

COMBAT KARATE CLASS ILLUSTRATES ADA "DIRECT THREAT" EXCEPTION

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The Americans with Disabilities Act (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation. It also mandates the establishment of TDD/telephone relay services.

An individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. In addition to other contagious and non-contagious diseases, HIV disease (whether symptomatic or asymptomatic) is an example of a physical impairment under the ADA.

Title II of the ADA prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by State and local governments. Title III of the ADA prohibits discrimination on the basis of disability in "places of public accommodation" (businesses and non-profit agencies that serve the public) and "commercial facilities" (other businesses).

Places of public accommodation include private establishments, such as museums, libraries, parks, zoos, amusement parks, private schools, day care centers, health spas, and bowling alleys. Public accommodations are required to provide goods and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity. In so doing, public accommodations must eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation.

Safety requirements may be imposed only if they are necessary for the safe operation of a place of public accommodation. They must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities. For example, an amusement park may impose height requirements for certain rides when required for safety.

A public accommodation must make reasonable modifications in its policies, practices, and procedures in order to accommodate individuals with disabilities. A modification is not required if it would "fundamentally alter" the goods, services, or operations of the public accommodation. Private parties may bring lawsuits to obtain court orders to stop discrimination. No monetary damages will be available in such suits. A reasonable attorney's fee, however, may be awarded. (The preceding overview of the ADA was based upon from excerpts of information available on the U.S. Justice Department's ADA homepage at: <http://www.usdoj.gov/crt/ada/adahom1.htm>)

The *Montalvo* opinion described herein illustrates how the "direct threat" and "fundamental alteration" exceptions to the ADA's equal opportunity mandate allowed for the reasonable modification offered by the public accommodation under the unique circumstances of this particular case.

BLOOD SPORT

In the case of *Montalvo v. Radcliffe*, 167 F.3d 873, 9 A.D. Cases 15 (4th Cir. 1999), Michael Montalvo, a 12-year old boy with AIDS, was denied admission to a traditional Japanese style martial arts school because of his HIV-positive status. The facts of the case were as follows:

Southside Virginia Police Karate Association, Inc. operates a karate school in Colonial Heights, Virginia, known as U.S.A. Bushidokan, which is owned by James P. Radcliffe, II. The school teaches exclusively traditional Japanese, combat-oriented martial arts rather than the more prevalent, family-oriented fitness programs offered by most martial arts schools. Within the first three weeks of lessons at U.S.A. Bushidokan, students learn techniques that involve substantial body contact, and within the first few months they apply these techniques to spar in actual combat situations.

Radcliffe testified at trial that the sparring often results in injuries which, while minor, are bloody... He explained that to progress "through the belt," a level of achievement, a student must "engage in combat activity fighting. You have to do the self-defense. It involves contact, that's what we do." Radcliffe noted that inherent in this form of karate are "consistently scratched skin, scratches, gouges, bloody lips, bloody noses, things of that nature."

In May 1997, Luciano and Judith Montalvo applied to enter their 12-year old son, Michael, into group karate classes at U.S.A. Bushidokan because Michael wanted to learn karate with some friends who had already begun lessons there. Luciano Montalvo signed a "Membership Application and Agreement" form in which he warranted that Michael was "in good health and that [he] suffer[ed] from no illness or condition . . . which would possibly be infectious to others" and that the Montalvos understood that "no member [would] use the facilities with any open cuts, abrasions, open sores, infections, [or] maladies with the potential of harm to others." In fact, however, Michael had AIDS. The Montalvos did not disclose that fact to U.S.A. Bushidokan because they were afraid that U.S.A. Bushidokan would not enroll Michael if it knew of his HIV-positive status.

Later, on the same day that the Montalvos submitted Michael's application, Radcliffe, having received information from an anonymous source, telephoned the Montalvos to inquire whether Michael had AIDS. Luciano Montalvo demanded to know the source of the information and adamantly and repeatedly denied that Michael had AIDS or was HIV-positive. After the Montalvos gave U.S.A. Bushidokan an affidavit from Michael's treating physician, Dr. Suzanne R. Lavoie, stating her medical opinion that Michael was "fit to begin karate classes," Michael began participating in karate classes at U.S.A. Bushidokan. After the first class, however, Radcliffe telephoned Luciano Montalvo to tell him that Dr. Lavoie's letter "wasn't sufficient" and to request that Michael have an AIDS test. This request prompted Luciano Montalvo to admit finally that Michael had AIDS.

Radcliffe then met with the Montalvos and informed them that Michael would not be allowed to participate in group karate classes at U.S.A. Bushidokan because of the risk of transmitting HIV to other students through frequent bloody injuries and physical contact. Radcliffe, however, did offer to give Michael private karate lessons. Luciano Montalvo immediately rejected that proposal because "the whole reason" he signed Michael up for lessons was that Michael "wanted to be with his friends."

