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## Advocate's Perspective Tennessee v. Lane

Barbara J. Fields Page 1

As a staff attorney at the Oregon Advocacy Center and as a wheelchair user, I believe that the Supreme Court's decision in *Tennessee v. Lane*, 124 S.Ct. 1978 (S.Ct. 2004) is a victory for folks with disabilities, considering the deep institutional prejudice from which it sprang. The outcome was a good result for the plaintiffs in this particular case. The opinion also contained a wide ranging analysis of the application of title II of the Americans With Disabilities Act ("ADA") to states that will be helpful guidance in bringing viable cases forward.

I read the *Lane* opinion with the goal of forming a straightforward explanation of why the Court ruled as it did. I also read *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), to which the *Lane* Court had referred several times. Both these cases raised the question of states' sovereign immunity and how that intersects with Congress' power to create civil rights legislation for the country. The Eleventh Amendment of the U.S. Constitution says, as interpreted, that states are immune to private suits for money damages when they violate federal law unless Congress enacted the law with the proper authority of the Fourteenth Amendment or other appropriate constitutional provision. The Fourteenth Amendment says, in pertinent part:

Section 1. . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

With respect to equal protection, this Supreme Court joins its predecessors in stating that "disability" is not a suspect classification, unlike race or gender. Therefore, if a person challenges the constitutionality of a state's action, saying it gives unequal treatment to disabled individuals, a federal court will only give the action rational basis scrutiny. As long as the state's action is rationally related to a legitimate government purpose, the court will find it constitutional. This is a large roadblock for disabled rights advocates. To the extent that remedying discrimination would require paying for reasonable accommodations, a state would be acting rationally in deciding not to spend the money. A discrimination argument based on an individual having the characteristic of disability would probably be a weak one, even though out in the real world, it is a pervasive, seemingly intractable societal problem.

The other prong of equal protection analysis is fundamental rights. If a state acts in a manner that adversely impacts a fundamental right of members of a group, the courts review that act using strict scrutiny, even if the group members themselves are not considered part of a suspect class. There is a wealth of jurisprudence defining what are fundamental rights. Examples include voting, freedom of travel, and education.

The plaintiff in *Lane* won his case because the Court held that Tennessee's action (or inaction) in allowing a courthouse to remain inaccessible to individuals who

## **Advocate's Perspective**

use wheelchairs was a violation of his fundamental right of access to the judicial process. Further, the Court took into account the copious documentation Congress had amassed to show a pattern and practice of disability discrimination by all states in the provision of public services. The court agreed that on the issue of access to courts and the judicial process, the amount of federal intrusion into the states' affairs was proportional to the historical wrongs they had committed.

As an advocate, I am thankful that in 2003 the Oregon legislature passed a bill (SB 17) that expanded the coverage of state laws prohibiting unlawful discrimination against individuals with disabilities to include our state government. See ORS 659A.142(4). This will increase the tools that Oregon attorneys and advocates have available as they develop strategies for both state and federal litigation of disability discrimination claims. This "little ADA" affords individuals even greater protection in some instances than does the federal ADA. For example, the statute itself has the effect of making disability a suspect classification.

By adding state government to the list of entities covered by Oregon's non-discrimination laws, the legislature also provided for a range of remedies: administrative enforcement through the Bureau of Labor and Industries, injunctive relief, compensatory damages, punitive damages, and prevailing party costs and attorney fees at trial and on appeal.

I believe advocates should pay close attention to the way the federal courts are ruling on title II ADA claims and strive to litigate cases that will make good precedent. At present, this seems to mean cases where a state is trampling on an already established fundamental right. If a client's set of facts do not fit within that parameter, perhaps it is the wiser choice to bring the case to state court.