PREGNANCY-RELATED IMPAIRMENTS AND THE AMERICANS WITH DISABILITIES ACT


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CANCER COMPLICATING PREGNANCY
PREGNANCY-RELATED IMPAIRMENTS AND THE AMERICANS WITH DISABILITIES ACT

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Congress passed the Americans with Disabilities Act (ADA) in 1990. [1] The ADA is perhaps the most significant federal antidiscrimination law since the Civil Rights Act of 1964. [26] The ADA's overriding purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." ll l Title I of the ADA
requires employers to provide reasonable workplace accommodations to individuals with disabilities. [4] [5] [25]

This article addresses the emerging relationship between pregnancy-related disabilities and the employment provisions of the ADA, set forth in title I of the Act. The term pregnancy-related disability "reflects the interaction between a pregnant woman's physical condition and the requirements of her job (or employer)." [41] As set forth by American Medical Association guidelines, this definition suggests that although the pregnant state may not be "disabling" in the workplace, the health complications associated with it, when combined with the nature of a job, may cause a disabling condition. [28]

Thus, physical and emotional complications from pregnancy may give rise to a pregnancy-related disability. Some health conditions accompanying pregnancy affect an employee temporarily; however, other conditions impair long-term job performance or job security. These conditions are "job-disabling" when combined with occupational requirements or the work demands of a specific employer.

PREGNANCY AND EMPLOYMENT

Eighty-five percent of working women are likely to become pregnant at least once during their careers. [41] An estimated 65% of women work during their pregnancies, most of them full-time. [33] Trends indicate that many women remain working until the last few weeks of gestation. [33] These statistics suggest that unjustified employment discrimination in the workplace may affect millions of women with pregnancy-related disabilities. Pregnancy-related discrimination
contributes significantly to the overall problem of employment discrimination against women in the workplace. [41]

As a result of appropriate workplace accommodations, many women who become pregnant are able to work throughout their pregnancy and can return to work shortly after delivering a child. Accommodations permit qualified female employees to perform and retain their jobs. Examples of workplace accommodations include job restructuring, part-time or modified work schedules, reassignment to a vacant position, and the acquisition or modification of equipment or devices. Women in whom cancer complicates the pregnancy often require certain accommodations for cancer treatment, such as light duty assignments, flexible schedules, and disability leave.

In view of the high percentage of women who will become pregnant and their potential need for workplace accommodations during and after pregnancy, it is crucial that health care professionals understand the impact of the ADA’s employment provisions. Health care professionals, such as obstetricians and oncologists, frequently are asked to communicate with employers about the physical status of their patients. Many pregnant women require advice from health care professionals about employment or job standards. Women with pregnancy-related disabilities may have concerns about their ability to continue work in certain jobs. Because obstetricians and oncologists specifically diagnose and treat cancer complicating a pregnancy, such professionals increasingly are being asked to comment on public policies toward this segment of the population and to aid in the resolution of the growing number of ADA pregnancy-related legal disputes.
TITLE I OF THE AMERICANS WITH DISABILITIES ACT

The ADA is a vehicle for social and cultural change that has shaped attitudes and behavior toward people with disabilities. Title I of the ADA was designed to provide a national mandate for the elimination of unjustified discrimination in employment against qualified individuals with disabilities. Title I provides that entities covered by the law (i.e., those organizations with 15 or more employees) may not discriminate against a qualified individual with a disability in employment application, hiring, advancement, discharge, compensation, benefits, training, or any other terms or privileges of employment.

Discrimination under the title I includes not making reasonable workplace accommodations to the known physical or mental impairments of a qualified individual with a disability, unless an employer demonstrates that the accommodation would impose an undue hardship on the operation of the business. In the legal literature and relevant case law, there has been some ambiguity in many of the defining terms of the ADA. These terms include disability, qualified individual with a disability, reasonable accommodations, and undue hardship.

