purpose for which the anti-discrimination statutes are enacted. Both Justice Mauzy on the Texas Supreme Court and the U.S. government itself have accused Texas courts of adversely affecting the government's ability to enforce the law and of frustrating the intent of Congress with its opinions. The government's stance is understandable, especially in light of the fact that the courts in the *ADQ* cases basically hold that a franchisor who exerts considerable control over its franchisees does not "operate" a place of public accommodation within the meaning of the applicable statute.

Although no one would advocate providing redress to plaintiffs who come before the court with frivolous allegations, how can a court possibly claim that it is upholding and protecting the goals of anti-discrimination laws by making sure that plaintiffs meet their required burdens? Some courts undoubtedly implement this absurd logic due to the fears they have—fears that are shared by many of the ADA's critics—that due to the ambiguous language of the act, and the over-zealous plaintiff's attorneys, a flood of frivolous claims will ensue. The fact that other courts are frequently faced with the same dilemma of requiring parties to meet their respective burdens, yet still manage to respect the purpose of the acts to further the rights of the disabled suggests that these fears are largely unfounded. Although a flood of frivolous claims such as the one in *Thompson* would likely impede the judicial process, there is a difference between a wholly frivolous claim that should be thrown out of court, and a possibly borderline claim that is thrown out because a court is neither ready nor willing to accept the notion that disabled individuals deserve a fair chance as well. A frivolous claim is a frivolous claim, no matter under which statute it is brought, and the area of disability law is not the place for the courts to attempt to curtail the litigious trend our society has found itself in, especially in light of the purposes of these anti-discrimination statutes. Obviously, potential plaintiffs must use good judgment and common sense when deciding whether or not to bring a given claim, but advocating such restraint in an effort to dissuade a flood of frivolous litigation is more consistent with the policy behind these acts than is the approach some Texas courts have taken with their granting of defendants' motions to dismiss.

The seeming reluctance of the Texas courts to accept the fact that discrimination against individuals with disabilities is no longer in vogue parallels the approach of many post-Civil War courts regarding the scope of the 13th, 14th and 15th Amendments. Although these amendments were obviously meant to further the rights of the newly emancipated black race, several cases, such as *Blyew v. United States*,[135] *The Slaughterhouse Cases*,[136] and *Plessy v. Ferguson*,[137] interpreted the new civil rights laws in an extremely narrow manner in an effort to set the boundaries of these laws, and to create a legacy that was to be followed in the future, much the same way the Texas courts discussed above have attempted to set a trend of limiting judicial construction. Unlike the ADA, the post-Civil War amendments were not passed at a time when society was conscious of the need to help a certain group of people who were having trouble helping themselves. The unreadiness of Reconstruction society influenced these decisions, and these decisions in turn influenced the rest of the twentieth century in its attempt to treat blacks as equals. Assuming that as a society we are more amenable to change in the 1990s if this change involves helping those less fortunate than ourselves, the rationale behind the attitudes of the several Texas courts discussed above is not readily apparent.

Although the law is backed by the power of the state, custom has the power of the people behind it; thus, governmental power to deal with discrimination and remedy unjust conditions is limited if society is simply not ready for accepting change. In other words, the mere fact that laws might change does not necessarily ensure that people will forego well-entrenched attitudes. Thus, perhaps we should not be so quick to condemn the judges who put forth the narrow approach espoused in the opinions discussed; perhaps these opinions may merely reflect the fact that these justices are just not ready for change. On the other hand, when the law says one thing and social reality says another, fear prevents rather than motivates social change. Therein lies the need for anti-discrimination legislation. Anti-discrimination laws such as the ADA and the TCHRA have multiple purposes. Not only are they meant to prohibit discrimination, regulate prejudice, and promote

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135. Blyew v. United States, 80 U.S. 581 (1871). The court in *Blyew* held that these amendments did not provide redress to the family of a murdered black woman because technically, the family was not "harmed."

136. The Slaughterhouse Cases, 83 U.S. 36 (1873). In this case, the Supreme Court conducted a technical analysis of the amendments, declaring that the privileges of being a United States citizen were different from the privileges of being a citizen of a state, and that because the amendments applied only to the former, states remained free to do as they wished.

137. Plessy v. Ferguson, 163 U.S. 537 (1896). This case upheld the legality of separate but equal treatment of blacks with regard to railroad accommodations.

equality, they also have the greater task of undoing and correcting well-entrenched social attitudes. These Texas courts seem to be guilty of possessing the exact unfounded preconceived notions about the abilities of the disabled that the ADA and the TCHRA seek to change. Given the most recent set of amendments to the TCHRA,[138] the courts of Texas should begin to effectuate the purpose of these anti-discrimination laws to prevent a repeat of the post-Civil War situation, in which, despite three amendments to the Constitution and ensuing federal legislation, unwarranted racial discrimination still pervades society 130 years later.

138. TEX. LAB. CODE ANN. § 21.001 (Vernon 1993).