On behalf of Michael, Luciano Montalvo filed this action against U.S.A. Bushidokan and Radcliffe under Title III of the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.). In bringing his ADA claim, Montalvo asked the court to issue an order "requiring the defendants to give Michael access to and the benefit of the group martial arts classes and to refrain from discriminating against Michael in any manner because he had AIDS." The federal district court denied Montalvo's ADA claim.

In the opinion of the district court, Michael Montalvo's "condition posed a significant risk to the health or safety of other students." Moreover, the court found "no reasonable modification could sufficiently reduce this risk without fundamentally altering the nature of the program." Accordingly, the federal district court entered judgment in favor of U.S.A. Bushidokan and Radcliffe. Montalvo appealed.

#### DIRECT THREAT?

On appeal, Montalvo argued that the facts established a case for discrimination under the Americans with Disabilities Act based on Michael's exclusion from karate classes because of his having AIDS. Moreover, Montalvo claimed the district court had clearly erred in finding (1) that "Michael's condition posed a `direct threat' to the health and safety of other class members" and (2) that "U.S.A. Bushidokan's offer of private lessons to Michael was a reasonable accommodation [for] Michael's disability."

As cited by the federal appeals court, Title III of the Americans with Disabilities Act ("ADA") , in pertinent part, provides as follows:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, ser vices, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a).

The court noted further that "denial of participation" in a program offered by a place of public accommodation is defined as an act of discrimination under Title III of the ADA. 42 U.S.C. § 12182(b)(1)(A)(I).

According to the court, Congress enacted Title III of the ADA to "facilitate disabled individuals' access to places of public accommodation." In so doing, however, the court noted that Congress had also recognized that "the need to protect public health may at times outweigh the rights of

disabled individuals." As a result, Congress had "created a narrow exception to this broad prohibition against discrimination based on disability in places of public accommodation." Specifically, the court acknowledged that "a place of public accommodation is entitled to exclude a disabled individual from participating in its program "where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3).

The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." In determining whether an individual poses a "direct threat," the court cited federal regulations requiring places of public accommodation to make "an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." 28 C.F.R. § 36.208(c). In so doing, the court noted that "a place of public accommodation must not base its calculus on stereotypes or generalizations about the effects of a disability":

The relevant factors which the place of public accommodation must weigh and balance are the nature, duration, and severity of the risk and the probability that the potential injury will actually occur.

If the place of public accommodation determines that the individual would pose a significant risk to the health and safety of others, it must then ascertain whether reasonable modifications of policies, practices, or procedures will mitigate the risk, to the point of eliminating it as a "significant risk. 42 U.S.C. § 12182(b)(3). 28 C.F.R. § 36.208(C)

Under the ADA, a failure to make a reasonable modification is itself an act of discrimination unless the place of public accommodation can demonstrate that implementing the modification would fundamentally alter the nature of the program. See 42 U.S.C. § 12182(b)(2)(A)(ii).

In this particular instance, U.S.A. Bushidokan did not dispute the fact that its karate school was a place of public accommodation subject to the requirements of Title III. Moreover, U.S.A. Bushidokan conceded that Michael Montalvo was "disabled" for purposes of the ADA by virtue of being HIV-positive or having AIDS. Further, U.S.A. Bushidokan admitted that it "denied Michael participation in group karate classes on the basis of his HIV-positive status, the condition that concededly constitutes his disability." U.S.A. Bushidokan, however, maintained that its "exclusion of Michael was legally justified because Michael posed a 'direct threat" to other members of the karate class."

Accordingly, the specific issue on appeal was "whether Michael's condition posed a significant risk to the health or safety of others." If so, the court would then consider "whether reasonable modifications of policies, practices, or procedures were available to eliminate the risk as a significant one."

In the opinion of the federal appeals court, Michael's HIV-positive status required a "fact intensive determination" to ascertain whether his condition "posed a significant risk to the health

or safety of others." Under the circumstances of this particular case, the appeals court found sufficient evidence to support the district court's determination that Michael posed such a risk.

First, both the Montalvos' and U.S.A. Bushidokan's medical experts testified that blood-to-blood contact is a means of HIV transmission, and both experts agreed that AIDS is inevitably fatal. In addition, U.S.A. Bushidokan's expert testified without challenge that it was possible to become infected with the virus from blood splashing into the eyes or onto seemingly intact skin.

Second, the type of activity offered at U.S.A. Bushidokan emphasized sparring, attack drills, and continuous body interaction with the result that the participants frequently sustained bloody injuries, such as nose bleeds, cuts inside the mouth, and external abrasions. Radcliffe testified that blood from those injuries is "extremely likely" to come in contact with other students' skin. Even though U.S.A. Bushidokan had a policy of constantly monitoring for bloody injuries and removing for treatment participants with those injuries, the fast-paced, continuous combat exercises hampered U.S.A. Bushidokan's efforts to eliminate contact when such injury occurred.

From these facts and other similar evidence, the district court found that there is "a high frequency of minor but bloody abrasions among the students" and that the blood from such injuries is "extremely likely" to spill onto the hands, uniforms, and mouths of other students.