DISABILITY

Numerous disputes have arisen with respect to what constitutes a covered disability under the ADA. The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for the enforcement of title I. EEOC guidelines for implementing title I recognize a number of impairments that qualify as disabilities, including those of the reproductive system; however, the regulations provide that pregnancy per se is not a disability under the
ADA. [18] Pregnancy is interpreted to be the physiologic result of the proper functioning of the female and male reproductive systems, with no related physical impairments. There is a split of opinion between federal courts, however, as to whether medical conditions arising as a result of pregnancy or that coincide with pregnancy may constitute disabilities covered by the ADA. [27] [44]

The majority of legal cases to date support the view that pregnancy and its normally related medical conditions are not disabilities covered under the ADA. Several courts cite the EEOC's explicit instruction on pregnancy that "conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments." [19] Furthermore, the EEOC has concluded that temporary or non-chronic impairments usually are not disabilities. [20]

Courts have expressed diverging views as to whether infertility constitutes a physical disability under the ADA. [39] Infertility has been interpreted by some courts to be a condition distinct from pregnancy. Infertility, a physical impairment, is the result of improper functioning of the female or male reproductive systems. Although in fertility, conditions related to pregnancy, and impairments of the reproductive system have been found to be physical impairments within the meaning of the ADA, pregnancy itself has not. [33]

Pregnancy-related disabilities, of course, are not the only source of temporary job disabilities. Every year many employees are disabled by cancer therapy, heart attacks, traffic accidents, and a wide variety of other illnesses and injuries. [41] Many employers have policies of not
accommodating any such disabilities or, at best, of accommodating them with a short-term
disability leave. [41]

Some courts have found that temporary impairments resulting from cancer treatment may not be
a substantial work limitation under the ADA. [31] In one case, an employee was not able to
support a claim under the ADA when her cancer treatment resulted in a modification of her work
schedule but did not result in a "substantial limitation" of her life's major activities. In analyzing
the facts of *Ellison v Software Spectrum Inc.*, the US Court of Appeals for the Fifth Circuit found
that a substantial limitation requires more than the inability to perform a single job. [31] The
court concluded that there must be a significantly restricted ability to perform a broad range of
jobs to be deemed disabled for the purposes of the ADA. [31] The court acknowledged that the
employee's breast cancer was an impairment and that not working was a major life activity. [31]
Nevertheless, the court concluded that the plaintiff was not substantially limited from working in
a range of jobs. [31]

In accordance with this decision, the US Court of Appeals for the *Eleventh Circuit in
Gordon v Hamm & Associates* found that an employee who was fired while undergoing
chemotherapy for a cancerous growth on his shoulder did not have a disability covered by
the ADA. [32] Observing that the employee's physician testified that the employee was able
to "continue with his normal activities" and that his treatments were performed on an
outpatient basis, the court ruled that the employee was not substantially limited in his ability
to work. [32] Thus, despite the fact that cancer often is a serious impairment, courts have found
that the limitations imposed by cancer treatment sometimes do not rise to the level required for a covered disability under the ADA.

In *Mark v The Burke Rehabilitation Hospital*, a New York federal district court concluded that lymphoma is a physical impairment under the ADA. [37] After being diagnosed with lymphoma, the plaintiff, Mr. Mark, underwent surgery and subsequent chemotherapy. [37] Mark claimed that the defendant hospital committed an ADA violation when it failed to accommodate his chemotherapy treatment schedule and fired him. [37] The court concluded that modifying the times when a particular job is performed maybe a reasonable accommodation under the ADA. [37]

Currently, there is no case law on the issue of whether cancer complicating a pregnancy qualifies as a disability for the purposes of ADA analysis. In *Leahr v Metropolitan Pier and Exposition Authority*, however, an Illinois federal district court found that the complications the plaintiff, Ms. Leahr, experienced during her pregnancy were temporary and did not qualify as a disability under the ADA. [36B] Ms. Leahr claimed unsuccessfully that her pregnancy-related high blood pressure, hypertension, and cholecystitis (gallbladder disease) constituted a "disability."

Nevertheless, in *Darian v University of Massachusetts, Boston*, the federal district court concluded that the plaintiffs severe pelvic bone pain, uterine contractions and irritation of the uterus associated with her pregnancy constituted a disability under the ADA. [28A]

Cases such as these illustrate that determining whether a condition qualifies as a disability under the ADA requires a case-by-case approach. [36A] One role of obstetricians and oncologists in
an ADA title I analysis is to aid in the systematic assessment of which instances of cancer during pregnancy constitute "substantial limitations" on major life activities.

It is not possible, of course, to anticipate prospectively how any particular pregnancy-related impairment might affect an individual's ability to function in a job. Therefore, questions arise in regards to whether a serious complication from pregnancy or coinciding with pregnancy, which may have resulted from an underlying physiologic disorder, constitutes a qualifying disability. [3] The legal definition of disability owing to cancer associated with pregnancy will evolve as new situations emerge.

A person is technically defined as having a disability covered by the ADA if that individual, by virtue of a physical or mental condition, is "substantially limited in performing major life activities." [23] Major life activities are things that people do every day (e.g., seeing, walking, speaking, and working). [23] Several factors are considered in assessing whether an individual is substantially limited in performing a major life activity, including the severity, nature, and duration of the impairment.

Although courts have grappled with the issue of whether pregnancy-related medical conditions qualify as a disability, several arguments maybe made for including these conditions under the ADA. First, the plain language and legislative history of the ADA indicate that the ADA should cover pregnancy-related medical conditions. [38] The legislative history of the ADA indicates that Congress has considered cancer to be an impairment [42]; in fact, one reason AIDS is a recognized disability is because of its impact on procreation and sexual relations
Similarly, pregnancy-related disabilities affect the ability to perform certain work functions.

Second, some courts have concluded that infertility is a disability because reproduction is a major life activity. [44] In Pacourek v Inland Steel Co., a federal district court in Illinois found that infertility may be deemed a physical impairment under the ADA. [40] The Court reasoned that because the reproductive system is among the body systems listed in the EEOC regulations, infertility as a condition preventing a woman from becoming pregnant is a physical impairment of the reproductive system. [40]

Nevertheless, other courts have interpreted the ADA as not including pregnancy and pregnancy-related conditions. Some courts have deferred to the EEOC’s interpretation of the ADA, which excludes pregnancy because it is not the result of a physiologic disorder. [18] [43] Other courts have stressed the temporary nature of a particular disability stemming from pregnancy, suggesting that it would not substantially impair the major life activity of working. 39b [21]

As mentioned previously, EEOC regulations state that temporary disorders are not disabilities. [21] Most courts analyzing title I discrimination cases have concluded that transient ailments do not constitute disabilities for the purposes of ADA analysis. Although there is no specific time period for when the temporary nature of an impairment threshold is crossed, conditions lasting from several months to over a year have been deemed temporary and thus not covered by the ADA. [29] Other courts have found that a condition must be permanent to be covered by the ADA. Because pregnancy is a short-term condition and not permanent, many
pregnancy-related limitations on work may be viewed as temporary. As such, pregnancy and pregnancy-related illnesses such as morning sickness most likely would be excluded from coverage.

The ADA also considers persons with disabilities to be those individuals who have a "record of impairment" (e.g., individuals with a history of cancer). [2] This provision protects patients with previous cancer from employment discrimination based on their prior medical history. In addition, a person "regarded as having an impairment" is covered even though he or she currently may not have such an impairment. [6A] Thus, a woman with an erroneous diagnosis of pregnancy-related cancer who is discriminated against in job assignments or employee health benefits on that basis would be covered by the ADA. [3]

Courts need guidance from obstetricians and oncologists to assess an individual's employment potential and to determine whether a person with cancer complicating a pregnancy is incorrectly "regarded as" disabled. [8] [14] These specialists and other health care professionals may lessen misconceptions about the abilities of individuals who are pregnant with cancer. If once it is determined that an individual with a disability is covered by the ADA, the next step is to assess whether that person is "qualified" to perform the job.

QUALIFIED INDIVIDUAL WITH A DISABILITY

The concept of a qualified individual with a disability is central to the ADA's goal of equal economic opportunity. [8] [14] [15] In establishing employment qualifications, the applicant's experience and skills are considered without the provision of workplace accommodations. An
individual with a disability is qualified for purposes of the ADA if he or she satisfies the prerequisites for the job, such as educational background or employment experience, and can perform essential job functions.

Essential job functions are fundamental work duties. [24] The determination of whether a job function is essential is a fact-specific inquiry made on a case-by-case basis. [8] This inquiry is meant to ensure, for instance, that qualified women with cancer complicating a pregnancy are not denied equal employment opportunities because they cannot perform marginal job functions.