In making its ruling, the district court found as facts that U.S.A. Bushidokan taught "hard-style Japanese karate . . . with a heavy emphasis on sparring and actual-fight simulation"; that there was "a high frequency of minor but bloody abrasions among the students"; and that the blood from such injuries was "extremely likely" to spill onto the students' hands, uniform, mouth, or "even onto the students with whom he or she is training."

The court found that it was "impossible" for U.S.A. Bushidokan to detect and attend to each injury immediately despite "conscientious and effective treatment procedures." The court acknowledged the existence of "universal precautions" -- established procedures for handling blood safely -- but found that even "a strict adherence" to such precautions would not prevent the spillage of blood and other bodily fluids and the attendant risk of HIV transmission.

Based on the expert testimony offered by both sides, the court found that HIV can be transmitted by "introducing the blood of one person who is HIV-positive into a wound of another person," or even "when contaminated blood is splashed into the eyes or onto the skin, even in the absence of an open wound." The court found that the transmission risk if Michael were to participate in group classes at U.S.A. Bushidokan would be "significant."

The court also found that because of this likelihood and because of the ineffectiveness of the "universal precautions" for handling blood in the context of

this hard-style karate, the risk of a student's transmitting HIV to another student was "significant."

Based upon such evidence, the federal appeals court concurred with the district court's determination that "the nature of the risk, combined with its severity, creates a significant risk to the health and safety of hard-style karate class members."

The nature, duration, and severity of the risk and probability of transmission -- factors outlined by... the ADA regulations -- indicate that a significant risk to the health and safety of others would exist if Michael were allowed to participate in the group karate classes. The nature of the risk... [i.e.,] the mode of transmission of the disease, is blood-to-blood or blood-to-eye contact, according to the testimony of both sides' experts. The duration of the risk... [i.e.,] how long the carrier is infectious, is for the length of Michael's life.

The severity of the risk is extreme because there is no known cure for AIDS, and, as the Montalvos concede, AIDS is inevitably fatal. And although the exact mathematical probability of transmission is unknown, the mode of transmission is one which is likely to occur in U.S.A. Bushidokan's combat-oriented group karate classes because of the frequency of bloody injuries and body contact.

When balancing the... factors to determine whether a risk is significant, one need not conclude that each factor is significant on its own. Rather, the gravity of one factor might well compensate for the relative slightness of another. Thus, when the disease at risk of transmission is, like AIDS, severe and inevitably fatal, even a low probability of transmission could still create a significant risk. In this case, therefore, we agree with the district court that Michael's condition posed a significant risk to the health and safety of others.

#### REASONABLE MODIFICATION?

Having found that "Michael Montalvo's condition posed a significant risk to the health or safety of others," the appeals court noted that "U.S.A. Bushidokan would still be required to admit him to group karate classes if a reasonable modification could have eliminated the risk as a significant one." The appeals court noted further that U.S.A. Bushidokan had offered private karate classes to Michael. In the opinion of the appeals court, this offer of private lessons was the "only modification which was both effective in reducing risk to an insignificant level and in maintaining the fundamental essence of U.S.A. Bushidokan's program." Further, in considering whether a modification was reasonable, the appeals court found "U.S.A. Bushidokan was entitled to reject the modification that would soften the teaching style of its program."

U.S.A. Bushidokan's unique niche in the martial arts market was its adherence to traditional, "hard-style" Japanese karate, and the contact between participants, which causes the bloody injuries and creates the risk of HIV transmission, was an integral aspect of such a program. To require U.S.A. Bushidokan to make its

program a less combat-oriented, interactive, contact intensive version of karate would constitute a fundamental alteration of the nature of its program.

The ADA does not require U.S.A. Bushidokan to abandon its essential mission and to offer a fundamentally different program of instruction. Similarly, U.S.A. Bushidokan was not required to implement further "universal precautions" such as using eye coverings and wearing gloves. The district court found as a fact that these modifications would not accomplish their goal of eliminating or reducing the otherwise significant risk Michael would pose to his classmates.

As Radcliffe testified on behalf of U.S.A. Bushidokan, the suddenness of injuries, the tendency of some wounds to splatter blood, the continuing movement and contact, and the inability to detect injuries immediately all would undermine the effectiveness of these precautions, particularly for places not protected by eye coverings, gloves, or other similar coverings.

U.S.A. Bushidokan did propose the effective modification of giving Michael private karate lessons, and the district court found this modification reasonable. But the Montalvos rejected this proposal.

As noted by the appeals court, "an ADA plaintiff is under no obligation to accept a proffered, otherwise reasonable modification." On the other hand, the court acknowledged that "such rejection does not impose liability on U.S.A. Bushidokan for failure to modify its program." The appeals court, therefore, affirmed the judgment of the district court in favor of defendants. In so doing, the federal appeals court held that "U.S.A. Bushidokan, in excluding Michael Montalvo from participating in its combat-oriented group karate classes, did not violate Title III of the ADA because Michael posed a significant risk to the health and safety of others that could not be eliminated by a reasonable modification."