The EEOC has identified three factors to determine essential job functions: (1) whether the job exists to perform that function; (2) whether few other employees are available to perform that function; and (3) whether a high degree of skill is required to perform the job function. [7] [9] [10] [29] A pregnant woman with complications from cancer who is significantly restricted in her ability to perform a broad range of jobs most likely would be deemed substantially impaired under the ADA.

Under title I, consideration is given to the employer's judgment as to what job functions are essential. The factors for assessing essential job functions vary within a group of people with a particular disability. [15] Often, the persons best able to make determinations as to essential job functions are employees who are pregnant themselves, in consultation with health care professionals. Currently, little systematic information is available to employers or covered employees in regards to the relationship between cancer and pregnancy and the qualifications for performing essential job functions. Obstetricians and oncologists provide much of what is known.
In sum, essential functions are those activities central to the job task that the qualified employee must perform with or without reasonable accommodation. Many women who become pregnant during employment may establish that they are qualified simply by the fact that they have already adequately performed the job in question. If, because of her pregnancy, a woman may no longer perform essential job functions, the question becomes whether there are reasonable workplace accommodations available that will make it possible for her to perform those functions.

**REASONABLE ACCOMMODATIONS**

An individual is considered a qualified employee with a disability if the person can perform essential job functions with or without reasonable accommodation. This requires employers to make individualized adjustments to jobs so that qualified individuals with disabilities have equal access to job opportunities, benefits, and advancement. [6] [7] [9] A reasonable accommodation is a modification to job tasks or to the workplace setting that permits a qualified employee with a disability to perform the job.

Reasonable accommodations ensure equal opportunity to the application process, enable employees with disabilities to perform essential job functions, and allow employees with disabilities to enjoy the same benefits as employees without disabilities. [12] [16] the legal scope of the reasonable accommodation provision has been a controversial aspect of title I analysis. This is because the appropriateness of any accommodation must involve a consideration of the
employer's needs and interests, the treatment plan as determined by health care professionals, and the needs of the employee with the pregnancy-related disability. [16]

_EEOC & Wessel v AIC Security Investigations Ltd._ is notable as the first case brought by the EEOC under ADA title I. In that case, Wessel and the EEOC claimed that defendant AIC fired Wessel because of his terminal inoperable brain cancer. [30] In reviewing the case on appeal, the Seventh Circuit held that the ADA definition of "reasonable accommodation" included job restructuring, such as by removing nonessential functions from the job. [30] Thus, although Mr. Wessel sometimes left work early in the afternoon for radiation treatments, he would be considered a qualified individual under the ADA as long as he was able to continue to fulfill his job duties. [30] The court reasoned that although attendance is necessary to any job, the importance of attendance requires scrutiny especially in an upper management position such as Wessel's in which a number of tasks may be effectively delegated to other employees. [30]

Determining coverage under the ADA requires an individualized analysis. Analysis of the appropriate accommodations to which an individual with a disability or a woman with pregnancy-related impairments may be entitled is tied to the circumstances of the case; however, an employer may not implement a blanket policy excluding all women with pregnancy-related disabilities from certain jobs.

In a related line of legal cases, the US Supreme Court has ruled that employers may not prohibit fertile or pregnant women from working in toxic environments, a practice that may result in a forced reduction in wages. [35] In _International Union v Johnson Controls_, the Court reasoned
that qualified pregnant women should be allowed to perform higher paying jobs that require exposure to toxic chemicals. [35] They also must be permitted to perform those jobs regardless of potential dangers to the fetus. [35]

Applying the reasonable accommodation provisions to a woman with cancer complicating a pregnancy may require a modification of work schedules to accommodate treatment. [5] A pregnant woman whose job requires climbing stairs might be accommodated by providing access to an elevator. A pregnant woman who cannot sit and work comfortably at a standard desk may require a different workstation configuration. The ADA requires an employer to provide such accommodations to enable qualified workers to perform essential job duties.

**UNDUE HARDSHIP**

Title I limits the obligations of employers to provide reasonable accommodations to qualified employees through the term *undue hardship*. This provision focuses on the fiscal impact of an accommodation. Undue hardship arises if the employer encounters significant difficulty or expense in providing an accommodation. Factors to be considered in determining undue hardship include the resources, type and size of the business, the structure of the work force, the nature and cost of the accommodation, and the effect of the accommodation on the business as a whole. [15]

To qualify for an accommodation, a qualified worker must be able to perform essential job functions. The accommodation requested must be "reasonable" and must not impose an undue hardship on the employer's business. Effective implementation of the ADA requires
additional input and research from health care professionals about appropriate, safe, and cost-effective accommodations that do not impose an undue hardship. [15]

**ENFORCEMENT**

An employer found to have discriminated under title I may be liable to the employee for compensatory and punitive damages, lost pay, reinstatement, reasonable accommodation, attorneys' and experts' fees, and other remedies provided by title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. [26] Although the Civil Rights Act of 1991 strengthens the ban on discrimination in employment against persons with disabilities (e.g., providing for jury trials in ADA cases), it limits monetary damages in cases of intentional discrimination in relation to the size of the employer, with monetary damages capped from $50,000 to $300,000. Filing a federal ADA claim with the EEOC does not prevent an injured worker from filing a state worker's compensation charge. [26]

**TITLE VII AND PREGNANCY-RELATED IMPAIRMENTS**

An independent source of federal protection for the pregnant worker comes from title VII of the Civil Rights Act of 1964. [26] Title VII prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." [26] Title VII provides protection from unequal treatment in the workplace. [26] In contrast to the ADA, title VII does not mandate on-the-job accommodations.
Title VU became applicable to pregnant workers with the passage of the Pregnancy Discrimination Act (PDA) in 1978 [26]; however, the PDA does not offer pregnant workers the protections that would be available if pregnancy were a protected disability under the ADA. Nevertheless, title VII's definition of sex discrimination was amended by the PDA to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." [26]

In contrast to the ADA, the PDA contains a provision that applies only to pregnant workers whose ability to work is affected by pregnancy.

The PDA thus prohibits employers from considering pregnancy when making employment decisions. [25] Although the PDA promotes workplace equality, like the ADA, it does not mandate employers to lower legitimate job qualifications or production standards. [36]

IMPLICATIONS

The previous discussion illustrates the importance to health care professionals of monitoring and communicating information about the employment of qualified individuals with pregnancy-related disabilities covered by the ADA. Title I poses a threefold communications challenge for health care professionals. [7] [9] [16] [17]

1. To foster dialogue about the ADA among employers, employees, and other professionals and about the meaning of its defining terms.

2. To raise public awareness and debunk long-standing myths about people with pregnancy-related impairments.
3. To help forestall or minimize disputes about effective ADA implementation through
dialogue, research, new treatments and technology, and public awareness.

Although many sources now exist to address these issues, [16] [17] misperceptions about the
implementation of title I continue to affect adversely acceptance of the ADA by the business
community, the professional community, and persons with disabilities. [15] It is critical that
title I be understood as an effort to include and empower qualified people through work and
not as a preferential treatment initiative. Many unfounded fears about the scope of the ADA are
based on a misunderstanding of this principle. Communicating information about title I from
multiple viewpoints (e.g., medical, economic, legal, cultural, and others) is a critical first step
toward achieving the empowerment and inclusion envisioned by the ADA. [7] [8] [9] [10] [16]

Questions remain in regards to whether certain pregnancy-related impairments qualify as ADA-
covered disabilities. Answers to these questions may enable qualified pregnant workers to be
accommodated effectively and to remain in the workplace late into their pregnancies. Studies of
workplace accommodations suggest that companies that are effectively implementing the ADA
demonstrate the ability to look beyond minimal compliance of the law in ways that enhance their
economic bottom line. [6A]

In a series of studies at Sears, Roebuck, and Co. from 1978 to 1996, a time period before and
after the July 26, 1992 effective date of title I, nearly all of the 500 accommodations sampled
required little or no cost. [11] [12] during the years from 1993 to 1996, the average direct cost for
accommodations was $45; from 1978 to 1992, the average cost was $121. [12] The low direct
costs of accommodations for employees with disabilities have been shown to produce substantial
economic benefits to companies in terms of increased work productivity, injury prevention, reduced worker's compensation costs, and workplace effectiveness and efficiency. [12] [15]

In a study of accommodations at Sears during the years from 1996 to 1997, the average direct cost for the accommodations sampled involving pregnancy-related impairments was $0. [13] Accommodations for pregnant women included shorter shifts, co-worker assistance on specific job tasks, and transfers to different departments. [13] In this same study, accommodations for individuals with cancer included flexible work hours to accommodate chemotherapy. [13]

Several general implications may be drawn from these and other findings. First, the degree to which many companies comply with the accommodation provisions of title I seems to relate more to their corporate cultures, attitudes, and business strategies than to the actual demands of the law. [15] Second, in terms of relative cost, although the direct costs of accommodations for any particular disability tend to be low, many companies regularly make informal and undocumented accommodations that require minor and cost-free workplace adjustments that are implemented directly by an employee and his or her supervisor. [15] The trend toward the provision of accommodation in the workplace suggests that employers are realizing positive economic returns on the accommodation investment, for instance, by enabling qualified workers with covered disabilities to return to or stay in the work force and by reducing worker absenteeism. [15]

Health care professionals can help further this trend by gathering information about the actual costs and benefits of hiring and retaining women with pregnancy-related impairments in ways
that encourage informed and cost-effective compliance with the law. [15] Information gained
from healthcare professionals about accommodations for employees with pregnancy-related
impairments will benefit employees without disabilities as well as those who may become
disabled in the future. Documenting forward-looking and cost-effective attempts to provide
accommodations will encourage compliance with the ADA and enable employers to learn from
such proactive efforts. [15] The cost of excluding persons with disabilities from the productive
mainstream of society in the United States is enormous, and the related mental and emotional
costs are immeasurable. [6A]

The ADA is foremost a federal civil rights law. Like the civil rights laws of the 1960s, the ADA
is an impetus for social change, affecting the lives of millions of American women who will face
pregnancy-related disabilities. It is important that health care professionals understand the
provisions of this legislation and be prepared to communicate accurately with patients,
employers, federal and state agencies, insurance companies, and others. The judgment of a health
care professional who is knowledgeable about the ADA will help keep many qualified
women who have pregnancy-related disabilities at work.

The principal message of the ADA is straightforward--all qualified persons with disabilities
should be given the same rights as everyone else. The understanding of this message by health
care professionals, policy makers, employers, employees, and others will serve as a measure of
society's success in meeting the challenges posed by work-related disabilities in the future.
I. The Americans with Disabilities Act of 1990, 42 USC §§ 12201-12213

1A. Abbott v Bragdon, 107 F3d 934 (1st Cir 1997), cert granted, Bragdon v Abbott, 118 S Ct. 554 (1997)
2. 42 USC § 12102(2)(A)-(C)
3. 42 USC § 12102(2)(C)
4. 2 US C § 12111(5)(A)
5. 42 USC§ 12111(9)(B)
6. 42 USC§ 12112(b)(5)(A)


18. 29 CFR § 1630.2 (1996)

19. 29 CFR § 1630.2(h)

20. 29 CFR § 1630.2(j)

21. 29 CFR § 1630.2(1)(1)-(2)

22. 29 CFR § 1630.2(j)(2)

23. 29 CFR § 1630.2(1)

24. 29 CFR § 1630.2(m & n)

25. 29 CFR § 1630.2(o)


28A. Dorian v University of Massachusetts, Boston, 980 F Supp 77 (D Mass 1997)

29. EEOC Compliance Manual § 902 (Mar 5, 1994)

30. EEOC and Wessel v AIC Security Investigations Ltd., 55 F3d 1276 (7th Cir 1995)


32. Gordon v Hamm & Associates, 100 F3d 907 (11th Cir 1996)


36A. Lacoparra v Pergament Home Centers. 982 F Supp 213 (SDNY 1997)

36B. Leahr v Metropolitan Pier and Exposition Authority. 1997 WL 414104 (ND Ill 1997)

37. Mark v The Burke Rehabilitation Hospital, 1997 WL 189124 (SDNY, 1997)


40. Pacourek v Inland Steel Co., 916 F Supp 797 (ND Ill 1996)


42. S Rep No. 116, 101st Cong, 1s t Sess 21, 22 (1989)


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